

**COUNCIL RESOLUTION No. 52-2022**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, ACTING AS THE LOCAL CONTRACT REVIEW BOARD, REPEALING EXISTING PUBLIC CONTRACTING RULES AND ADOPTING REVISED PUBLIC CONTRACTING RULES TO REFLECT LAWS ADOPTED BY THE STATE AND INCORPORATING EQUITY REQUIREMENTS.**

**WHEREAS** the city last adopted updated public contracting rules on December 19, 2017, and

**WHEREAS** since 2017, the state legislature has adopted new statutes applicable to public procurement and revised rules have been drafted to comply with the new statutes, and

**WHEREAS** specific requirements to advance equity and inclusion in public procurement and promote economic growth of disadvantaged businesses have been incorporated into the city's public contracting rules, and

**WHEREAS** the City Council has determined and is still of the opinion that the public contracting rules better suit the needs of the city than the Oregon Attorney General's model rules for public procurements, and

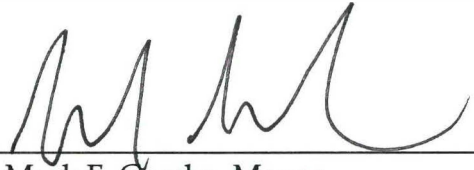
**WHEREAS** there is a consistent need for the city to enter into public procurements and it is therefore appropriate for the city to adopt public contracting rules consistent with the state Public Contracting Code (Oregon Revised Statute (ORS) Chapters 279A, 279B and 279C).

**Now, Therefore, be it Resolved** by the City Council of the City of Milwaukie, Oregon, that:

- Section 1. The City Council, acting as the Local Contract Review Board, hereby adopts the rules, attached as Exhibits A and B, pursuant to the authority granted the board by MMC Chapter 3.05. These rules shall apply to all contracting, purchasing and disposal of personal property by the city.
- Section 2. The city continues to opt out of the Attorney General Model Rules given that the rules do not apply to the city for public procurements.
- Section 3. The rules adopted under Section 1 shall be effective for procurements that have not been advertised or entered into as of June 30, 2022. However, the public contracting rules in existence prior to this resolution shall remain in effect as to any procurement entered into prior to June 30, 2022, or for which solicitations are or have been advertised prior to June 30, 2022.

Introduced and adopted by the City Council on **June 21, 2022.**

This resolution is effective on **June 30, 2022.**



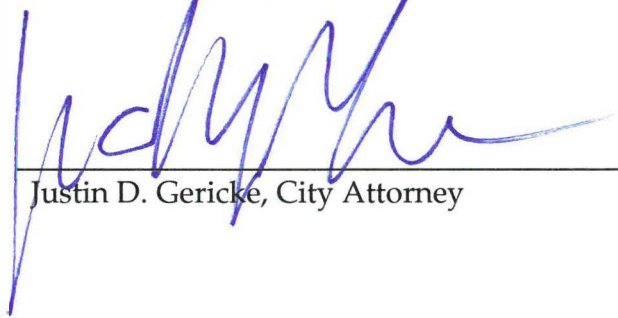
Mark F. Gamba, Mayor

ATTEST:

APPROVED AS TO FORM:



Scott S. Stauffer, City Recorder



Justin D. Gericke, City Attorney



# CITY OF MILWAUKIE LOCAL CONTRACT REVIEW BOARD - PUBLIC CONTRACTING RULES

The following Public Contracting Rules (PCR) have been adopted by the City Council acting as the Local Contract Review Board pursuant to the authority granted to the Board by Municipal Code Section 3.05. The rules apply to all contracting, purchasing, and disposing of personal property by the City of Milwaukie but do not apply to acquisition, sale or other transfer of real property.

Except as otherwise provided, all applicable federal statutes and regulations ([PCR 115.000](#) and [2 CFR Part 200](#)) will be followed when federal funds are involved and the federal statutes or regulations conflict with any of the City's Public Contracting Rules.

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# CITY OF MILWAUKIE -

## PUBLIC CONTRACTING RULES

### PCR 5.000 DEFINITIONS

Following are definitions of words and phrases used in the Public Contracting Rules (Exhibit A), solicitations, and contract documents:

**Addendum or Addenda** – addition to, deletion from or a material change to a solicitation document.

**Amendment** – a written modification to the terms and conditions of a public contract, other than changes to the work of public improvement contract.

**Architect** – a person who is registered and holds a valid certificate in the practice of architecture in the State of Oregon, as provided under [ORS 671.010 to 671.220](#), and includes without limitation the terms "architect," "licensed architect" and "registered architect."

**Bid** – a written response to an invitation to bid.

**Bid Closing** – date and time announced as the deadline for the receipt of bids.

**Bid Opening** – date, time and location set for the public opening of bids.

**Bid Sample** – a representative specimen of the item that will be available in response to the bid.

**Bidder** – a person who submits a bid in response to an invitation to bid or request for quotes.

**Bidding Period** – span of time between the solicitation's date of publication and the time and date set for receipt of bids.

**Board** – the City of Milwaukie Local Contract Review Board

**City or The City** – the City of Milwaukie, Oregon, a municipal corporation and a public contracting agency. May also refer to City employees or elected officials.

**Change Order** – a mutually agreed upon change order, or a construction change directive or other written order issued by the City to the Contractor requiring a change in the work within the general scope of a public improvement contract.

**COBID** – State of Oregon's Certification Office for Business Inclusion and Diversity, created within the Oregon Business Development Department or such state agency, department or entity to which has been delegated the responsibility to certify minority-owned businesses, women-owned businesses, businesses that service-disabled veterans own and emerging small businesses.

**COBID Certification Directory** – the online directory that lists businesses certified by the Oregon Certification Office for Business Inclusion and Diversity. Businesses that appear in the directory are currently certified and approved to be utilized. Businesses that are noted as suspended cannot be utilized in new contracts or purchases until the suspension is removed.

**COBID-certified Business** – a business that has been historically underutilized, including minority-owned, women-owned, and service-disabled veteran-owned business enterprises and emerging small businesses interested in contracting with state, county and city government agencies, and has been certified through COBID.



**Competitive Sealed Bidding** – a competitive sealed bid procedure to solicit and award a public contract for goods or services. Also referred to as an Invitation to Bid.

**Competitive Sealed Proposals** – a competitive sealed proposal procedure to solicit and award a public contract for goods or services.

**Contract** – any written agreement, including a solicitation document and the accepted portions of a bid, proposal or quote between the City and the contractor describing the work to be done and the obligations of the parties. Depending upon the goods and/or services being procured, the City may use "contract" as meaning a purchase order, price agreement, intergovernmental agreement, service agreement or other contract document. If the contract is for a public improvement, the contract may consist of the solicitation document, including any addenda, the general and special conditions governing the work, the accepted portions of the bid or proposal, the performance and payment bond (if required), plans, technical specifications, approved show drawings, and any contract amendments, including approved change orders.

**Contract Price** – total of the awarded contract amount, including any approved alternates and any fully executed change orders or amendments.

**Contractor** – individual, firm, or corporation awarded a public contract to furnish goods or services. May also be referred to as a Consultant.

**Cooperative Procurement** – a procurement conducted on behalf of one or more public agencies. Cooperative procurement includes, but is not limited to multiagency contracts and price agreements. Cooperative procurement does not include agreements formed among only public agencies under [ORS 190](#).

**Days** – calendar days, unless otherwise specified.

**Debarment** - the exclusion or suspension of a person to receive invitations for bids, requests for proposals, or the award of a contract by the City for a specified period of time that is proportionate with the seriousness of the offense or the failure or inadequacy of performance.

**Descriptive Literature** – materials submitted by prospective bidders or proposers to provide information concerning the products available in response to a solicitation.

**Direct Labor** – all hours directly related to the performance of a service or manufacture of a product, but not supervision, administration, inspection and shipping.

**Emergency** – circumstances that could not have been reasonably foreseen, create a substantial risk of loss, damage or interruption of services or a threat to property, public health, welfare or safety, and require prompt execution of a contract to remedy the condition.

**Emerging Small Business** – an independent business that has a principal place of business located in Oregon, qualifies as a tier one firm or a tier two firm, is properly licensed and legally registered to perform business in Oregon, and is not a subsidiary or parent company that belongs to a group of firms that the same individuals own or control if, in the aggregate, the group of firms does not qualify as a tier one firm or a tier two firm, as defined in [ORS 200.005\(5\)](#).

**Engineer** – a person who is registered and holds a valid certificate in the practice of engineering in the State of Oregon, as provided under [ORS 672.002 to 672.325](#), and includes without limitation the terms "engineer," "professional engineer" and "registered professional engineer."

**Goods** – supplies, equipment, materials, or any personal property, including tangible, intangible and intellectual property and rights and licenses in relation thereto, or any combination of these items.

**Grant** – depending upon the context:

i. City as Grant Recipient

An agreement under which the City receives moneys, property or other assistance, including but not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, from a grantor for the purpose of supporting or stimulating a program or activity of the City and in which no substantial involvement by the grantor is anticipated in the program or activity other than involvement associated with monitoring compliance with the grant conditions;

ii. City as Grant Provider

An agreement under which the City provides moneys, property or other assistance, including but not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, to a recipient for the purpose of supporting or stimulating a program or activity of the recipient and in which no substantial involvement by the City is anticipated in the program or activity other than involvement associated with monitoring compliance with the grant conditions; or

iii. Other

Grant does not include a public contract for a public improvement, for public works, as defined in [ORS 279C.800](#), or for emergency work, minor alterations or ordinary repair or maintenance necessary to preserve a public improvement, when under the public contract the City pays, in consideration for contract performance intended to realize or to support the realization of the purposes for which grant funds were provided to the City, moneys that the City has received under a grant.

**Individual with a Disability** – an individual who, because of the nature of disabilities, relies upon specialized employment services to find, secure and maintain employment.

**Invitation to Bid** – document used to solicit competitive bids.

**Joint Cooperative Procurement** – a cooperative procurement in which the contracting agencies are specifically named in the procurement and resulting contract. Use of joint cooperative procurements is limited to the identified participants only and other governmental bodies may not later use the resulting contract.

**Land Surveyor** – a person who is registered and holds a valid certificate in the practice of land surveying in the State of Oregon, as provided under [ORS 672.002 to 672.325](#), and includes without limitation the terms “land surveyor,” “professional land surveyor” and “registered professional land surveyor.”

**Low Tie Bids** – low responsive bids from responsible bidders that are identical in price, fitness, availability and quality and which meet all the requirements and criteria set forth in the bid documents.

**Minority-owned business, women-owned business, or business that a service-disabled veteran owns** – a small business where at least 51 percent of which one or more minority individuals, women or service-disabled veterans own and control, or where at least 51 percent of the stock of which, if the small business concern is a corporation, is owned by one or more minority individuals, women or service-disabled veterans who also control and manage the daily business operations of the small business, as defined in [ORS 200.005\(7\)](#).

**Oregon Forward Procurement List** – a listing of non-profit agencies for individuals with disabilities who currently are qualified to participate in the Oregon Forward program created by [ORS 279.835 through 279.850](#) and includes a list of goods and services offered by qualified non-profit agencies for individuals with disabilities and as determined by the State of Oregon Procurement Office to be suitable for purchase by a public agency.

**Permissive Cooperative Procurement** – a cooperative procurement in which the purchasing contracting agencies are not specifically named in the procurement and resulting contract. Permissive cooperative procurements allow participants to establish contracts or price agreements under the terms, conditions and prices of the original contract.

**Person** – a natural person capable of being legally bound, a sole proprietorship, a corporation, a partnership, a limited liability company or partnership, a limited partnership, a for-profit or nonprofit unincorporated association, a business trust, two or more persons having a joint or common economic interest, any other person with legal capacity to contract or a public body.

**Personal Property** – all city-owned possessions, including vehicles, tools, goods, furniture, equipment, construction materials, and animals, which are not real property and has an exchangeable value.

**Personal Services** – services that require specialized skills, knowledge and resources in the application of technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment, including, without limitation, architectural, engineering, photogrammetric mapping, transportation planning, land surveying or related services, or other professional service.

**Photogrammetrist** – an individual registered with the board and holding a valid certificate to practice photogrammetric mapping, as provided under [ORS 672.002\(8\)](#).

**Prevailing Rate of Wage** – rate of hourly wage, including all fringe benefits, that the State of Oregon Bureau of Labor and Industries determines is paid in the locality to the majority of workers employed on projects of a similar character in the same trade or occupation.

**Price Agreement** – a public contract for the procurement of goods or services at a set price with no guarantee of a minimum or maximum purchase, or an initial order or minimum purchase combined with a continuing contractor obligation to provide goods or services in which the City does not guarantee a minimum or maximum additional purchase.

**Procurement** – the act of purchasing, leasing, renting or otherwise acquiring goods or services. Procurement includes each function and procedure undertaken or required to be undertaken by the City to enter into a public contract, administer a public contract and obtain the performance of a public contract.

**Proposal** – a written response to a Request for Proposals or Request for Qualifications.

**Proposer** – a person who submits a proposal in response to a Request for Proposals or Request for Qualifications.

**Public Agency** – any state, county, city, or public entity, or any of its political subdivisions, organized and existing under law or charter.

**Public Contract** – a sale or other disposal, or a purchase, lease, rental or other acquisition, by a public agency of personal property, services, including personal services, public improvements, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. Public contract does not include grants.

**Public Contracting Code** – Oregon Revised Statute chapters 279A, 279B and 279C.

**Public Improvement** – a project for construction, reconstruction or major renovation on real property by or for a public agency. Public Improvement does not include projects for which no funds of a public agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or emergency work, minor alteration, ordinary repair or maintenance necessary to preserve a public improvement.

**Qualified Non-profit Agency for Individual with Disabilities** – a nonprofit organization that is organized under the laws of the United States or the State of Oregon and operated to provide training or employment for individuals with disabilities in Oregon and as defined in [ORS 279.835\(6\)](#).

**Quote** – a written response to a Request for Quotes.

**Responsible Bidder or Proposer** – a responsible bidder or proposer is one who has:

1. Adequate financial resources to perform the contract, or ability to obtain such resources. The City will require acceptable evidence of the bidder's or proposer's ability to provide or obtain the required financial resources. Acceptable evidence normally consists of, but is not limited to, current and recent balance sheets, income statements, cash flow statements, and/or a performance bond from an acceptable surety in an amount equal to the bid or proposal price. Such evidence may also include a commitment of specific arrangement that will be in existence at the time of contract award to rent, purchase, or otherwise acquire the needed facilities, equipment, or other resources;
2. Ability to comply with the required or proposed delivery or performing schedule, taking into consideration all existing commercial and public business commitments;
3. A satisfactory performance record. A bidder or proposer who is, or recently has been, seriously deficient in contract performance will be presumed to be non-responsible, unless the City determines that the circumstances were properly beyond the contractor's control or that the contractor has taken appropriate corrective action. Record of failure to perform acceptably is strong evidence of non-responsibility. The City will consider the number of contracts involved and the extent of the deficiency of each in making this evaluation. In addition, the City may consider whether the bidder's performance history demonstrates responsibility as defined in [ORS 200.005\(6\) and 200.045\(3\)](#);
4. Key personnel available of sufficient experience, as determined by the City, to perform the contracts;
5. The necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain these skills and abilities as required to satisfactorily perform the contract. These may include, as appropriate, such elements as production

control procedures, property control systems, and quality assurance measures applicable to materials to be produced or services to be performed by the bidder and its proposed subcontractor(s);

6. The necessary production, construction, and technical equipment and facilities, or the ability to obtain them;
7. A satisfactory record of integrity;
8. For contractors on public improvement contracts, has not been determined to be not responsible by the Construction Contractors Board; and
9. Is otherwise qualified and eligible to receive award under applicable laws and regulations.

**Responsive Bid or Proposal** – a bid or proposal that complies with all material aspects of the solicitation and with all prescribed public procurement procedures and requirements.

**Real Property** – city-owned buildings, structures, improvements, machinery, equipment or fixtures erected upon, above or affixed to the land.

**Related Services** – personal services, other than architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, that are related to planning, designing, engineering or overseeing public improvement projects or components of public improvement projects, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, hazardous substances or hazardous waste or toxic substances testing services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner's representation services or land-use planning services.

**Request for Proposals** – a document used to solicit competitive proposals when criteria for award includes qualifications and price.

**Request for Qualifications** – a document used to solicit competitive proposals when criteria for award is based solely on qualifications.

**Request for Quotes** – a document used to solicit competitive quotes when criteria for award includes prices, rates or other conditions.

**Solicitation** – a document issued to invite offers from prospective bidders and proposers to provide goods and services as defined by the City.

**Specifications** – any description of the physical or functional characteristics or of the nature of a supply, service, or construction item. Specifications may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery and the quantities or qualities of materials to be furnished under the contract. Specifications generally will state the result to be obtained and may, on occasion, describe the method and manner of doing the work to be performed. Specifications may be incorporated by reference and/or through attachment to the contract.

**Telecommunications Services** – the lease or rental of the use of voice and data transmission facilities or services, or of central office services, but does not include acquisition of switch or station equipment or acquisition or installation of wire and cable.

**Transportation Planning Services** - services for projects that require compliance with the National Environmental Policy Act, [42 U.S.C. 4321](#) et seq.

**Writing or Written** – consisting of letters, characters and symbols inscribed on paper by hand, print, type or other method of impression, intended to represent or convey particular ideas or meanings, and when required or permitted by law, or required or permitted in a solicitation, also means letters, characters and symbols made in electronic form and intended to represent or convey particular ideas or meanings.

## **PCR 10.000 COMPETITIVE PROCESS REQUIRED AND EXEMPTIONS**

### **10.010 Competitive Process and Exemptions**

- A. All public improvement contracts will be based upon competitive bidding and all other public procurements will be based upon competitive bids or competitive proposals (collectively "formal competitive process"), except the following:
1. Contracts made with other public agencies. Contracts made with other public agencies are not subject to these rules, except to the extent that the rules explicitly allow certain transactions with other public agencies.
  2. Contracts which are exclusively for personal services as determined by application of [PCR 70.010](#). Such contracts may include incidental materials such as written reports, architectural or engineering renderings, and similar supplemental materials.
  3. Grants and contracts evidencing acceptance of funds or award of funds by the City.
  4. Contracts for professional or expert witnesses or consultants relating to existing or potential litigation or other legal matters.
  5. Transfers of real property and any interest in real property and development agreements entered into for the redevelopment and disposition of real property.
  6. Energy savings performance contracts.
  7. Contracts relating to bonds, certificates of participation, and similar debt repayment obligations, or to program loans, or to public investments.
  8. Employee benefit plans.
  9. Contracts specifically exempt under the following rules:
    - [10.015](#) Exemption of Contracts with an Estimated Value Under Certain Dollar Amounts
    - [10.020](#) Price Regulated Items
    - [10.025](#) Library Periodicals
    - [10.030](#) Advertising
    - [10.035](#) Equipment Maintenance, Repair and Overhaul
    - [10.040](#) Purchases under Established Price Agreements
    - [10.045](#) Gasoline, Diesel Fuel, Heating Oil, Lubricants, and Asphalt
    - [10.050](#) Investment Contracts
    - [10.055](#) Insurance Contracts
    - [10.060](#) Employee Benefit Insurance
    - [10.065](#) Office Copier Purchases
    - [10.070](#) Sole-source Procurements
    - [10.075](#) Contract Amendments (Including Change Orders and Extra Work)
    - [10.080](#) Affirmative Action Contracts
    - [10.085](#) Purchase Off Contract by Other Public Agencies
    - [10.090](#) Oil or Hazardous Material Removal

- [10.095](#) Required Procurement from Qualified Non-profit Agencies for Individuals with Disabilities
- [10.100](#) Ammunition
- [10.105](#) Public Improvement Contracts Involving Design or Construction Management
- [10.110](#) Individual and Class Exemptions
- [80.010](#) Emergency Contracts

- B. When a contract is exempt from a formal competitive process, the City will use reasonable efforts to ensure it is obtaining goods or services on the best terms (price, quality and other terms). Those efforts will normally include seeking out potential contractors and determining price and availability by use of informal quotes or other similar methods. The City will not knowingly purchase goods or services if it knows that comparable goods or services are available at lower cost on otherwise similar terms.

**10.015 Exemption of Contracts with an Estimated Value under Certain Dollar Amounts**

A. Public Contracts Other Than Public Improvements Contracts

The City may, in its discretion, enter into public contracts other than public improvement contracts without a formal competitive process if the estimated value of the contract does not exceed \$150,000. If this exemption is applied, the City must use either the small procurement or intermediate procurement procedures set forth in Subsections C and D of PCR 10.015. This exemption does not authorize City employees or officials to enter into an agreement in excess of their dollar authority to bind the City.

B. Public Improvement Contracts

The City may, in its discretion, enter into public improvement contracts without competitive bidding if the estimated value of the contract does not exceed \$100,000. If this exemption is applied, the City must use either the small procurement or intermediate procurement procedures set forth in Subsections C and D of PCR 10.015. This exemption does not authorize City employees or officials to enter into an agreement in excess of their dollar authority to bind the City.

C. Small Procurement Procedures

When the estimated value of goods and/or services does not exceed the small procurement amount in accordance with state statute, the City may award to any source known to the City to provide goods or services of acceptable quality at competitive prices. The City may not knowingly use a more expensive source if the goods or services of equivalent quality are readily available from alternate sources on the same terms at lower prices. The City will comply with [PCR 120.000](#), as required.

D. Intermediate Procurement Procedures

When the estimated value of goods and/or services exceeds the small procurement amount but does not exceed \$150,000, or exceed \$100,000 for a public improvement contract or \$50,000 for a transportation public improvement contract, the City may award after seeking at least three informally solicited competitive price bids or quotes or competitive proposals from prospective contractors. The City will keep a written record of the sources and amount of the bids, quotes or proposals received. If three suppliers are not



reasonably available, a lesser number of actual bids, quotes or proposals will suffice provided that a written record is made of the effort to obtain the bids, quotes or proposals. The City will comply with [PCR 120.000](#), as required.

E. No Division or Fragmentation

A procurement of goods and/or services may not be artificially divided or fragmented to allow use of the small or intermediate procurement procedures. However, each order of library materials for the City library will be considered a separate procurement and may be made by using the small or intermediate procurement procedures if within the dollar amounts for those procedures.

The division of total requirements, when economically feasible, into smaller tasks or quantities is only allowable to permit the maximum participation by minority-owned, women-owned, service-disabled veteran-owned or emerging small businesses.

F. Amendment of Small and Intermediate Procurements

A procurement awarded under the small or intermediate procurement procedures may not be amended if the amendment(s) would result in a total price that exceeds 25% of the value of the initial contract or purchase amount, except in the case of unit price contracts in accordance with [PCR 10.075\(A\)](#).

### **10.020 Price Regulated Items**

The City may, without formal competitive process, procure goods or services where the rate or price for the goods or services being purchased is established by federal, state, or local regulatory authority.

Purchases for library subscriptions for periodicals including journals, magazines, and similar publications may be made without formal competitive process. However, this provision does not authorize the use of a higher priced source if a lower price source of acceptable quality is known to be available.

### **10.025 Library Periodicals**

Purchases for the library of subscriptions for periodicals, including journals, magazines and similar publications, may be made without a formal competitive process. However, this provision does not authorize the use of a higher-priced source if a lower-priced source of acceptable quality is known to be available.

### **10.030 Advertising**

The City may purchase advertising without formal competitive process.

### **10.035 Equipment Maintenance, Repair and Overhaul**

Procurements for equipment maintenance, repair, or overhaul may be let without a formal competitive process, subject to the following conditions:

- A. The services and/or parts required are unknown and the cost cannot be determined without extensive preliminary dismantling or testing; or

- B. The services and/or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source.

The City should, where possible, use a price agreement rather than relying on this exception.

#### **10.040 Purchases Under Established Price and Cooperative Agreements**

- A. When the price of goods and services has been established by a price or cooperative agreement entered into by a competitive process, the City may purchase goods and services from the supplier without a subsequent competitive process. The City must be an active member of the cooperative to proceed with the purchase.
- B. If the estimated amount of a permissive cooperative procurement exceeds \$250,000, the City must provide public notice that includes a description of the procurement, estimated amount of purchase, name of administering agency, and the time, date and place for submission of comments. The notice must be posted for at least seven days before the comment submission deadline.
- C. The City may participate in, sponsor, conduct or administer a joint cooperative procurement for the procurement of any goods, services or public improvements.
- D. The City may participate in, sponsor, conduct or administer a permissive cooperative procurement for the procurement of any goods or services, but not public improvements.

#### **10.045 Gasoline, Diesel Fuel, Heating Oil, Lubricants and Asphalt**

The City may, without a competitive process, purchase gasoline, heating oil, lubricants, and asphalt subject to the following:

- A. Prior to selection of the contractor, the City gets quotes from at least three vendors in the area;
- B. The City makes its purchase from at the least expensive source of those providing quotes; and
- C. The City retains written justification for the purchase made.

#### **10.050 Investment Contracts**

The City may, without a formal competitive process, contract for the purpose of the investment of public funds or the borrowing of funds by the City when such investment or borrowing is contracted pursuant to duly enacted statute, ordinance, charter, or constitution.

#### **10.055 Insurance Contracts**

Contracts for insurance where either the annual or aggregate premium exceeds \$5,000 must be procured by a formal competitive process or by one of the following procedures:

##### **A. Agent of Record**

The City may appoint a licensed insurance agent ("agent of record") to perform insurance services in connection with more than one insurance contract. Among the services to be provided is the securing of competitive proposals from insurance carriers for all coverages for which the agent of record is given responsibility. Proposals for coverage are presented to the City Manager or designee for approval:

1. Prior to the selection of an agent of record, the City will make reasonable efforts to inform known insurance agents in the competitive market area that it is considering such selection. These efforts will include a public advertisement in at least one newspaper of general circulation in the area. The advertisement will generally describe the nature of the insurance that the City will require. If the amount of the annual premium for insurance other than employee benefits insurance is likely to exceed \$150,000 per year, such notice will also include a public advertisement in at least one insurance trade publication of general circulation in the state.
2. An agent's appointment will not exceed a period of 5 years, but the same agent(s) may be selected in a subsequent period. Agents must qualify the appointments prior to each period as if each appointment period were the first.
3. In selecting an agent of record, the City will select the agent(s) most likely to perform the most cost-effective services at a level of competence acceptable to the City.

**B. Specific Proposals for Insurance Contracts**

The City may solicit proposals from licensed insurance agents for the purpose of acquiring specific insurance contracts subject to the following conditions:

1. The City will make reasonable efforts to inform known insurance agents in the competitive market area of the subject matter of the contract and to solicit proposals for providing the services required in connection with that contract. Such efforts will include public advertisements in at least one newspaper of general circulation in the area. If the amount of annual premium for insurance other than employee benefits insurance is likely to exceed \$150,000 per year, such notice will also include a public advertisement in at least one insurance trade publication of general circulation in the state.
2. The City will select an agent on the basis of the most competitive offer considering coverage, premium cost, and service to be provided.

**10.060 Employee Benefit Insurance**

The City may purchase employee benefit insurance without formal competitive process.

**10.065 Office Copier Purchases**

- A. The City may enter into contracts for the purchase or lease of photocopiers without formal competitive process.
- B. In exercising this exemption, the City will consider the operating capabilities and limitations of each brand or model as well as cost and select the brand and vendor that will produce the best combination of performance and cost per copy for each application.

## 10.070 Sole-source Procurements

### A. General

The City may purchase goods or services without a formal competitive process if there is only one seller of a product or service of the quality required, or if the efficient utilization of existing equipment or supplies requires specification of a compatible product for which there is only one seller. The determination of a sole source must be based on written findings as required by [ORS 279B.075](#). A sole source contract may be awarded only after approval of the findings by the City Manager or designee.

The intent to award must be published at least once in at least one newspaper of general circulation in the City and in as many additional issues and publications as the City may determine to be necessary or desirable to ensure no competition exists. The public notice will describe the goods or services to be acquired, identify the prospective contractor, and include the date, time and place that protests are due. The City will give affected contractors at least seven (7) days from the date of public notice to protest the sole-source determination.

To the extent reasonably practical, the City will negotiate with the sole source to obtain the best possible contract terms for the City.

### B. Telecommunications Services

The City may award a contract for telecommunications services without a formal competitive process if it determines that no competition exists among services suppliers. In determining whether competition exists, the City may consider the following factors:

1. The extent to which alternative providers exist in the relevant geographic and service market. The relevant market will vary from service category to service category and cannot be predetermined in advance.
2. The extent to which alternative services offered are comparable or substitutable in technology, service provided, and performance. For example, if the City's requirement is for digital services, analog services are not comparable or substitutable.
3. The extent to which alternative providers can respond to the City's interests in consistency and continuity of services throughout its service area, volume discounts, and centralized management. The City must document in writing its findings on these factors or any other factors used in determining whether competition exists. In developing its findings, the City may solicit information by any means, including informal discussions, correspondence, or through a formal Request for Information.

### C. Developer Provision of Public Improvements

At times, private developers provide public improvements for the City as required by a condition of land use approval or as required by a development agreement with the City. The developer in those circumstances is conclusively deemed to be a sole source for the provision of the public improvements, without the need for findings. No competitive process is required to enter into a development agreement that includes the provision of public services by a developer or for a developer to provide and the City to accept public improvements as required by a condition of approval.

### **10.075 Contract Amendments (Including Change Orders and Extra Work)**

A contract amendment for additional work, including change orders, extra work, field orders, or other changes to the original specifications, which increases the original contract price, may be made with the contractor without a formal competitive process subject to the following conditions:

- A. The original contract was let by formal competitive process or an exemption the use of which is authorized by these rules, and the contract documents included unit prices or bid alternates were provided that provide a basis for determining the cost for additional work, and a binding obligation exists on the parties covering the terms and conditions of the additional work; or
- B. The amount of the aggregate cost increase resulting from all amendments does not exceed 25% of the original contract amount. Amendments made pursuant to Section A of this rule are not included in computing the aggregate amount under this section.

### **10.080 Affirmative Action Contracts**

- A. Public contracts may be awarded without a formal competitive process pursuant to a specific Affirmative Action plan. Affirmative Action is a program designed to ensure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age, physical or mental handicap, or being a disabled American veteran, including but not limited to, personnel practices of contractors, "set-aside" programs, and minority business enterprises. These rules will not be construed to prohibit engaging in practices designed to promote affirmative action goals and policies.
- B. In carrying out the affirmative action policy, by appropriate ordinance, resolution or administrative rule, the City may limit competitive bidding on a public contract for procurement of goods and services or on any public contract estimated to cost \$50,000 or less to contracting entities owned or controlled by persons described in Subsection A of this section.

### **10.085 Purchase Off Contract by Other Public Agencies**

- A. The City may purchase goods or services without a formal competitive process if the goods or services are purchased from a bidder that has been awarded a contract for the same good or services, whether by a requirements contract or by individual contract by another public agency through its public contract purchasing procedures if:
  - 1. The original contract was awarded by a competitive bid or proposal process or pursuant to an exemption equivalent to an exemption provided by these rules.
  - 2. The contract allows other public agency usage of the contract. A contract that does not prohibit other public agency usage of the contract will be deemed to allow other public agency use, unless the agency that awarded the contract objects to the use.
  - 3. The purchase is on the same terms, or terms which are no less favorable to the City in all material respects, as the contract awarded by the public agency.

- B. A purchase under the Oregon Cooperative Purchasing Program, or any similar federal or regional program, including the Electronic Government Act of 2002 (10 USC 381) will be considered an exempt purchase under this exemption.

#### **10.090 Oil or Hazardous Material Removal**

- A. The City may enter into public contracts without a formal competitive process when ordered to clean up oil or hazardous waste pursuant to the authority granted the Department of Environmental Quality (DEQ) under [ORS Chapter 466](#), especially [ORS 466.605 through 466.680](#), and this order necessitates the prompt establishment and performance of the contract in order to comply with the statutes regarding spill or release of oil or hazardous material that has created an emergency condition. In exercising its authority under this exemption, the City will:
  - 1. To the extent reasonable under the circumstances, encourage competition by attempting to make informal solicitations or to obtain informal quotes from potential suppliers of goods or services.
  - 2. Make written findings describing the circumstances requiring cleanup or a copy of the DEQ order ordering such cleanup.
  - 3. Record the measures taken under Subsection 1 of this section to encourage competition, the amount of the quotes or proposals obtained, if any, and the reason for selection the contractor selected.
- B. The City will not contract pursuant to this exemption in the absence of an order from DEQ to clean up a site with a time limitation that would not permit hiring a contractor under the usual formal competitive process procedures.

#### **10.095 Required Procurement from Qualified Non-profit Agency for Individuals with Disabilities**

- A. Purpose is to encourage and assist individuals with disabilities to achieve maximum personal independence through useful and productive gainful employment by assuring an expanded and constant market for sheltered workshop and activity center products and services, thereby enhancing their dignity and capacity for self-support and minimizing their dependence on welfare and need for costly institutionalization.
- B. In accordance with [ORS 279.850\(1\)](#), if the City intends to procure goods or services on the Oregon Forward Program (OFP) procurement list that the State of Oregon Department of Administrative Services (DAS) established under [ORS 279.845](#), then the goods or services must be procured at the price DAS establishes from an OFP qualified non-profit agency, provided the product or service is of the appropriate specifications and is available within the period the City requires.
- C. To the extent competition exists among OFP qualified non-profit agencies, the City will select the non-profit agency offering the lowest price for an acceptable level of goods or services.
- D. The OFP procurement list may be reviewed at the Oregon Forward Program website at <https://ofp.dasapp.oregon.gov/>.
- E. The Public Contracting Code does not apply to OFP procurements under [ORS 279A.025\(4\)](#).

## 10.100 Ammunition

The City may enter into contracts for the purchase of lethal and non-lethal ammunition, both for service and for training, without a formal competitive process.

## 10.105 Public Improvement Contracts Involving Design or Construction Management

The City may enter into public improvement contracts without competitive bidding if the contracts involve design or construction management or require expertise beyond normal construction work. Unless exempt under some other exemption, a competitive proposal process must be used. The City will comply with [PCR 120.000](#), as required. One of the following alternative processes will be followed:

### A. Construction Manager/General Contractor

The City may select a person or firm to act as a Construction Manager/General Contractor (CM/GC) to construct public improvements by means of a competitive proposal process.

1. A CM/GC performs specified construction manager services in addition to traditional general contractor services. A CM/GC contract will require full performance within a negotiated Guaranteed Maximum Price (GMP). The basis for payment will be reimbursable direct costs plus a fee constituting full payment for work and services rendered, which together will not exceed the GMP.
2. The solicitation documents will include:
  - a. A description of the evaluation process and criteria. The criteria may include cost, quality, experience, availability, commitment to timely completion, and other factors.
  - b. The process to be followed for establishing the GMP.
  - c. A description of the circumstances under which any of the following activities may be authorized and undertaken for compensation prior to establishing the GMP, but only after unit prices are established:
    - i. Early procurement of materials and supplies;
    - ii. Early release of bid packages for such things as site development; and
    - iii. Other advance work related to critical components of the project.
3. The contract documents will include:
  - a. A description of the method by which the CM/GC will competitively select contractors and subcontractors.
  - b. Either the GMP or a process for establishing a GMP.
  - c. A description of the situations in which the CM/GC may perform the work of the improvement without subcontracting, including any requirement that the CM/GC compete with others to do the work and the work that the CM/GC may perform directly without a competitive process.
  - d. The standards or factors under which changes or additional work that warrants an increase in the GMP, as well as criteria for decreasing the GMP. The GMP will not be increased without a concomitant increase to the scope of the GMP. The disposition of any cost savings resulting from completion of the work below

the GMP, including the CM/GC share, if any, in those cost savings. Normally, the cost savings should accrue to the City.

- e. The items or categories of items are eligible for cost reimbursement within the GMP.
- f. A provision for a final audit adjustment and process.
- g. A fee that is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee should be expressly defined wherever possible. The fee, first expressed as a proposed percentage of all reimbursable costs, will be identified during and become an element of the selection process. It will subsequently be expressed as a fixed amount when the GMP is established.
- h. Any economic incentives, the specific criteria that apply and their relationship to other financial elements of the contract (including the GMP).

## B. Design-Build Contracts

1. A design-build contract is one in which a single entity designs and constructs a public improvement. Design-build contracts will only be used if City staff has the expertise and experience to administer a design-build contract. The design-build process may be used to:
  - a. Obtain through a design-build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility.
  - b. Integrate value engineering suggestions into the design phase, as the construction contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing contract changes.
  - c. Reduce the risk of design flaws, misunderstandings and conflicts inherent in construction contractors building from designs in which they have had no opportunity for input, with the potential of reducing contract claims.
  - d. Shorten project time as construction activity (early submittals, mobilization, subcontracting and advance work) commences prior to completion of a "biddable" design, or where a design solution is still required (as in complex or phased projects); or
  - e. Obtain innovative design solutions through the collaboration of the contractor and design team, which would not otherwise be possible if the contractor had not yet been selected.
2. If a design-build contractor is not an Oregon licensed design professional, the design-build contractor will disclose in its proposal that it is not an Oregon licensed design professional and identify the Oregon licensed design professional(s) who will provide design services.
3. A design-build contractor awarded a contract will provide additional security as required by [ORS 279C.380\(1\)\(a\)](#). The obligation is not intended to be a substitute for



professional liability insurance, and does not include errors and omissions or latent defects coverage.

4. The level or type of design services required must be clearly defined within the solicitation documents and contract, along with a description of the level or type of any design services previously performed for the project. The services to be performed will be clearly delineated as either design specifications or performance standards.
5. The contract will clearly identify the liability of design professionals, will include requirements for professional liability insurance, and will clearly identify the extent of any indemnity or warranty.

C. Other Public Improvement Contracts Where Quality Is An Issue

In many situations, including those projects that require a higher-than-normal level of expertise or skill, quality of the final product may be important beyond meeting minimum specifications. In those situations, the City may use a request for proposal process, provided that the cost factor constitutes at least 65% percent of the total evaluation score. In scoring the cost factor, the proposer submitting the lowest cost amount will receive the maximum possible score for the cost factor, and the scores of the other proposers will be reduced by the percentage by which their cost exceeded the lowest cost. For example, if the maximum score for the cost factor is 80, the lowest cost proposer would get a score of 80. A proposer with a cost that is 10 percent higher would have the score reduced by 10 percent (8 points), to 72.

**10.110 Individual and Class Exemptions**

- A. The City may exempt a particular contract or a class of contracts from formal competitive process requirements, such as those described in [PCR 10.105](#), which are not otherwise exempted under these rules. The City will prepare an application for an exemption containing the following information:
  1. The nature of the project or class of contracts;
  2. Estimated cost of the project, if applicable;
  3. A narrative description of the cost savings anticipated by the exemption from the formal competitive process and the reasons the formal competitive process would be inappropriate;
  4. Proposed alternative contracting and purchasing practices to be employed, including compliance with [PCR 120.000](#), as required; and
  5. The estimated date by which it would be necessary to let the contract, if applicable; and
  6. Identification of the project or class's defining characteristics, including a combination of project descriptions or locations and methods of procurement or other factors that distinguish the limited and related class of public improvement contracts from the City's overall construction program. The City may not identify a class solely by funding source, such as a particular fund, or by the method of procurement, but must identify the class using characteristics that reasonably relate to the exemption criteria set forth in this section.

- B. The Board may require such additional information as it deems necessary to determine whether a specific contract or a class of contracts is to be exempt from the formal competitive process.
- C. If the project is a public improvement, the Board will hold a public hearing and adopt findings justifying the exemption. The findings will at a minimum address or include the following findings:
  - 1. It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts; and
  - 2. The awarding of public improvement contracts under the exemption will likely result in substantial cost savings to the City as required by [ORS 279C.335\(2\)\(b\)](#).
- D. Notification of the public hearing will be published in a newspaper of general circulation in the City and one trade newspaper of general statewide publication a minimum of 14 days prior to the hearing. The notice will state that the public hearing is for the purpose of taking comments on the City's draft findings for an exemption from the formal competitive process requirement. At the time of the notice, copies of the draft findings will be made available to the public. At the option of the City, the notice may describe the process by which the findings are finally adopted and may indicate the opportunity for any further public comment.
- E. At the public hearing, the City will offer an opportunity for any interested party to appear and present comment.
- F. If the City is required to act promptly due to circumstances beyond its control that do not constitute an emergency, notification of the public hearing can be published simultaneously with the City's solicitation of contractors for the alternative public contracting method, as long as responses to the solicitation are due at least five (5) days after the meeting and approval of the findings.
- G. If the project is a procurement of something other than a public improvement, the Board may approve a special procurement or a class of special procurements if the Board finds that a written request submitted under Section A, above, demonstrates that the use of a special procurement as described in the request, or an alternative procedure prescribed by the Board meets the following criteria:
  - 1. The approval is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts; and
  - 2. Is reasonably expected to result in substantial cost savings to the contracting agency or to the public; or
  - 3. Otherwise substantiality promotes the public interest in a manner that could not practicably be realized by complying with requirements of these rules.
- H. Public notice of the approval of a special procurement or class of special procurements for something other than a public improvement will be published in a newspaper of general circulation in the City a minimum of seven (7) days prior to entry into any public contract exempted thereby as required by [ORS 279B.085\(3\)](#).

### **10.115 Evaluation of Public Improvement Contracts Not Awarded By Competitive Bidding**

Upon completion of and final payment for any public improvement contract in excess of \$100,000 for which the City did not use the competitive bidding process, the City will prepare and deliver to the Local Contract Review Board an evaluation of the public improvement project. The evaluation will include but not be limited to:

- A. The actual project cost as compared with original project estimates.
- B. The amount of any guaranteed maximum price.
- C. The number of project change orders issued.
- D. A narrative description of successes and failures during the design, engineering and construction of the project.
- E. An objective assessment of the use of the alternative contracting process as compared to the findings required by [ORS 279C.335](#).

Evaluations required by this section will be made available for public inspection and will be completed within 30 days of acceptance of the project.

## **PCR 15.000 PRICE AGREEMENTS**

### **15.010 Price Agreements**

The City may enter into price agreements providing the following conditions are met:

- A. The contract is awarded by a formal competitive process or an exemption the use of which is authorized by these rules; and
- B. The term of the contract, including renewals, does not exceed five (5) years.

### **15.015 Multiple Price Agreements Permitted**

The City may enter into price agreements with more than one supplier for the same goods or services.

## **PCR 20.000 BRAND NAMES OR MARKS**

### **20.010 Specification of Particular Brand Names or Products**

- A. Specifications for public contracts will not expressly or implicitly require any product of any particular manufacturer or seller except pursuant to an exemption under [PCR 20.015](#) (Copyrighted Materials), [20.020](#) (Single Manufacturer or Compatible Products), [20.025](#) (Product Pre-qualification), or [20.030](#) (Brand Name or Mark Exemption Applications).
- B. If there is no other practical method of specification, the City may designate a particular brand name, make or product "or equal", but this practice should be avoided whenever possible.

### **20.015 Copyrighted Materials**

The City may specify a specific copyrighted product. This exemption does not include patented or trademark goods.

## **20.020 Single Manufacturer or Compatible Products**

- A. If there is only one manufacturer or seller of a product of the quality required, or if the required product is data processing equipment which will be used for research where there are requirements for exchange of software and data with other research establishments, or if the efficient utilization of the existing equipment or supplies requires a compatible product of a particular manufacturer or seller, the City may specify such particular product subject to the following conditions:
1. The product is selected on the basis of the most competitive offer considering quality and cost. The term "cost" includes not only the product price, but also other items of expense such as costs related to quality of conversion.
  2. Prior to awarding the contract, the City has made reasonable effort to notify known vendors of competing or comparable products of the intended specifications and invited such vendors to submit competing proposals.
  3. If the purchase does not exceed \$150,000, such notice and invitation may be informal.
  4. If the amount of the purchase exceeds \$150,000, such notice will include advertisement in at least one newspaper of general circulation in the area where the contract is to be performed and will be timely to allow competing vendors a reasonable opportunity to make proposals.
- B. If the amount of the purchase exceeds \$150,000, the City will document its actions in the bid file. Such documentation will include:
1. A brief description of the proposed contract or contracts.
  2. A detailed description of the reasons why the product and/or seller was selected and any competing products and/or sellers that were rejected. The description will also include the efforts taken by the City to notify and invite proposals from competing vendors.
- C. If the City intends to make several purchases of the product of a particular manufacturer or seller for a period not to exceed 2 years, it may so state in the documentation required by subsections (1)(b) and (2) of this rule, and such documentation will be sufficient notice as to subsequent purchases.

## **20.025 Product Prequalification**

- A. When it is impractical to create specific design or performance specification for a type of product to be purchased, the City may specify a list of approved products by reference to particular manufacturers or sellers according to the following product prequalification procedure:
1. The City has made reasonable efforts to notify known manufacturers or vendors of competitive products of its intention to accept applications for inclusion in its list of pre-qualified products. Notification will include advertisement in a trade journal of statewide distribution when possible. In lieu of advertising, the City may notify vendors and manufacturers appearing on the appropriate list maintained by the Department of Administrative Services of the State of Oregon.

2. The City permits application for pre-qualification of similar products up to 15 days prior to advertisement for bids on the product.
- B. If an application for inclusion in a list of pre-qualified products is denied, or an existing pre-qualification revoked, the City will notify the applicant in writing. The applicant may appeal to the Board for a review of the denial or revocation in the same manner as an appeal of disqualification or denial provided in [PCR 30.145](#).

### **20.030 Brand Name or Mark Exemption**

- A. The City may apply for and receive a brand name or mark exemption ruling from the Board for current and contemplated future purchases. Applications will contain the following information:
1. A brief description of the contract or contracts to be covered. The description should include contemplated future purchases.
  2. The brand name, mark or product to be specified.
  3. The reasons the City is seeking the exemption.
- B. The Board may grant brand name or mark exemptions only if either of the following conditions is met:
1. The exemption is not likely to encourage favoritism in public contracts or substantially diminish competition and will result in cost savings.
  2. There is only one manufacturer or seller of the product of the quality required, or efficient utilization of existing equipment or supplies requires acquisition of compatible equipment or supplies.

## **PCR 25.000 DISADVANTAGED BUSINESSES**

### **25.010 Contracting Opportunities**

The City will comply with any requirements listed in [PCR 120.000](#) for providing contracting opportunities to minority-owned, women-owned, and service-disabled veteran-owned businesses and emerging small businesses.

## **PCR 30.000 FORMAL COMPETITIVE PROCESSES**

### **30.010 Competition**

- A. Contracts issued by the City will be awarded by formal competitive process except as otherwise exempted under the Oregon Public Contracting Code or these rules.
- B. It is the policy of the City to encourage public contracting competition that supports openness and impartiality to the maximum extent possible.
- C. The City finds that:
  - 1. Competition exists not only in prices, but in the technical competence of suppliers, in their ability to make timely deliveries, and in the quality and performance of their products and services and that a balance must exist between performance competition and price competition.
  - 2. The nature of effective competition varies with the product or service being procured and, that while competitive sealed bids are a common method of procurement, it is not always the most advantageous, practical or cost-effective method of source selection. The cost of the selection process must be considered - a costly selection process is not appropriate for contracts with a low dollar value.
  - 3. Meaningful competition can be achieved through a variety of methods when procuring goods or services. The methods include but are not limited to:
    - a. Price competition as represented by the initial or acquisition price;
    - b. Competition as represented by price and performance evaluations of the competing items and suppliers;
    - c. Competition as represented by the evaluation of the capabilities of bidders or proposers to perform needed services;
    - d. Competition as represented by evaluation of the capabilities of the bidders and proposers to perform the services followed by a negotiation on price;
    - e. Competition as represented by another method of procurement that is reasonably calculated to satisfy the City's needs.
- D. All public contracts will be made under conditions that foster or reflect competition among a sufficient number of potential suppliers that offer a wide spectrum of products and services and that represent a broad marketplace. Fostering competition will be reflected in:
  - 1. Writing specifications and procurement documents in a simple and easy to read format;
  - 2. Searching for new sources of supply;
  - 3. Attempting to make solicitation documents simple and inviting;
  - 4. Everyday courtesy shown to prospective suppliers and contractors; and
  - 5. The way information on contracting opportunities is provided to suppliers, including but not limited to, advertisement in publications of general circulation or in trade publications and any other reasonable methods that encourage competition.

- E. The City may evaluate every aspect of competition in its efforts to purchase products or services, choose the appropriate solicitation process, or award contracts according to the criteria described herein and arrive at offers that represent optimal value to the City.

### **30.015 Eligibility to Bid on Construction Contracts**

A person will not submit a bid or proposal to work as a construction contractor unless that person is first registered with the Construction Contractors Board as required by [ORS 701.021](#) or licensed by the State Landscape Contractor's Board as required by [ORS 671.530](#). Bids from persons who fail to comply with this requirement will be deemed non-responsive and be rejected.

### **30.020 Solicitation Documents**

Solicitation documents will include the following:

- A. Instructions and information to bidders or proposers concerning the submission requirements, including the time and date set for opening, the name, address and title of the person designated to receive bids and a contact person (if different), a statement the bid or proposal must be physically received by the City by the deadline and any other special information relating to bid submission. The bid deadline will be at least seven (7) days after the first publication of notice and five (5) days after the last publication of notice.
- B. The date that prequalification applications must be filed if prequalification is a requirement;
- C. The character of the work to be done or the items to be purchased, including, as applicable: specifications, delivery or performance schedule, inspection and acceptance requirements, and special evaluation factors;
- D. The location where any additional information, including additional specifications, may be reviewed or obtained;
- E. For bids – the contract terms and conditions, including warranty and bonding or other security requirements, as applicable. For proposals - a list of contract terms required by the City, a list of additional issues to be included in the contract, and a list of issues for which the proposer is expected to propose contract terms;
- F. That the solicitation may be cancelled or that any or all bids may be rejected for not complying with all prescribed procedures and requirements;
- G. That any and all bids may be rejected for good cause on a finding that it is in the public interest to do so;
- H. In invitations to bid, a statement whether the bidder is a resident bidder;
- I. A statement that a contractor must be licensed for asbestos abatement under [ORS 468A.710](#), or any other specialty trade identified, if applicable;
- J. That no bid or proposal for construction will be received or considered by the City unless the bidder or proposer is registered with the Construction Contractors Board, as required by [ORS Chapter 701.021](#) or licensed by the State Landscape Contractors Board, as required by [ORS 671.530](#);
- K. If bid or proposal security is required, a description of the security required;

- L. A description of any performance and payment bonding requirements;
- M. For proposals, a description of the manner in which proposals will be evaluated and the relevant value of each evaluation factor, including price. If a multi-tiered process is used, that process will be described, including the process for protesting the decision at any stage of the process;
- N. All requirements must be in compliance with [PCR 120.000](#);
- O. If applicable, a statement that no bid will be considered unless the bid contains a statement that the bidder will pay the higher of the applicable state or federal prevailing rate of wage to all workers on the public works, in compliance with [ORS 279C.838](#), [ORS 279C.840](#) or [40 USC 3141](#), et seq.; and
- P. All addenda issued by the City.

**30.025 Bids and Proposals Are Offers**

- A. Bids and proposals constitute an offer to enter into a contract which, if accepted by the City, will bind the bidder or proposer to a contract unless the bid or proposal is withdrawn prior to opening.
- B. The bid or proposal will constitute a "firm offer" unless bidders or proposers are specifically authorized to take exceptions or to leave terms open to negotiation by the solicitation. However, nothing in this provision prohibits the City from negotiating with a bidder or proposer to the full extent allowed by state law. Unless expressly authorized by the solicitation documents or these rules, bidders or proposers will not make their bids or proposals contingent upon the City's acceptance of specifications or contractual terms that conflict with or are in addition to those advertised in the solicitation documents.

**30.030 Public Notice**

A. Distribution

Solicitation documents or notices of the availability of bid documents will be sent to likely bidders and proposers, placed on the City's procurement management system or otherwise furnished to a sufficient number of bidders or proposers for the purpose of securing competitive bids or proposals. Notice of availability will indicate where, when, and for how long the documents may be obtained. The City may charge a fee for the bid documents.

1. The City must give notice of a solicitation for competitive bids at least 14 days before closing.
2. The City must give notice of a solicitation for competitive proposals at least 21 days before closing.
3. Despite subsections 1 and 2 of this section, the City may determine that a shorter interval of time is in the public's interest and that a shorter time period will not substantially affect competition. In no event may the solicitation for competitive bids or proposals be less than seven (7) days before closing. The City must document specific reasons for the shorter time period in the procurement file.



## B. Advertising

1. Every formal solicitation of bids or proposals will be advertised. An advertisement for bids or proposals will be published at least once in at least one newspaper of general circulation in the City and in as many additional issues and publications as the City may determine to be necessary or desirable to ensure competition. If for a construction contract in excess of \$125,000, notice will be published in at least one trade newspaper of general statewide circulation. The City will endeavor to provide information concerning bids and proposals on its website and may post information on other databases.
2. All advertisements for bids or proposals will state:
  - a. The date and time after which bids will not be received, which date will not be less than five (5) days after the date of the last publication of the advertisement;
  - b. The date that pre-qualification applications must be filed if pre-qualification is a requirement;
  - c. The work to be done or the items to be purchased;
  - d. The location where additional documentation, including specifications, specifications may be reviewed or obtained;
  - e. The name, title, and address of the person designated to receive bids;
  - f. The date, time, and place that bids or proposals will be opened;
  - g. If for a public improvement, whether the prevailing wage provisions of [ORS 279C.800 to 279C.870](#) or the Davis-Bacon Act ([40 USC 3141, et seq.](#)), or both, apply.

### **30.035 Bid or Proposal Preparation**

#### Bid and Proposal Preparation Instructions:

- A. Except as otherwise allowed, as applicable, bids and proposals will be typed and will be signed in ink or with electronic signature by the submitter or an authorized representative.
- B. Bids and proposals will be made on the bid forms provided unless otherwise instructed in the solicitation document.
- C. Alterations or erasures, if any, will be initialed in ink or electronically by the person signing the bid.
- D. Bids and proposals will include all required documents and descriptive literature.

### **30.040 Bidder Prequalification**

The City may require mandatory prequalification of bidders on forms prescribed in the bid document. When prequalification is required by the bid documents as a condition for bidding, the City will not consider the bid(s) of any prospective bidder who is not prequalified. The City will determine qualifications within 30 days of receipt of an application for prequalification. In determining responsibility of the applicant, the City will consider only the criteria listed in [ORS 279B.110\(2\)](#) for projects other than public improvements and [ORS 279C.430](#) for public improvements. City may have a separate prequalification process.

If a bidder is currently prequalified by either Oregon Department of Transportation or Oregon Department of Administrative Services to perform contracts, the bidder may be determined to be presumed qualified to perform similar work for the City. The City must indicate in the solicitation if it will allow presumed prequalification.

### **30.045 Bidder Submissions**

#### **A. Samples and Descriptive Literature**

Samples or descriptive literature may be required when it is necessary to evaluate required characteristics of an item. Samples may be returned in accordance with provisions contained in the bid documents.

#### **B. Identification of Bids and Proposals**

Bids and proposals will be submitted in a sealed envelope or in electronic format and appropriately marked to ensure proper identification and special handling. The City will not be responsible for the proper identification and handling of any bid not submitted in the designated manner or format to the required delivery point. The City may refuse to accept or may reject any bid or proposal not properly sealed or marked.

#### **C. Receipt of Bid or Proposal**

It is the submitter's responsibility to ensure that bids or proposals are received by the City at the required delivery point prior to the stated bid or proposal closing time regardless of the method used to submit or transmit them.

### **30.050 Bid Security**

#### **A. Public Improvement Contracts**

Bid security will not exceed 10 percent of the base bid(s). Bid security will be required for public improvement contracts where the amount of the contract exceeds \$100,000, or \$50,000 in the case of transportation projects. The bid security will be forfeited if the bidder fails to execute the contract promptly and properly, if awarded.

#### **B. Other Public Contracts**

Bid security will not exceed 10 percent of the bid and may be required by the City for other contracts in order to guarantee acceptance of the award. This requirement will be stated in the bid documents.

#### **C. Contracts Under \$100,000**

Bid security for contracts of less than \$100,000 will be required only in critical circumstances so as not to discourage competition.

#### **D. Form of Bid Security**

The following forms of bid security will be accepted by the City:

1. Surety bond from surety company authorized to do business in the State of Oregon;
2. Cashier's check, certified check, or savings and loan secured check;
3. Annual surety bond filed with the City (except for public improvement contracts); or

#### **E. Return of Bid Security**

The bid security of all unsuccessful bidders may be returned after a contract has been executed or all bids have been rejected. The City may return the bid security of unsuccessful bidders after bid opening and prior to award if the return does not prejudice bid award and provided that the security of at least the three lowest bidders is retained pending the execution of a contract.

F. Security for Proposals

If contracts are to be awarded based on competitive proposals, the City may, in its discretion, require proposal security on the same terms as the bid security described in this section. Proposal security will normally be required for any public improvement contract to be awarded by a proposal process.

**30.055 Pre-Bid or Pre-Proposal Conferences**

Pre-bid or pre-proposal conferences may be held by the City to explain the City's requirements, conduct site inspections, or otherwise supplement or clarify information. The City may require attendance at the conference as a condition for bidding or submitting a proposal. The conferences will be announced in the solicitation documents. The conference will be held within a reasonable time after the solicitation documents have been issued but sufficiently before bid closing to allow consideration of the conference results in preparing submittals. Statements at the conference will not change the solicitation documents unless confirmed to all prospective bidders or proposers by means of a written addendum to the solicitation documents.

**30.060 Addenda to Solicitation Documents**

A. Form

Changes to solicitation documents will be accomplished by addenda. The bidder or proposer will acknowledge receipt of all addenda issued, either with the bid or proposal or separately prior to opening. A solicitation may be delayed or suspended by addendum if in the best interest of the City.

B. Distribution

Addenda will be sent to all prospective bidders or proposers known to have obtained the solicitation documents or attended any mandatory conferences.

C. Timeliness

1. Addenda will be issued within a reasonable time prior to bid closing to allow consideration prior to submittal of the bid or proposal, but in no case less than 72 hours before the submittal deadline. If necessary, the City may notify prospective bidders or proposers by email.
2. In its discretion, the City may extend the closing date and time to allow prospective bidders or proposers to analyze and adjust to changes made by addenda. The City will notify prospective bidders or proposers of new closing date and time either in the addendum or in writing accompanying the addendum.

D. Addenda to Multi-Tier RFPs

If a multi-tier process is used to evaluate proposals, the City may issue addenda applicable to any tier of the process at least five (5) days before starting that tier of the process. If the

City does issue such addenda, amended or supplemental proposals may be submitted before the next tier of the process is started.

### **30.065 Pre-Opening Modification or Withdrawal of Bids or Proposals**

#### **A. Modifications**

Bids or proposals once submitted may be modified in writing prior to the time and date set for bid closing. Any modifications will be prepared on the company letterhead, signed by an authorized officer, and state that the new document supersedes or modifies the prior bid or proposal. To ensure the integrity of the process, the submission containing any modifications to a bid or proposal will be marked as *Bid (or Proposal) Modification* or *Bid Number (or other identification)*.

#### **B. Withdrawals**

1. Bids or proposals may be withdrawn by written notification on company letterhead signed by an authorized person and received prior to the time and date set for closing. Bids or proposals also may be withdrawn in person prior to the scheduled closing upon presentation of appropriate identification.
2. Unopened bids or proposals withdrawn under subsection (a) above may be released to the bidder after voiding any date and time stamp used.
3. Requests to withdraw mailed or emailed bids or proposals will be marked as follows:

*Bid (or Proposal) Withdrawal*

*Bid (or Proposal) Number or Other Identification*

#### **C. Documentation**

All documents relating to the modification or withdrawal of bids or proposals will be made a part of the appropriate bid file.

### **30.070 Receipt, Opening, and Recording of Bids and Proposals**

#### **A. Receipt**

Upon receipt, each bid, proposal, and modification will be time-stamped or marked by hand but not opened and will be stored in a secure place until opening. If bids, proposals, or modifications are opened inadvertently or are opened prior to the time and date set for opening because they were improperly identified, the bids, proposals, or authorized modification documents will be resealed and stored for opening at the correct time. When this occurs, documentation of the procedure will be placed in the file. Bids and proposals may be submitted, received and opened through electronic instruments.

#### **B. Opening and Recording**

Bids and modifications will be opened publicly at the time, date, and place designated in the bid documents. If witnesses are present at the bid opening, and to the extent practicable, the name of each bidder, the bid price(s), and such other information as considered appropriate, will be read aloud. On voluminous or unit price bids the City may elect not to read the bid items and prices aloud.

Proposals may be opened at any time after the deadline for submittal of proposals. A summary sheet providing basic information about each proposal will be prepared.

C. Availability

Opened bids and proposals will not be available for public inspection until after a notice of intent to award a contract is issued. The fact that bids or proposals are opened at a meeting does not make the contents of the proposals subject to disclosure. The City will verify and determine that the confidential information claimed to be exempt is in fact exempt from disclosure under the Oregon Public Records Law. Material so designated will accompany the bid and will be readily separable from the bid or proposal in order to facilitate public inspection of the non-confidential portion of the bid or proposal. Prices, makes, model, or catalog number of items offered, scheduled delivery dates, and terms of payment will be publicly available regardless of any designation to the contrary.

D. Notice of Intent to Award

The City will provide notice of intent to award to each person that has submitted a bid or proposal. The notice will state the date, time and location of the bid award decision. The notice will include the name of the person or entity that staff recommends the contract be awarded to. The notice will include any bid comparisons sheets or proposal comparison sheets. [See also PCR 30.130](#) regarding protests.

**30.075 Late Bids, Proposals, Withdrawals, and Modifications**

Any bid, proposal, withdrawal, or modification received after the deadline for submission set in the solicitation documents is late and will not be considered. The City may use any watch or clock to determine the time and the determination of the City employee or officer receiving the bids as to whether a bid, proposal, withdrawal, or modification is late will be final and not subject to challenge.

**30.080 Mistakes**

A. General

Under extraordinary circumstances, a bid or proposal may be withdrawn after the deadline for submittal because of an inadvertent nonjudgmental mistake. If the mistake is attributable to an error in judgment, the bid or proposal may not be withdrawn or corrected. Correction or withdrawal by reason of non-judgmental mistake is permissible but only to the extent it is not contrary to the interest of the City or the fair treatment of other bidders or proposers.

B. Mistakes Discovered after Bid Closing but before Award

This section applies to situations where mistakes in bids are discovered after the submission deadline but before award.

1. Minor Informalities

Minor informalities are matters of form rather than substance that are evident from the bid documents, or insignificant mistakes that can be waived or corrected promptly without prejudice to other bidders or the City; that is, the informality does not affect price, quantity, quality, delivery, or contractual conditions except in the case of informalities involving unit prices. Examples include, but are not limited to, the failure of a bidder to:

- a. Return the number of signed bids or number of other documents required by the bid documents;

- b. Sign the bid form in the designated block so long the bid documents evidence an intent to be bound; or
- c. Acknowledge receipt of an addendum to the bid documents, but only if:
  - i. It is clear from the bid that the bidder received the addendum and intended to be bound by its terms; or
  - ii. The addendum involved did not affect price, quantity, quality, or delivery.

C. Mistakes Where Intended Correct Bid is Evident

If the mistake and the intended correct bid are clearly on the face of the bid form, or can be substantiated from accompanying documents, the City may accept the bid. Examples of mistakes that may be clearly evident on the face of the bid form are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors. Mistakes that are clearly evident on the face of the bid form or proposal document also may include instances in which the intended correct bid or proposal item is made clearly evident by simple arithmetic calculations. For example, a missing unit price may be established by dividing the total bid or proposal item by the quantity of units for that item, and a missing or incorrect total bid or proposal price for an item may be established by multiplying the unit price by the quantity when those figures are available on the bid or proposal. For discrepancies between unit prices and extended prices, unit prices will normally prevail.

D. Mistakes Where Intended Correct Bid is Not Evident

The City may not accept a bid in which a mistake is clearly evident on the face of the bid form but the intended correct bid is not clearly evident or cannot be substantiated from accompanying documents.

**30.085 Time for Acceptance**

Bids will be valid and binding offers for 30 days from the deadline to submit bids unless otherwise specified in the bid documents. Proposals will be binding and valid offers for 60 days from the date of the submittal deadline unless otherwise specified in the solicitation documents.

**30.090 Extension of Time for Acceptance of Bid or Proposals**

The City may request in writing that bidders or proposers extend the time in which the City may accept their offers.

**30.095 Evaluation and Award**

A. General

The contract, if awarded, is to be awarded to the lowest responsive and responsible bidder or the best responsive and responsible proposer. Consistent with the provisions of the solicitation documents and in the public interest as determined by the City, awards may be made by item, groups of items, or entire bid or proposal. The City reserves the right to reject any bid or proposal not in compliance with the solicitation documents or with state law, City Code, or these rules. The City reserves the right to reject any or all bids or proposals upon a finding by the City that it is in the public interest to do so.

B. Special Requirements

1. Solicitation documents will set forth any special requirements and criteria that will be used to determine the lowest responsible bidder. No bid will be evaluated for any requirement or criterion that is not disclosed in the bid documents or City regulation.
2. In determining the lowest responsible bidder, the City will, for the purpose of awarding the contract, add a percent increase on the bid of a non-resident bidder equal to the percent, if any, or of the preference give to that bidder in the state in which the bidder resides.
3. In determining the best responsible proposer, the City will, for the purpose of awarding the contract, include scoring as required under [PCR 120.000](#).
4. The City may rely on the list provided for by the Oregon Department of Administrative Services pursuant to [ORS 279A.120](#) for preference provided for by this section. The list is found on the National Association of State Procurement Officials website at:  
<https://www.naspo.org/research-innovation/state-preference-repository/>
5. In addition to the above stated preferences, the City may give preference to procuring goods that are fabricated or processed, or services that are performed, entirely within this state if the goods or services cost less than or equal to 10 percent more than goods that are not fabricated or processed, or services that are not performed, entirely within this state. If more than one bidder or proposer qualifies for the preference described in this subsection, the City may give an additional 5% preference to a qualifying bidder or proposer that resides in or is headquartered in this state. However, this section does not apply to emergency work, minor alterations, ordinary repairs or maintenance work for public improvements or to other construction contracts described in [ORS 279C.320](#).

C. Product Availability

1. The solicitation documents will set forth the evaluation criteria to be used in determining product acceptability. The City may require the submission of samples, descriptive literature, technical data, or other material, and may also provide for accomplishing any of the following prior to award.
  - a. Demonstration, inspection, or testing of a product prior to award for such characteristics as quality or workmanship;
  - b. Examination of such elements as appearance, finish, taste, or feel; or
  - c. Other examinations to determine whether the product conforms to specifications.
2. The acceptability evaluation is conducted only to determine that a bidder's offering is acceptable as provided in the bid documents. Any bidder's product which does not meet the minimum requirements will be rejected.

D. Determination of Lowest Responsive and Responsible Bidder

Following the determination of product acceptability as set forth in subsection C, if applicable, bids will be evaluated to determine which bidder offers the lowest cost to the City in accordance with the evaluation criteria set forth in the bid documents. Only objectively measurable criteria, which are set forth in the bid documents, will be applied in

determining the lowest responsible bidder. Examples of such criteria include, but are not limited to, transportation cost, volume weighing, trade-in allowances, depreciation allowances, cartage penalties, and ownership or life cycle cost formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible, such evaluation factors:

1. Are reasonable estimates based upon information the City has available concerning future use;
2. Treat all bids equitably; and
3. Recognize that public policy requires acquisitions and public improvements to be accomplished at the least cost.

The City will also take into account any preferences provided by these rules in determining the lowest bid.

E. Determination of Best, Responsive, and Responsible Proposer

Proposals will be evaluated to determine which proposer offers the best solution to the City in accordance with the evaluation criteria set forth in the solicitation documents. Only the criteria set forth in the solicitation documents will be applied. The criteria will be as objective as possible. Examples of evaluation criteria may include, but are not limited to, cost, quality, service, compatibility, product reliability, equity goals and requirements, operating efficiency, expansion potential, performance history on other private and public contracts, experience of key personnel, adequacy of equipment and/or physical plan, financial wherewithal, sources of supply, references and warranty provisions. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such evaluation factors will:

1. Be reasonable estimates based on information available to the City;
2. Treat all proposals equitably;
3. To the extent that the proposal involves a public improvement, recognize that public policy requires public improvements to be accomplished at the least cost.

F. In evaluating proposals, the City may use any of the following methods:

1. An award based solely on an evaluation of the written proposals;
2. Discussions with a number of proposers leading to a best and final offer from each proposer and an evaluation of the best and final offers;
3. An award based on the written proposals and interview performance;
4. Serial negotiations, starting with the highest ranked proposer;
5. Competitive simultaneous negotiations;
6. A multi-tiered process, with some number of proposers being eliminated at each stage of the process;
7. A multi-stage process, with a qualifications determination at the first stage of the process, followed by cost considerations; or
8. Any other method or combination of methods designed to best serve the needs of the City and the community.



The solicitation document will describe the process to be followed.

G. No Assignment or Transfer of Contract Rights

Unless an express provision of the public contract otherwise provides, the contractor will not assign, sell or transfer rights, nor delegate responsibilities, under public contract, either in whole or in part, without first obtaining the City's prior written consent. Unless otherwise agreed by the City in writing, such consent will not relieve the contractor of any obligations under a public contract, and any assignee or transferee will be considered the agent of the contract and bound to abide by all provisions of the public contract. Except in the event of a novation, if the City consents in writing to an assignment, sale, or transfer of the contractor's rights and responsibilities, the contractor and its surety, if any, will remain ultimately liable to the City for complete performance of the public contract as if no such assignment, sale, or transfer had occurred.

**30.100 Life Cycle Cost Analysis**

- A. In determining the lowest responsible bidder, in the award of a contract, the City may use the cycle costing. As used in this rule, life cycle costing means determining the cost of a product for its useful life.
- B. The City will follow these procedures:
  - 1. At the time of writing specifications for the product, the City will identify those factors which will have cost implications over the life of the product and which, for evaluation purposes, will be used to adjust the bid or proposal price of the product.
  - 2. The solicitation documents will set out clearly the factors and methodology to be used in life cycle cost adjustments.
  - 3. The results of life cycle costing adjustments will be applied to the bid or proposal price of the product(s) offered. The bid or proposal that results in the lowest overall ownership cost, taking into account the life cycle costing adjustments, will be considered the lowest bid or best proposal for purposes of bid or proposal price evaluation.

**30.105 Responsible Bidder or Responsible Proposer**

- A. The City will consult with the Construction Contractors Board concerning the responsibility of any entity to whom a public improvement contract is proposed to be awarded. The City has the right, prior to awarding any public contract, to make such investigation as is necessary to determine whether a bidder or proposer is responsible. This investigation may include, but is not limited to:
  - 1. An inquiry into the responsibility of proposed subcontractors and suppliers.
  - 2. Requiring a bidder or proposer to demonstrate its financial ability to perform the contract as provided in subsection A(1) of this rule. In exercising this right, the City will notify the apparent successful bidder or proposer in writing to submit such documentation as the City deems necessary to complete a thorough evaluation of financial ability. By submitting a bid or proposal, a bidder or proposer authorizes the City to request any credit report information the City deems necessary to investigate and evaluate financial responsibility to perform the contract(s).

- B. Failure of a bidder or proposer to promptly supply information requested by the City during its responsibility investigation will be grounds for a finding of non-responsibility.
- C. Only bids and proposals from responsible bidders or proposers will be eligible for contract award. Bid or proposals from non-responsible bidders or proposers will be rejected as provided in [PCR 30.110](#).

### **30.110 Responsive and Non-responsive Bids or Proposals; Acceptance and Rejection**

- A. A responsive bid or proposal is one that complies in all material aspects with the solicitation documents and with all prescribed public procurement procedures and requirements.
- B. A non-responsive bid or proposal is one which:
  - 1. Omits, or is unclear, as to the price and the price cannot be determined in the bid or proposal documents;
  - 2. Offers goods or services of a quality or quantity inferior to that requested in the solicitation documents;
  - 3. Does not meet the delivery date requirements specified in the solicitation documents;
  - 4. Takes exception to the terms and conditions of the solicitation documents other than as allowed by these rules or the solicitation documents;
  - 5. Is conditional upon the City's acceptance of terms and conditions difference from those contained in solicitation documents, except as allowed by these rules or the solicitation documents; or
  - 6. Contains a deviation which, if the bid or proposal were accepted, would give the bidder or proposer a substantial advantage or benefit not shared by other bidders or proposers to the solicitation documents.
  - 7. The City will accept, and consider for award, only those bids or proposals which are responsive as defined in this rule. Non-responsive bids or proposals will be rejected.

### **30.115 Low Tie Bids**

- A. Award
  - 1. If low tie bids are received, preference will be given to goods and services that have been manufactured or produced in Oregon.
  - 2. If the bids remain tied after application of Subsection 1, preference will be given to the bidder whose principal offices or headquarters are located in Oregon.
  - 3. If the bids remain tied after application of subsections 1 and 2, the award will be made by drawing lots among any tied Oregon bidders. Such bidders will be given notice and an opportunity to be present when the lots are drawn.
  - 4. If there are no Oregon bidders after application of subsections 1 and 2, award of the contract will be made by drawing lots.

### 30.120 Rejection of Individual Bids or Proposals

#### A. General

This section applies to rejections, in whole or in part, of individual bids or proposals. The City may reject in whole or in part, any bid not in compliance with all prescribed bidding procedures and requirements, and may reject for good cause any bid or proposal upon a written finding of the City that it is in the public interest to do so. No bid will be considered unless the bid security, properly executed, has been submitted with the bid as required by the bid documents.

#### B. Reasons for Rejection

Reasons for rejecting a bid or proposal include, but are not limited to:

1. The submitter has not pre-qualified when pre-qualification is required or has been disqualified;
2. The submitter has been declared ineligible by the Commissioner of the Bureau of Labor and Industries under [ORS 279C.860](#);
3. The bid or proposal is non-responsive, that it does not conform in all material respects to bid documents or requirements, including all prescribed public procurement procedures and requirements;
4. The supply, service, or construction item offered in the bid or proposal is unacceptable by reason of its failure to meet the requirements of the solicitation documents or permissible alternates or other acceptability criteria set forth in the solicitation documents;
5. The submitter is not capable of satisfying the terms and conditions of the public contract in a timely manner due to financial incapacity, inability to obtain bonding, loss of license, or other objective cause;
6. The submitter within the last five (5) years has been found, in a civil, criminal, or administrative proceeding, to have committed fraud, misrepresentation, price-rigging, unlawful anti-competitive conduct, or similar behavior;
7. The submitter has been determined responsible for more than one breach of a public or private contract or contracts in the last three (3) calendar years (i.e., adjudicated by a court, or as determined in writing by the City in the case of a public contract) before the scheduled date of the bid opening;
8. The security has not been submitted or properly executed as required by the solicitation documents;
9. When applicable, the bidder has not met the emerging small business, disadvantaged business, minority business, and women business enterprise requirements, if any, established by the City, and has not made a good faith effort to comply with the requirements prior to the time bids are opened;
10. The submitter failed to certify in accordance with Section D of this rule; or
11. Other circumstances of the particular bid, proposal, or submitter (including submitter's subcontractors) indicate that acceptance of the bid or proposal would impair the integrity of the selection process or result in an imprudent contract by the City.

12. The contractor has discriminated against subcontractors because the subcontractor is a minority-owned, women-owned, service-disabled veteran-owned business or emerging small business enterprise certified under [ORS 200.055](#).

C. Form of Business Entity

The corporate or business form of bidders or proposers will be subject to scrutiny, so that previously disqualified bidders or proposers, or their officers and directors, may not by subterfuge, change of apparent ownership, or other adjustments in formal appearance, avoid application of this rule.

D. Non-discrimination Certification

The bidder or proposer will certify as part of the bid that the contractor has not discriminated against subcontractors because the subcontractor is certified as a minority-owned, women-owned, service-disabled veteran-owned business or emerging small business enterprise.

### **30.125 Rejection of All Bids or Proposals**

A. Bid or Proposal Rejection

Any or all bids or proposals may be rejected in whole or in part, for good cause upon a written finding by the City that it is in the public interest to do so. The City is not liable to any bidder or proposer for any loss or expense caused by or resulting from the rejection of a bid, proposal or award.

Notification of rejection of all bids or proposals, along with the good cause justification and finding of public interest will be sent to all that submitted a bid or proposal.

Additionally, if bids or proposals are rejected, the City may return bids or proposals to the person that made the proposal. The City will destroy bids and proposals within 14 days of notice of rejection to the proposer. The City will keep reasons for the rejection and a list of returned and destroyed bids and proposals in the solicitation file.

B. Rejection Criteria

Reasons for rejecting all bids or proposals include, but are not limited to:

1. An error in the solicitation documents, including its terms, conditions, or specifications that unnecessarily restricted competition for the public contract;
2. The price, quality, or performance presented by the lowest or best responsible bidder or proposer is, in the City's opinion, too costly or of insufficient quality to justify acceptance of the bid or proposal. This criterion may be satisfied evidence that the same goods or services can be obtained otherwise for less cost;
3. Misconduct, error, or ambiguous or misleading provisions in the bid documents or process threaten the fairness and integrity of the competitive process; or
4. Causes other than legitimate market forces threaten the integrity of the competitive procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and inadvertent or intentional errors in the bid documents.

### **30.130 Protests of Intent to Award**

#### **A. Purpose**

Adversely affected or aggrieved bidders or proposers must exhaust all avenues of administrative review and relief before seeking judicial review of any decision by the City under the Public Contracting Code or these rules.

#### **B. Notice of Intent to Award**

The written notice of intent to award the contract will constitute a final decision by the City to award the contract if no written protest of the notice is filed with the City within seven (7) calendar days of the notice of intent to award or such other period (but not less than seven days) as provided in the City's solicitation. If a protest is timely filed, the notice of intent to award is a final decision of the City upon issuance of a written decision denying the protest and affirming the intent to award. The notice of intent to award and any written decision on a protest will be sent to every bidder or proposer who provided an address.

#### **C. Right to Protest**

The bidder or proposer who is adversely affected or aggrieved by the City's notice of intent to award of the contract to another bidder or proposer on the same solicitation will have no less than seven (7) calendar days after notice of intent to award is published to submit to the City a written protest of the notice or such other time as provided in the solicitation documents. The written protest will specify the grounds upon which the protest is based. In order to be adversely affected or aggrieved, a bidder or proposer must itself be eligible for award of the contract as the lowest responsible bidder or best proposer and must be next in line for award (i.e., all lower bids or higher ranked proposers are non-responsive or non-responsible and the written protest must so claim). The City will not entertain a protest submitted after the time period established in this rule or such different period as may be provided in the City's solicitation.

#### **D. Authority to Resolve Protests**

The City Manager, or designee, will have the authority to settle or resolve a written protest submitted under section E of this rule.

#### **E. Decision**

If the protest is not settled or resolved by mutual agreement, the City Manager, or designee, will promptly issue a written opinion on the protest. If the opinion denies the protest, judicial review of this decision will be available if provided for by statute. If the City Manager or designee determines that there is good cause for the protest, the matter will be submitted to the Board for further action. The decision of the Board on a protest will be final. Both the protestor and the person to whom the contract was awarded will have a right to present arguments to the Board.

### **30.135 Protests Other Than Notice of Intent to Award**

- A. A protest may be filed to contest the adoption or amendment of these rules, adoption of a class or contract specific exemption, solicitation documents (including specifications and contract terms), or the process used in the solicitation. The protest must be filed with the City Manager within seven (7) days of the adoption or amendment of rules or exemptions, the publication of solicitation documents, or other action being protested. Grounds for protest are limited to:
  - 1. That the City acted contrary to law;
  - 2. That the City's actions unnecessarily restrict competition; or
  - 3. That the City has improperly specified a brand name.
- B. The protest must include:
  - 1. Sufficient information to identify the solicitation;
  - 2. The grounds for the protest;
  - 3. Evidence or supporting information; and
  - 4. The relief sought.
- C. The City Manager will, if possible, issue a written decision on the protest under this section at least three (3) days before any bid or proposal opening that could be affected by the protest.
- D. A bidder or proposer who does not protest a proposed contract term included in the solicitation documents must accept the contract term as included in the solicitation documents.
- E. If protest of a solicitation is timely received, the opening date may be extended if necessary to allow consideration for the protest and issuance of any addenda to the solicitation documents.
- F. Envelopes containing protests of solicitation specifications will be marked as follows:

*Specification Protest*

*Bid or Proposal Number or Other Identification*

### **30.140 Negotiation**

#### **A. Negotiation with Bidders**

If a project is competitively bid and all responsive bids from responsible bidders exceed the City's cost estimate, the City may negotiate with the lowest responsive, responsible bidder, prior to awarding the contract, in order to solicit value engineering and other options to attempt to bring the project within the City's cost estimate.

- 1. A negotiation with the lowest responsive, responsible bidder pursuant to this paragraph will not result in the award of the contract to that bidder if the scope of the project is significantly changed from the original bid proposal.
- 2. Notwithstanding any other provision of law, the records of a bidder used in contract negotiation pursuant to this paragraph are not subject to public inspection until after

the negotiated contract has been awarded or the negotiation process has been terminated.

B. Negotiation with Proposers

The City may negotiate with proposers after proposal opening in order to try to reach the best possible contract for the City. Proposals may be revised in the course of negotiations for the best offer, provided that any revision is not so extensive as to be unfair to other proposers who do not have the opportunity to negotiate.

**30.145 Bidder Disqualification**

A. Grounds for bid-specific disqualification include:

1. The person does not have sufficient financial ability to perform the contract. If a bond is required to ensure performance of a contract, evidence that the person can acquire a surety bond in the amount and type required will be sufficient to establish financial ability;
2. The person does not have equipment available to perform the contract;
3. The person does not have key personnel available of sufficient experience to perform the contract; or
4. The person has repeatedly breached contractual obligations to public and private contracting agencies.
5. The person has discriminated against a subcontractor because the subcontractor is a minority-owned, women-owned, service-disabled veteran-owned business or emerging small business enterprise certified under [ORS 200.055](#).
6. The person has engaged in conduct prohibited by [ORS 200.075](#), including:
  - a. If the person has entered into any agreement representing that a disadvantaged, minority-owned, women-owned, service-disabled veteran-owned business or emerging small business enterprise, certified pursuant to [ORS 200.055](#), will be performing or supplying materials under a public improvement contract without the knowledge and consent of the certified enterprise;
  - b. If the person exercises management and decision making control over the internal operations, as defined by [ORS 200.075\(1\)\(b\)](#), of any certified disadvantaged, minority-owned, women-owned, service-disabled veteran-owned business or emerging small business enterprise;
  - c. If the person uses a disadvantaged, minority-owned, women-owned, service-disabled veteran-owned business or emerging small business enterprise to perform contracting services or provide supplies under a public improvement contract to meet an established disadvantaged business enterprise goal, when the enterprise does not perform a commercially useful function, as define by [ORS 200.075\(4\)](#), in performing its obligations under the contract.

B. Debarment

A prospective bidder or proposer may be excluded or suspended from receiving invitations for bids and requests for proposals, or for consideration for an award of a solicitation for a period of up to three (3) years, if convicted of a criminal offense relating to a public contract, convicted of a crime involving dishonesty (as provided in [ORS 279B.130\(2\)\(b\)](#)), convicted under antitrust statutes, has violated a contract and debarment for violation was listed in the contract terms, or has failed to carry workers compensation or unemployment insurance.

Debarment will be by written decision explaining the reasons for the debarment and explaining appeal rights. Appeals will be provided under [ORS 279B.425](#). Any appeal must be filed with the City Manager within three (3) days after receipt of the notice of debarment.

C. Investigation

The City may make such investigation as is necessary to determine whether a person is qualified. If a bidder or prospective bidder fails to supply information promptly as requested by the City, such failure is grounds for debarment.

D. Notice of Disqualification

The prospective bidder or proposer will be notified in writing by personal service or certified mail of the City's decision to exclude or suspend the person from bidding with the City. The written notice will contain:

1. The effective date of the debarment and the effective period of debarment;
2. The grounds for debarment from bidding; and
3. A statement of the contractor's appeal rights and applicable appeal deadlines.

E. Appeal of Disqualification

If a contractor wishes to appeal the City's decision to debar, the contractor must notify the City in writing within three (3) business days after receipt of the notification. The City will mail its notice to the contractor by certified mail return receipt requested, if not personally served. Appeals will be conducted under the procedures and standards of [ORS 279C.445 and 279C.450](#). A protest of a denial, revocation, or revision of a prequalification will be filed within three (3) business days after receipt of notice of the decision. On receipt of the protest, a hearing will be set before the Board and the hearing will be held and the decision issued within 30 days of receipt of the protest. The Board will consider the action *de novo*, based on applicable standards. If the denial is upheld, the person filing the protest will reimburse the City for costs of processing the protest.

**30.150 Cancellation of Invitations to Bid or Requests for Proposals**

A. Cancellation of Solicitation

An invitation to bid or request for proposal may be canceled, in whole or in part, for good cause upon a written finding by the City that it is in the public interest to do so. The City is not liable to any bidder or proposer for any loss or expense caused by or resulting from the cancellation of a solicitation. The reasons therefore will be made part of the solicitation file.



B. Notice of Cancellation

When an invitation to bid or request for proposal is canceled prior to the submission deadline, notice of cancellation will be sent to all known holders of the documents. When an invitation to bid or request for proposals is canceled after the submission deadline, notice will be sent to those who submitted a bid or proposal. The notice of cancellation will:

1. Identify the specification documents;
2. Briefly explain the reason for cancellation; and
3. Where appropriate, explain that an opportunity will be given to compete on any re-solicitation.

**30.155 Disposition of Bids or Proposals in Event of Cancellation**

A. Prior to Bid Opening

When an invitation for bid or request for proposals is canceled prior to opening of the bids or proposals, all submissions will be returned unopened, if submitted with a clearly visible return address. If there is no return address on the envelope, the submissions will be opened to determine the source and then returned to sender.

B. After Opening

When an invitation for bid or request for proposals is canceled after opening, the City may return bids or proposals to the person that made the proposal. The City will destroy bids and proposals within 14 days of notice of cancellation to the proposer. The City will keep reasons for the cancellation and a list of returned and destroyed bids in the solicitation file.

**30.160 Documentation of Award**

A. Basis of Award

Following award, a record showing the basis for determining the successful bidder will be made a part of the file.

B. Contents of Award Record

The record will consist of:

1. Completed bid tabulation sheet and written justification of any rejection of lower bids; or
2. Completed proposal evaluations and written explanation for any rejection of proposals for failing to meet mandatory requirements of the solicitation.

**30.165 Foreign Contractor**

If the amount of the contract exceeds \$10,000 and the contract was awarded to a "nonresident bidder," the contractor will promptly report to the Oregon Department of Revenue on forms to be provided by the Department of Revenue the total contract price, terms of payment, length of contract and such other information as the Department of Revenue may require before final payment can be received on the contract. A copy of the report will be forwarded to the City. The City will satisfy itself that the above requirements have been complied with before it issues

final payment on the contract. For the purposes of this rule, a foreign contractor is one who is not domiciled in or registered to do business in the State of Oregon.

### **30.170 Contract Terms and Conditions**

#### **A. Required Terms and Conditions**

The City will establish standard terms and conditions for contracts. Contracts will include provisions relating to the following, if applicable. For those provisions referring to statutes, the contract language will comply with and implement the statutes.

1. Payment of laborers and material suppliers, contributions to the Industrial Accident Fund, liens and withholding taxes, and drug testing ([ORS 279B.220](#), [279C.505](#));
2. Payment of claims by public officers, payments to first-tier subcontractors, and claims by labor and materials suppliers ([ORS 279C.515](#));
3. Hours of labor ([ORS 279B.020](#), [279B.235](#), [279C.520](#), [279C.540](#));
4. Environmental and natural resources regulations ([ORS 279B.525](#));
5. Payment for medical care, compliance with or exemption from workers compensation laws ([ORS 279B.230](#), [279C.530](#));
6. Prevailing wage rates ([ORS 279C.830](#));
7. Salvaging, recycling, composting or mulching yard waste material, and salvage and recycling of construction and demolition debris ([ORS 279B.225](#), [279C.510](#));
8. Certification by contractor of compliance with the Oregon tax laws according to [ORS 305.385](#);
9. Certification by contractor of nondiscrimination as to relations with subcontractors ([ORS 279A.110](#));
10. Inclusion of provisions in contracts with subcontractors, as required by [ORS 279C.580](#);
11. Progress payments and retainage;
12. Bonding requirements (performance and payment bonds, and bonds required to be filed with the Construction Contractor's Board or Bureau of Labor and Industries); and
13. Any other requirement imposed by federal or state law, regulation, rule or ordinance, which is applicable to the contract.

#### **B. The City may develop and require contract provisions relating to the following:**

1. Termination of the contract;
2. Suspension of the work;
3. Labor and materials liens;
4. Liability in absence of bond;
5. Use of recovered resources and recycled and recyclable materials, including paper, oils, and tires; and
6. Any other term to further the City's and the public interest.

C. Terms and Conditions Applicable to Construction Contracts

In cases where the contract calls for work as a "contractor" as defined in [ORS 701.005\(5\)](#), the contract will contain:

1. Certification by the contractor that the contractor is registered with the Construction Contractors Board according to [ORS 701.035 to 701.055](#), unless prohibited by federal regulations.
2. Certification by the contractor that all subcontractors performing work as defined in [ORS 701.005\(5\)](#) will be registered with the Construction Contractors Board according to [ORS 701.035 to 701.055](#) before the subcontractors commence work under this contractor.

D. Special Terms and Conditions

The City may also establish special terms and conditions applicable to specified categories of contracts. Any special terms and conditions will be included in the bid documents and become an integral part of those contracts.

E. Compliance and Exceptions to Terms and Conditions

1. Bidders and proposers will be responsible for noting the terms and conditions included applicable to each set of solicitation documents.
2. By submitting a bid or proposal, the bidder or proposer acknowledges acceptance of and the intent to abide by the terms and conditions specified in the solicitation and agrees to enter into a contract consistent with state public contracting law requirements. Submission of a bid or proposal without objection to provisions listed in the form contract included in the solicitation documents constitutes an offer to enter into a contract on those terms and no negotiation of those terms is permitted after the contract award.
3. The City has the right to reject any bid or proposal that takes exception to specifications or to contract terms, unless the right to take exception is expressly granted in the solicitation. Bids or proposals which take exception to the specifications or contract terms, or which are made contingent upon the City's acceptance of different or additional specifications or terms, may be rejected because they are not responsive to the solicitation.
4. Any exceptions to any proposed terms and conditions must be clearly stated in writing by the bidder or proposer in the signed bid or proposal. The City reserves the right to reject or accept any bid or proposal that takes exception to the terms and conditions, but must take into account any objections in comparing the bid or proposal to other bids or proposals. Exceptions to the terms and conditions become contractual obligations only upon written acceptance by the City.

F. Commentary

The following is a list of federal, state and local agencies of which the City has knowledge that have enacted ordinances or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that may affect the performance of contracts:

**Federal Agencies:**

Agriculture, Department of Forest  
Service Soil Conservation Service

Defense, Department of Army Corps of Engineers

Energy, Department of Federal Energy Regulatory  
Commission Environmental Protection Agency

Department of Health and Human Services

Housing and Urban Development, Department of Solar Energy Conservation Bank

Interior, Department of  
Bureau of Sports Fisheries and Wildlife  
Bureau of Outdoor Recreation  
Bureau of Land Management  
Bureau of Mines  
Bureau of Indian Affairs  
Bureau of Reclamation  
Geological Survey  
Minerals Management Service

Labor, Department of Mine Safety and Health Administration  
Occupational Safety and Health Administration

Transportation, Department of Coast Guard  
Federal Highway Administration

Water Resources Council

**State Agencies:**

Administrative Services, Department of  
Agriculture, Department of  
Columbia River Gorge Commission  
Consumer & Business Services, Department of Oregon Occupational Safety & Health  
Division

Energy, Department of  
Environmental Quality, Department of  
Fish and Wildlife, Department of  
Forestry, Department of  
Geology and Mineral Industries, Department of  
Human Resources, Department of  
Land Conservation and Development Commission  
Parks and Recreation, Department of  
Soil and Water Conservation Commission  
State Engineer  
State Land Board  
Water Resources Board

**Local Agencies:**

City Council  
County Court  
County Commissioners, Board of  
Port Districts  
Metropolitan Services Districts  
County Service Districts  
Sanitary Districts  
Water Districts  
Fire Protection Districts

**30.175 Availability of Award Decisions – Contract Retention****A. Contract Documents**

A signed purchase order, agreement or contract, as applicable, will be executed with the person to whom the contract is awarded.

**B. Notification to Unsuccessful Bidders**

Unsuccessful bidders and proposers will be provided with the notice of intent to award.

**C. Availability of Files**

Completed files, other than confidential materials, will be available for public review by the City.

**D. Copies from Files**

Copies of material from files, other than previously described tabulation sheets, may be obtained upon payment of a reasonable copying charge.

**30.180 Requests for Proposals**

A. The City may use the request for proposal process for any contract for which price is not the sole factor for awarding the contract. When the City uses a request for proposal, the solicitation document will state:

1. The necessary contract terms;
2. The evaluation criteria to be applied in awarding the contract and the role of an evaluation committee;
3. The criteria for awarding the contract, which may include, but are not limited to, cost, quality, service, experience, expertise, compatibility, product reliability, operating efficiency, and expansion potential;
4. All requirements in compliance with [PCR 120.000](#), including applicable equity criteria;
5. Complaint processes and remedies available;
6. The provisions made for vendors to comment on any specifications that they believe limit competition; and
7. The location where sealed written proposals are to be submitted and the date and deadline for submittal.

- B. All requests for proposals will be published at least once in a newspaper, journal, trade publication or similar periodical. In deciding where to advertise, the City will consider what publication is most likely to be read by qualified proposers.
- C. The City may establish an ad hoc proposal review committee to evaluate any proposal and may provide for an interview of selected proposers as part of the evaluation process. Any use of a proposal review committee or interview process will be detailed in the request for proposals.

### **30.185 Performance and Payment Security**

#### **A. Public Improvements Contract**

Except in emergencies, when the requirement may be waived, or unless the requirement is exempted under these rules, all persons entering into public improvements contracts with the City will be required to provide:

1. A performance bond in a sum equal to the contract price; and
2. A payment bond in a sum equal to the contract price.
3. Proof that a public works bond with a corporate surety in the amount of \$30,000 has been filed with the Construction Contractors Board for contracts subject to Prevailing Wage Rate Laws, unless exempted pursuant to [ORS 279C.836\(4\), \(7\), \(8\) or \(9\)](#).

Public improvement contracts of \$100,000 or less are exempt from the bond requirements.

#### **B. Other Public Contracts**

The City may require performance security for other public contracts. Such requirements will be stated in the solicitation documents.

#### **C. Contracts Under \$100,000**

Performance bonds for a contract under \$100,000 will be utilized only in critical circumstances, so as not to discourage competition.

#### **D. Requirement for Surety Bond**

A surety bond furnished by a surety company authorized to do business in Oregon is the only acceptable form of performance security unless otherwise specified in the solicitation documents.

#### **E. Time for Submission**

Upon request by the City, the apparent successful bidder or proposer must furnish the required performance bond within ten days of contract award. Prompt submittal of the performance bond is required to ensure timely project initiation. Failure to furnish the bond prior to the deadline may result in rejection of the bid or proposal, forfeiture of bid security, and award to the next lowest responsible bidder or next highest-scoring proposer.

#### **F. Claims on Payment Bonds**

Claims on payment bonds will comply with [ORS 279C.600 to 279C.610](#) and [PCR 40.065](#).

### **30.190 Right to Audit Records**

#### **A. Records Maintenance; Access**

Contractors and subcontractors will maintain all fiscal records relating to public contracts in accordance with generally accepted accounting principles. In addition, contractors and subcontractors will maintain any other records necessary to clearly document (i) their performance and (ii) any claims arising from or relating to their performance under a public contract. Contractors and subcontractors will make all records pertaining to their performance and any claims under a public contract accessible to the City at reasonable times and places, regardless whether litigation has been filed as to such claims.

#### **B. Audit of Cost or Pricing Data**

The City may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data according to the terms of a contract to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, for which cost or pricing data are required, will maintain such books and records that relate to such cost or pricing data for three (3) years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

#### **C. Contract Audit**

The City will be entitled to inspect, examine, copy, and audit the books and records of a contractor or any subcontractor under any contract or subcontract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records will be maintained by the contractor for a period of three (3) years from the date of final payment under the prime contract and by the subcontractor for a period of three (3) years from the date of final payment under the subcontract, or until the conclusion of any audit, controversy or litigation arising out of or related to the contract, whichever date is later, unless a shorter period is otherwise authorized in writing.

### **30.195 Right to Inspect Plant**

#### **A. Time for Inspection**

The City may, at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor that is related to the performance of any contract awarded.

#### **B. Access to Plant or Place of Business**

As a condition of bidding, bidders agree that the City may enter a contractor's or subcontractor's plant or place of business during normal business hours for the following purposes:

1. Inspect and/or test supplies or services for acceptance by the City pursuant to the terms of the bid; or
2. Investigate in connection with a bidder's application, a minority business certification, or bidder disqualification.

#### **C. Contractual Provisions**

Contracts may provide that the City may inspect supplies and services at the contractor's or subcontractor's facility and perform tests to determine whether they conform to the bid

documents, or; after award, to contract requirements, and are therefore acceptable. Such inspections and tests will be conducted in accordance with the terms of the contract.

D. Procedures for Trial Use and Testing

The City may establish operational procedures governing the testing and trial use of equipment, materials, and the application of resulting information and data to specifications or procurements.

E. Conduct of Inspections

1. Inspectors

Inspections or tests will be performed so as not to unduly delay the work of the contractor or subcontractor. No change of any provision of the specifications or the contract may be required by the inspector without written authorization of the City, unless otherwise specified in the solicitation documents. The presence or absence of an inspector will not relieve the contractor or subcontractor from any requirement of the contract

2. Location

When an inspection is made in the plant or place of business of a contractor or subcontractor, such contractor or subcontractor will provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing.

3. Time of Testing or Inspection

Inspection or testing of supplies and services performed at the plant or place of business of any contractor or subcontractor will be performed at reasonable times during normal business hours.

F. Inspection of Construction Projects

On-site inspection of construction will be performed in accordance with the terms of the contract.

**30.200 Contract Cancellation and Termination Procedures**

- A. A contract may be canceled by the City for any violation of the provisions of the contract or for violation of the certification of non-discrimination against minority-owned, women-owned, service-disabled veteran-owned businesses and emerging small business enterprises.
- B. The City may terminate any contract if insufficient funds are appropriated to complete the contract.
- C. No cancellation of a public contract will, unless limited by the terms of the particular contract, restrict or abrogate any other remedy available to the City that is provided either by law or under the particular contract.
- D. The City will provide the contractor written notice of the grounds for cancellation or termination and of its intention to cancel the contract or terminate the contractor's performance. If the contractor provided a performance and payment bond, the surety will



also be provided with a copy of the notice of contract cancellation or contractor termination. The notice will include the effective date of the intended cancellation or termination, the grounds for cancellation or termination, and notice of the amount of time (if any) in which the City will permit the contractor to correct the failure to perform. The public contract may provide contract cancellation or contractor termination procedures that are different from or in addition to, those provided in this rule.

- E. If the contractor has provided a performance and payment bond, the City may afford the contractor's surety the opportunity, upon the surety's receipt of a contractor termination notice, to provide a substitute contractor to complete performance of the contract. Performance by the substitute contractor will be rendered pursuant to all material provisions of the original contract, including the provisions of the performance and payment bond. Such substitute performance does not involve the award of a new public contract and will not be subject to competitive procurement requirements.

## **PCR 40.000 PUBLIC IMPROVEMENTS**

### **40.010 Application**

In addition to the requirements set forth in [PCR 30.000](#) of these rules, the following rules apply to public improvement contracts, unless otherwise exempted. The requirements in [PCR 40.000](#) are intended to be complementary to those in [PCR 30.000](#), with the rules in [PCR 40.000](#) supplementing the [PCR 30.000](#) requirements, where applicable, to meet the City's needs when administering contracts for public improvements.

The requirements of this section address matters covered in [ORS Chapter 279C](#) (with exception of Architectural, Engineering, Land Surveying, and Related Services, all of which are addressed in [PCR 70.015](#) of these rules).

### **40.015 Competitive Bidding**

The City will solicit bids for public improvement contracts by invitations to bid, except as otherwise allowed or required by these rules, or pursuant to [ORS 279C.335](#) on competitive bidding exceptions and exemptions, [ORS 279A.030](#) on prevailing federal law, or [ORS 279A.100](#) on affirmative action. [Also see PCR 10.105](#) regarding alternative contracting methods.

### **40.020 Contracts for Public Improvements**

Contracts for public improvements will follow the requirements of the most current version of the [Oregon Standard Specifications for Construction](#), as amended by the City of Milwaukie. To the extent that the [Oregon Standard Specifications for Construction](#) conflict with other City public contracting rules, the Specifications will control. All other City public contracting rules applicable to the procurement will apply.

Public improvements that are not suitable under the [Oregon Standard Specifications for Construction](#) will instead comply with [PCR 30.000](#) and PCR 40.000, as applicable. The City may, in its sole discretion, determine if a public improvement is not suitable to follow the [Oregon Standard Specifications for Construction](#). [Such contracts](#) include, but are not limited to, construction for well sites, sewer lift station improvements, and building construction.

## **40.025 Prequalification**

### **A. Prequalification**

Pursuant to [ORS 279C.430](#) and this rule, two types of prequalification are authorized:

#### **1. Mandatory Prequalification**

The City may require mandatory prequalification of bidders on forms prescribed by the City. The City will determine prequalification status in accordance with [ORS 279C.430](#). The City must indicate in the solicitation if mandatory prequalification is required and establish the time for submitting the prequalification application. Mandatory prequalification is when the City conditions a bidder's submission of a bid or quote upon the bidder's prequalification. When prequalification is required by the bid documents as a condition for bidding, the City will not consider the bid(s) of any prospective bidder who is not prequalified.

#### **2. Permissive Prequalification**

The City may prequalify a bidder for the City's solicitation list on forms prescribed the City, but in permissive prequalification the City will not limit distribution of a solicitation to that list.

### **B. Prequalification Presumed**

If the bidder is currently prequalified by either Oregon Department of Transportation or Oregon Department of Administrative Services to perform contracts, the bidder may be determined to be presumed qualified to perform similar work for the City. The City must indicate in the solicitation if it will allow presumed prequalification.

### **C. Standards for Prequalification**

A bidder may prequalify by demonstrating to the City's satisfaction:

1. Financial, material, equipment, facility and personnel resources and expertise, or ability to obtain such resources and expertise, indicate that the bidder is capable of meeting all contractual responsibilities;
2. Record of performance;
3. Record of integrity;
4. Bidder is qualified to contract with the City.

### **D. Notice of Denial**

If a bidder fails to prequalify for a mandatory prequalification, the City will notify the bidder, specify the reasons in Section C of this rule and inform the bidder of the bidder's rights under [ORS 279C.445](#) and [ORS 279C.450](#).

## **40.030 Bid Evaluation and Award**

### **A. General**

Unless exempted by these rules, a public improvement contract, if awarded, is to be awarded to the lowest, responsive and responsible bidder.

B. Special Requirements

The solicitation documents will set forth any special requirements and criteria, which will be used to determine the lowest, responsive and responsible bidder. No bid will be evaluated for any requirement or criterion that is not disclosed in the solicitation documents or City regulation.

C. Bid Evaluation and Award

The evaluation format for competitive bidding will be as specified in the solicitation documents.

D. Proposal Evaluation and Award

If a selection method other than competitive bids is authorized by these rules for a public improvement, proposals will be evaluated to determine which proposer offers the best solution to the City in accordance with the evaluation criteria set forth in the solicitation documents and in the City's rules. The solicitation evaluation criteria may include, but are not limited to, cost, quality, relevant experience, service, performance history on other private and public contracts, experience and availability of key personnel, equity requirements, adequacy of equipment and physical plant, financial wherewithal, sources of supply, and references. Evaluation factors need not be precise predictors of actual future costs and performance, but, to the extent possible, such evaluation factors will:

1. Be reasonable estimates based on information available to the City;
2. Treat all proposals equitably;
3. Recognize that public policy requires acquisitions and public improvements to be accomplished at the least cost.

E. No assignment or transfer of contract rights

A contractor will not assign, sell, or transfer rights, nor delegate responsibilities under a public contract either in whole or in part, without first obtaining the City's prior written consent. Such written consent will not relieve a contractor of any obligations under a public contract, and any transferee will be considered the agent of the contractor and bound to abide by all provisions of the public contract. Except in the event of a novation, if the City consents in writing to an assignment, sale, or transfer of the contractor's rights and responsibilities, the contractor will remain ultimately liable to the City for complete performance of the public contract as if on such assignment, sale, or transfer had occurred.

**40.035 Negotiation**

The City may negotiate a public improvement contract in accordance with [PCR 30.140](#).

**40.040 Contract Cancellation Procedures**

A. Termination Due to Circumstances Beyond the Control of the Contractor

1. Reasons for Termination

The City may, in its sole discretion, by written order or upon written request from the contractor, terminate the contract or a portion thereof if any of the following occur:

- a. The contractor is prevented from completing the work for reasons beyond the control of the City;
  - b. Completion of the project is beyond the control of the contractor;
  - c. Any reason considered by the City to be in the public interest (other than a labor dispute or reason of any third-party judicial proceeding relating to the work other than a suit or action filed in regards to a labor dispute). These reasons may include, but are not limited to, non-availability of materials, phenomenon of nature of catastrophic proportions or intensity, executive orders of the President related to national defense, congressional or state acts related to funding;
  - d. Any third-party judicial proceeding relating to the work other than a suit or action filed in regards to a labor dispute;
  - e. If the circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the public works;
  - f. The City does not have funds budgeted or available to complete the contract;  
or
  - g. Any other reason allowed as a basis for termination under the contract.
2. Payment When Contract is Terminated

When the contract, or any portion thereof, is terminated before completion of all items of work in the contract, payment will be made for the actual items of work completed under the contract, or by mutual agreement, for items of work partially completed. No claim for loss of anticipated profits will be allowed.

3. Responsibility for Completed Work if Contract Terminated

Termination of the contract or a portion thereof will not relieve the contractor of responsibility for the work completed, nor will it relieve the surety of its obligation for any claims arising from the work performed.

B. Termination of Contract for Default

1. Declaration of Default

The City may, after giving the contractor or the surety seven (7) days' written notice and an opportunity to cure deficient performance, terminate the contractor's performance for any reasonable cause, including but not limited to those set forth below in subsections (a) through (f). Upon such termination, the City may immediately take possession of the premises and of all materials, tools, and appliances thereon as well as all other materials, whether on the premises or not, on which the contractor has received partial payment. The City may finish the work by whatever method it may deem expedient.

- a. If the contractor should persistently or repeatedly refuse to or fail to supply an adequate number of properly skilled workers or proper materials for the efficient execution of the project; or
- b. If the contractor should fail to make prompt payment to subcontractors for material or labor, or persistently disregard laws, ordinances, or the instruction of

the City, or otherwise be guilty of a substantial violation of any provision of the contract; or

- c. If the Contractor should voluntarily or involuntarily seek protection under the U.S. Bankruptcy Code and its Debtor in Possession or Trustee for the estate fails to assume the contract within a reasonable time; or
- d. If the contractor should make a general assignment for the benefit of the contractor's creditors; or
- e. If a receiver should be appointed on account of the contractor's insolvency; or
- f. If the contractor is otherwise in material breach of any part of the contract.

2. Required Response to Declaration of Default

If the above action is taken, the contractor or the surety will provide the City with immediate and peaceful possession of all of the material is, tools, and appliances located on the premises, as well as all other materials whether on the premises or not, on which contractor has received any progress payment. Further, the contractor will not be entitled to receive any further payment until the work is completed. On the completion of the work, determination will be made by the City of the total amount under the terms of the contract, had the contractor completed the work. If the difference between said total amount and the sum of all amounts previously paid to the contractor, which difference will hereinafter be called the "unpaid balance," exceeds the expense incurred by the City in completing the work, including expense for additional managerial and administrative services, such excess will be paid to the contractor, with the consent of the surety. If, instead, the expense incurred by the City exceeds the unpaid balance, the amount of the excess will be paid to the City by the contractor or the surety.

3. Expense of Completion

The expense incurred by the City will be as determined and certified by the City.

4. Substitution of Contractor

As provided in [PCR 30.200\(E\)](#), termination of the contractor and substitution of another contractor to complete the work does not constitute the award of a new public contract.

5. Refusal to Perform

In addition to and apart from the above-mentioned right of the City to terminate the employment of the contractor, the contract may be canceled by the City for any willful failure or refusal on the part of the contractor to perform faithfully the contract according to all of its terms and conditions; however, in such event neither the contractor nor the surety will be relieved from damages or losses suffered by the City on account of the contractor's breach of contract.

6. Remedies are Cumulative

The City may, at its discretion, avail itself of any or all of the above rights or remedies without prejudice or preclude the City from subsequently invoking any other right or remedy set forth above or elsewhere in the contract.

## 40.045 Retainage

### A. Retainage of Progress Payments

The City will retain amounts from progress payments so that the total value of all amounts retained will not exceed five percent of the value of completed work. If the contract work is 50 percent completed and the work is progressing satisfactorily, the retainage may be reduced on the remaining progress payments. Any reduction or elimination of retainage will be allowed only upon written application of the contractor, which application will include written approval of the contractor's surety; except that when the contract work is 97 ½ percent completed, the City may without application by the contractor, reduce the retained amount to 100 percent of the value of the contract work remaining to be done. If retainage has been reduced or eliminated, the City reserves the right in protecting its interests to reinstate at any time retainage from further progress payments.

### B. Alternatives to Cash Retainage

In lieu of cash retainage to be held by the City, the contractor may select one of the following options:

#### 1. Deposit of Securities

The contractor may deposit bonds or securities with the City or in any bank or trust company to be held for the benefit of the City. In such event, the City will reduce the retainage in an amount equal to the value of the bonds and securities. This reduction in retainage will be made in the progress payments made subsequent to the time the contractor deposits the bonds and securities.

The value of the bonds and securities will be determined periodically by the City and the amount retained on progress payments will be adjusted accordingly. The bonds and securities deposited by the contractor will be fully assigned to the City or be payable to the City on demand and will be of a character approved by the Finance Director, including but not limited to the following:

- a. Bills, certificates, notes or bonds of the United States.
- b. Other obligations of the United States or its agencies.
- c. Obligations of any corporation wholly owned by the Federal Government.
- d. Indebtedness of the Federal National Mortgage Association.
- e. Time certificates of deposit or savings account passbooks issued by a commercial bank, savings and loan association, or mutual savings bank, duly authorized to do business in Oregon.
- f. Corporation bonds rated A or better by a recognized rating service.
- g. General obligation bonds of the State of Oregon or any political subdivision thereof.
- h. Irrevocable letters of credit from a bank doing business in Oregon.

At the time the City determines that all requirements for the protection of the City's interest has been fulfilled, all bonds and securities deposited as above provided will be released to the contractor.

2. Deposit in Interest-Bearing Account

If the contract price exceeds \$500,000, the City will place amounts deducted as retainage into an interest-bearing escrow account. Interest on the retainage amount accrues from the date the payment request is approved until the date the retainage is paid to the contractor to which it is due, as required by ORS 279C.570(2). Interest earned on such account will accrue to the contractor.

The contractor will execute such documentation and instructions respecting the interest-bearing escrow account as the City may require in order to protect its interests, including but not limited to a provision that no funds may be paid from the account to anyone without the City's advance written authorization. Amounts retained and interest earned will be included in the final payment to Contractor made in accordance with [PCR 40.060](#), unless otherwise specified in the Contract.

3. Surety Bond

The City may, at its discretion, allow the contractor to deposit a surety bond in a form acceptable to the City in lieu of all or a portion of funds retained to be retained. The contractor will accept like bonds from subcontractors and suppliers when the City allows surety bonds for retainage.

C. Recovery of Costs

If the City incurs additional costs as a result of the exercise of any of the options for retainage described herein, the City may recover such costs from the contractor by reduction of the final payment. As work on the contract progresses, the City will, upon request, inform the contractor of all accrued costs.

**40.050 Progress Payments**

A. Request for Progress Payments

At a regular time each month, the contractor will, if required by the contract documents, submit to the City a request for payment based upon an estimate of the amount of work completed; otherwise, the City will prepare a progress estimate of the quantities of the various classes of work performed. Upon verification and approval of the City, the sum of these values will be referred to as the "value of completed work." With these estimates as a base, a progress payment will be made to the contractor, which will be equal to the value of completed work, less such amounts as may have been previously paid, less such other amounts as may be deductible or as may be owing and due to the City for any cause, and less an amount to be retained in protection of the City's interests.

B. Progress Payments Do Not Constitute Acceptance of Work

Progress payments will not be construed as an acceptance or approval of any part of the work covered thereby, and they will in no manner relieve the contractor of responsibility for defective workmanship or material.

C. Estimates for Progress Payments

The estimates upon which progress payments are based are not represented to be accurate estimates, and all quantities shown therein are subject to correction in the final estimate. If the contractor uses such estimates as a basis for making payments to subcontractors, this is at the contractor's own risk, and the contractor will bear all loss that may result.

D. Contractor Certified Statements, Payment Withholding

The City will withhold 25 percent of any amount earned by the contractor until the contractor files certified statements with the City on any project covered by Prevailing Wage Rate Law.

**40.055 Final Inspection**

A. Notification of Completion

When the contractor determines that all construction work on the project has been completed, the contractor will so notify the City in writing. The City will make an inspection of the project and project records within 15 days of receiving said notice. If, at such inspection, all construction provided for and ordered under the contract is complete and satisfactory to the City, and all certifications, bills, forms, and documents have been submitted properly, such inspection will constitute the final inspection.

B. Instructions to Complete the Work

If, however, at any inspection, any work in whole or in part is found unsatisfactory, or it is found that all certifications, bills, forms, and documents have not been submitted properly, the City will within 15 days provide instructions to the contractor on outstanding requirements to complete the project. At such time as the contractor determines full compliance with, and the execution of such instructions, the contractor will notify the City in writing. The City will make another inspection within 15 days after such notice, and this inspection will constitute the final inspection provided construction work has been completed satisfactorily.

C. Acknowledgment of Acceptance

Upon satisfactory completion of all work required under the contract, the City will acknowledge acceptance of the work in writing.

**40.060 Final Estimate and Final Payment**

A. Submission of Final Estimate

As soon as practicable after final inspection of the work under the contract, if unit prices were applicable, the City will prepare a final estimate of the quantities of the various classes of work performed. Following a determination of the total amount due the contractor, and following final acceptance of the work by the City, final payment will be made to the contractor.

B. Set-off of Prior Payments

All prior partial estimates and payments will be subject to correction in the final estimate and payment.

C. Interest

Beginning 30 days after the date of final acceptance of the project by the City, the City will pay to the contractor interest at the rate established by state statute on any money due and payable to the contractor. Interest will also be payable on any interim payments that are more than 30 days overdue. No interest will be assessed against retainage or other amount lawfully withheld by the City.



#### **40.065 Claims for Unpaid Labor or Supplies**

##### **A. Right of Action**

A person claiming to have supplied labor or materials for work on a public improvement contract let by the City for which the person has not been paid by the prime contractor or any subcontractor, may have a right of action on the contractor's payment bond. This right arises if the person has not been paid in full and has given written notice of a claim within 180 days of last providing labor or furnishing materials, or within 200 days of providing labor or furnishing materials if the claim is for a required contribution to a fund of any employee benefit plan.

##### **B. Notice of Claim**

1. To initiate a claim against the contractor's bond, a person should file a Notice of Claim in the form and manner referenced below. Such notice must be given to the contractor and the City.
2. Any notice of claim should include the following information:
  - a. Name and address of the claimant;
  - b. Name of prime contractor;
  - c. Title of project and contract date;
  - d. Name of the City;
  - e. Name of bonding company (may be obtained from City); and
  - f. Name of contractor or subcontractor to whom labor or material was supplied.

##### **C. Response to Notice of Claim**

Upon receipt of such Notice of Claim, the City will:

1. Send an acknowledgment to claimant;
2. Send a copy of the notice to prime contractor; and
3. File a copy of the notice with the bonding (surety) company.

##### **D. Referral to Surety Company**

If the contract has been completed and all funds disbursed to the prime contractor, all claims will be referred to the surety company for resolution. The City will not arrange for second payments directly to subcontractors or suppliers for work already paid for by the City.

##### **E. Discretionary Payment of Claim**

If the contract is still in force, the City may pay a valid claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due to the contractor under the contract.

##### **F. Liability of Claim**

If the City chooses to make a payment as provided in Subsection E, the contractor or the contractor's surety will not be relieved from obligation with respect to any unpaid claims.

### Sample Notice of Claim

To: (insert name of the public body)

NOTICE IS HEREBY GIVEN that the undersigned, (insert name of subcontractor/supplier), a (corporation, partnership, sole proprietorship, etc.), as claimant, has a claim for (labor performed by the claimant, materials supplied by the claimant, etc.), generally consisting of (brief description) in the sum of \$\_\_\_ against the payment bond taken from (name of prime contractor), as principal, and (name of bonding company), as surety, for the construction of the (title or description of project). The material or labor was supplied to (name of contractor).

(Insert a brief description of the work concerning which the bond was taken)

DATED this \_\_\_\_ day of \_\_\_\_, 20\_\_.

By \_\_\_\_\_ (claimant's name)

#### **40.070 Prevailing Wage Laws**

Contractors will comply with prevailing wage laws ([ORS 279C.800 to 279C.870](#) or the Davis-Bacon Act, [40 US 3141](#), et seq.), as applicable.

#### **PCR 50.000 WAIVER OF SECURITY (BID, PERFORMANCE AND PAYMENT BONDS)**

(Also see [PCR 30.050](#))

#### **50.010 Bid Security Requirements**

The City will require bid security unless an exception under the Public Contracting Code or these rules apply. The City may, in its discretion, waive bid security requirements for contracts other than those for public improvements. In its discretion, the City may accept blanket bid bonds. The City may require proposal security bonds.

#### **50.015 Contracts Under \$100,000**

The City may, in its discretion, waive the bid security, payment bond and performance bond requirements if the amount of the public improvement contract is less than \$100,000, or \$50,000 for highways, bridges and other transportation projects.

#### **50.020 Emerging Small Business Contracts Under \$100,000**

- A. The City may, in its discretion, waive bid security, performance bond and payment bond requirements when the public improvement project:
1. Has estimated direct construction costs not exceeding \$100,000;
  2. Is being undertaken through a program where the bidders are drawn exclusively from a list of certified emerging small businesses maintained by the Certification Office for Business Inclusion and Diversity; and
  3. The City has been provided funds by the legislature for the purpose of assisting Emerging Small Businesses.

- B. The City may waive bid security, performance bond and/or payment bond requirements under the following conditions:
  - 1. There exists an emerging small business account or like source of funds containing an unexpended and unobligated balance;
  - 2. The City has authority to encumber and make payments from the account; and
  - 3. The City encumbers an amount in the account to cover the total cost of each project wherein the bid security and/or the performance bond is waived.

## **PCR 60.000 PERSONAL PROPERTY DISPOSITION**

### **60.010 Surplus Personal Property**

- A. Personal property under the dollar value of \$1,000 may be disposed of after being declared surplus by any department head or the city manager.

Personal property that exceeds the dollar value may be disposed of only after being declared surplus by the city manager. The method of disposal will be determined based on condition, value, demand, and/or use.
- B. Personal property may be declared surplus if it is scheduled for replacement in an adopted budget or it is no longer necessary to provide City services.

### **60.015 Auction Sales of Personal Property**

Personal property may be sold at auction if the City determines that an auction will probably result in the best net return for the City. Auctions that are widely publicized, including internet auctions, do not require notice by the City.

### **60.020 Sales of Personal Property**

- A. When the current market value per item is estimated to be more than \$25,000, the personal property must be offered for competitive bid and be advertised in a newspaper of general circulation in the City. The City, at its discretion, may choose between sealed written bids or a public auction. If no bids are received or if a determination is made that the market value of the property exceeds the offer of the highest responsible bidder, all bids may be rejected and the City may negotiate a sale subject to the following conditions:
  - 1. An appraisal of the market value of the property is obtained and documented, and the negotiated sale price exceeds the market value; or
  - 2. The sale amount exceeds the highest bid received through the bidding or auction process.
- B. The City may sell personal property by a negotiated sale if the value of the property is estimated to be less than \$25,000 and the City has determined that a sale without competitive bidding will result in at least as much net revenue as would a competitive bidding process. The City will endeavor to get as many quotes as is reasonable under the circumstances (normally at least three) and will negotiate to maximize the proceeds for the City.

### **60.025 Liquidation Sales of Personal Property**

The City may sell personal property through a commercially recognized third-party liquidator if the City has determined that a liquidation sale will result in increased net revenue and the selection of the liquidator was conducted by the competitive request for proposal process under these rules.

### **60.030 Donations of Personal Property**

- A. The City may transfer personal property, including recyclable or reclaimed materials, without remuneration or only nominal remuneration without competitive bids to the following entities:
  - 1. Another public agency;
  - 2. Any sheltered workshop, work activity center or group care home which operates under contract or agreement with, or grant from, any state agency and which is certified to receive federal surplus property; or
  - 3. Any recognized non-profit activity, which is certified to receive federal surplus property.
- B. The City may donate or sell, without competitive bids, surplus personal property to recognized private, non-profit social or health service activities, subject to the following conditions:
  - 1. A determination has been made that the property is not needed for other public purposes; and
  - 2. If the property has a current market value of \$1,000 or more, the donation or sale will:
    - a. Be approved by the city manager or designee; and
    - b. Be documented by the City to be clearly in the public interest.
- C. The City will maintain a record of all transfers, donations, or sales authorized by Section A and B of this rule.

### **60.035 Trade of Personal Property**

The City may trade personal property owned by the City to other government agencies or to other entities provided the following conditions apply:

- A. Trades to other government agencies are exempt from public bidding by [PCR 10.010\(A\)\(1\)](#); however, such trades must be approved by the city manager.
- B. Trades of personal property with parties other than government agencies must proceed as follows:
  - 1. The market value of both the item to be traded and the item requested must be documented.
  - 2. The proposal to trade an item for another item must be made available to an adequate number of potential vendors to encourage competition.
  - 3. Such trades must be approved by the city manager.

#### **60.040 Authorizing Documents for Disposition of Personal Property**

- A. Transfer of ownership documents, such as the bill of sale, for personal property that has been sold, auctioned, donated, traded or liquidated by the City may be authorized by the department head or city manager provided that the property was previously declared as surplus under subsection 60.010(A).
- B. Notwithstanding the provisions in subsection (A), above, all ownership documents, including the bill of sale, must be authorized by the city manager or their designee for any personal property that possesses an original title or when a certificate of origin accompanies the property.

#### **60.045 Personal Property With No Value**

The City may, in its sole discretion, determine personal property has no value to proceed with disposal under one of the methods listed in [PCR 60.015](#) through [60.035](#). When no value is determined, the City may dispose of the personal property by refuse or recycling only after declaring the property as surplus.

## **PCR 70.000 PERSONAL SERVICES CONTRACTS**

### **70.010 Personal Services Contracts**

- A. Personal service contracts are not subject to a formal competitive process under the Oregon Public Contracting Code. Determining whether a contract is for a personal service may include, but is not limited to, the following:
1. When the City has developed, or can develop, reasonably adequate design and/or performance specifications and select a consultant on the basis of meeting the minimum specifications would likely meet the City's needs. If the tasks can be reasonably performed based solely on compliance with minimum specifications, then the tasks should be performed pursuant to a contract awarded by a competitive bidding process and is not considered a personal service.  
  
Conversely, if the City is reasonably unable to develop adequate design and/or performance specifications but must instead have the assistance of the consultant's training, knowledge, and expertise to develop a scope of work then the tasks would most appropriately be performed under a personal service contract.
  2. Selecting the consultant on the basis of qualifications will result in the City obtaining the best value for its money.
  3. When the contract is awarded primarily on the basis of qualifications, including but not limited to, such criteria as experience, training, knowledge, expertise, technical skill, creativity, artistic ability, performance history, and demonstrated ability to exercise sound professional judgment.
  4. A personal service contract is not appropriate when price is or should be the primary or a major selection criterion.
- B. Examples of personal services may include, but are not limited to, the following:
1. Services performed as an independent contractor in a professional capacity, including but not limited to, the services of an accountant, attorney, architectural or land use planning consultant, photogrammetrist, registered professional engineer, appraiser or surveyor, advertising, graphic design, transportation planner, or information technology consultant.
  2. Services by an artist in the performing of fine arts, including but not limited to, photographer, filmmaker, painter, weaver, or sculptor.
  3. Services of a specialized creative and research-oriented, noncommercial nature.
  4. Services for educational and human services.
- C. Examples of services that are NOT personal services may include, but are not limited to, the following:
1. Services, even though in a professional capacity, if predominately for a product (e.g., a contract with a landscape architect to design a garden is a personal service, but a contract to design a garden and supply all the shrubs and trees is predominately a tangible product).
  2. Services with a temporary service or personnel agency to supply labor which is of a type that can generally be done by any competent worker (e.g., data entry, key

punch, janitorial, security guard, crowd management, crop spraying, laundry, and landscape maintenance).

3. Services for trade-related activities considered to be labor and material contracts.
4. Services of a trade-related activity, to accomplish routine, continuing, and necessary functions, even though a specific license is required to engage in the activity. Examples are repair and/or maintenance of all types of equipment or structures.

### **70.015 Screening and Selection Procedures for Architects, Engineers, Land Surveyors, Photogrammetrists, Transportation Planners and Related Services**

The City may enter into a personal service contract based on the procedures described in this section to screen and select proposers to perform the type of professional service required. The selection procedures will be used to select architects, engineers, land surveyors, photogrammetrists, transportation planners and related services. These selection procedures do not apply to personal services contracts for other professionals, nor do they apply to the appointment or hiring of City officials and employees, to employment or services contracts with City officials and employees (except if providing services outside the scope of employment or official duties), or to collective bargaining agreements.

#### **A. Formal Selection Procedure**

This procedure will be used for personal service contracts when the estimated value of the contract exceeds \$250,000. The City may elect to use this Formal Selection Procedure at any time for any personal service contract, regardless of estimated value.

Only after the City has selected the most qualified consultant in accordance with the applicable selection procedures, may the City solicit or use pricing policies and pricing proposals, or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, to determine a consultant's compensation.

Nothing in these rules will impede the City's ability to prequalify personal services in advance pursuant to [ORS 279B.120](#) and [ORS 279B.125](#), so long as the formal procedure is followed during the prequalification process. Notwithstanding the exclusion against revoking prequalifications in [ORS 279B.120\(3\)](#), the City may determine that a prequalified proposer is not responsible prior to contact award.

#### **1. Selection Criteria**

- a. City may consider each prospective consultant's specialized experience, capabilities, technical competence, resources committed to perform work, record of past performance, quality of work, credentials, performance data sufficient to establish their qualification for the project, availability to the project locale, familiarity with the project locale, and proposed project management techniques.
- b. City will consider ownership status and employment practices regarding disadvantaged business enterprises, minority-owned, women-owned, and service-disabled veteran-owned businesses, and emerging small businesses or historically underutilized businesses.
- c. The City will comply with [PCR 120.000](#), as required.

## 2. Announcement

- a. The City will make at least one public announcement of its need for personal services in an appropriate trade periodical or newspaper of general circulation.
- b. The announcement will include a description of the proposed project(s), the scope of the services required, project completion dates, and a description of any special requirements, if present.
- c. The announcement will invite qualified prospective consultants to indicate their interest in performing the services required and will specify that compensation requirements will be submitted only upon successful completion of the qualifications-based selection of candidates.

The announcement will specify a closing date by which the proposal must be received by the appropriate department.

- d. The City must give notice of the selection procedures for at least 21 days before closing.
- e. Despite subsection 2(d) of this section, the City may determine that a shorter interval of time is in the public's interest and that a shorter time period will not substantially affect competition. In no event may the selection procedures for formal selection of personal services be less than seven (7) days before closing. The City must document specific reasons for the shorter time period in the procurement file.

## 3. Initial Screening

The City will evaluate the qualifications of all proposers responding to the announcement by the closing date and select from among the respondents a minimum of three (3) prospective consultants whose proposals evidence the highest level of qualification. Should fewer than three (3) proposals be received, then each prospective consultant submitting proposals that meet the minimum qualifications will be evaluated.

## 4. Final Selection Procedure

### a. Interviews

The City may elect to hold interviews with the finalists selected from the initial screening. Applicant capability, experience, and qualifications will determine the final selection. The interviews may be in person or by video conference. The City will make a determination of the most qualified consultant from the written materials and interview evaluation.

### b. Consultant Selection

The City will provide a written notice of intent to award to each proposer that has submitted a proposal. The notice will state the date, time and location of the selection decision. The notice will include the name of the consultant that staff recommends the contract be awarded to. The notice will include any proposal comparison sheets. After the City has selected the most qualified consultant and notified that consultant in writing, the City will request compensation requirements from such consultant. The City may enter into



mutual negotiations with the selected consultant regarding pricing policies and proposals or other pricing information. City and the selected consultant will discuss and refine the scope of services for the project and will negotiate conditions, including but not limited to compensation level and performance schedule, based on the scope of services. The compensation level paid must be reasonable and fair to the contracting agency as determined solely by the City. Authority to negotiate a contract under this section does not supersede any provision of [ORS 279A.140](#) or [279C.520](#).

c. Protest of Consultant Selection

- i. The City will provide notification to all proposers of the most qualified selection. A proposer who claims to have been adversely affected or aggrieved by the City's selection may submit a written protest of the selection to the City no less than seven (7) days after the date of notice of intent to award.
- ii. A Proposer submitting a protest must claim that the protesting proposer is the highest-ranked proposer because the proposals of all higher-ranked proposers failed to meet the requirements of the selection procedures or because the higher-ranked proposers otherwise are not qualified to perform the architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or related services described in the selection procedures.
- iii. The City will not consider any protest that is submitted after the submission deadline.

5. Public Disclosure of Contents of Proposals

- a. Notwithstanding public records law under [ORS 192.311 to 192.338](#), if the City solicits a contract for personal services by formal selection:
  - i. The City may open proposals so as to avoid disclosing contents to competing proposers during, when applicable, the process of negotiation.
  - ii. The City need not open proposals for public inspection until after the contracting agency executes a contract.
- b. Notwithstanding any requirement to open proposals to public inspection after the City executes a contract, the City will withhold from disclosure to the public trade secrets, as defined in [ORS 192.345](#), and information submitted to a public body in confidence, as described in [ORS 192.355](#), that are contained in a proposal. Opening a proposal at a public meeting, as defined in [ORS 192.610](#), does not make the contents of the proposal subject to disclosure, regardless of whether the public body that opens the proposal fails to give notice of or provide for an executive session for the purpose of opening proposals. If a request for proposals is canceled after proposals are received, the City will return all proposals and all copies of the proposal to the proposer that made the proposal. The City will keep a list of returned proposals in the file for the solicitation.

6. Negotiation

If the City and selected consultant are unable for any reason to negotiate a contract at a compensation level that is reasonable and fair to the City, the City will formally terminate negotiations with consultant by written communication. The City may then negotiate with the next most qualified candidate. The negotiation process may continue in this manner through successive candidates until an agreement is reached or the City terminates the contracting process.

7. Recommendation

If a contract is reached with the selected consultant, the City will make a recommendation to the Board for award of the contract based on the written materials, interview evaluation, negotiated scope of services and fee proposal.

8. Execution of Contract

After the Board has approved the award of contract, the consultant and City will enter into a contract for services.

B. Intermediate Selection Procedure

1. This procedure may be used when the estimated value of the personal services contract exceeds \$100,000 but does not exceed \$250,000.
2. The City may select the most qualified consultant after seeking at least three (3) proposals.
3. The selection procedure specified above in subsections A(3-8) will be observed with the exception that the consultant selection as described in subsection A(4)(a) and A(4)(c) may be omitted from the process.
4. The City will comply with [PCR 120.000](#), as required.

C. Direct Appointment Procedure

A qualified consultant may be appointed directly when the estimated value of the contract does not exceed \$100,000. The City will comply with [PCR 120.000](#), as required.

D. Responsible Parties' Actions

1. Consultants  
Submit qualifications, credentials, and performance data relating to their capabilities to the appropriate department in response to project announcement.
2. Department
  - a. Determine that the work on a project requires the personal services of a consultant.
  - b. Announce project as required by this section.
  - c. Determine appropriate selection/appointment procedure.
  - d. Select consultant as specified under this rule.
  - e. Interview the top candidates and make the final selection.

- f. Execute contract and award to consultant with the Board, city manager, or designee's approval.
  - g. Maintain a file on the selection process, including:
    - i. The method and copy of the announcement.
    - ii. The names of firms/individuals.
    - iii. A justification of need for the contract.
    - iv. The basis for selection.
    - v. How reasonableness of price was negotiated with selected consultant.
    - vi. A copy of the resulting contract.
3. City Manager
- a. Make direct and emergency appointments as required.
  - b. Approve/disapprove personal services contract and all subsequent amendments unless the amount of the contract requires the Board's approval.

E. Amendments

1. Amendments for additional work on personal service contracts will be permitted only if the City requests additional work of the same type. Any such amendment may not exceed 25% of the original contract value. If an additional personal services contract is to be awarded for work related to an existing personal service contract, the total value of the new and old contracts is to be considered in determining the type of selection procedure required. If a contract was originally awarded by the Intermediate Selection procedure, amendments that would result in a total contract price of more than \$250,000 are not permitted. If a contract was originally awarded by the direct appointment procedure, amendments that would result in a total contract price of more than \$100,000 are not permitted.
2. Notwithstanding the provisions in subsection (E)(1), above, any contract for an architect, engineer, photogrammetric mapping, transportation planning, or land surveyor allowed under [ORS 279C.115](#) may be amended under this section so long as the following criteria are met:
  - a. The City's project manager creates a memo to the project file that explains how the new contract satisfies the following requirements:
    - i. The work described in the proposed contract consists of work that was substantially described, planned, or otherwise previously studied or rendered in the earlier awarded contract with the consultant;
    - ii. Why the work proposed in the new contract is a continuation of the earlier project; and
    - iii. A statement describing why it was not possible or practicable to finish the project under the terms of the earlier agreement or proceed with a new selection procedure.
  - b. If a proposed amendment would increase the consultant's cost to a level at or beyond twice the value of the original agreement, the city manager will review

and approve all such proposed amendments, even if the city manager does not have signing authority over the amendment.

- c. Signing authority for an amendment belongs to the individual or entity with authority over the amendment given the cumulative value of the amendments of the agreement. For purposes of this section cumulative value refers to the value of the approved amendments, plus the value of the amendment proposed for approval.

## **70.020 Screening and Selection Procedures for Other Personal Services**

### **A. Formal Selection Procedure**

This procedure will be used for personal services other than those described in [PCR 70.015](#) when the total cost of the contract exceeds \$150,000. The City may elect to use this Formal Selection Procedure at any time for any personal service contract, regardless of estimated value.

Nothing in these rules will impede the City's ability to prequalify personal services in advance pursuant to [ORS 279B.120](#) and [ORS 279B.125](#), so long as the formal procedure is followed during the prequalification process. Notwithstanding the exclusion against revoking prequalifications in [ORS 279B.120\(3\)](#), the City may determine that a prequalified proposer is not responsible prior to contact award.

#### **1. Selection Criteria**

- a. City may consider each prospective consultant's specialized experience, capabilities, technical competence, resources committed to perform work, record of past performance, quality of work, credentials, performance data sufficient to establish their qualification for the project, availability to the project locale, familiarity with the project locale, and proposed project management techniques, and price.
- b. City will consider ownership status and employment practices regarding disadvantaged business enterprises, minority-owned, women-owned, service-disabled veteran-owned businesses, and emerging small businesses or historically underutilized businesses.
- c. The City will comply with [PCR 120.000](#), as required.

#### **2. Announcement**

- a. The City will make at least one public announcement of its need for personal services in an appropriate trade periodical or newspaper of general circulation.
- b. The announcement will include a description of the proposed project(s), the scope of the services required, project completion dates, and a description of any special requirements, if present.
- c. The announcement will invite qualified prospective consultants to indicate their interest in performing the services required.
- d. The announcement will specify a closing date by which the proposal must be received by the appropriate department.
- e. The City must give notice of the solicitation for at least 21 days before closing.

- f. Despite subsection 2(e) of this section, the City may determine that a shorter interval of time is in the public's interest and that a shorter time period will not substantially affect competition. In no event may the solicitation for formal selection of personal services be less than seven (7) days before closing. The City must document specific reasons for the shorter time period in the procurement file.
- 3. Initial Screening

The City will evaluate the qualifications and criteria of all proposers responding to the announcement by the closing date and select from among the respondents a minimum of three (3) prospective consultants whose proposals evidence the highest level of qualification. Should fewer than three (3) proposals be received, then each prospective consultant submitting proposals that meet the minimum qualifications will be evaluated.
- 4. Final Selection Procedure
  - a. Interviews

The City may elect to hold interviews with the finalists selected from the initial screening. Applicant capability, experience, and compensation requirements will determine the final selection. The interviews may be in person or by video conference. The City will make a determination from the written materials and interview evaluation.
  - b. Consultant Selection

The City will provide a written notice of intent to award to each proposer that has submitted a proposal. The notice will state the date, time and location of the selection decision. The notice will include the name of the consultant that staff recommends the contract be awarded. The notice will include any proposal comparison sheets. The City and the selected consultant will discuss and refine the scope of services for the project and will negotiate conditions. Authority to negotiate a contract under this section does not supersede any provision of [ORS 279A.140](#) or [279C.520](#).
  - c. Protest of Consultant Selection
    - i. The City will provide to all proposers a copy of the selection notice that the City sent to the highest-ranked proposer. A proposer who claims to have been adversely affected or aggrieved by the City's selection may submit a written protest of the selection to the City no less than seven (7) days after the date of notice of intent to award.
    - ii. A Proposer submitting a protest must claim that the protesting proposer is the highest-ranked proposer because the proposals of all higher-ranked proposers failed to meet the requirements of the selection procedures or because the higher-ranked proposers otherwise are not qualified to perform the required services described in the selection procedures.
    - iii. The City will not consider any protest that is submitted after the submission deadline.

5. Public Disclosure of Contents of Proposals

Opened proposals will not be available for public inspection until after a notice of intent to award a contract is issued. The fact that proposals are opened at a meeting does not make the contents of the proposals subject to disclosure. The City will verify and determine that the confidential information claimed to be exempt is in fact exempt from disclosure under the Oregon Public Records Law. Material so designated will accompany the proposal and will be readily separable from the proposal in order to facilitate public inspection of the non-confidential portion of the proposal. Prices and terms of payment will be publicly available regardless of any designation to the contrary.

6. Negotiation

If the City and selected consultant are unable for any reason to negotiate a contract that is reasonable and fair to the City, the City will formally terminate negotiations with consultant by written communication. The City may then negotiate with the next most qualified candidate. The negotiation process may continue in this manner through successive candidates until an agreement is reached or the City terminates the contracting process.

7. Recommendation

If a contract is reached with the selected consultant, the City will make a recommendation to the Board for award of the contract based on the written materials, interview evaluation, negotiated scope of services and fee proposal.

8. Execution of Contract

After the Board has approved the award of contract, the consultant and City will enter into a contract for services.

B. Intermediate Selection Procedure

1. This procedure may be used when the estimated value of the personal services contract exceeds \$50,000 but does not exceed \$150,000.
2. The City may select the most qualified consultant after seeking at least three (3) proposals. The City may contact prospective consultants with which it has had previous successful experience, or which are known by the City to be qualified to offer the sought-after services. A projected fee will be requested, along with other primary criteria, and a selection made by the City based upon the consultant's capability, experience, project approach, and compensation requirements.
3. The selection procedures specified above in subsections A(3-6) will be observed with the exception that the consultant selection as described in subsections A(4)(a) and A(4)(c) may be omitted from the process.
4. The City will comply with [PCR 120.000](#), as required.

C. Direct Appointment Procedure

1. A qualified consultant may be appointed directly from a current list of the City's consultants, another public contracting agency's current list of consultants pursuant to an intergovernmental agreement entered into in accordance with [ORS Chapter 190](#), or from consultants offering the necessary services that the City reasonably can locate. Direct Appointment procedure may be used when:
  - a. The estimated value of the personal services contract does not exceed \$50,000;  
or
  - b. When the project consists of work that has been substantially described, planned, or otherwise previously studied or rendered in an earlier contract, provided that the original selection procedure used for the project was a formal procedure and the consultant's estimated fee does not exceed \$150,000.
2. A direct appointment will be competitive to the extent practicable and may be based on the consultant's availability, capabilities, staffing experience, compensation requirements, and the project location.
3. The City will comply with [PCR 120.000](#), as required.

D. Responsible Parties' Actions

1. Consultants  
Submit qualifications, credentials, and performance data relating to their capabilities to the appropriate department in response to project announcement.
2. Department
  - a. Determine that the work on a project requires the personal services of a consultant.
  - b. Announce project as required by this section.
  - c. Determine appropriate selection/appointment procedure.
  - d. Select consultants as specified under this rule.
  - e. Interview the top candidates and make the final selection.
  - f. Execute contract and award to consultant, with the Board, city manager or designee's approval.
  - g. Maintain a file on the selection process, including:
    - i. The method and copy of the announcement.
    - ii. The names of firms/individuals and cost estimates considered.
    - iii. A justification of need for the contract.
    - iv. The basis for selection.
    - v. The means by which rates were established.
    - vi. How reasonableness of price was determined.
    - vii. A copy of the resulting contract.

3. City Manager
  - a. Make direct and emergency appointments as required.
  - b. Approve/disapprove personal services contract and all subsequent amendments unless the amount of the contract requires the Board's approval.

E. Amendments

Amendments for additional work on personal service contracts under this rule will be permitted only if the City requests additional work of the same type. Any such amendment may not exceed 25% of the original contract value. If an additional personal services contract is to be awarded for work related to an existing personal service contract, the total value of the new and old contracts is to be considered in determining the type of selection procedure required. If a contract was originally awarded by the Intermediate Selection procedure, amendments that would result in a total contract price of more than \$150,000 are not permitted. If a contract was originally awarded by the direct appointment procedure, amendments that would result in a total contract price of more than \$50,000 are not permitted.

**PCR 80.000 EMERGENCY PROCUREMENTS**

**80.010 Emergency Procurements**

- A. Regardless of the estimated value of the procurement, the City Manager or designee may, at the City Manager or designee's discretion, authorize or let public contracts and purchases without a formal competitive process if an emergency exists and the emergency consists of circumstances creating a substantial risk of loss, damage, interruption of service, or threat to public health or safety that could not have been reasonably foreseen and requires prompt execution of a contract to remedy the condition.
- B. The City Manager or designee must first declare the existence of an emergency, which will authorize the City to enter into emergency procurements after making detailed written findings describing the emergency conditions necessitating prompt execution. A copy of the findings together with the amount of the contract(s) or purchase(s) and the name of the contractor(s) will be immediately forwarded by the City Manager to the Board.
- C. Any procurement awarded under this exemption will be awarded within sixty (60) days following declaration of the emergency unless an extension is granted by the City Manager or designee.
- D. The City may enter into a public contract without a formal competitive process when circumstances that could not reasonably be anticipated require prompt establishment and performance of the contract in order to preserve public funds, property, or the uninterrupted provision of government services. In exercising its authority under this exemption, the City will:
  1. To the extent reasonable under the circumstances, encourage competition by attempting to make informal solicitations from potential suppliers of goods or services;



2. Make written findings describing the circumstances that require the prompt performance of the contract and of the harm anticipated to result from failing to establish the contract on an expedited basis; and
  3. Record the measures taken under subsection 1 of this section to encourage competition, the amounts of the quotes or proposals obtained, if any, and the reason for selecting the contractor.
- E. The City will not procure pursuant to this exemption in the absence of a substantial risk of loss, damage, or interruption of services that would occur if contract performance awaited the time necessary, given the complexity of the project, to solicit, receive and analyze bids or proposals.

## **PCR 90.000 REINSTATEMENT/RETROACTIVE APPROVALS**

### **90.010 Application**

The City may at times need to reinstate an expired or terminated contract and retroactively approve an existing contract for goods and services, or for architectural, engineering, land surveying services and related services ("Contract").

### **90.015 Requirements to Reinstate an Expired Contract**

- A. The Contract was properly signed by all parties prior to expiration;
- B. Then the Contract expired;
- C. The City reinstates the Contract;
  1. To fulfill its term, up to the maximum time period provided in the Contract; or
  2. To complete one or more deliverables included within the scope of work at the time of its expiration.
- D. The City documents in writing the deliverable(s) pending completion at the time of the expired Contract's reinstatement; and
- E. If the contractor has performed work under the Contract, the reinstatement does not apply to payments made for work performed between the expiration of the Contract and the date of any reinstatement.

### **90.020 Requirements to Retroactively Approve an Existing Contract**

- A. The Contract exists and has not expired;
- B. The Contract was signed by all parties except that the required approval of the Board or City Manager or designee was lacking; and
- C. If the Contractor has performed work under the Contract, the retroactive approval does not apply to payments made for work performed between the start of the Contract and the date of any retroactive approval.

### **90.025 Process**

The City must meet the following conditions for either a reinstatement of an expired Contract or retroactive approval of an existing Contract:

- A. The City must submit a written request to the Board or city manager, as authorized under [ORS 279A.065\(6\)\(a\)](#). If the request is submitted to the Board, the City must also follow its internal procedures.
- B. The Request must explain the following:
  - 1. The proposed reinstatement of the expired Contract or retroactive approval of the existing Contract;
  - 2. The background facts that led to the request;
  - 3. The good faith basis for making the request;
  - 4. The need for reinstatement of an expired Contract or retroactive approval of an existing Contract due to unforeseen or unavoidable conditions;
  - 5. The steps to prevent a reoccurrence. For examples:
    - a. Improvement of City's internal policies and procedures; or
    - b. Provision of new training or retraining.
  - 6. Acknowledgement that the request is in the best interest of the City.
- C. Obtain all other approvals required for the Contract, including but not limited to the city manager and/or department head. The City must obtain all other approvals required for the Contract before any reinstatement, extension of time under [PCR 90.035](#), or retroactive approval becomes binding.
- D. The Board must approve the request.

### **90.030 Effect of Approval**

- A. An approved reinstatement of an expired Contract makes the Contract in full force and effect, as if it had not expired.
- B. An approved retroactive approval of an existing Contract makes the Contract in full force and effect, as if it had been approved by the Board or city manager when the Contract was formed.
- C. The Board or city manager, as appropriate, may approve any related Contract documents to implement the reinstatement or retroactive approval.
- D. The City may make an approved payment after any related Contract documents are signed by the authorized parties.

### **90.035 Amendments of a Reinstated Contract**

- A. If the City requests reinstatement of an expired Contract, the request may also include a request to amend the reinstated Contract for specified time only. The Board or city manager, as appropriate, may approve this request, including the amendment.
- B. The City may amend a reinstated or retroactively approved Contract for purposes other than time in accordance with [ORS 279A.065\(6\)\(a\)](#).

## **PCR 100.000 RECYCLABLE/RECYCLED PROCUREMENTS**

### **100.010 Recycled Material and Product Guidelines**

The City will make every effort to prefer, specify, and purchase recyclable items and materials with recycled content in accordance with [ORS 279A.125](#). Incentives for recycled materials will be applied whenever economically feasible.

A preference of five percent will be applied for materials and supplies manufactured from recycled materials, as provided in [PCR 100.015](#) with the exception of recycled paper and paper products, which receive a higher preference percentage as stated in [PCR 100.020](#).

The bidder or proposer will indicate in its bid or proposal, the materials it considers subject to the five percent preference. The five percent preference will only apply to the value of that portion of a bid or proposal that offers products containing verifiable recycled contents. The five percent preference will be applied by dividing the bid amount for the recycled goods by 1.05 and using the resulting number in calculating the total bid amount.

### **100.015 Recycled Materials Preference**

- A. In order to qualify for a recycled materials preference, bidders and proposers, in their bids or proposals, will certify the minimum or the exact percentage of recycled product in all materials and supplies offered and both the post-consumer and secondary waste content thereof.
- B. Bids that contain false information about the percentage of recycled product, post-consumer and secondary waste content, and verifiable recycled content will be rejected as non-responsive.
- C. Contracts awarded as a result of a preference under this rule are subject to investigation, including but not limited to, audits, plant visitations, examination of invoices and other documents, as the City deems necessary to confirm that the products supplied contain the percentages of recycled product, post-consumer and secondary waste stated in the bid or proposal.
- D. Failure to provide products containing the percentages of recycled product, postconsumer and secondary waste stated in the bid may result in:
  1. The contractor being required to reimburse the City for the portion of the contract price that is attributable to the preference; and
  2. Contract termination; or
  3. Both subsections 1 and 2 of this section, or such other remedies the City deems appropriate.

### **100.020 Recycled Material and Product Procurements**

#### **A. Purchase of Paper Products**

The City promotes the use of recycled paper and paper products. Purchase of recycled paper and paper products is preferred even when the cost of such recycled paper or paper products is up to seven (7) percent higher than the cost of the same quality paper or paper products containing little or no recycled paper. "Recycled paper" will be defined

as a paper product with not less than 50 percent of its total weight consisting of secondary waste materials or 25 percent of its total weight consisting of post-consumer waste.

1. In the specification and purchase or lease of City high-speed copiers and small offset press application paper and fine printing paper, including book, bond, cover, gum, index, bristols, boards, ledger, and duplicator papers:
  - a. The City will use recycled paper wherever possible if available and compatible with existing printing and copying equipment;
  - b. The City will try to eliminate excessive or unnecessary paper use, including but not limited to over-purchase of paper, overprinting of materials, purchases of too high a grade of paper, purchase of paper which is not recyclable, and purchase of virgin paper when recycled paper is available in the same grade;
  - c. Procurement specifications for the purchase or lease of new printing and copying equipment will require the acceptance and operational use of recycled paper and will be capable of two-sided copying and printing;
  - d. The procurement of unbleached, recycled paper is encouraged and the use of bright, hard to bleach colored or otherwise non-recyclable papers will be discouraged; and
  - e. In the specification and purchase of other paper items including corrugated and fiberboard boxes, folding box board and cartons, stationery, envelopes, legal and scratch pads, manifold business forms (including computer paper), toilet tissue, paper towels, facial tissue, paper napkins and industrial wipes, and brown and coarse papers, the City will actively solicit information from vendors with regard to the availability of other paper products (as listed above) with recycled paper content and promote its use.

B. Purchase of Composted Waste Materials

In the specification and purchase of landscape cover, soil amendment, and fill materials:

1. The City will eliminate from procurement specifications any exclusions or barriers to the purchase of recycled compost materials, except for exclusions based upon plant or human health or safety; and
2. The City will make every effort to utilize and specify functionally equivalent composted waste products in the place of products manufactured from virgin materials.

C. Purchase of Retread Tires

In the specification and purchase of tires for vehicles and equipment in the City fleet:

1. The City will make every reasonable effort to utilize retread tires in the place of tires manufactured from virgin materials where technical requirements will allow; and
2. The City will give preference to the purchase of retread tires to the maximum extent possible within the intended use of the product taking the following into consideration:
  - a. The product is unable to meet the City's specifications (e.g., emergency response vehicles and heavy equipment);

- b. The product is not available within specified delivery schedules; and
- c. The product is not price competitive.

D. Purchase of Re-refined Petroleum Products

In the purchase of lubricating oils for vehicles and equipment in the City fleet:

1. The City will make every reasonable effort to utilize lubricating oils with re-refined oil content unless:
  - a. The product does not meet performance specifications recommended by the original equipment manufacturer and related warranties would be voided; and
  - b. The product is found to not be economically or technically feasible.
2. The City will review current procurement specifications in order to eliminate (wherever economically and technically feasible) an exclusion of lubricants refined from recycled waste materials.

E. Purchase of Building Insulation Products

In the specification and purchase of building insulation products:

1. The City will make every effort to prefer, specify, and purchase insulation products manufactured from recovered or recycled materials for maintenance and repair operations, building construction projects and work or projects which are let to private contractors; and
2. A decision not to purchase insulation products with the highest percentage of recovered material content will be based upon a determination that such products:
  - a. Are not available within a reasonable period of time;
  - b. Are not available at a reasonable price; and/or
  - c. Fail to meet reasonable performance standards set forth in applicable specifications.

F. Purchase of Recyclable Plastic Products

In the specifications and purchase of disposable food service products and bags:

1. The City will specify and utilize products, which are exclusively recyclable where available and locally marketed. Preference will be given to products manufactured from materials which are readily recyclable with developed recycling markets and processes; and
2. City employees in all departments will use washable beverage cups and other food services ware in the place of disposable items wherever possible. Disposable cups and utensils will be utilized primarily for meetings and guests.

G. Recycling/Reuse

The City will also recycle or reuse materials and supplies of purchases as much as possible. Following is a listing of some basic items which will be recycled or reused: paper, cardboard, scrap metal, tires, lubricants, and solvents, lead acid batteries, roadside brush and chipped wood waste, plastic materials, and surplus property.

## **PCR 110.000 RETENTION**

### **110.010 Retention Procedures**

- A. The City will follow procedures for the orderly retention and disposition of public records, regardless of medium or physical format, as specified by the Oregon State Archives in [OAR 166, Division 200](#).
- B. The City may store original contract documents and related procurement documents exclusively on an electronic records systems and media provided that the standards and requirements specified in [OAR 166, Division 17](#) are met.

## **PCR 115.000 FEDERAL PROCUREMENT STANDARDS**

### **115.010 Procurements Awarded When Federal Funding Involved**

Except as otherwise provided, all applicable federal statutes and regulations ([PCR 115.000](#) and [2 Code of Federal Regulations \(CFR\) Part 200](#)) will be followed when federal funds are involved and the federal statutes or regulations conflict with any of the City's Public Contracting Rules.

### **115.015 Standards of Conduct**

The procurement will follow these standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award, and administration of procurements.

#### A. Conflict of Interest

No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a federal funding if a real or apparent conflict of interest exists. Such a conflict would arise when the employee, officer, or agent, any member of their immediate family, their partner, or an organization which employs or is about to employ any of these parties, has a financial or other interest in or a tangible personal benefit from a firm considered for award.

1. The City considers a "financial interest" to be the potential for gain or loss to the employee, officer, or agent, any member of their immediate family, their partner, or an organization which employs or is about to employ any of these parties as a result of the particular procurement. The prohibited financial interest may arise from ownership of certain financial instruments or investments such as stock, bonds, or real estate, or from a salary, indebtedness, job offer, or similar interest that might be affected by the particular procurement.
2. The City considers an "apparent" conflict of interest to exist where an actual conflict does not exist, but where a reasonable person with knowledge of the relevant facts would question the impartiality of the employee, officer, or agent participating in the procurement.

#### B. Gifts

No employee, officer, or agent may solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts.

C. Excluded Competition

In order to ensure objective performance and eliminate unfair competitive advantage, any contractor that develops or drafts specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such requirements.

**115.020 Methods of Procurement**

The City will follow the more conservative procurement procedures when federal and city thresholds differ. Note federal thresholds are set per the most current version of [48 CFR Subpart 2.1](#).

A. Micro-Purchases

When the value of goods and services does not exceed \$10,000, or \$2,000 for a public improvement, the City may award to any source known to provide the goods and services of acceptable quality and/or competitive rates. The City will adhere to the following procedures and requirements for the procurement:

- [PCR 10.015\(C\)](#) for goods, services and public improvements
- [PCR 70.015\(C\)](#) or [70.020\(C\)](#) for personal services

B. Small Purchases

When the value of goods and services exceeds \$10,000 but does not exceed \$150,000, or exceed \$100,000 for a public improvement or \$50,000 for a transportation public improvement, the City may award after seeking at least three informally solicited competitive bids, quotes or proposals from prospective contractors. The City will adhere to the following procedures and requirements for the procurement:

- [PCR 10.015\(D\)](#) for goods and services
- [PCR 10.015\(D\)](#) for public improvements not exceeding \$100,000 (or \$50,000 for transportation public improvements)
- [PCR 40.000](#) for public improvements exceeding \$100,000 (or \$50,000 for transportation public improvements)
- [PCR 70.015\(B\)](#) or [PCR 70.020 \(B\)](#), as applicable, for personal services

C. Simplified Acquisition Threshold

When the value of goods and services exceeds \$150,000, the City may award after seeking formally solicited competitive sealed bids or proposals from prospective contractors. The City will adhere to the following procedures and requirements for the procurement:

- [PCR 30.000](#) for goods and services
- [PCR 40.000](#) for public improvements
- [PCR 70.015\(A\)](#) or [70.020\(A\)](#), as applicable, for personal services

D. Non-Competitive Procurements

There are specific circumstances in which noncompetitive procurements can be used. Noncompetitive procurements can only be awarded if one or more of the following circumstances apply:

1. The acquisition of goods and services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (PCR 115.020(A)).
2. The goods and services are only available from a single source ([PCR 10.070](#)); or
3. A public emergency for the goods and services will not permit a delay resulting from publicizing a competitive solicitation ([PCR 80.000](#)).
4. The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the City; or
5. After solicitation of a number of sources, competition is determined inadequate.

Non-competitive procurement is not justified due to the City's failure to adequately plan its procurement, concerns about the amount of financial assistance available to support a procurement, or ability to save money.

**115.025 Procurement Requirements**

A. The solicitation document will conform to the following requirements:

1. The solicitation must incorporate a clear, accurate description of the technical requirements for the material, product, or service requested.
2. The description of the technical requirements must not contain features that unduly restrict competition.
3. The description of the technical requirements may include a statement of the qualitative nature of the material, product, or service requested, and when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. When it is impractical or uneconomical to write a clear and accurate description of the technical requirements of the property or services, the solicitation may use a "brand name or equal" description as a means to define the performance or other prominent requirements of procurement. The specific features of the named brand which must be met by bidders or proposers must be clearly stated.
4. The solicitation should avoid detailed product specifications, if at all possible.
5. The solicitation must identify all requirements which bidders or proposers must fulfill and all other factors to be used in evaluating the bids or proposals.
  - a. If using the Competitive Proposals method, the solicitation will state if the City reserves its right to award the contract to a proposer other than the lowest priced proposer.
6. The solicitation will acknowledge the use of federal financial assistance.



7. The solicitation will state the type of contract that will be awarded, including but not limited to:
  - a. Fixed Price (lump sum or unit price)

A contract that provides a firm price that remains irrespective of the contractor's actual cost of performing the scope of work under the contract. The risk of performing the work, at the fixed price, is assumed by the contractor. Fixed price contracts may include an economic price adjustment, incentives, or both.
  - b. Cost Reimbursement

A contract that provides for reimbursement of the contractor for its reasonable, allocable, actual, and allowable costs, with an agreed-upon fee. There is a limit to the costs that a contractor may incur at the time of contract award, and the contractor may not exceed those costs without the City's approval or does so at its own risk. In a cost-reimbursement contract, the City assumes more risk than in a fixed price contract. There are many varieties of cost-reimbursement contracts, such as cost-plus-fixed-fee, cost-plus-incentive-fee, and cost-plus-award-fee.
  - c. Time and Materials

A contract whose cost to the City is the sum of the actual cost of materials and direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.
  - d. Cost Plus Percentage of Cost

A contract that uses cost plus percentage of cost and cost plus percentage of construction cost methods are prohibited.
8. The solicitation will not unduly restrict competition, including but not limited to:
  - a. Place unreasonable requirements on firms in order for them to qualify to do business;
  - b. Require unnecessary experience;
  - c. Require excessive bonding;
  - d. Use improper prequalification procedures that conflict with the requirements set forth in these rules, including but not limited to:
    - i. The City will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum full and open competition.
    - ii. The City will not exclude potential bidders or proposers from qualifying during the solicitation period.
    - iii. The City will follow all other applicable procurement standards identified in this rule in the award of a contract.
    - iv. The City may submit a solicitation directly to those contractors identified on a prequalified list, however, the City must publicly solicit the

requirement pursuant to the applicable standards contained in these procurement rules and allow any additional interested contractors to submit their qualifications, and if deemed qualified, submit their bids or proposals in response to the solicitation.

- e. Make a non-competitive solicitation only to a person or firm on a retainer contract where that award is not for goods or services specified for delivery under the scope of work of the retainer contract.
  - f. Impose prohibited in-state or local geographic preferences that conflict with the requirements set forth in these rules. The use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals is prohibited, except in those cases where applicable federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws.
    - i. When contracting for architectural and engineering services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms to compete for the contract, given the nature and size of the project.
9. The solicitation will inform prospective contractors that they will need to comply with all applicable federal laws, regulations, executive orders, and requirements of the agency providing the federal funds.

### **115.030 Contract Provisions**

A. Contracts will contain the applicable provisions as follows:

1. Contracts for more than the simplified acquisition threshold, as set forth in [PCR 115.020\(C\)](#), will address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.
2. Contracts in excess of the micro-purchase threshold, as set forth in [PCR 115.020\(A\)](#), will address termination for cause and for convenience by the City including the manner by which it will be effected and the basis for settlement.
3. Except as otherwise provided under [41 CFR Part 60](#), all contracts that meet the definition of "Federally assisted construction contract" in [41 CFR Part 60-1.3](#) will include the equal opportunity clause provided under [41 CFR Part 60-1.4\(b\)](#), in accordance with Executive Order 11246, Equal Employment Opportunity (30 Fed. Reg. 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, Amending Executive Order 11246 Relating to Equal Employment Opportunity, and implementing regulations at [41 CFR Part 60](#) (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor).
4. All prime construction contracts in excess of \$2,000 awarded by the City will include a provision for compliance with the Davis-Bacon Act ([40 United States Code \(USC\) Parts 3141-3144 and 3146-3148](#)) as supplemented by Department of Labor regulations at 29 CFR Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction). Contractors will be required to pay

- wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. A copy of the current prevailing wage determination issued by the Department of Labor will be in each solicitation. The decision to award a contract or subcontract will be conditioned upon the acceptance of the wage determination.
5. Contracts subject to the Davis-Bacon Act will also include a provision for compliance with the Copeland "Anti-Kickback" Act ([40 USC Part 3145](#)), as supplemented by Department of Labor regulations at [29 CFR Part 3](#) (Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States). The contractor will be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which they are otherwise entitled.
  6. Where applicable (see [40 USC Part 3701](#)), all contracts awarded by the City in excess of \$100,000 that involve the employment of mechanics or laborers will include a provision for compliance with [40 USC Parts 3702](#) and [3704](#), as supplemented by Department of Labor regulations at [29 CFR Part 5](#). Under [40 USC Part 3702](#), each contractor will be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of [40 USC Part 3704](#) are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of property or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.
  7. Value Engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lowest cost. Construction projects estimated to exceed \$100,000, or \$50,000 in the case of transportation projects, will include a value engineering clause.
  8. Funding Agreement is defined as any contract, grant, or cooperative agreement entered into between any federal agency (other than the Tennessee Valley Authority) and any contractor for the performance of experimental, developmental, or research work funded in whole or in part by the federal government. This term also includes any assignment, substitution of parties, or subcontract of any type entered into for the performance of experimental, developmental, or research work under a funding agreement as defined in the first sentence of this paragraph. If the federal financial assistance meets the definition of funding agreement, contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that funding agreement, then the contract will comply with the requirements of [37 CFR Part 401](#) (Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements).
  9. Where applicable, all contracts for amounts in excess of \$150,000 will contain a provision that requires the contractor to agree to comply with all applicable

standards, orders, or regulations issued pursuant to the Clean Air Act ([42 USC Parts 7401-7671q](#)) and the Federal Water Pollution Control Act as amended ([33 USC Parts 1251-1387](#)).

10. Contract will contain the debarment and suspension regulations implementing Executive Order 12549, Debarment and Suspension (1986) and Executive Order 12689, Debarment and Suspension (1989) at [2 CFR Part 180](#) and the Department of Homeland Security's regulations at [2 CFR Part 3000](#) (Non-procurement Debarment and Suspension). These regulations restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in federal assistance programs and activities.
11. Contract will require, for contractors that apply or bid for an award of \$100,000 or more, to file the required certification where each tier certifies to the tier above that it will not and has not used federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by [31 USC Part 1352](#). Each tier must also disclose any lobbying with non-federal funds that takes place in connection with obtaining any federal award. Such disclosures will be forwarded from tier to tier up to the City.
12. Any other provisions required by [Appendix II to part 200](#) – Contract Provisions for non-Federal Entity Contracts Under Federal Awards.

### **115.035 Time and Materials Contracts**

#### **A. Conditions Precedent**

The City may use a time and materials contract only after a determination that (1) no other contract is suitable; and (2) if the contract includes a ceiling price that the contractor exceeds at its own risk.

#### **B. Differentiating Time and Materials and Cost Plus Percentage of Cost Contracts**

A time and materials contract provides for the payment of labor costs on the basis of fixed hourly billing rates which are specified in the contract. These hourly billing rates will include wages, indirect costs, general and administrative expense, and profit. No fee or profit is allowed except as part of the fixed billing rate for direct labor hours, such that materials are billed at cost.

To include for the payment of labor costs on the basis of fixed hourly billing rates and allow the contractor to bill for actual costs other than labor (such as materials or travel) plus a percentage rate of those actual costs would constitute a prohibited cost plus percentage of cost contract. A contractor, however, is allowed to recover overhead costs on its direct costs, such as materials or travel, if the contractor's accounting system clearly separates the overhead costs associated with those direct costs and those overhead costs are not included in the overhead pool that is applied to direct labor costs. In other words, there must be no duplicate billing for material handling overhead costs in the rates applied to labor hours.

## **115.040 Contracting with Small and Minority Businesses, Women's Business Enterprises, and Labor Area Surplus Firms**

The City will take, and document, all necessary, affirmative steps to assure that small and minority businesses, women's business enterprises, and labor area surplus firms are used when possible or required. These steps are in addition to full and open competition and must include, at a minimum, the following six affirmative steps:

A. Solicitation Lists

Place small and minority businesses and women's business enterprises on solicitation lists.

B. Solicitations

Assure that it solicits small and minority businesses and women's business enterprises whenever they are potential sources.

C. Dividing Requirements

Divide total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses and women's business enterprises.

D. Delivery Schedules

Establish delivery schedules, where the requirement permits, which encourage participation by small and minority businesses and women's business enterprises.

E. Obtaining Assistance

Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce.

F. Prime Contractor Requirements

Require the prime contractor, if subcontracts are anticipated or let, to take the five (5) affirmative steps described above.

## **PCR 120.000 EQUITY IN PUBLIC PROCUREMENT**

The procedures and requirements outlined in this section and throughout these rules ensure all businesses receive an equal opportunity to earn contracts and purchases administered by the City, including minority-owned, women-owned, service-disabled veteran-owned and emerging small businesses.

### **120.010 Equity Activities**

The City will engage in the following activities with the goal of increasing city contracts and purchases with COBID-certified businesses:

A. Outreach

The City will engage in additional outreach procedures, including electronic notices of solicitations, open houses, workshops, participation in local and regional outreach opportunities, and foster an open-door practice that welcomes both COBID-certified and COBID-eligible businesses in doing business with the City.

B. Technical Assistance

The City will provide technical assistance and information to COBID-certified and COBID-eligible businesses on feasible options for bonding, insurance, certification, and the City's procurement processes.

C. Package Contracting Opportunities

The City may examine alternatives for arranging projects by type of work to attract disadvantaged and emerging small businesses where the City, in its sole discretion, determines it is feasible. Packaging opportunities such as dividing smaller project tasks into separate contracts, awarding scored points to responsive bidders/proposers that identify COBID-certified businesses to be used for subcontracted work (even when bidder/proposer is not certified), or follow an alternative procurement method for public improvements (e.g., construction manager/general contractor or design-bid) may be considered.

D. Contract Requirements

City will consider modifying insurance and bonding requirements and applicable taxes to maximize competition.

E. Reporting

The City will track contract spending and issue an annual report (after the close of each fiscal year) to the administrative services director and city manager that includes, but is not limited to, total dollars spent on contracted goods and services and percentage of spend awarded to COBID-certified businesses, and total dollars spent on construction-related services and percentage of spend awarded to COBID-certified businesses at both the prime and tier one subcontractor level.

The report will also highlight recommendations that may increase opportunities for COBID-certified and COBID-eligible businesses.

## **120.015 Procurement Procedures**

The City will promote the use of COBID-certified businesses for contracts and purchases to the maximum extent practical.

### **A. Small Procurements and Direct Appointments**

The City may review the [COBID Certification Directory](#) for eligible businesses or to contact known certified or eligible businesses in the category of work being solicited before awarding the contract or making the purchase.

### **B. Intermediate Procurements**

City may review the [COBID Certification Directory](#) for eligible businesses and include known certified or eligible businesses in the distribution list for the category of work being solicited. If, upon review of the [COBID Certification Directory](#), there are no such businesses qualified in the category of work being solicited then the City will retain such information and documentation in the procurement file.

The City may, at any time, elect to include equity and diversity requirements and applicable scoring in an intermediate procurement solicitation.

### **C. Formal Procurements**

City will include, at minimum, the following equity and diversity components in all formal procurements, including public improvements procured through alternative contracting methods as described in [PCR 10.105](#) to [10.110](#).

1. Apply at least 20% of the total available scoring points based on equity and inclusion criteria.
2. Require contractors to submit monthly reports on their COBID-certified utilization on a contract or project-specific basis.
3. Include a statement in all required formal solicitation documents signifying the City's intent to provide maximum opportunities to COBID-certified businesses.

## **120.020 Authority to Require Subcontracting with Service-Disabled Veteran-Owned and Emerging Small Businesses**

The City may, in solicitation documents, require a contractor to subcontract some portion of the work to be performed or some portion of the materials be provided by a COBID-certified service-disabled veteran-owned business or emerging small business. The City may establish other requirements authorized by [ORS 279A.105](#).

## **120.025 Excluded Procurements**

Contracts and purchases procured as emergency procurements ([PCR 80.000](#)), public improvements that are awarded to the lowest bid ([PCR 40.000](#)), or the purchase of goods and services otherwise exempted from a competitive process, unless otherwise stated, under these Public Contracting Rules. The City may review the [COBID Certification Directory](#) for businesses or contact known certified businesses in the category of work being solicited for an emergency contract or purchase. A good faith attempt should be made to locate a qualified COBID-certified business to provide a quote for the required goods or services, even if competition is not required.

### **120.030 Required Certification During Contract Term**

- A. Any contractor awarded a contract, in whole or in part, on the basis of COBID-certification, or a subcontractor to which the contractor awarded a subcontract in connection with the contract, in whole or in part, on the basis of COBID-certification, is required to remain COBID-certified for the entire term of the contract or subcontract.

If the City determines at any time during the term of a contract that a contractor to which the City awarded the contract, in whole or in part, on the basis of COBID-certification, or a subcontractor to which the contractor awarded a subcontract in connection with the contract, in whole or in part, on the basis of COBID-certification, is no longer COBID-certified, the City may:

1. Terminate the contract;
2. Require the contractor to terminate the subcontract; or
3. Exercise any of the remedies for breach of contract that are reserved in the contract terms.

- B. If the City determines at any time during the term of a contract that a contractor to which the City awarded the contract on the basis of any equity criteria described in the solicitation, or a subcontractor to which the contractor awarded a subcontract in connection with the contract on the basis of any equity criteria described in the solicitation, was never compliant or is no longer compliant, the City may:

1. Terminate the contract;
2. Require the contractor to terminate the subcontract; or
3. Exercise any of the remedies for breach of contract that are reserved in the contract terms.

### **120.035 Scoring**

In all applicable formal procurements, at least 20% of the total available scoring points will be based on one or more of the following equity and diversity criteria: COBID certification, business demographics, support for workforce diversity, utilization of COBID-certified subcontractors, if applicable, or other criteria as determined by the City. For example, if the criteria for qualifications, project approach, experience, and other selected factors totals 100 points, at minimum an additional 20 points (or 20%) will be added to the criteria specific to equity and diversity, for an actual total of 120 points.

The City may award points from the determined percentage of total available scoring points to one or more specific equity and inclusion criteria, all in the City's sole discretion. Points awarded to more than one specific equity and inclusion criteria may be split out as desired by the City.

In all applicable intermediate and formal procurements, the City will include, at minimum, a chosen percentage of scoring for COBID certification.



### **120.040 Waiver**

The City may consider an exception for any business who is not currently certified through Oregon COBID, but the business can meet the eligibility criteria and only has yet to receive certification.

A business must complete the City's COBID Waiver Application process to help determine if the business would be eligible for the Oregon COBID certification, and thus, the City's waiver. The City will review all applications and determine if the business is eligible based on the applicant's responses. Waivers approved by the City will be effective for six months from the date of approval and apply only to procurements generated by the City.

If a waiver is approved, the business will be regarded by the City as if the business were a COBID-certified business for the effective period of the waiver, and therefore eligible to receive all applicable benefits (i.e., scoring) in its submissions to solicitations and procurements issued by the City.

# CITY OF MILWAUKIE – GENERAL CONDITIONS FOR CONSTRUCTION

Part 00100 as originally published by Oregon Department of Transportation for Certified LPAs has been modified. This is an updated table of contents applies to the City of Milwaukie's Part 00100.

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## **PART 00100 - GENERAL CONDITIONS FOR CONSTRUCTION FOR CITY OF MILWAUKIE**

*Delete Part 00100 in its entirety as originally published and replace with the following:*

### **SECTION 00110 - ORGANIZATION, CONVENTIONS, ABBREVIATIONS, AND DEFINITIONS**

#### **00110.00 Organization of Specifications**

The Specifications are comprised of the following:

- The 2021 Oregon Standard Specifications for Construction, as revised by the City of Milwaukie amendments, which contain Part 00100 General Conditions for Construction for City of Milwaukie, which deal with the solicitation process and contractual relationships;
- The 2021 Oregon Standard Specifications for Construction, as revised by the City of Milwaukie Amendments, which contain Parts 00200 through 03000, published by the Oregon Department of Transportation which contain the detailed Technical Specifications involved in prosecution of the Work, organized by subject matter;
- Supplemental Specifications, if any; and
- The Special Provisions.

In addition, throughout the Specifications:

- Each Part is divided into Sections and Subsections.
- Reference to a Section includes all applicable requirements of the Section.
- When referring to a Subsection, only the number of the Subsection is used; the word "Subsection" is implied.
- Where Section and Subsection numbers are not consecutive, the interval has been reserved for use in the Special Provisions or future expansion of the Standard Specifications.

#### **00110.05 Conventions Used Throughout the Specifications Include:**

**(a) Grammar** – The General Conditions for Construction for (Certified LPA), Part 00100 General Conditions, is written in the indicative mood, in which the subject is expressed. The 2021 Oregon Standard Specifications for Construction, published by the Oregon Department of Transportation, parts 00200 through 03000, the detailed Technical Specifications, are generally written in the imperative mood, in which the subject is implied. Therefore, throughout Parts 00200 through 03000, and on the Plans:

- The subject, "the Contractor", "the Agency" and/or "the Engineer."
- "Will" refers to decisions or actions of the Contractor, Agency and/or the Engineer.
- The following words, or words of equivalent meaning, refer to the actions of the Agency and/or the Engineer, unless otherwise stated: "allowed", "directed", "established", "permitted", "ordered", "designated", "prescribed", "required", "determined".
- The words "approved", "acceptable", "authorized", "satisfactory", "suitable", "considered", and "rejected", "denied", "disapproved", or words of equivalent meaning, mean by or to the Agency and/or the Engineer, subject in each case to Section 00150 of the General Conditions.



- The words "as shown", "shown", "as indicated", or "indicated" mean "as indicated on the Plans".
  - Certain Subsections labeled "Payment" contain statements to the effect that the accepted quantities will be paid for at the Contract unit price, per unit of measurement for the items listed therein. In such cases the Agency will pay for only those Pay Items listed in the Schedule of Items.
- (b) Capitalization of Terms** - Capitalized terms, other than titles, abbreviations, and grammatical usage, indicate that they have been given a defined meaning in the Standard Specifications. Refer to [Section 00110.20](#) "Definitions". Defined terms will always be capitalized in Part 00100; in Parts 00200 through 03000, defined terms will generally not be capitalized, with the notable exception of "the Contractor", "the Agency", and "the Engineer".
- (c) Punctuation** - In this publication the "outside method" of punctuation is employed for placement of the comma and the period with respect to quotation marks. Only punctuation that is part of the quoted matter is placed within quotation marks.
- (d) References to Laws, Acts, Regulations, Rules, Ordinances, Statutes, Orders, and Permits** - References are made in the text of the Specifications to "laws", "acts", "rules", "statutes", "regulations", "ordinances", etc. (collectively referred to for purposes of this Subsection as "Law"), and to "orders" and "permits" (issued by a governmental authority, whether local, State, or federal, and collectively referred to for purposes of this Subsection as "Permits"). Reference is also made to "applicable laws and regulations". The following conventions apply in interpreting these terms, as used in the Specifications.
- **Statutes and Rules** - Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) referenced in the Specifications are accessible online, including through the Oregon Legislative Counsel Committee web site and through the Oregon Secretary of State Archives Division web site.
  - **Law** - In each case, unless otherwise expressly stated therein, the Law is to be understood to be the current version in effect. This also applies where a specific Law is referenced or cited, regardless of whether the text of the Law has been included in the Specifications or not, and regardless of whether the text of the Law has been summarized or paraphrased. In each case, the current version of the Law is applicable under any Contract. The reader is therefore cautioned to check the actual text of the Law to confirm that the text included in the Specifications has not been modified or superseded.
  - **Permits** - Orders and permits issued by a government agency may be modified during the course of performing the Work under a Contract. Therefore, wherever the term "order" or "permit" is used in the Specifications, it is intended to refer to the then-current version. That version may be embodied in a modified, superseding order or permit, or it may consist of all terms and conditions of prior orders or permits that have not been superseded, as well as the additional terms added by amendment or supplement. In certain cases, the orders and/or permits are identified by name in the Specifications; in other cases the terms are used in the generic sense. The reader is cautioned to check the text(s) of each order and permit identified either by name or by generic reference.
  - **Applicable Laws and Regulations** - Where phrases such as "applicable law," "applicable laws and regulations," "applicable legal requirements" or similar phrases appear, it is to be understood as including all applicable laws, acts, regulations, administrative rules, ordinances, statutes, and orders and permits issued by a

governmental or regulatory authority. The words "law" or "laws" may or may not be capitalized in such phrases.

**00110.10 Abbreviations** - Following are meanings of abbreviations used in the Standard Specifications, in the Special Provisions, on the Plans, and in other Contract Documents. Other abbreviations and meanings of abbreviations may be in the individual Sections of the Standard Specifications to which they apply, in the Special Provisions, and in [OAR 731-005](#) and [OAR 731-007](#).

- AAR - Association of American Railroads
- AASHTO - American Association of State Highway and Transportation Officials
- ABC - Associated Builders and Contractors, Inc.
- AC - Asphalt Concrete
- ACI - American Concrete Institute
- ACP - Asphalt Concrete Pavement
- ACWS - Asphalt Concrete Wearing Surface
- ADA - Americans with Disabilities Act
- AGC - Associated General Contractors of America
- AIA - American Institute of Architects
- AISC - American Institute of Steel Construction
- AISI - American Iron and Steel Institute
- AITC - American Institute of Timber Construction
- ANSI - American National Standards Institute
- APA - Engineered Wood Association
- APWA - American Public Works Association
- AREMA - American Railway Engineering and Maintenance of Right-of-Way Association
- ASCE - American Society of Civil Engineers
- ASME - American Society of Mechanical Engineers
- ASTM - American Society for Testing and Materials
- ASTV - Actual Strength Test Value
- ATPB - Asphalt Treated Permeable Base
- AWG - American Wire Gauge
- AWPA - American Wood Protection Association
- AWS - American Welding Society
- AWWA - American Water Works Association

- CAGT - Certified Aggregate Technician
- CAT-I - Certified Asphalt Technician I
- CAT-II - Certified Asphalt Technician II
- CBM - Certified Ballast Manufacturers
- CCO - Contract Change Order
- CCT - Concrete Control Technician
- CDT - Certified Density Technician
- CEBT - Certified Embankment and Base Technician
- CMDT - Certified Mixture Design Technician
- CPF - Composite Pay Factor
- CRSI - Concrete Reinforcing Steel Institute
- CFR - Code of Federal Regulations
- CS - Commercial Standard, Commodity Standards Division, U.S. Department of Commerce
- D1.1 - Structural Welding Code - Steel, American Welding Society, current edition
- D1.5 - Bridge Welding Code, American Welding Society, current edition
- DBE - Disadvantaged Business Enterprise
- DEQ - Department of Environmental Quality, State of Oregon
- DOGAMI - Department of Geology and Mineral Industries, State of Oregon
- DSL - Department of State Lands, State of Oregon
- EAC - Emulsified Asphalt Concrete
- EPA - U.S. Environmental Protection Agency
- ESCP - Erosion and Sediment Control Plan
- FHWA - Federal Highway Administration, U.S. Department of Transportation
- FSS - Federal Specifications and Standards, General Services Administration
- GSA - General Services Administration
- ICEA - Insulated Cable Engineers Association (formerly IPCEA)
- IES - Illuminating Engineering Society
- IMSA - International Municipal Signal Association
- ISO - International Standards Organization
- ISSA - International Slurry Surfacing Association
- ITE - Institute of Transportation Engineers

- JMF - Job Mix Formula
- MFTP - Manual of Field Test Procedures (ODOT)
- MIL - Military Specifications
- MSC - Minor Structure Concrete
- MUTCD - Manual on Uniform Traffic Control Devices for Streets and Highways, FHWA, U.S. Department of Transportation
- NEC - National Electrical Code
- NEMA - National Electrical Manufacturer's Association
- NESC - National Electrical Safety Code
- NIST - National Institute of Standards and Technology
- NPDES - National Pollutant Discharge Elimination System
- NPS - Nominal Pipe Size (dimensionless)
- OAR - Oregon Administrative Rules
- ODA - Oregon Department of Agriculture
- ODOT - Oregon Department of Transportation
- ORS - Oregon Revised Statutes
- OR-OSHA - Oregon Occupational Safety and Health Division of the Department of Consumer and Business Services
- OSHA - Occupational Safety and Health Administration, U.S. Department of Labor
- PCA - Portland Cement Association
- PCC - Portland Cement Concrete
- PCI - Precast/Prestressed Concrete Institute
- PCP - Pollution Control Plan
- PF - Pay Factor of a constituent
- PLS - Professional Land Surveyor
- PMBB - Plant Mixed Bituminous Base
- PTI - Post-Tensioning Institute
- PUC - Public Utility Commission, State of Oregon
- QA - Quality Assurance
- QC - Quality Control
- QCT - Quality Control Technician
- QL - Quality Level
- QPL - Qualified Products List

RAP	- Reclaimed Asphalt Pavement
REA	- Rural Electrification Administration, U.S. Department of Agriculture
RMA	- Radio Manufacturers Association or Rubber Manufacturers Association
SAE	- Society of Automotive Engineers
SI	- International System of Units (Système Internationale)
SRCM	- Soil and Rock Classification Manual (ODOT)
SSPC	- Society for Protective Coatings
T	- Tolerances, AASHTO Test Method
TM	- Test Method (ODOT)
TV	- Target Value
UBC	- Uniform Building Code (as adopted by the State of Oregon)
UL	- Underwriters Laboratory, Inc.
UPC	- Uniform Plumbing Code (as adopted by the State of Oregon)
USC	- United States Code
WAQTC	- Western Alliance for Quality Transportation Construction
WCLIB	- West Coast Lumber Inspection Bureau
WWPA	- Western Wood Products Association

**00110.20 Definitions** - Following are definitions of words and phrases used in the Standard Specifications, in the Special Provisions, on the Plans, and in other Contract Documents. Other definitions may be in the individual Sections of the Standard Specifications to which they apply, in the Special Provisions, and in [OAR 731-005](#) and [OAR 731-007](#).

**Act of God or Nature** - A natural phenomenon of such catastrophic proportions or intensity as would reasonably prevent performance.

**Actual Strength Test Value (ASTV)** - The ASTV at 28 Days is the average compressive strength of the three cylinders tested. All specimens that show definite evidence, other than low strength, of improper sampling, molding, handling, curing, or testing must be discarded. The average strength of the remaining cylinders will then be considered the test result.

**Addendum** - A written or graphic modification, issued before the opening of Bids, which revises, adds to, or deletes information in the Solicitation Documents or previously issued Addenda.

**Additional Work** - Increased quantities of any Pay Item, within the scope of the Contract, for which a unit price has been established.

**Advertisement** - The public announcement (Notice to Contractors) inviting Bids for Work to be performed or Materials to be furnished.

**Agency** - The City of Milwaukie, a municipal corporation of the State of Oregon, which has entered into a Contract with the Contractor.

**Agency-Controlled Lands** - Lands owned by the Agency, or controlled by the Agency under lease or agreement, or under the jurisdiction and control of the Agency for the purposes of the Contract.

**Aggregate** - Rock of specified quality and gradation.

**Attorney in Fact** - An Entity appointed by another to act in its place, either for some particular purpose, or for the transaction of business in general.

**Award** - Written notification to the Bidder that the Bidder has been awarded a Contract.

**Base** - A Course of specified material of specified thickness placed below the Pavement.

**Bid** - A competitive offer, binding on the Bidder and submitted in response to an invitation to bid.

**Bid Bond** - The Surety bond for Bid guaranty.

**Bid Booklet** - The electronic version that is available to be downloaded from the Agency Bid Management System, that contain the information identified in [00120.10](#).

**Bid Closing** - The date and time after which Bids, Bid modifications, and Bid withdrawals will no longer be accepted.

**Bid Documents** - See under Solicitation Document.

**Bid Opening** - The date and time Bids are opened.

**Bid Schedule** - The list of Pay Items, their units of measurement, and estimated quantities (When a Contract is awarded, the Bid Schedule becomes the Schedule of Items).

**Bid Section** - The portion of the Bid Booklet containing all pages after the Bidder's checklist and before the appendix.

**Bidder** - An Entity that submits a Bid in response to an invitation to bid.

**Bike Lane** - A lane in the Traveled Way, designated by striping and Pavement markings for the preferential or exclusive use of bicyclists.

**Borrow** - Material lying outside of planned or required Roadbed excavation used to complete Project earthwork.

**Boulders** - Particles of rock that will not pass a 12 inch square opening.

**Bridge** - A single or multiple span Structure, including supports, that carries motorized and non-motorized vehicles, pedestrians, or utilities on a Roadway, walk, or track over a watercourse, highway, railroad, or other feature.

**Buttress** - A rock fill placed at the toe of a landslide or potential landslide in order to resist slide movement.

**Calendar Day** - Any day shown on the calendar, beginning and ending at midnight.

**Camber** - A slight arch in a surface or Structure to compensate for loading.

**Change Order** - A written order issued by the Engineer to the Contractor modifying Work required by the Contract, or adding Work within the scope of the Contract, and, if applicable, establishing the basis of payment for the modified Work.

**Changed Work** - Work included in a Pay Item and within the scope of the Contract that is different from that reflected in the Contract Documents (see [00140.30](#)).

**City Engineer** – The City Engineer is the person designated by the City Manager.

**Class of Project** - A designation based on a Project's funding source, i.e., State or Federal-Aid.

**Class of Work** - A designation referring to the type of Work in which Bidders must be pre-qualified. Classes of Work are limited to those listed in ODOT's Contractor's Prequalification Application.

**Clay** - Soil passing a No. 200 sieve that can be made to exhibit plasticity (putty-like properties) within a range of water contents.

**Clear Zone** - Roadside border area, starting at the edge of the Traveled Way, that is available for safe use by errant vehicles. Establishing a minimum width Clear Zone implies that rigid objects and certain other hazards within the Clear Zone should be relocated outside the Clear Zone, or shielded, or remodeled to make them break away on impact or be safely traversable.

**Close Conformance** - Where working tolerances are given on the Plans or in the Specifications, Close Conformance means compliance with those tolerances. Where working tolerances are not given, Close Conformance means compliance, in the Engineer's judgment, with reasonable and customary manufacturing and construction tolerances.

**Coarse Aggregate** - Crushed Rock or crushed Gravel retained on a 1/4 inch sieve, with allowable undersize.

**Cobbles** - Particles of Rock, rounded or not, that will pass a 12 inch square opening and be retained on a 3 inch sieve.

**Commercial Grade Concrete** - Concrete furnished according to Contractor proportioning, placed in minor Structures and finished as specified.

**Construction Contracts Unit** – Agency's office that administers construction contracts

**Contract** - The written agreement between the Agency and the Contractor, including without limitation all Contract Documents, describing the Work to be completed and defining the rights and obligations of the Agency and the Contractor.

**Contract Administration Engineer** - The Agency representative presiding over Agency-level claims review under [00199.40](#).

**Contract Amount** - Sum of the Pay Item amounts computed by multiplying the Pay Item quantities by the unit prices in the Schedule of Items.

**Contract Day** – Days counted for the purpose of charging Contract Time.

**Contract Documents** - Solicitation Documents, Specifications, Standard Drawings, Plans, Public Improvement Contract, Contract booklet, Change Orders, Force Account Work orders, pay documents issued by the Agency, Materials certifications, Project Work schedules, final estimate, written orders and authorizations issued by the Agency, Material source development and reclamation plans, and permits, orders and authorizations obtained by the Contractor or Agency applicable to the Project, as well as all documents incorporated by reference therein.

**Contract Time** - The amount of time allowed to complete the Work under the Contract.

**Contractor** - The Entity awarded the Contract according to the solicitation.

**Course** - A specified Surfacing Material placed in one or more Lifts to a specified thickness.

**Coverage** - One Pass by a piece of Equipment over an entire designated area.

**Cross Section** - The exact image formed by a plane cutting through an object, usually at right angles to a central axis, to determine area.

**Day** - A Calendar Day including weekdays, weekends, and holidays, unless otherwise specified.

**Durable Rock** - Rock that has a slake durability index of at least 90% based on a two-cycle slake durability test, according to ASTM D4644. In the absence of test results, the Engineer may evaluate the durability visually.

**Emulsified Asphalt** - Emulsified asphalt cement.

**Emulsified Asphalt Concrete** - A mixture of Emulsified Asphalt and graded Aggregate.

**Engineer** - The Engineer who represents the Agency and who is designated by the Agency to administer the contract.

**Entity** - A natural person capable of being legally bound, sole proprietorship, limited liability company, corporation, partnership, limited liability partnership, limited partnership, profit or nonprofit unincorporated association, business trust, two or more persons having a joint or common economic interest, or any other person with legal capacity to contract, or a government or governmental subdivision.

**Equipment** - All machinery, tools, manufactured products, and fabricated items needed to complete the Contract or specified for incorporation into the Work.

**Establishment Period** - The time specified to assure satisfactory establishment and growth of planted Materials.

**Existing Surfacing** - Pavements, slabs, curbs, gutters, walks, driveways, and similar constructions of bricks, blocks, portland cement concrete, bituminous treated materials, and granular surfacing materials on existing Highways.

**Extra Work** - Work not included in the Contract, but deemed by the Engineer to be necessary to complete the Project.

**Final Acceptance** - Written confirmation by the Agency that the Project has been accepted by the Agency.

**Final Inspection** - The inspection conducted by the Engineer to determine that the Project has been completed according to the Contract.

**Fine Aggregate** - Crushed Rock, crushed Gravel, or Sand that passes a 1/4 inch sieve, with allowable oversize.

**First Notification** - Written acknowledgment by the Engineer of the date on which workers employed by the Contractor or a Subcontractor have begun performance of the Contract, including Aggregate source development or erection of a plant, but not including installation of covered temporary signs according to Section 00222.



**Force Account Work** - Items of Extra Work ordered by the Engineer that are to be paid according to [Section 00197](#).

**Granular Material** - Graded and selected free-draining material composed of particles of Rock, Sand, and Gravel.

**Gravel** - Particles of Rock, rounded or not, that will pass a 3 inch sieve and be retained on a No. 4 sieve.

**Highway** - Every road, street, thoroughfare and place, including bridges, viaducts and other structures within the boundaries of the State, open, used or intended for use by vehicular traffic.

**Incidental** - A term identifying those acts, services, transactions, property, Equipment, labor, Materials, or other items for which the Agency will make no separate or additional payment.

**Inspector** - The representative of the Engineer authorized to inspect and report on Contract performance.

**Leveling** - Placing a variable-thickness Course of Materials to restore horizontal and vertical uniformity to existing Pavements, normally continuous throughout the Project.

**Lift** - The compacted thickness of material placed by Equipment in a single Pass.

**Local Public Agency (LPA) or Local Agency** - See Agency.

**Mandatory Source** - A material source provided by the Agency from which the Contractor is required to obtain Materials (see [00160.00\(b\)](#) and [00160.40](#)).

**Materials** - Any natural or manmade substance specified for use in the construction of the Project or for incorporation into the Work.

**Median** - The portion of a divided Highway separating traffic traveling in opposite directions.

**Multiple Course Construction** - Two or more Courses, exclusive of Patching or Leveling, placed over the entire Roadway width.

**Multi-Use Path** - That portion of the Highway Right-of-Way or a separate Right-of-Way, physically separated from motor vehicle traffic and designated for use by pedestrians, bicyclists and other non-motorized users.

**Neat Line** - Theoretical lines specified or indicated on the Plans for measurement of quantities.

**Nondurable Rock** - Rock that has a slake durability index of less than 90% based on a two-cycle slake durability test, as tested by ASTM D4644, or Rock that is observed to readily degrade by air, water, and mechanical influence.

**Notice to Contractors** - The public announcement inviting Bids for Work to be performed or Materials to be provided.

**Notice to Proceed** - Written notice authorizing the Contractor to begin performance of the Work.

**On-Site Work** - Any Work taking place on the Project Site, including designated staging areas adjacent to the Project Site, except for installation of covered temporary signs according to Section 00222.

**Organic Soil** - A Soil with sufficient organic content to influence the Soil properties.

**Panel** - The width of specified Material being placed by Equipment in a single Pass.

**Pass** - One movement of a piece of Equipment over a particular location.

**Patching** - Placing a variable-thickness Course of Materials to correct sags, dips, and/or bumps to the existing grade and Cross Section, normally intermittent throughout the Project.

**Pavement** - Asphalt concrete or portland cement concrete placed for the use of motor vehicles, bicycles, or pedestrians on Roadways, Shoulders, Multi-Use Paths and parking areas.

**Pay Item (Contract Item)** - A specific unit of Work for which a price is provided in the Contract.

**Payment Bond** - The approved security furnished by the Contractor's Surety as a guaranty of the Contractor's performance of its obligation to pay promptly in full all sums due for Materials, Equipment, and labor furnished to complete the Work.

**Peat** - A Soil composed primarily of vegetative matter in various stages of decomposition, usually with an organic odor, dark brown to black color, and a spongy consistency.

**Performance Bond** - The approved security furnished by the Contractor's Surety as a guaranty of the Contractor's performance of the Contract.

**Plans** - Standard and Supplemental Drawings, and approved unstamped and reviewed stamped Working Drawings (see [00150.10](#) and [00150.35](#)).

**Project** - The sum of all Work to be performed under the Contract.

**Project Manager** - The Engineer's representative who directly supervises the engineering and administration of a Contract.

**Project Site** - The geographical dimensions of the real property on which the Work is to be performed, including designated contiguous staging areas.

**Prospective Source** - A Material source provided by the Agency, from which the Contractor has the option of obtaining Materials (see [00160.00\(a\)](#) and [00160.40](#)).

**Publicly-Owned Equipment** - Equipment acquired by a state, county, municipality or political subdivision primarily for use in its own operations.

**Public Traffic** - Vehicular or pedestrian movement, not associated with the Contract Work, on a public way.

**Railroad** - Publicly or privately owned rail carriers, including passenger, freight, and commuter rail carriers, their tenants, and licensees. Also, Utilities that jointly own or use such facilities.

**Right-of-Way** - Land, property, or property interest, usually in a strip, acquired for or devoted to transportation or other public works purposes.

**Roadbed** - Completed excavations and embankments for the Subgrade, including ditches, side slopes, and slope rounding, if any.

**Roadside** - The area between the outside edges of the Shoulders and the Right-of-Way boundaries. Unpaved median areas between inside Shoulders of divided Highways and infield areas of interchanges are included.

**Roadway** - That portion of a Highway improved and available for vehicular use. It refers to all Pavement contiguous to the Traveled Way lying typically between the curbs or edges of pavement.

**Rock** - Natural deposit of solid material composed of one or more minerals occurring in large masses or fragments.

**Sand** - Particles of Rock that will pass a No. 4 sieve and be retained on a No. 200 sieve.

**Schedule of Items** - The list of Pay Items, their units of measurement, estimated quantities, and prices.

**Schedule of Values** - The breakdown of the values of the component elements comprising a lump sum Pay Item.

**Second Notification** - Written acknowledgment by the Engineer of the end of Contract Time according to [00180.50\(g\)](#).

**Shoulder** - The part of a Roadbed contiguous to the Traveled Way or Roadway, whether paved or unpaved, for accommodating stopped vehicles, for emergency use and for lateral support of Base and surface Courses.

**Silt** - Soil passing a No. 200 sieve that is nonplastic or exhibits very low plasticity.

**Single Course Construction** - A wearing Course only, not including patching or leveling Courses or partial width Base Course.

**Slope** - Vertical distance to horizontal distance, unless otherwise specified.

**Soil** - Accumulations of particles produced by the disintegration of Rock, which sometimes contains organic matter. Particles may vary in size from Clay to Boulders.

**Solicitation Document** - Documents which define the procurement of a public improvement Project, including, but not limited to, the Bid Booklet, Agency-provided Plans, Standard Specifications, Special Provisions, Addenda, and which includes all documents incorporated by reference. May also be called Bid Documents.

**Special Provisions** - The special directions, provisions, and requirements specific to a Project that supplement or modify the Standard Specifications. Permits and orders governing the Project that are issued directly to the Agency by a governmental or regulatory authority are considered to be part of the Special Provisions, to the extent and under the conditions stipulated in the Special Provisions. This includes any amended or supplemental permits or orders issued during the course of performing the Work under a Contract.

**Special Services** - Work services that the Contractor and Engineer agree cannot be satisfactorily performed by the Contractor's and Subcontractors' forces, including, but not limited to, temporary traffic control, owner operated trucking, sawcutting, core drilling, vacuum excavation, arborist services, fabrication and machining work that is most effectively performed away from the Project Site, or rental of operated Equipment as defined in [00180.20\(c\)](#).

**Specifications** - The Standard Specifications and Special Provisions, together with all provisions of other documents incorporated therein by reference.

**Standard Drawings** - The Agency-prepared detailed drawings for Work or methods of construction that normally do not change from project to project.

**Standard Specifications** – The 2018 Oregon Standard Specifications for Construction, published by the Oregon Department of Transportation, as amended by the Agency, consisting of Part 00100 General Conditions for Construction for City of Milwaukie and Parts 00200 through 03000 “Technical Specifications”. It provides directions, provisions, and requirements necessary for performing public improvement projects.

**State** - The State of Oregon.

**Structures** - Bridges, retaining walls, endwalls, cribbing, buildings, culverts, manholes, catch basins, drop inlets, sewers, service pipes, underdrains, foundation drains, and other similar features which may be encountered in the Work.

**Subbase** - A Course of specified material of specified thickness between the Subgrade and a Base.

**Subcontractor** - An Entity having a direct contract with the Contractor or another Subcontractor, to perform a portion of the Work.

**Subgrade** - The top surface of completed earthwork on which Subbase, Base, Surfacing, Pavement, or a Course of other Material is to be placed.

**Substructure** - Those parts of a Structure which support the Superstructure, including bents, piers, abutments, and integrally built wingwalls, up to the surfaces on which bearing devices rest. Substructure also includes portions above bearing surfaces when those portions are built integrally with a Substructure unit (e.g., backwalls of abutments). When Substructure and Superstructure elements are built integrally, the division between Substructure and Superstructure is considered to be at the bottom soffit of the longitudinal or transverse beam, whichever is lower. Culverts and rigid frames are considered to be entirely Substructure.

**Superstructure** - Those parts of a Structure above the Substructure, including bearing devices.

**Supplemental Drawings** - The Agency-prepared detailed drawings for Work or methods of construction that are Project specific, and are denoted by title in the Project title block.

**Supplemental Specifications** – Supplemental Specifications are amendments to the Standard Specifications, and supplement and modify the Standard Specification with regard to the Work to be done under the Contract.

**Supplier** - The Entity that furnishes goods to be incorporated into the Work.

**Surety** - The Entity that issues the bond.

**Surfacing** - The Course or Courses of Material on the Traveled Way, auxiliary lanes, Shoulders, or parking areas for pedestrian, bicycle or vehicle use.

**Third Notification** - Written acknowledgment by the Engineer, subject to Final Acceptance, that as of the date of the notification the Contractor has completed the Project according to the Contract, including without limitation completion of all minor corrective work, Equipment and plant removal, site clean-up, and submittal of all certifications, bills, forms and documents required under the Contract.

**Ton** - One short ton of 2,000 pounds (Ton, ton, Tn, or T).

**Topsoil** - Soil ready for use in a planting bed.

**Traffic Lane** - That part of the Traveled Way marked for moving a single line of vehicles.

**Traveled Way** - That part of the Highway for moving vehicles, exclusive of berms and Shoulders.

**Typical Section** - That Cross Section established by the Plans which represents in general the lines to which the Contractor will work in the performance of the Contract.

**Unsuitable Material** - Frozen material, or material that contains organic matter, muck, humus, peat, sticks, debris, chemicals, toxic matter, or other deleterious materials not normally suitable for use in earthwork.

**Utility** - A line, facility, or system for producing, transmitting, or distributing communications, power, electricity, heat, gas, oil, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity which directly or indirectly serves the public. The term may also mean the utility company, district, or cooperative owning and operating such facilities, including any wholly-owned or controlled subsidiary.

**Warranty Bond** - The approved security furnished by the Contractor's, Subcontractor's, or Supplier's Surety as a guaranty of the Contractor's performance of its warranty obligations.

**Work** - The furnishing of all Materials, Equipment, labor, and Incidentals necessary to successfully complete any individual Pay Item or the entire Contract, and the discharge of duties and obligations imposed by the Contract.

**Work Day** - Every Calendar day excluding Saturdays, Sundays and legal holidays as listed in [ORS187.010](#).

**Worker** - Any person performing work under the contract, including employees of the Contractor or subcontractor, and persons having full or partial ownership of the Contractor or subcontractor (This definition is not intended to nor does it alter the definition or meaning of the term "worker" as used in any applicable laws or regulations, including but not limited to for purposes of paying prevailing wage rates).

**Working Drawings** - Supplemental Plans, not furnished by the Agency, that the Contractor is required to submit to the Engineer (see [00150.35](#)).

**Workplace Violence** - Any act of physical, verbal or written aggression by an individual in or related to the workplace and/or project sites. This includes, but is not limited to, verbal abuse, threats or intimidation and physical intimidation, assault or battery by a worker or former worker. Workplace violence may also include destruction or abuse of property.

## **SECTION 00120 - BIDDING REQUIREMENTS AND PROCEDURES**

**00120.00 Prequalification of Bidders** - Bidders must be pre-qualified by the Oregon Department of Transportation, in the Class of Work as appropriate. Bids submitted by a Bidder who is not pre-qualified at the time of Bid Opening will be rejected as non-responsive.

**00120.01 General Bidding Requirements** - Bidders may be requested to submit Bids either by paper or through the internet (electronic). If both paper Bids and electronic Bids are submitted for the same invitation to bid, the paper Bids will prevail.

As and when applicable, the Contractor will maintain the certifications required by [ORS 279A.107](#).

It is the bidder's responsibility to ensure that bids are received by the Agency at the required delivery point prior to the stated bid closing time regardless of the method used to submit or transmit them.

### **00120.05 Request for Plans, Special Provisions, and Bid Booklets**

**(a) Informational Plans and Special Provisions** – Informational Plans and Special Provisions are available for review, free of charge, on the Agency website identified in the Call for Bids. Informational Plans and Special Provisions may also be available at select plan centers. Note that Informational Plans and Special Provisions may not contain all required forms and affidavits required to submit a complete bid.

**(b) Bidding Plans, Special Provision, and Bid Booklets** – Bidders choosing to submit bids must register and obtain Plans, Special Provisions and Bid Booklets on the agency web site as described in the Call for Bids. By registering for Plans, Special Provisions, and Bid Booklets from the Agency, the Bidder will be recorded on the Agency's list of plan holders and will receive Addendum and updates issued by the Agency. Bids will only be accepted from Bidders recorded by the Agency as plan holders.

Paper Bids - Bidders will access and print Plans, Special Provisions, and Bid Booklets from the Agency's web site.

Electronic Bids – Bidders will access Plans, Special Provisions, and Bid Booklets from the Agency's web site. Bid requested to be submitted electronically must be sent to [Engineering@milwaukieoregon.gov](mailto:Engineering@milwaukieoregon.gov) in PDF format not exceeding 25MB.

The Agency will not be responsible for the proper identification and handling of any bid not submitted in the designated manner or format to the required delivery point specified in the bidding documents. The Agency may refuse to accept or may reject any bid not properly sealed or marked.

It is the bidder's responsibility to ensure that bids are received by the Agency at the required delivery point prior to the stated bid closing time regardless of the method used to submit or transmit them.

**00120.10 Bid Booklet** - The Bid Booklet may include, but is not limited to:

- Bidder's checklist
- Bid Section
- Appendix, which includes required time-sensitive forms, DBE information, sample forms, and other informational pages

The Bid Section includes all pages after the Bidder's checklist and before the appendix. The Bid Section may include, but is not limited to:

- Description and location of the proposed Project
- Time, date, and location for opening Bids
- Project completion time
- Class of Project (i.e., Federal-Aid or State)
- Class of Work
- Identification of applicable Special Provisions
- Bid statement
- Certificate of non-collusion
- Certificate of noninvolvement in any debarment or suspension (for Federal-Aid Projects)
- Certificate regarding lobbying activities (for Federal-Aid Projects)
- Certificate of residency (for State Projects)
- Certificate of compliance with Oregon tax laws
- Certificate of nondiscrimination regarding ORS 279A.110 and certificate regarding policy and practice against sexual harassment, sexual assault and discrimination against employees who are members of a protected class as required by ORS 279A.112 (House Bill 3060, 2017)
- Bid Schedule
- Identification of Bidder(s) and Sureties
- Limiting statements
- Bid signature page
- Bid Bond form
- First-tier Subcontractor disclosure form

Depending on the Class of Project, other certificates or statements may be included within the Bid Section. Plans, Specifications, and other documents referred to in the Bid Section will be considered part of the Bid.

**00120.15 Examination of Work Site and Solicitation Documents; Consideration of Conditions to be Encountered** - Before submitting a Bid, Bidders will make a careful visual examination of the site of the proposed Work, the Bid Booklet, Plans, and Specifications. Bidders must also contact Utility owners to verify all Utilities' anticipated involvement on the Project Site. Bidders will also review any subsurface investigation material referenced in [00120.25](#) that may be available and conduct additional investigation of any unusual condition apparent during the visual site

examination. As soon as reasonably practicable after noting any such unusual condition, Bidder must notify Agency, in writing, of any such unusual condition and the additional investigation undertaken by Bidder. Submission of a Bid will constitute confirmation that the Bidder has examined the Project Site and finds the Plans and Specifications to be sufficiently detailed and accurate to enable Bidder to properly perform the Work, and understands the conditions to be encountered in performing the Work and all requirements of the Contract.

The Bidder is responsible for loss or unanticipated costs suffered by the Bidder because of the Bidder's failure to fully examine the site and become fully informed about all conditions of the Work, or failure to request clarification of Plans and Specifications Bidder believes to be erroneous or incomplete.

It is understood that the Plans, Specifications and other contract documents do not purport to control the method of the work, but only the requirements as to the nature of the completed work. The Contractor assumes the entire responsibility for the method of performing and installing the work. Suggestions as to the method of performing and installing the work included in the contract documents will be deemed advisory only and the feasibility of such methods, or the lack thereof, will not affect the Contractor's liability or status as an independent Contractor under this contract.

Any clarification of Plans and Specifications needed by the Bidder will be requested in writing through the Engineer. Unless the procurement period is shorter than one week, requests for changes or clarification must be submitted at least five days prior to the date of Bid Closing. The Agency will respond to each request at least 72 hours prior to the date of Bid Closing. If the Procurement period is less than seven days, requests must be submitted within one day after the Procurement is issued and the Agency will issue its response to each such request at least 24 hours prior to Bid Closing. Failure to timely request clarification or changes will be deemed acceptance of all of the terms and conditions of the Procurement. Oral explanations or interpretations given before receiving Bids for a Project will not be binding. To be binding, interpretation of the Plans and Specifications by the Agency must be made by written Addendum furnished to all Holders of Bidding Plans according to [00120.30](#). Notification of erroneous or incomplete Plans or Specifications must also be submitted to the Engineer. Such notification must also be made in sufficient time for the Agency to make any necessary modifications and issue Addenda to Bidders prior to Bid Closing.

**00120.16 Material, Equipment, and Method Substitutions** - When the Contract specifies certain Materials, Equipment, and/or methods, the Bidder will include those Materials, Equipment, and/or methods in the Bid unless the Engineer has issued an Addendum granting approval to substitute. Unless the Engineer has approved substitutions of Materials, Equipment, products, and/or methods prior to opening of Bids, the Bidder will furnish the items specified in the Contract. Substitution after Award is specified in 00180.31(b), 00180.31(c), and 00180.31(d). The procedure for requesting approval is as follows:

- (a) **Written Request** - If a Bidder proposes to use Materials, Equipment and/or methods other than those specified, the Bidder must send a written request to the Engineer, at least 7 Calendar Days prior to Bid Opening, including complete descriptive and technical information on the proposed Materials, Equipment and/or methods.



- (b) **Functional Similarity** - Materials and Equipment proposed for substitution must be similar in design, and equal or better in quality and function to those specified.
- (c) **Manufacturer's Information** - If manufacturers' brochures or information is needed, the Bidder will submit three copies of each with all pertinent information clearly marked.
- (d) **Differences** - The Bidder will specifically note all differences between the specified Materials, Equipment and/or methods and the proposed substitutes.
- (e) **Cost** - Where a substitute will result in alteration of the design or space requirements, or any other modifications to the Plans, the Bidder will include in the substitution request all items of cost for the revised design and construction.
- (f) **Notification of Holders of Bidding Plans** - If the Engineer approves any proposed substitution, such approval, and any modifications necessitated to the design and construction by the substitution, will be acknowledged by Addenda.

**00120.17 Use of Agency-Owned Land for Staging or Storage Areas** - The Contractor may use Agency-owned property for staging or storage areas, subject to the following limitations:

(a) **Within Normal Right-of-Way Limits** - If approved by the Engineer, the Contractor may use available property within the normal Right-of-Way limits for the purpose of constructing improvements under the Contract. Where the Agency owns, or has rights to, other adjacent properties in the Project area, "normal Right-of-Way" is limited to a line drawn across that property connecting the normal Right-of-Way limits on either side of the property.

(b) **Outside Normal Right-of-Way Limits** - The Contractor may not use Agency-owned property outside of normal Right-of-Way limits for the Project without the approval of the Engineer.

If a Bidder obtains approval before submitting a Bid, use of the property will be at no cost to the Contractor, or at a cost stated by the Engineer upon granting approval, as confirmed by Addendum.

If approval is not obtained before submitting a Bid, and the Contractor proposes to use Agency-owned property outside the normal Right-of-Way limits, then use of the property may be approved by the Engineer, but the Contractor will be assessed fair market value, as determined by the Engineer, for use of the property.

(c) **Restrictions on Use** - Contractors will comply with all applicable laws, ordinances, and regulations pertaining to use of Agency-owned property, and:

- Not cause unreasonable impacts on traffic and other facility users.
- Clean up all hazardous materials deposited by, or resulting from, Contractor operations.
- Be responsible for all costs associated with use of the property.
- All staging areas must be approved by the Agency prior to mobilizing materials and equipment.
- All staging areas must be fenced off to the satisfaction of the Agency.
- No storage of materials will be allowed in areas which may pose a hazard to pedestrians, or which may potentially block access to the site.

**00120.20 Interpretation of Quantities in Bid Schedule** - Quantities appearing in the Bid Schedule are approximate and are provided only for comparison of Bids. The Agency does not warrant that the actual individual items, amount of Work, or quantities will correspond to those shown in the Bid Schedule. Payment to the Contractor will be made only for actual quantities of Work performed and accepted or Materials furnished and accepted, as required by the Contract. Quantities of Work to be performed and Materials to be furnished may each be increased, decreased, or omitted as provided in [00120.30](#) and [00140.30](#).

Material for work required to complete the project, but not specifically identified in the bid schedule, will be considered incidental to the Work.

**00120.25 Subsurface Investigations** - If the Agency or its consultant has conducted subsurface or geologic investigations of the proposed Project Site, the results of the investigations may be included in written reports. If reports have been prepared, copies will be available at the Engineer's office. If the Agency has retained subsurface samples, they will also be available for inspection. Bidders and the Contractor may make arrangements for viewing the samples through the Engineer's office.

The availability of subsurface information from the Agency is solely for the convenience of the Bidder and will not relieve the Bidder or the Contractor of any risk, duty to make examinations and investigations as required by [00120.15](#), or other responsibility under the Contract Documents. It is mutually agreed to by all parties that:

- The written report(s) are reference documents and not part of the Contract Documents.
- The subsurface investigations made by the Agency are for the purpose of obtaining data for planning and design of the Project.
- The data for individual test boring logs apply only to that particular boring and is not intended to be conclusive as to the character of any material between or around test borings.
- If Bidders use this information in preparing a Bid, it is used at their own risk, and Bidders are responsible for all conclusions, deductions, and inferences drawn from this information.

**00120.30 Changes to Plans, Specifications, or Quantities before Opening of Bids** - The Agency reserves the right to issue Addenda making changes or corrections to the Plans, Specifications, or quantities. Only holders of Solicitation Documents obtained from the Agency's web site, who have been identified by the Agency as Holders of Bidding Plans, will be notified of these Addenda through the Agency's web site. Addenda may be downloaded from the Agency's web site. Bidders will be responsible for checking the Agency website for Addenda. Bidders, not the Agency, will be responsible for failure of Bidders to check and download Addenda.

The Agency will not be responsible for failure of Bidders to receive Addenda sent as described in the preceding paragraph. Bids must incorporate all Addenda. Bids may be rejected if opened and found by the Agency to not be based on all Addenda issued before Bid Closing.

## 00120.40 Preparation of Bids:

### (a) General:

**(1) Paper Bids** - For Bids submitted by paper, the Bidders will not alter, in any manner, the paper documents within the Bid Section. Bidders must complete the certifications and statements included in the Bid Section of the Bid Booklet according to the instructions. Signature of the Bidder's authorized representative thereon constitutes the Bidder's confirmation of, and agreement to, all certifications and statements contained in the paper Bid Booklet. Entries on the paper documents in the Bid Section must be in ink or typed. Signatures and initials must be in ink, except for changes submitted by email or facsimile (FAX) transmission as provided by [00120.60](#) (in which case signatures on the scanned document will be considered originals).

The Bidder will properly complete and bind all the paper documents in the Bid Section, as specified in [00120.10](#), between the front and back covers of the Bid Booklet, except that the Bid Bond is not required if another permissible type of Bid guaranty is provided (see [00120.40\(e\)](#)).

**(2) Electronic Bids** - The Bidders will not alter, in any manner, the documents within the Bid Section. Bidders must complete the certifications and statements included in the Bid Section of the Bid Booklet according to the instructions. Signature of the Bidder's authorized representative thereon constitutes the Bidder's confirmation of, and agreement to, all certifications and statements contained in the Bid Booklet. Entries on the documents in the Bid Section must be typed and legible in PDF format of the Electronic Bid Submission. Initials must be discernable in the PDF format of the Electronic Bid Submission. Signature must be by one of the following methods:

#### (i) Digital Signature

- A. Adobe PDF – drawn signature (See Steps to Sign a PDF at [https://helpx.adobe.com/acrobat/using/signing-pdfs.html#sign\\_a\\_pdf](https://helpx.adobe.com/acrobat/using/signing-pdfs.html#sign_a_pdf)) (NOTE: typed signatures will not be accepted);
- B. A scan of a signed paper document or a graphic image of a signature appended to a PDF document; or
- C. Alternative: No less than two (2) business days prior to Bid Closing Time, contact the Project Manager to propose the method by which the bidder will affix a verifiable electronic signature. The Project Manager will verify that the proposed method is equivalent to one of the above digital signature methods above to verify the Electronic Bid Submission is acceptable by the named Bidder.

**(b) Bidding Considerations** - Bidders may refer to the following Subsections for requirements that may affect bidding considerations:

- [00120.80](#) Reciprocal Preference for Oregon Resident Bidders
- [00130.80](#) Project Site Restrictions
- [00150.55](#) Cooperation with Other Contractors
- [00150.75](#) Protection and Maintenance of Work During Construction
- [00160.20\(a\)](#) Buy America
- [00160.20\(b\)](#) Buy Oregon
- [00170.07](#) Record Requirements

- [00180.20](#) Subcontracting Limitations
- [00180.21](#) Subcontracting
- [00195.50\(a-1\)](#) Progress Estimates
- [00195.00\(a\)](#) Cost of Insurance and Bonds
- [00199.30](#) Claims Procedure

**(c) Bid Schedule Entries:**

**(1) Paper Bid Schedule Entries** - Using figures, Bidders will fill in all blank spaces in the paper Bid Schedule. For each item in the paper Bid Schedule, Bidders must enter the unit price and the product of the unit price multiplied by the quantity given. The unit price must be greater than zero, contain no more than two decimal places to the right of the decimal point, and be expressed in U.S. dollars and cents (for example, \$150.25 or \$0.37). Unit prices submitted which contain more than two decimal places, will be truncated by the Agency at the second decimal place to determine the product of the unit price and quantity. No rounding will be considered or paid. Bidders Bid must also enter the total amount of the Bid obtained by adding amounts for all items in the paper Bid Schedule. Corrections or changes of item entries must be in red ink, with incorrect entry lined out and correct entry entered and initialed.

**(d) Bidder's Address and Signature Pages** - Bidders must include in the Bid the address to which all communications concerning the Bid and Contract should be sent. The Bid must be signed by a duly authorized representative of the Bidder.

**(e) Bid Guaranty** - All Bids must be accompanied by a Bid guaranty in the amount of 10% of the total amount of the Bid. Acceptable Surety companies are limited to those authorized to do business in the State of Oregon. Forfeiture of Bid guaranties specified in 00130.60. Return of guaranties is specified in by 00130.70.

**(1) Bid Guaranty with Paper Bids** - For Bids submitted by paper, the Bid guaranty will be either a Surety bond, irrevocable letter of credit issued by an insured institution as defined in [ORS 706.008](#) or security in the form of a cashier's check or certified check made payable to the Agency (see [ORS 279C.365\(4\)](#)).

If a Surety bond is submitted, Bidders must use the Agency's standard Bid Bond form included with the paper Bid Booklet. Bidders must submit the bond with original signatures and the Surety's seal affixed. The Bid guaranty will be submitted by mail, delivery service, or hand delivered to the offices and addresses, and at the times given in the paper Bid Booklet.

**(2) Bid Guaranty with Electronic Bids** - The Bid guaranty must be either a Surety bond, irrevocable letter of credit issued by an insured institution as defined in ORS 706.008 or security in the form of a cashier's check or certified check made payable to the Agency (see ORS 279C.365(4)).

**(i) Surety Bond.** If a Surety bond is submitted, Bidders must use the Agency's standard Bid Bond form included with the Bid Booklet or an alternative Bid Bond form, including terms of the Agency's standard Bid Bond, acceptable to the Agency. Bidders must submit in one of the following methods:

- A.** Include an electronic submittal in PDF format of the bond with signatures and some form of indication that the Surety's seal is affixed, and include, either on the PDF of the bond or by separate page within the Electronic Bid Submittal,

the name of the Surety, telephone number of the Surety's office to provide validation of the bond, and a bond validation number; or

**B.** Alternatively, the bidder must:

(1) Have previously submitted by email a proposed method to electronically verify the posting of the surety bond in the name of the Agency, and such method will have been approved by the Agency's attorney as an alternative means to validate the issuance of the bond in the name of the Agency, that is callable by the Agency upon demand (e.g., "escrow" of the bond by the Oregon Construction Contractors Board or other entity); and

(2) Submit in the Electronic Bid Submittal a PDF of the bond or by separate page within the Electronic Bid Submittal, the name of the entity holding the bond and the telephone number of the entity's office to provide verification that the entity is holding the bond upon call by the Agency.

**(ii) Irrevocable Letter of Credit.** If an irrevocable letter of credit is submitted, Bidders must:

**A.** Include in the Electronic Bid Submittal a PDF of the irrevocable letter of credit with signatures of the financial institution, and include, either on the PDF of the irrevocable letter of credit or by separate page within the Electronic Bid Submittal, the name of the Financial Institution, telephone number of the Financial Institution's office to provide verification of issuance of the irrevocable letter of credit, and such information to identify the irrevocable letter of credit (e.g., bank account / letter of credit number); or

**B.** Alternatively, the bidder must:

(1) Have previously submitted by email not less than five (5) business days prior to the Bid Closing Time to the Project Manager the proposed method to electronically verify the issuance of the irrevocable letter of credit for the benefit of the Agency, and such method will have been approved by the Agency's attorney as an alternative means to validate the issuance of the irrevocable letter of credit in the name of the Agency, and that is callable by the Agency upon demand; and

(2) Submit in the Electronic Bid Submittal a PDF of the irrevocable letter of credit, and upon either the PDF copy of the irrevocable letter of credit or by separate page within the Electronic Bid Submittal, the name of a licensed escrow company or substitute approved by the Agency, that it is holding the irrevocable letter of credit, the telephone number of the escrow office or approved substitute to provide verification that the financial institution has issued the irrevocable letter of credit, it is being held by the escrow company or approved substitute, and is available upon call by the Agency.

**(iii) Security.** Either a cashier's check or certified check made payable to the Agency. If the Bid guaranty amount is submitted by check to the Agency, the Bidder:

**A.** Includes within the Bid Submittal a statement that the Bid guaranty was issued to the Agency by check prior to the Bid Closing Time; and

**B.** Assumes all liability for ensuring the check is received by the Agency by the Bid Closing Time. Delays due to mail and/or delivery handling, including, but not limited to delays within the Agency's internal distribution systems, do not

excuse the Proposer's responsibility for submitting the proposal to the correct location by the proposal due date.

**(f) Disclosure of First-Tier Subcontractors** - Without regard to the amount of a Bidder's Bid, if the Agency's cost range for a public improvement Project in the "Notice to Contractors", or in other advertisement or solicitation documents, exceeds \$100,000, the Bidder will, within 2 working hours of the time Bids are due to be submitted, submit to the Agency, on a form provided by the Agency, a disclosure identifying any first-tier Subcontractors that will furnish labor or labor and Materials, and whose contract value is equal to or greater than:

- 5% of the total Project Bid, but at least \$15,000; or
- \$350,000, regardless of the percentage of the total Project Bid.

For each Subcontractor listed, Bidders must state:

- The name of the Subcontractor;
- The dollar amount of the subcontract; and
- The category of Work that the Subcontractor would be performing.

If no subcontracts subject to the above disclosure requirements are anticipated, a Bidder will so indicate by entering "NONE" or by filling in the appropriate check box. For each Subcontractor listed, Bidders must provide all requested information. Failure to submit a form or submission of a form that does not include the information required by ORS 279C.370 for each Subcontractor listed, specifically the name of each Subcontractor, the dollar amount of each subcontract and the category of Work that each Subcontractor will perform, will result in the rejection of the Bid. The Agency is not required to determine the accuracy or the completeness of the Subcontractor disclosure. See ORS 279C.370 and OAR 731-007-0260. .

The Subcontractor Disclosure Form may be submitted for a paper Bid either:

- By filling out the Subcontractor Disclosure Form included in the Bid Booklet and submitting it together with the Bid at the time and place designated for receipt of Bids;
- By removing it from the paper Bid Booklet, filling it out and submitting it separately to the Agency at the address given in the Bid Booklet; or
- By e-mail, using the form and address provided on the Agency's web site named in the paper Bid Booklet.

Subcontractor Disclosure Forms submitted by any method will be considered late if not received by the Agency within two (2) working hours of the time designated for receiving Bids.

E-mail submissions must be fully compatible with Word for Windows®. The Agency is not responsible for partial, failed, illegible or partially legible e-mail submittals, and such forms may be rejected as incomplete.

In the event that multiple Subcontractor Disclosure Forms are submitted, the last version received prior to the deadline will be considered to be the intended version.

Bids not in compliance with the requirements of this Subsection will be considered non-responsive.

Bidders are responsible for investigating the status and capacity of their subcontractors to work on Agency contracts. Bidders will not use Subcontractors who have been debarred from participating in Agency contracts or declared or determined by the Commissioner of the Bureau of Labor and Industries or the Construction Contractors Board to be ineligible or

not qualified to hold or participate in a public contract. A Bid that is accompanied by a First-Tier Disclosure Statement that includes the name of an entity that has been disbarred or declared ineligible or unqualified to work on an Agency contract may be rejected as non-responsive.

**00120.45 Submittal of Bids:**

- (a) Paper Bids** - Paper Bids may be submitted by mail, parcel delivery service, or hand delivery to the Agency, and at the times given in the Bid Booklet. Bidders must submit paper Bids in a sealed envelope. If submitted by mail or by parcel delivery service, the Bidder will place the sealed envelope containing the paper Bid inside a separate sealed envelope or package.

Paper Bids submitted after the time set for receiving paper Bids will not be opened or considered. The Agency assumes no responsibility for the receipt and return of late paper Bids.

Preparation and submission of Bids is at the sole risk and expense of the Bidder and is not a cost of contract performance.

- (b) Electronic Bids** – Electronic Bids may be submitted by email to the Agency in PDF format by the time given in the Bid Booklet. If submitted by email, the Bid file will not exceed 25MB.

Bids received by the Agency after the time set for receiving Bids will not be opened or considered. The Agency assumes no responsibility for the receipt and return of late Bids.

**00120.60 Revision or Withdrawal of Bids:**

- (a) Paper Bids** - Information entered into the paper Bid Booklet by the Bidder may be changed after the paper Bid has been delivered to the Agency, provided that:

- Changes are prepared according to the instructions identified in the Bid Booklet; and
- Changes are received at the same offices, addresses, and times identified in the paper Bid Booklet for submitting Bids; and
- The changes are submitted in writing or by scanning and submitting via email electronic facsimile transmission to the email address given in the paper Bid booklet, signed by an individual authorized to sign the Bid. Email submittals received by the Agency will constitute an original document.

- (b) Electronic Bids** - Information entered into the Bid Booklet by the Bidder may be changed after the Bid has been sent to the Agency, provided that:

- Changes are prepared according to the instructions identified in the Bid Booklet; and
- Changes are received at the same email addresses and times identified in the Bid Booklet for submitting Bids; and
- The changes are submitted in writing to the email address given in the Bid booklet, signed by an individual authorized to sign the Bid. Electronic submittals received by the Agency will constitute an original document.

**00120.65 Opening and Comparing Bids** - Bids will be opened and the total price for each Bid will be read publicly at the time and place specified in the Bid Advertisement. Bidders and other interested parties are invited to be present.

Bids for each Project will be compared on the basis of the total amount of each Bid. The total amount of the Bid will be the total sum computed from quantities listed in the Bid Schedule and unit prices entered by the Bidder.

In case of conflict between the unit price and the corresponding extended amount, the unit price will govern, and the Agency may make arithmetic corrections on extension amounts.

**00120.70 Rejection of Nonresponsive Bids** - A Bid will be considered irregular and will be rejected if the irregularity is deemed by the Agency to render the Bid non-responsive. Examples of irregularities include without limitation:

- The Bid Section documents provided are not properly used or contain unauthorized alterations.
- The Bid is incomplete or incorrectly completed.
- The Bid contains improper additions, deletions, alternate Bids, or conditions.
- The Bid is submitted on documents not obtained directly from the Agency, or is submitted by a Bidder who has not been identified by the Agency as a Holder of Bidding Plans, as required by [00120.05](#).
- The Bid or Bid modifications are not signed by a person authorized to submit Bids or modify Bids, as required by [00120.01](#).
- A member of a joint venture and the joint venture submit Bids for the same Project. Both Bids may be rejected.
- The Bid has entries not typed or in ink, or has signatures or initials not in ink (save for changes received by email as provided by [00120.60](#)).
- Each change or correction is not individually initialed.
- White-out tape or white-out liquid is used to correct item entries.
- The price per unit cannot be determined.
- The Bid guaranty is insufficient or improper.
- The original Bid Bond form is not used or is altered.
- The Oregon Construction Contractors Board registration number and expiration date are not shown on the Bid if required in the Solicitation Document. This requirement applies to Agency and State-funded Projects, with the exception of Aggregate production and landscape Projects. (not required on Federal-Aid Projects)
- A disclosure of qualified first-tier Subcontractors, if required under [00120.40\(f\)](#), is not received within 2 working hours of the time Bids are due to be submitted, or the disclosure form is not complete.
- The Bidder has not complied with the DBE requirements of the solicitation.
- The Bid does not acknowledge all issued Addenda.
- The Bid contains entries that are not greater than zero.
- The Bid entries are not expressed in U.S. dollars and cents.



- The Agency determines that any Pay Item is significantly unbalanced to the potential detriment of the Agency.
- The Bidder has liquidated and delinquent debt owed to the Agency.

In addition, the Agency may reject all Bids for good cause upon its finding that it is in the public interest to do so. The Agency may also waive minor informalities or irregularities.

**00120.80 Reciprocal Preference for Oregon Resident Bidders** - This Subsection applies only to Contracts for Projects financed without federal funds.

Bidders must complete the certificate of residency provided by the Agency in the Bid Booklet. Failure to properly complete the form will be cause to reject the Bid.

As used in the certificate of residency and this Subsection, "Resident Bidder" means a Bidder who has:

- Paid unemployment taxes or income taxes in the State of Oregon during any of the 12 calendar months immediately preceding submission of the Bid;
- A business address in the State of Oregon; and
- Certified in the Bid that the Bidder qualifies as a Resident Bidder.

"Nonresident Bidder" means a Bidder who is not a Resident Bidder as defined above.

In determining the lowest Bid, the Agency will, for the purpose of awarding the Contract, add a percentage increase to the Bid of a Nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides ([ORS 279A.120](#)). The percentage preference applied in each state will be published on or before January 1 of each year by the Oregon Department of Administrative Services. The Agency may rely on these percentages without incurring liability to any Bidder ([ORS 279A.120](#)).

This increase will only be applied to determine the lowest Bid, and will not cause an increase in payment to the Contractor after Award of the Contract.

**00120.90 Disqualification of Bidders** - The Bid(s) of a disqualified Bidder will be rejected. Any of the following reasons is sufficient to disqualify a Bidder:

- More than one Bid is submitted for the same Work by an Entity under the same or different name(s).
- Evidence of collusion among Bidders. Participants in collusion will be found not responsible, and may be subject to criminal prosecution.
- Any of the grounds for disqualification cited in [ORS 279C.440](#).

A Bidder will be disqualified if the Bidder has:

- Not been prequalified as required by [00120.00](#);
- Been declared ineligible by the Commissioner of the Bureau of Labor and Industries under [ORS 279C.860](#);
- Not been registered (licensed) by the Oregon Construction Contractors Board (CCB) or been licensed by the State Landscape Contractors Board before submitting a Bid ([ORS 279C.365\(1\)\(k\)](#), [ORS 701.021](#), [ORS 701.026](#), and [ORS 671.530](#)). The Bidder's registration

number and expiration date must be shown in the Bid form, if requested. Failure to furnish the registration number, if requested, will render the Bid non-responsive and subject to rejection. (not required on Federal-Aid projects); or

- Been determined by the CCB under [ORS 701.227](#) not to be qualified to hold or participate in a public contract for a public improvement.

**00120.91 Rejection of Bid on Grounds of Nonresponsibility of Bidder** - The Bid of a Bidder who is found to be non-responsible according to the criteria listed in [00130.10](#) or [ORS 279C.375\(3\)](#) will be rejected.

## **SECTION 00130 - AWARD AND EXECUTION OF CONTRACT**

**00130.00 Consideration of Bids** - After opening and reading Bids, the Agency will check them for correct extensions of unit prices and totals (see [00120.65](#)). The total of extensions, corrected where necessary, will be used by the Agency for Award purposes.

The Agency reserves the right to waive minor informalities and irregularities, seek clarification of any Bid or response that, in its sole discretion, it deems necessary or advisable, and to reject any or all Bids for irregularities under [00120.70](#) or for good cause after finding that it is in the public interest to do so ([ORS 279C.395](#)). An example of good cause for rejection in the public interest is the Agency's determination that any of the unit Bid prices are significantly unbalanced to the Agency's potential detriment. The Agency may correct obvious clerical errors, when the correct information can be determined from the face of the documents, if it finds that the best interest of the Agency and the public will be served thereby.

Bids will be considered and a Contract awarded, if at all, within 30 Calendar Days from the date of Bid Opening, unless an extension beyond that time is agreed to by both parties and acknowledged in writing by the Bidder.

**00130.10 Award of Contract** - After the Bids are opened and a determination is made that a Contract is to be awarded, the Contract will be awarded to the lowest responsible Bidder. For the purposes of this Section, "lowest responsible Bidder" means the responsible Bidder that submitted the lowest responsive Bid who is not on the list created by the Construction Contractors Board according to [ORS Chapter 701](#), and who has:

- Substantially complied with all prescribed public bidding procedures and requirements.
- Available the appropriate financial, Materials, Equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to indicate the capability of the prospective Bidder to meet all contractual responsibilities.
- A satisfactory record of performance. In evaluating a Bidder's record of performance, the Agency may consider, among other things, whether the Bidder completed previous contracts of a similar nature with a satisfactory record of performance. For purposes of evaluating a Bidder's performance on previous contracts of a similar nature, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the Bidder's control, the Bidder stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. Satisfactory performance of the Contract also

includes compliance with the requirements for records in [00170.07](#) for Contracts with the Agency.

- A satisfactory record of integrity. In evaluating a Bidder's record of integrity, the Agency may consider, among other things, whether the Bidder has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the Bidder's performance of a contract or subcontract.
- Qualified legally to contract with the Agency.
- Supplied all necessary information in connection with the inquiry concerning responsibility. If a prospective Bidder fails to promptly supply information requested by the Agency concerning responsibility, the Agency will base the determination of responsibility upon any available information, or may find the prospective Bidder not to be responsible.
- Not been disqualified by the public contracting agency under [ORS 279C.440](#).
- An unexpired certificate issued by the Oregon Department of Administrative Services (under [ORS 279A.167](#)) upon completion of the curriculum and assessment that the Bidder understands the prohibitions set forth in [ORS 652.220](#) and in other laws or rules that prohibit discrimination in compensation or wage payment. The certificate is only required if the Bidder employs 50 or more full time workers and submitted a Bid for a procurement with an estimated contract price that exceeds \$500,000.

If the Bidder is found not to have a satisfactory record of performance or integrity, the Agency will document the record and the reasons for the unsatisfactory finding.

The Agency will provide Notice of Intent to Award on the Agency's web site.

The Award will not be final until approved by the City Council at one of its regularly scheduled meetings.

Notice of Award and Contract booklets ready for execution will be sent within 30 Calendar Days of the opening of Bids or within the number of Calendar Days specified in the Special Provisions or a written mutual agreement.

**00130.15 Right to Protest Award** - Adversely affected or aggrieved Bidders, limited to the three apparent lowest Bidders and any other Bidder directly in line for Contract Award, may submit to the Agency a written protest of the Agency's intent to Award within seven (7) Calendar days following the date of the Notice of Intent to Award. The protest must specify the grounds upon which it is based.

An aggrieved Bidder may protest an award only if the bidder alleges, in its written protest, that it should have received the award because:

- (a) All lower Bids are non-responsive;
- (b) The Agency failed to conduct the Bid process as described in the Bid Document;
- (c) The Agency has abused its discretion in rejecting the protestor's Bid as non-responsive or non-responsible; or
- (d) The Agency's evaluation of Bids or subsequent determination of award is otherwise in violation of ORS Chapters [279A](#) AND [279C](#) or the Agency's public contracting rules.

The written protest must describe the facts that support the protest. The Agency will not consider late protests or protests that do not describe facts that would support a finding that the Bidder is aggrieved for one of the reasons in clauses (a) through (d) above.

**00130.20 Cancellation of Award** - Without liability to the Agency, the Agency may for good cause cancel Award at any time before the Contract is executed by all parties to the Contract, as provided by [ORS 279C.395](#) for rejection of Bids, upon finding it is in the public interest to do so.

**00130.30 Contract Booklet** - The Contract booklet may include but is not limited to:

- Special Provisions
- Addenda
- Schedule of Items
- Public Improvement Contract
- Performance Bond
- Payment Bond
- Certification of workers' compensation coverage

**00130.40 Contract Submittals** - Before the Agency will execute the Contract, the successful Bidder will furnish the following:

**(a) Performance and Payment Bonds** - When Awarded the Contract, the successful Bidder will furnish a Performance Bond and a Payment Bond of a Surety authorized to do business in the State of Oregon.

The successful Bidder will submit the standard bond forms, which are bound in the Contract booklet. Faxed or photocopied bond forms will not be accepted. The amount of each bond must be equal to the Contract Amount. The Performance Bond and the Payment Bond must be signed by the Surety's authorized Attorney-in-Fact, and the Surety's seal must be affixed to each bond. A power of attorney for the Attorney-in-Fact must be attached to the bonds in the Contract booklet, which must include bond numbers, and the Surety's original seal must be affixed to the power of attorney. Bonds will not be canceled without the Agency's consent, nor will the Agency normally release them, prior to Contract completion.

When a coating system warranty is required by 00594.75, the Contractor will also furnish a supplemental warranty performance bond as and when described in 00594.75.

**(b) Certificates of Insurance** - The successful Bidder will furnish the Agency certificates of insurance applicable to the Project, according to [00170.70](#). The insurance coverages must remain in force throughout the performance of the Contract and must not be allowed to lapse without prior written approval of the Agency. Bidders may refer to [00170.70](#) for minimum coverage limits and other requirements.

For specified Contracts, certified copies, and in some instances the original, of insurance policies may be required by the Special Provisions.

**(c) Workers' Compensation** - To certify compliance with the workers' compensation insurance coverage required by [00170.61\(a\)](#) and [00170.70\(d\)](#), the successful Bidder will complete and sign the "Certification of Workers' Compensation Coverage" form bound in the Contract booklet.

**(d) Registration Requirements:**

- (1)** [ORS 701.021](#), [ORS 701.026](#), and [ORS 671.530](#) require that Bidders be registered with the Oregon Construction Contractors Board or licensed by the State Landscape Contractors Board prior to submission of a Bid on a Project not involving federal funds. Registration with the Construction Contractors Board or licensing by the State Landscape Contractors Board is not a prerequisite to bidding on Federal-Aid Projects; however, the Agency will not execute a Contract until the Contractor is so registered or licensed.
- (2)** Bidders must be registered with the Corporation Division, Oregon Secretary of State, if bidding as a corporation, limited liability company, joint venture, or limited liability partnership, or if operating under an assumed business name and the legal name of each person carrying on the business is not included in the business name.
- (3)** A Contractor registered under [ORS 701](#) may bid on a landscaping Project or perform a construction project that includes landscape contracting as a portion of the project if the landscape contracting is subcontracted to a licensed landscaping business as defined in [ORS 671.520](#).
- (4)** A landscaping business may bid on a Project or perform a Contract that includes the phase of landscape contracting for which it is not licensed if it employs a landscape contractor, or subcontracts with another licensed landscaping business, licensed for that phase.

**(e) Tax Identification Number** - The successful Bidder will furnish the Agency the Bidder's Federal Tax Identification Number.

**00130.50 Execution of Contract and Bonds:**

**(a) By the Bidder** - The successful Bidder will deliver the required number of Contract booklets with the properly executed Contract, Performance Bond, Payment Bond, certification of workers' compensation coverage, and the required certificates of insurance, to the Agency within 10 Calendar Days after the date on which the Contract booklets are sent or otherwise conveyed to the Bidder under [00130.10](#). The Bidder will return the originals of all documents received from the Agency and named in this Subsection, with original signatures. Certificates of insurance will also be originals. Certificates of insurance for coverages that are permitted by the Agency under [00170.70\(a\)](#) to be obtained by appropriate subcontractors will be delivered by the Contractor to the Agency together with the Contractor's request under [00180.21](#) for approval of the subcontract with that subcontractor. No copies of these documents will be accepted by the Agency.

Proper execution requires that:

- If the Contractor is a partnership, limited liability partnership, joint venture, or limited liability company, an authorized representative of each Entity comprising it must sign the Contract, Performance Bond, and Payment Bond, and an authorization to sign must be attached.
- If the Contractor is a corporation, the President and the Secretary of that corporation must sign the Contract, Performance Bond, and Payment Bond. However, if other corporate officers are authorized to execute contracts and bonds, the successful Bidder will furnish with those documents a certified, true and correct copy of the corporate bylaws or minutes stating that authority. If only one officer is signing, then the bylaws or minutes must include the authority to sign without the signature of others. The successful Bidder will also include the title(s) or corporate office(s) held by the signer(s).

**(b) By the Agency** - Within ten (10) Working Days after the Agency has received and verified the properly executed documents specified in [00130.50\(a\)](#), and received legal sufficiency approval from the Agency's attorney (if required), the Agency will execute the Contract. The Agency will then send a fully-executed original Contract booklet to the successful Bidder, who then officially becomes the Contractor.

**00130.60 Failure to Execute Contract and Bonds** - Failure of the successful Bidder to execute the Contract and provide the required certificates, certifications, and bonds may be cause for cancellation of the Award, and may be cause for forfeiture of the Bid guaranty under [ORS 279C.385](#).

Award may then be made to the next lowest responsible Bidder, the Project may be re-advertised, or the Work may be performed otherwise as the Agency decides.

The forfeited Bid guaranty will become the Agency's property, not as a penalty but as liquidation of damages resulting from the Bidder's failure to execute the Contract and provide the certificates, certifications, and bonds as required by these Specifications.

**00130.70 Release of Bid Guaranties** - Bid guaranties will be released and checks returned 7 Calendar Days after Bids are opened, except for those of the three apparent lowest Bidders on each Project. The guaranties of the three apparent lowest Bidders will be released and checks returned to unsuccessful Bidders within 7 days of the Agency's execution of the Contract.

**00130.80 Project Site Restriction** - Until the Agency sends the Contractor written Notice to Proceed with the Work, and the Contractor has filed the public works bonds required in [00170.20](#), the Contractor must not go onto the Project Site on which the Work is to be done, nor move Materials, Equipment, or workers onto that Project Site.

The Contractor will not automatically be entitled to extra compensation because the commencement of Work is delayed by failure of the Agency to send the Contract for execution. However, if more than 60 Calendar Days elapse between the date the Bid is opened and the date the Agency sends the Contract to be executed, the Agency will consider granting an adjustment of time for completion of the Work to offset any actual delay to Contract completion resulting directly from delay in commencement.

**00130.90 Notice to Proceed** - Notice to Proceed will be issued by the Agency during the Pre-construction Meeting.

Should the Agency fail to issue the Notice to Proceed during the Pre-construction Meeting, the Contractor may apply for an adjustment of Contract Time according to 00180.80(c).

The Engineer will issue a First Notification recording the date the performance of the Contracts has begun.

## **SECTION 00140 - SCOPE OF WORK**

**00140.00 Purpose of Contract** - The purpose of the Contract is to set forth the rights and obligations of the parties and the terms and conditions governing completion of the Work. The Contractor's obligations will include without limitation the following:

- The Contractor will furnish all Materials, Equipment, labor, transportation, and Incidentals required to complete the Work according to Plans, Specifications, and terms of the Contract.
- The Contractor will perform the Work according to the lines, grades, Typical Sections, dimensions, and other details shown on the Plans, as modified by written order, or as directed by the Engineer.
- The Contractor will perform all Work determined by the Engineer to be necessary to complete the Project.
- The Contractor will contact the Engineer for any necessary clarification or interpretation of the Contract.
- Contractor will have the contract documents, an approved set of construction plans and a copy of the 2021 edition of the Oregon Standard Specifications available at the Project Site at all times.

**00140.10 Typical Sections** - The Typical Sections are intended to apply in general. At other locations where the Typical Section is not appropriate, the Contractor will perform construction to the identified alignment as directed by the Engineer.

**00140.20 Thickness** - The thickness of Courses of Materials shown on the Plans, given in the Specifications, or established by the Engineer is considered to be the compacted thickness. Minor variations are acceptable when within tolerances specified in the Specifications or Plans, or when approved by the Engineer.

**00140.30 Agency-Required Changes in the Work** - Changes to the Plans, quantities, or details of construction are inherent in the nature of construction and may be necessary or desirable during the course of Project construction.

Without impairing the Contract, the Agency reserves the right to require changes it deems necessary or desirable within the scope, which in the Specifications means general scope, of the Project.

These changes may modify, without limitation:

- Specifications and design
- Grade and alignment
- Cross Sections and thicknesses of Courses of Materials
- Method or manner of performance of Work
- Project Limits

or may result in:

- Increases and decreases in quantities
- Additional Work



- Elimination of any Contract item of Work
- Acceleration or delay in performance of Work

Upon receipt of a Change Order, the Contractor will perform the Work as modified by the Change Order. If the Change Order increases the Contract Amount, the Contractor must notify its Surety of the increase and direct the Surety to increase the amount of the performance and payment bonds to equal the new Contract Amount. The Contractor must provide the Agency with a copy of the modified bond documents within 15 calendar days of receipt of the Change Order. The Contractor's performance of Work according to Change Orders will neither invalidate the Contract nor release the Surety. Payment for changes in the Work will be made according to [00195.20](#). Contract Time adjustments, if any, will be made according to [00180.80](#).

**00140.40 Differing Site Conditions** - The following constitute differing Project Site conditions provided such conditions are discovered at the Project Site after commencement of the Work: For Federal Aid Highway Construction projects:

- **Type 1** - Subsurface or latent physical conditions that differ materially from those indicated in the Contract Documents; or
- **Type 2** - Unknown physical conditions of unusual nature that differ materially from those ordinarily encountered and generally recognized as inherent in the Work provided for in the Contract.

For projects that are not Federal Aid Highway Construction projects:

- **Type 1** - Subsurface or latent physical conditions that could not have been discovered by careful examination of the Project Site, utilities and available records as described in 00120.15 and differ materially from those indicated in the Contract Documents; or
- **Type 2** - Unknown physical conditions of unusual nature that differ materially from those ordinarily encountered and generally recognized as inherent in the Work provided for in the Contract.

The party discovering such a condition must promptly notify the other party, in writing, of the specific differing conditions before they are disturbed and before the affected Work is performed. The Contractor must not continue Work in the affected area until the Engineer has inspected such condition according to [00195.30](#) to determine whether an adjustment to Contract Amount or Contract Time is required.

Payment adjustments due to differing Project Site conditions, if any, will be made according to [00195.30](#). Contract Time adjustments, if any, will be made according to [00180.80](#).

**00140.50 Environmental Pollution Changes** - ORS [279C.525](#) will apply to any increases in the scope of the Work required as a result of environmental or natural resources laws enacted or amended after the submission of Bids for the Contract. The Contractor will comply with the applicable notice and other requirements of [ORS 279C.525](#). The applicable rights and remedies of that statute will also apply.

In addition to [ORS 279C.525](#), the Agency has compiled a list at [00170.01](#) of those federal, State, and local agencies, of which the Agency has knowledge, that have enacted ordinances, rules, or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that may affect the performance of Agency contracts.



**00140.60 Extra Work** - If directed by the Engineer's written order, the Contractor will perform work not included in the Contract. The Contractor will perform this work according to:

- Standard Specifications
- Standard Drawings
- Supplemental Specifications, if any
- Other Plans and Specifications issued by the Engineer

Payment for Extra Work will be made according to [Section 00196](#). Contract Time adjustments, if any, will be made according to [00180.80](#).

**00140.65 Disputed Work** - The Contractor may dispute any part of a Change Order, written order, or an oral order from the Engineer by the procedures specified in [Section 00199](#).

**00140.70 Cost Reduction Proposals** - The Contractor may submit written proposals to the Engineer that modify Plans, Specifications, or other Contract Documents for the sole purpose of reducing the total cost of construction. Unless otherwise agreed to in writing by the Agency, a proposal that is solely or primarily a proposal to reduce estimated quantities or delete Work, as determined by the Engineer, is not eligible for consideration as a cost reduction proposal and will instead be addressed under [00140.30](#), whether proposed or suggested by the Agency or the Contractor.

**(a) Proposal Requirements** - The Agency will not adopt a cost reduction proposal that impairs essential functions or characteristics of the Project including but not limited to service life, economy of operation, ease of maintenance, designed appearance, or design and safety standards.

To conserve time and funds, the Contractor may first submit a written request for a feasibility review by the Engineer. The request should contain a description of the proposal together with a rough estimate of anticipated dollar and time savings. The Engineer will, within a reasonable time, advise the Contractor in writing whether or not the proposal would be considered by the Agency, should the Contractor elect to submit a detailed cost reduction proposal.

A detailed cost reduction proposal must include without limitation the following information:

- A description of existing Contract requirements for performing the Work and the proposed change;
- The Contract items of Work affected by the proposed change, including any quantity variation caused by the proposed change;
- Pay Items affected by the proposed change including any quantity variations;
- A detailed cost estimate for performing the Work under the existing Contract and under the proposed change. Cost estimates will be made according to Section 00197. Costs of re-design, which are incurred after the Agency has accepted the proposal, will be included in the cost of proposed work; and
- A date by which the Engineer must accept the proposal in order to accept the proposed change without impacting the Contract Time or cost reduction amount.

**(b) Continuing to Perform Work** - The Contractor will continue to perform the Work according to Contract requirements until the Engineer issues a Change Order incorporating the cost reduction proposal. If the Engineer fails to issue a Change Order by the date specified in the proposal, the proposal must be deemed rejected.

**(c) Consideration of Proposal** - The Engineer is not obligated to consider any cost reduction proposal. The Agency will not be liable to the Contractor for failure to accept or act upon any cost reduction proposal submitted. Contractor will bear all risks of delay for reasonable time spent by Agency to review and accept, modify or reject any such change requested by Contractor and will not be entitled to any additional compensation for such delay.

The Engineer will determine in its sole discretion whether to accept a cost reduction proposal as well as the estimated net savings in construction costs from the adoption of all or any part of the proposal. In determining the estimated net savings, the Engineer may disregard the Schedule of Items. The Engineer will establish prices that represent a fair measure of the value of Work to be performed or to be deleted as a result of the cost reduction proposal.

**(d) Sharing Investigation Costs** - As a condition for considering a Contractor's cost reduction proposal, the Agency reserves the right to require the Contractor to share in the Agency's costs of investigating the proposal. If the Agency exercises this right, the Contractor will provide written acceptance of the condition to the Engineer. Such acceptance will authorize the Agency to deduct its share of investigation costs from payments due or that may become due to the Contractor under the Contract.

**(e) Acceptance of Proposal Requirements** - If the Contractor's cost reduction proposal is accepted in whole or in part, acceptance will be made by a Change Order that will include without limitation the following:

- Statement that the Change Order is made according to [00140.70](#);
- Revised Contract Documents that reflect all modifications necessary to implement the approved cost reduction measures;
- Any conditions upon which the Agency's approval is subject;
- Estimated net savings in construction costs attributable to the approved cost reduction measures; and
- A payment provision according to which the Contractor will be paid 50% of the estimated net savings amount as full and adequate consideration for performance of the Work of the Change Order.

The Contractor's cost of preparing the cost reduction proposal and the Agency's costs of investigating the proposal, including any portion paid by the Contractor, will be excluded from determination of the estimated net savings in construction costs. Costs of re-design, which are incurred after the Agency has accepted the proposal, will be included in the cost of the Work attributable to cost reduction measures.

If the Agency accepts the cost reduction proposal, the Change Order that authorizes the cost reduction measures will also address any Contract Time adjustment.

**(f) Right to General Use** - Once submitted, the cost reduction proposal becomes the property of the Agency. The Agency reserves the right to adopt the cost reduction proposal for general use without additional compensation to the Contractor when it determines that a proposal is suitable for application to other contracts.

**00140.80 Use of Publicly Owned Equipment** - The Contractor is prohibited from using publicly-owned Equipment except in the case of emergency. In an emergency, the Contractor may rent publicly-owned Equipment provided that:

- The Engineer provides written approval that states that such rental is in the public interest; and
- Rental does not increase the Project cost.

**00140.90 Final Trimming and Cleanup** - Before Final Inspection as described in [00150.90](#), the Contractor will neatly trim and finish the Project and remove all remaining unincorporated Materials and debris. Final trimming and cleanup must include without limitation the following:

- The Contractor will retrim and reshape earthwork, and repair deteriorated portions of the Project Site.
- Where the Work has impacted existing facilities or devices, the Contractor will restore or replace those facilities to their pre-existing condition.
- The Contractor will clean all drainage facilities and sanitary sewers of excess Materials or debris resulting from the Work.
- The Contractor will clean up and leave in a neat, orderly condition, Rights-of-Way, Materials sites, and other property occupied in connection with performance of the Work.
- The Contractor will remove temporary buildings, construction plants, forms, falsework and scaffolding, surplus and discarded Materials, and rubbish.
- The Contractor will dispose of Materials and debris including without limitation forms, falsework, scaffolding, and rubbish resulting from clearing, grubbing, trimming, clean-up, removal, and other Work. These Materials and debris become the property of the Contractor. The Contractor will dispose of these Materials and debris immediately.
- The Contractor will restore and replant or resurface adjoining properties to match existing grades and existing surfaces.
- Erosion and sediment control needed to stabilize the Project Site.
- Sweep paved areas broom clean.
- Remove petrochemical spills, stains and other foreign deposits.
- Rake grounds that are neither planted nor paved to a smooth, even-textured surface.
- Remove tools, construction equipment, machinery and surplus material from the site.
- Clean exposed exterior and interior hard-surfaced finishes to a dirt-free condition free of stains, films and similar foreign surfaces.
- Avoid disturbing natural weathering of exterior surfaces.
- Restore reflective surfaces to their original condition.
- Remove debris and surface dust from limited access spaces, including roofs, plenums, shafts, trenches, equipment vaults, manholes, attics, and similar spaces.
- Broom clean concrete floors in unoccupied spaces.
- Remove labels that are not permanent labels.
- Touch-up, repair, and restore marred exposed finishes and surfaces.
- Replace finishes that cannot be satisfactorily repaired or restored, or that show evidence of repair or restoration.

- Do not paint over the “UL” and similar labels, including mechanical and electrical nameplates.
- Wipe surfaces of mechanical and electrical equipment, elevator and similar equipment.
- Remove excess lubrication, paint, and mortar droppings and other foreign substances.

Unless the Contract specifically provides for payment for this item, the Agency will make no separate or additional payment for final trimming and cleanup.

## **SECTION 00150 - CONTROL OF WORK**

**00150.00 Authority of the Engineer** - The Engineer has full authority over the Work and its suspension (see [Section 00180](#)). The Contractor will perform all Work to the complete satisfaction of the Engineer. The Engineer's determination will be final on all matters, including but not limited to the following:

- Quality and acceptability of Materials and workmanship
- Measurement of unit price Work
- Timely and proper prosecution of the Work
- Interpretation of Contract Documents
- Payments due under the Contract

The Engineer's decision is final and, except as provided in [00180.80](#) for adjustments of Contract Time and [Section 00199](#) for claims for additional compensation, may be challenged only through litigation.

Work performed under the Contract will not be considered complete until it has passed Final Inspection by the Engineer and has been accepted by the Agency.

Interim approvals issued by the Engineer, including but not limited to Third Notification, will not discharge the Contractor from responsibility for errors in prosecution of the Work, for improper fabrication, for failure to comply with Contract requirements, or for other deficiencies, the nature of which are within the Contractor's control.

**00150.01 Project Manager's Authority and Duties** - The Engineer may designate a Project Manager as its representative on the Project with authority to enforce the provisions of the Contract.

When the Engineer has designated a Project Manager, the Contractor should direct all requests for clarification or interpretation of the Contract, in writing, to the Project Manager. The Project Manager will respond within a reasonable time. Contract clarification or interpretation obtained from persons other than the Project Manager will not be binding on the Agency.

The Project Manager will have the authority to appoint Inspectors and other personnel as required to assist in the administration of the Contract.

**00150.02 Inspector's Authority and Duties** - To the extent delegated under [00150.01](#), Inspectors are authorized to represent the Engineer and Project Manager to perform the following:

- Inspect Work performed and Materials furnished, including without limitation, the preparation, fabrication, or manufacture of Materials to be used;
- Orally reject defective Materials and to confirm such rejection in writing;
- By oral order, temporarily suspend the Work for improper prosecution pending the Engineer's decision; and
- Exercise additional delegated authority.

Inspectors are not authorized to:

- Accept Work or Materials.
- Alter or waive provisions of the Contract.
- Give instructions or advice inconsistent with the Contract Documents.

**00150.10 Coordination of Contract Documents** - The Contract Documents, including but not limited to Contract Change Orders, the Special Provisions, the Plans, and the Standard Specifications are intended to collectively describe all of the items of Work necessary to complete the Project.

**(a) Order of Precedence** - The Engineer will resolve any discrepancies between these documents in the following order of precedence:

- Permits from governmental agencies;
- Contract Change Orders;
- Addenda;
- Bid schedule;
- Special Provisions;
- Agency-prepared drawings specifically applicable to the Project and bearing the Project title;
- Reviewed and accepted, stamped Working Drawings;
- Standard Drawings;
- Approved Unstamped Working Drawings;
- Supplemental Specifications;
- Standard Specifications;
- The Public Improvement Contract; and
- All other Contract Documents not listed above.

Notes on a drawing will take precedence over drawing details.

Dimensions shown on the drawings, or that can be computed, will take precedence over scaled dimensions.

- (b) **Immaterial Discrepancies** - The Contract Documents specify details for the construction and completion of the Work. If Contract Documents describe portions of the Work in sufficient detail but are silent in some minor respect, the Contractor may proceed utilizing the current best industry practices.
- (c) **Material Discrepancies** - If the Contractor identifies a discrepancy, error, or omission in the Contract Documents that cannot be resolved by the approach specified in (b) above, the Contractor must immediately request clarification from the Engineer.

**00150.15 Construction Stakes, Lines, and Grades:**

- (a) **General** - The Contractor will perform no Work until the Engineer establishes field controls. Work performed without field controls will be subject to removal at the Contractor's expense.
- (b) **Agency Responsibilities** - The Engineer will:
- Provide CADD linework or other design files or data, for reference only, upon request.
- (c) **Contractor Responsibilities** - The Contractor must:
- Inform the Engineer of staking requirements at least five (5) Calendar Days before the staking needs to begin;
  - Coordinate construction to provide sufficient area for the Engineer to perform surveying work efficiently and safely;
  - Accurately measure detailed dimensions, elevations, and Slopes from the Engineer's stakes and marks;
  - Layout access ramps (line and grade) as detailed on the plans from the control point provided at each ramp. Perform the Work in such a manner as to preserve stakes and marks; and
  - Set any reference lines for automatic control from the control stakes provided by the Engineer.
  - Inform the Engineer of any property corners monuments and/or survey markers that are not shown on the plans and are found during construction activities that may be disturbed as part of the construction activities whether or not they are shown on the plans, prior to disturbing the monuments. Allow the Agency two (2) Working days for referencing all found markers before they are removed.
  - Set all final rock grade reference lines, stakes and marks.
  - Monuments disturbed by the Contractor's activities that have not been properly notified to the Agency or referenced by a licensed Land Surveyor will be replaced by the Contractor's surveyor at the Contractor's expense.
  - Lay out and set construction stakes and marks to establish control for the lines, grades, Slopes, Cross Sections, and curve super-elevations for the Work;
  - Provide one set of construction stakes for line and grade for each phase of the Work as follows:
    1. Streets – Top face of curb
    2. Sidewalks – Back of walk
    3. Pipes – Invert elevation at centerline of pipe at changes in alignment.
    4. Access Ramps – None
    5. Manholes/Inlets/Catch Basins – Location and one invert elevation.

- Preserve all temporary survey control points, benchmarks, grade stakes and other reference points for as long as they are needed for construction activities. Re-staking due to contractor, subcontractor or vendor's neglect will be at the contractor's expense.

**00150.20 Inspection:**

- (a) Inspection by the Engineer** - The Engineer may test Materials furnished and inspect Work performed by the Contractor to ensure Contract compliance. The Contractor will notify the Engineer 72 hours (three full Work Days) in advance for inspection of each portion of the Work.

Contractor will not begin placing successive Courses or portions of Work until preceding Courses or portions of the Work have been inspected.

If the Contractor performs Work without the Engineer's inspection or uses Materials that the Engineer has not approved, the Engineer may order affected portions of the Work removed at the Contractor's expense.

At the Engineer's direction, any time before the Work is accepted, the Contractor will uncover portions of the completed Work for inspection. After inspection, the Contractor will restore these portions of Work to the standard required by the Contract. If the Engineer rejects Work due to Materials or workmanship, or if the Contractor performed such Work without providing sufficient advance request for inspection to the Engineer, the Contractor will bear all costs of uncovering and restoring the Work. If the Engineer accepts the uncovered Work, and the Contractor performed the Work only after providing the Engineer with sufficient advance notice, the costs of uncovering and restoring the Work will be paid for by the Agency according to [00195.20](#).

- (b) Inspection Facilities** - The Contractor will furnish walkways, railings, ladders, shoring, tunnels, platforms, and other facilities necessary to permit the Engineer to have safe access to the Work to be inspected. The Contractor will require producers and fabricators to provide safe inspection access as requested by the Engineer.
- (c) Sampling** - When directed by the Agency, the Contractor will furnish the Engineer with samples of Materials that the Engineer will test. All of the Contractor's costs related to this required sampling are incidental.
- (d) Inspection by Third Parties** - Where third parties have the right to inspect the Work, the Contractor will coordinate with the Engineer and provide safe inspection access.
- (e) Contractor's Duty to Make Corrections** - The Contractor will perform all Work according to the Contract Documents. The Contractor will correct Work that does not comply with the Contract Documents at its own expense. Inspection of the Work by the Engineer does not relieve the Contractor of responsibility for improper prosecution of the Work.

**00150.25 Acceptability of Materials and Work** - The Contractor will furnish Materials and perform Work in Close Conformance to the Contract Documents. If the Engineer determines that the Materials furnished or the Work performed are not in Close Conformance with the Contract Documents, the Engineer may:

- Reject the Materials or Work and order the Contractor, at the Contractor's expense, to remove, replace, or otherwise correct any non-conformity; or
- Accept the Materials or Work as suitable for the intended purpose, adjust the amount paid for applicable Pay Items to account for diminished cost to the Contractor or diminished

value to the Agency, document the adjustment, and provide written documentation to the Contractor regarding the basis of the adjustment.

The Engineer's decisions concerning acceptability of Materials or Work will be final.

**00150.30 Delivery of Notices** - Written notices to the Contractor by the Engineer or the Agency will be delivered:

- In person;
- by electronically confirmed facsimile transmission;
- By U.S. Postal Service first class mail or priority mail (which at the sender's option may include certified or registered mail return receipt requested), to the current office address as shown in the records of the Agency; or
- By overnight delivery service of a private industry courier, to the current office address as shown in the records of the Agency.

Notices will be considered as having been received by the Contractor:

- At the time of actual receipt when delivered in person or by facsimile transmission;
- At the time of actual receipt or seven (7) Calendar Days after the postmarked date when deposited for delivery by first class or priority mail, whichever is earlier; or
- At the time of actual receipt or three (3) Calendar Days after deposit with a private industry courier for overnight delivery service, whichever is earlier.

Written notices to the Engineer or the Agency by the Contractor must be delivered to the Agency address shown in the Special Provisions, unless a different address is agreed to by the Engineer, and will be delivered:

- In person;
- by electronically confirmed facsimile transmission;
- By U.S. Postal Service first class mail or priority mail (which at the sender's option may include certified or registered mail return receipt requested); or
- By overnight delivery service of a private industry courier.

Notices will be considered as having been received by the Agency:

- At the time of actual receipt when delivered in person or by facsimile transmission;
- At the time of actual receipt or seven (7) Calendar Days after the postmarked date when deposited for delivery by first class or priority mail, whichever is earlier; or
- At the time of actual receipt or three (3) Calendar Days after deposit with a private industry courier for overnight delivery service, whichever is earlier.

For purposes of this Subsection, the time zone is Pacific Standard Time (PST) to determine time of receipt of notices and other documents. For purposes of this Subsection, non-business days are Saturdays, Sundays and legal holidays as defined by ORS 187.010 and 187.020.

Following Notice to Proceed, all notices and other documents submitted to the Contractor by the Engineer, or to the Engineer by the Contractor, will be submitted electronically under 00170.08.

Claims must be submitted on paper documents according to Section 00199.



### 00150.35 Plans and Working Drawings:

- (a) **Plans** - The Plans will show details of lines, grades, and Typical Section of the Roadway, and locations and design details of Structures.
- (b) **Working Drawings** - The Contractor will supplement the Agency-prepared Plans with stamped or unstamped Working Drawings that show all information necessary to complete the Work. The applicable Section or Subsection of the Standard Specifications will indicate the supplemental information required and whether the drawings are to be stamped or unstamped. Stamped and unstamped Working Drawings are defined as follows:
  - (1) **Stamped Working Drawings** - Working Drawings, calculations, and other data which are prepared by or under the direction of a Professional Engineer licensed in the State of Oregon, and which bear the engineer's signature, seal, and expiration date.
  - (2) **Unstamped Working Drawings** - Working Drawings, calculations, and other data that do not bear an engineering seal.
- (c) **Number and Size of Drawings** - The Contractor will submit Working Drawings according to one of the following methods:
  - (1) **Paper Submittal** - For paper submissions, submit seven copies of Working Drawings for steel Structures and six copies of Working Drawings for other Structures to the Engineer. The submitted copies must be clear and readable. Drawing dimensions must be 8 1/2 inches by 11 inches, 11 inches by 17 inches, or 22 inches by 36 inches in size. One copy of the submitted Working Drawings will be returned to the Contractor after processing. The Contractor will submit such additional number of copies to the Engineer for processing that the Contractor would like to have returned.
  - (2) **Electronic Submittal** - For electronic submissions, submit Working Drawings according to the "Guide to Electronic Shop Drawing Submittal" which is available from ODOT.
- (d) **Processing Working Drawings** - The Engineer will process Working Drawings and include all comments on them as follows:
  - (1) **Stamped Working Drawings** - Stamped Working Drawings will be designated as "reviewed" or "reviewed with comments" by the Engineer.
  - (2) **Unstamped Working Drawings** - Unstamped Working Drawings will be designated on the face of the Drawing, as "approved", "approved as noted", or "returned for correction" by the Engineer.

The Contractor will not fabricate or construct any structural components until the stamped or unstamped Working Drawings are returned by the Engineer with written notation of approval or review, as applicable, of the Working Drawings.

The Engineer's processing of the Working Drawings does not amend any contractual obligations of the parties. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents.

The Engineer will process and return Working Drawings within 21 Calendar Days (65 Calendar Days if Railroad approval is required) after receipt by the Engineer. If the Engineer fails to return such drawings within this period of time, the Engineer will consider granting a Contract Time extension according to [00180.80](#).

**00150.37 Equipment Lists and Other Submittals** - The Contractor will submit Equipment lists, and other required submittals for approval by the Engineer. The Engineer will respond to requests for approval within 21 Calendar Days (65 Calendar Days if Railroad approval is required) after receipt by the Engineer unless otherwise specified in the Section of the Specifications requiring such approval.

**00150.40 Cooperation and Superintendence by the Contractor** - The Contractor is responsible for full management of all aspects of the Work, including superintendence of all Work by Subcontractors, Suppliers, and other providers. The Contractor will appoint a single Superintendent and may also appoint alternate Superintendents as necessary to control the Work. The form of appointment of the alternate will state, in writing, the alternate's name, duration of appointment in the absence of the Superintendent, and scope of authority. The Contractor will:

Provide for the cooperation and superintendence on the Project by:

- Furnishing the Engineer all data necessary to determine the actual cost of all or any part of the Work, added Work, or changed Work.
- Allowing the Engineer reasonable access to the Contractor's books and records at all times. To the extent permitted by public records laws, the Engineer will make reasonable efforts to honor the Contractor's request for protection of confidential information.
- Keeping one complete set of Contract Documents on the Project Site at all times, available for use by all the Contractor's own organization, and by the Engineer if necessary.

Appoint a single Superintendent and any alternate Superintendent who must meet the following qualifications:

- Appointees will be competent to manage all aspects of the Work.
- Appointees will be from the Contractor's own organization.
- Appointees will have performed similar duties on at least one previous project of the size, scope and complexity as the current Contract.
- Appointees will be experienced in the types of Work being performed.
- Appointees will be capable of reading and thoroughly understanding the Contract Documents.
- Appointees' qualifications will be reviewed and approved by the Agency.

The appointed single Superintendent, or any alternate Superintendent must:

- Be present for all On-Site Work, regardless of the amount to be performed by the Contractor, Subcontractors, Suppliers, or other providers, unless the Engineer provides prior approval of the Superintendent's or alternate Superintendent's absence.
- Be readily contactable during off-hours for emergencies relating to this project, at the discretion of the Agency.
- Be equipped with a two way radio or cell phone capable of communicating throughout the project during all the hours of Work on the Project Site and be available for communication with the Engineer.
- Have full authority and responsibility to promptly execute orders or directions of the Engineer.

- Have full authority and responsibility to promptly supply the Materials, Equipment, labor, and Incidentals required for performance of the Work.
- Coordinate and control all Work performed under the Contract, including without limitation the Work performed by Subcontractors, Suppliers, and Owner Operators.
- Furnish every subcontractor a complete set of Project Plans and applicable Special Provisions and ensure that the documents are on the Project Site and in use when the subcontractor is performing work.
- Remove any person employed on the project, by the Contractor or a subcontractor, who, in the opinion of the Engineer, does not act in a courteous and professional manner towards the adjacent property owners, the traveling public or Agency staff, at the written request of the Engineer. That employee must not be again employed on the project without the approval of the Engineer.
- Appoint alternate Superintendents as necessary to control the Work. The form of appointment of the alternate will state, in writing, the alternate's name, duration of appointment in the absence of the Superintendent, and scope of authority.
- Diligently pursue progress of the Work according to the schedule requirements of Section 00180.
- Cooperate in good faith with the Engineer, Inspectors, and other contractors in performance of the Work.
- Provide all assistance reasonably required by the Engineer to obtain information regarding the nature, quantity, and quality of any part of the Work.
- Provide access, facilities and assistance to the Engineer in establishing such lines, grades and points as the Engineer requires.
- Carefully protect and preserve the Engineer's marks and stakes.
- Be removed by the Agency at any time during the performance of the contract for failure to satisfactorily perform any of the duties listed above.

Any Superintendent or alternate Superintendent who repeatedly fails to follow the Engineer's written or oral orders, directions, instructions, or determinations, will be subject to removal from the project.

If the Contractor fails or neglects to provide a Superintendent, or an alternate Superintendent, and no prior approval has been granted, the Engineer has the authority to suspend the Work according to [00180.70](#). Any continued Work by the Contractor, Subcontractors, Suppliers, or other providers may be subject to rejection and removal. The Contractor's repeated failure or neglect to provide the superintendence required by these provisions constitutes a material breach of the Contract, and the Engineer may impose any remedies available under the Contract, including but not limited to Contract termination.

### **00150.50 Cooperation with Utilities:**

**(a) General** - Unless otherwise specified in the Special Provisions or on the Plans, existing Utilities requiring adjustment may be adjusted by the Utility before, during, or after Project construction. "Adjustment of Utilities" will mean the alteration, improvement, connection, disconnection, relocation, or removal of existing Utility lines, facilities, or systems in temporary or permanent manner.

**(b) Agency Responsibilities** - The Agency may provide available contact information for utility companies to the Contractor.

The Plans may not normally show the anticipated new location of Utilities that have been or will be adjusted.

**(c) Contractor's Responsibilities** - The Contractor must:

- Follow applicable rules adopted by the Oregon Utility Notification Center;
- Contact Utility owners during Bid preparation and after the Contract is awarded to verify all Utilities' involvement on the Project Site;
- Coordinate Project construction with the Utilities' planned adjustments, take all precautions necessary to prevent disruption of Utility service, and perform its Work in the manner that results in the least inconvenience to the Utility owners;
- Include all Utility adjustment work, whether to be performed by the Contractor or the Utilities, on the Contractor's Project Work schedule submitted under [00180.41](#);
- Protect from damage or disturbance any Utility that remains within the area in which Work is being performed. Maintain and re-establish location marks according to OAR 952-001-0090(2)(a). Coordinate re-establishment of the location marks with the associated Utility;
- Not disturb an existing Utility if it requires an unanticipated adjustment, but will protect the Utility from damage or disturbance and promptly notify the Engineer;
- Determine the exact location before excavating within the reasonable accuracy zone according to OAR 952- 001- 0090(2)(c);
- Pothole all Utilities prior to beginning construction of improvements, and/or ordering materials. Potholing is an incidental item for which no additional payment will be provided.
- Notify the Engineer immediately regarding grade or elevation conflict to allow for redesign or relocation as is necessary.
- Backfill any exposed Utilities as recommended and approved by the Utility representative. Obtain Utility locate warning tape from the Utility and replace damaged or removed warning tape. Utility locate warning tape may not be present at all existing Utilities;
- Stake, place warning tape, and maintain no work limits around critical Utility facilities as shown or directed by the Engineer and the Utility;
- In addition to the notification required in OAR 952- 001- 0090(5), Notify the Engineer and the Utility as soon as the Contractor discovers any previously unknown Utility conflicts or issues. Contrary to the OAR, stop excavating until directed by the Engineer and allow the Utility a minimum of two weeks to relocate or resolve the previously unknown Utility issues; and

- Report to the Engineer any Utility owner who fails to cooperate or fails to follow the planned Utility adjustment.

Unless the delay is caused by acts or omissions of the contracting agency or persons acting therefore, if the Contractor is delayed and has stopped contract Item work for 60 minutes or less, neither additional Contract Time nor additional compensation will be considered.

Subject to the Engineer's approval, the Contractor may adjust the Utilities by asking the Utility owners to move, remove, or alter their facilities in ways other than as shown on the Plans or in the Special Provisions. The Contractor will conduct all negotiations, make all arrangements, and assume all costs that arise from such changes.

In the event the Contractor's work damages Utility, the Contractor must immediately notify the affected Utility of the damage and coordinate the repair work. The Contractor will make available to the Utility any manpower or equipment that will facilitate the repair and the continuation of the scheduled work.

Work within the Tolerance Zone, defined as 24-inches, must proceed with hand tools or non-invasive methods in compliance with OAR 952-001-0090(3)(c). If Contractor's work within Tolerance Zone did not comply with OAR 952-001-0090(3)(c), Contractor will bear all costs of repair.

- (d) Notification** - If the Project is located within the area served by the Oregon Utility Notification Center, the Contractor will notify owners of Utilities prior to the performance of Work in the vicinity of their facilities. The Utilities notification system telephone number is 1-800-332-2344.

The Contractor must comply with the rules of the Oregon Utility Notification Center, [OAR 952-001-0010 through OAR 952-001-0090](#), and [ORS 757.993](#). The Contractor may contact the Oregon Utility Notification Center at 503-232-1987 about these rules.

**00150.55 Cooperation with Other Contractors** - The Agency reserves the right to perform other work on or near the Project Site, including without limitation any Materials site, with forces other than those of the Contractor.

- If such work takes place on or near the Project Site, the Contractor will have the following obligations:
- The Contractor will coordinate Work with other contractors or forces.
- The Contractor will cooperate in good faith with all other contractors or forces.
- The Contractor will perform the Work specified in the Contract in a way that will minimize interference and delay for all forces involved.
- The Contractor will place and dispose of the Materials being used so as not to interfere with the operations of other forces.
- The Contractor will join the Work with that of other forces in a manner acceptable to the Engineer or the Agency, and will perform it in the accepted sequence with the work of the other force.

No extra or additional compensation or time extension will be made for the Contractor's coordination of this work.

The Engineer will resolve any disagreements under this Subsection that may arise among the Contractor and other work forces, or between the Contractor and the Agency. The Engineer's decision in these matters is final, as provided in [00150.00](#).

When the schedules for Work of the Contractor and the work of other forces overlap, each contractor involved will submit a current, realistic progress schedule to the Engineer. Before the Engineer accepts the schedule, each party will have the opportunity to review all schedules. After this review and any necessary consultations, the Engineer will determine acceptable schedules.

The Contractor waives any right it may have to make claims against the Agency for any damages or claims that may arise because of inconvenience, delay, or loss due solely to the presence of other contractors working on or near the Project Site.

If the Contract gives notice of work to be performed by other forces that may affect the Contractor's Work under the Contract, the Contractor will include any costs associated with coordination of the Work in the appropriate Pay Item or as a portion of a Pay Item.

In an emergency, the contractor most immediately able to respond may repair a facility or Utility of another contractor in order to prevent further damage to the facility, Utility, or other Structure as a result of the emergency.

#### **00150.60 Construction Equipment Restrictions:**

**(a) Load and Speed Restrictions for Construction Vehicles and Equipment** - The Contractor will comply with legal weight and speed restrictions when moving Materials or Equipment beyond the limits of the Project Site.

The Contractor will control vehicle and Equipment loads and speeds within the Project Site according to the following restrictions, unless the Special Provisions provide otherwise:

- The Contractor will restrict loads and speeds as necessary to avoid displacement or loss of Materials on Subgrades and Aggregate Bases.
- The Contractor will restrict weights to legal loads, and will travel at speeds of no more than 45 mph or the posted construction speed, whichever is less, on treated Bases, Pavement, or wearing Courses.
- The Contractor will not cross Bridges or other Structures with Equipment or vehicles exceeding the legal load limit without prior written permission of the Engineer. The Contractor will make any such request in writing, describing the loading details and the arrangement, movement, and position of the Equipment on the Structure. The Contractor will comply with any restrictions or conditions included in the Engineer's written permission.

**(b) Protection of Buried Items** - The Contractor will use temporary fill or other methods to avoid overload of pipes, box culverts, and other items that are covered, or to be covered, by fill or backfill.

**(c) Responsibility for Damages** - The Contractor will assume responsibility for damages caused by excessive Equipment speed or loads while performing the Work, both inside and outside the Project Site. The Engineer's permission to cross Bridges and other Structures, according to 00150.60(a) will not relieve the Contractor from responsibility for load-caused damages.

**00150.65 Use of Light, Power, and Water** – The Contractor may connect any temporary electrical service, wiring and piping (with proper application and after obtaining the necessary meters) as required for its operation, to the extent that these services are presently available at the site. Any additional utilities required will be furnished by the Contractor at its own expense.

If the Contractor requires a job telephone, they will furnish same at their own expense.

Contractor will bear all costs for City of Milwaukie refundable water meters deposits. Contractor will not be charged for water from Agency-supplied bulk water meters on Agency capital projects.

Under no circumstances will the Contractor request or seek to use water from residential, commercial, or industrial property owners or tenants.

**00150.70 Detrimental Operations** - The Contractor will avoid operations whose methods, conditions, or timing may injure people or damage property or the Work. Damage may include without limitation, staining surfaces with mud or asphalt or damaging Utilities and foundations (also see [00150.60](#), [00150.75](#), and [Section 00170](#)).

In accordance with generally accepted construction practices, the Contractor will be solely and completely responsible for conditions of the job site, including safety of all persons and property during performance of the work. This requirement will apply continuously and not be limited to Normal Working Hours. The duties of the Agency do not include review of the adequacy of the Contractor's safety measures, on or near the construction site.

When any such damage occurs, the Engineer will determine if it is to be corrected by repair, replacement, or compensatory payment by the Contractor. If compensatory payment is required, the Engineer will determine the amount. Compensatory payment may be deducted from monies due or to become due to the Contractor under the Contract.

**00150.73 Salvage and Recycling Materials** – The Contractor will salvage or recycle construction and demolition debris, if feasible and cost effective. If lawn or landscape maintenance is included in the Work, the Contractor will compost or mulch yard waste material at an approved site, if feasible and cost effective (See [ORS 279C.510](#)).

**00150.75 Protection and Maintenance of Work During Construction** - The Contractor will protect and maintain the Work during construction and until Third Notification has been issued, unless otherwise provided in the Contract. For the purposes of this Subsection, "maintenance" will include measures to prevent deterioration of Roadway and Structures at the Project Site, and to keep them in good condition at all times during the prosecution of the Work. The Contractor will continuously allocate sufficient Equipment and workers to achieve such maintenance.

If the Contract requires the placement of a Course upon a previously constructed Course or Subgrade, the Contractor will maintain the previous Course or Subgrade during all construction operations.

The Contractor will include costs of protecting and maintaining the Work during construction in the unit prices bid for the various Pay Items. The Contractor will not be paid an additional amount for this Work, unless otherwise specified.



The Engineer will timely notify the Contractor of Contractor's noncompliance with this Subsection. If the Contractor fails to remedy unsatisfactory protection or maintenance within 24 hours after receipt of such notice, the Engineer may proceed to remedy the deficiency, and deduct the entire cost from monies due or to become due the Contractor under the Contract.

**00150.80 Removal of Unacceptable and Unauthorized Work** - The Contractor will correct or remove unacceptable Work and remove unauthorized work, as directed by the Engineer in writing. The Contractor will replace such work with Work and Materials conforming to the requirements of the Contract.

For the purposes of this Subsection, "unauthorized work" will include without limitation the following:

- Work that extends beyond lines shown on the Plans or otherwise established by the Engineer;
- Work that is contrary to the Engineer's instructions; and
- Work that is conducted without the Engineer's written authorization.

The Agency will not pay the Contractor for unacceptable Work, except as provided in 00150.25, or for unauthorized work. The Engineer may issue a written order for the correction or removal of such work at the Contractor's sole expense.

If, when ordered by the Engineer, the Contractor fails to correct or remove unacceptable Work or remove unauthorized work, the Engineer may have the correction, removal or removal and replacement, done by others and deduct the entire cost from monies due or to become due the Contractor under the Contract.

**00150.90 Final Inspection:**

**(a) On-site Construction Work** - The Engineer will inspect the Project at a time close to the completion of On-Site Work for Contractor's compliance with the Contract Documents.

When all On-Site Work on the Project is completed, including but not limited to Change Order Work and Extra Work, the Engineer will issue Second Notification as specified in [00180.50\(g\)](#).

Within 15 Calendar Days after the Engineer receives the Contractor's written notification that all punch list items, final trimming and cleanup according to [00140.90](#) have been completed, the Engineer will review the Project and notify the Contractor that all Work is complete, or will give the Contractor written instruction regarding incomplete or unsatisfactory Work.

**(b) All Contract Work** - The Engineer will issue the Third Notification when the Contractor has satisfactorily accomplished all of the following:

- The Contractor has completed all On-Site Work required under the Contract, including the punch list items from (a) above;
- The Contractor has removed all Equipment, other than that incorporated into the Work; and
- The Contractor has submitted all required certifications, bills, forms, warranties and other documents.



The dated date of the Third Notification will be deemed to be the date of completion of the Work, entitling the Contractor to release of retainage. If retainage is due, it will be paid to the normal pay cycle per [00195.50](#).

- (c) **As-Built Drawings** – The Contractor will keep accurate records on a set project plans of all additions or deletions to the work, and of all changes in location, elevation and character of the work not otherwise shown or noted on Contract Documents. Prior to Final Acceptance of the work, the Contractor will transmit this “as-constructed” information to the Engineer for approval.

**00150.91 Post-Construction Review** - The Contractor or the Engineer may request a Post-Construction Review meeting, to be held at a time prior to issuance of Third Notification but not earlier than 45 Days following the date of Second Notification. The meeting may be held if agreed to by both parties. The party making the request will conduct the meeting, and will announce the time and place of the meeting at least 15 Days prior to the meeting date. The purpose of this meeting is to examine the Project for possible process improvements that may benefit future projects.

**00150.95 Final Acceptance** - The Agency will issue a Notice of Final Acceptance after completion of the Contractor's warranty period.

**00150.96 Maintenance Warranties and Guarantees** - Prior to Third Notification, the Contractor will transfer to the Agency all unexpired manufacturers' warranties and guarantees for Materials and Equipment installed on the Project. Such warranties and guarantees will recite that they are enforceable by the Agency.

**00150.97 Responsibility for Materials and Workmanship:**

- (a) The Contractor will perform the Work according to the terms, conditions, and requirements of the Contract.
- (b) Whether before or after the Agency's acceptance of the Work, the Contractor will, at no additional expense to the Agency, be responsible for:
- Correcting or repairing any defects in, or damage to, the Work which results from the use of improper or defective materials or workmanship; or
  - Replacing, in its entirety, the Work affected by the use of improper or defective materials or workmanship to the extent provided by law; and
  - Correcting or repairing any Work, Materials, Structures, Existing Surfacing, Pavement, Utilities, or sites, including without limitation Wetlands, damaged or disturbed in that correction, repair, or replacement (see [00170.80](#) to [00170.85](#)).
- (c) Full or partial termination of the Contract under 00180.90 will not relieve the Contractor of responsibility for completed or performed Work, or relieve the Contractor's Surety of the obligation for any just claims arising from the completed or performed Work.

**Section 150.98 Cleanup** - The Contractor will be responsible for the cleanliness of the construction site at any point to Agency's satisfaction during the construction period until final acceptance. Responsibility of subcontractors, installers, material suppliers or others for

cleanliness will be delegated as the Contractor sees fit but will in no way reduce their responsibility.

Clean up will be done nightly before the Contractor leaves the job site such that hazards to pedestrians and vehicles are minimized. Partial clean-up will be done by the Contractor when they feel it is necessary, or when in the opinion of the Owner or Engineer, partial clean-up should be done prior to major clean-up and final inspection.

If the Contractor fails to commence the cleanup within 24 hours after directed by the Engineer, the Engineer may have the work performed by others. The cost will be borne by the Contractor and may be deducted from payments due or to become due to the Contractor.

**Section 00150.99 Waste Sites** - All debris resulting from construction operations, such as packaging, waste materials, damaged equipment, etc., will be trucked from the site by the Contractor and disposed of at an approved off-site location which is provided by the Contractor. The Contractor will police the hauling of debris to ensure that all spillage from haul trucks is promptly and completely removed from public and/or private rights-of-way.

All debris must be disposed of in accordance with Federal, State and City rules and regulations. The Contractor will operate the waste site in such a manner as to meet all safety and health requirements of State and local agencies. Sites, operations, or the result of such operations, which create a nuisance problem, or which result in damage to public or private properties will not be permitted. The Contractor will not deposit materials on an unimproved dedicated street area without the prior written permission of the Owner.

All excavated materials will be disposed of off-site as provided by the Contractor. All costs for disposing of this excess material and maintaining the disposal site will be incidental to other items of Work contained in the Proposal, unless otherwise specified in the project Special Provisions.

## **SECTION 00160 - SOURCE OF MATERIALS**

**00160.00 Definitions** - The following definitions apply to Section 00160:

- (a) Prospective Source** - Agency-furnished Materials source, use of which by the Contractor is optional. The Agency makes no guarantee or representation, by implication or otherwise, of the land use status, quantity, quality, or acceptability of Materials available from it, except as may be stated in the Special Provisions.
- (b) Mandatory Source** - Agency-furnished Materials source, use of which by the Contractor is required.
- (c) Blue Sheets** - Prequalified products and submittals for qualification of electrical equipment and materials.
- (d) Green Sheets** - Conditionally prequalified products and submittals for conditional qualification of controller equipment.
- (e) Red Sheets** - Statewide list of certification exempt traffic management systems components pursuant to ORS 479.540 and OAR 918-261-0037.

#### **00160.01 Notification of Source of Supply and Materials:**

**(a) All Materials** - The Contractor will notify the Engineer in writing of all proposed Materials sources of supply, including without limitation any steel or other fabricators within the following time frames:

- At least 15 Calendar Days before using or fabricating Materials, if source is within the State; or
- At least 45 Calendar Days before using or fabricating Materials, if source is outside the State

The Contractor will identify if the material source is a DBE or non DBE. For DBE suppliers, the Contractor will identify an estimated value of the materials to be supplied. For any committed DBE supplier, the Contractor will submit a copy of the materials purchase order or supply agreement. For non-committed DBE suppliers, when the estimated value is over \$10,000, the Contractor will submit a copy of the materials purchase order or supply agreement.

For this purpose, a committed DBE firm is one that was identified by the Contractor to meet an assigned DBE goal including DBE firms substituting for DBE firms committed as a condition of contract award.

**(b) Prospective Source Materials** - When given an option to use Prospective Sources of Materials to be incorporated into the Work, the Contractor will notify the Engineer in writing of the option selected within 15 Calendar Days from date of Notice to Proceed. Otherwise, such Materials sources may become unavailable.

**(c) Approval Required** - Before allowing production or delivery of Materials to begin from any source, the Contractor must obtain the Engineer's approval. Approval to use any source does not imply that Materials from that source will be accepted. If approved sources do not provide Materials that meet Specifications, the Materials will be rejected. The Contractor will then be responsible for locating other sources and obtaining the Engineer's approval.

**(d) Terms Required** - The Contractor must comply with [00170.07](#).

**00160.05 Qualified Products List (QPL)** - The QPL is a listing of manufactured products available on the market (shelf items) that ODOT has evaluated and found suitable for a specified use in highway construction. The QPL is available from ODOT's Construction Section website at:

<http://www.oregon.gov/ODOT/HWY/CONSTRUCTION/pages/index.aspx>

The most current published PDF version of the QPL on ODOT's Construction Section website at the time of Advertisement is the version in effect for the Project. The Engineer may approve for use a conditionally qualified product, or a product qualified for inclusion in a later edition of the QPL, if the Engineer finds the product acceptable for use on the Project.

Use of listed products will be restricted to the category of use for which they are listed. The Contractor will install all products as recommended by the manufacturer. The Contractor will replace qualified products not conforming to Specifications or not properly handled or installed at no additional cost to the Agency.

**00160.07 Electrical Equipment and Materials** - The Blue Sheets and Green Sheets are a listing of manufactured products available on the market (shelf items) that ODOT has evaluated and found suitable for use as electrical and controller equipment and materials for highway construction. The Blue Sheets and Green Sheets are available on the ODOT Traffic Standards

website (see 00110.05(e)). The most current version of the Blue Sheets and Green Sheets on the date of Advertisement is the version in effect for the Project.

When the Contract specifies the use of the Blue Sheets and Green Sheets, unless specified as the subject of an exemption per ORS 279C.345, the Agency may approve for use a product qualified for inclusion in a later edition of the Blue Sheets and Green Sheets or other equivalent product that meets the requirements of the Blue Sheets, following the Blue Sheet Qualification/Specification Information, or the Green Sheets, following the ODOT Standard Specification for Microcomputer Signal Controller and errata information, if the Agency finds the product acceptable for use on the Project.

Use of listed products will be restricted to the category of use for which they are listed. The Contractor will install all products as recommended by the manufacturer. The Contractor will replace qualified products not conforming to the Specifications or not properly handled or installed at no additional cost to the Agency

**00160.10 Ordering, Producing, and Furnishing Materials** - The Contractor will not place orders for or produce full quantities of Materials anticipated to be required to complete the Work until the Work has advanced to a stage that allows the quantities to be determined with reasonable accuracy.

**(a) Contractor's Duties** - In purchasing, producing, or delivering Materials, the Contractor will take into account the following:

- Kind of work involved;
- Amount of work involved;
- Time required to obtain Materials; and
- Other relevant factors.

**(b) Approval of Quantity of Materials Ordered** - Materials quantities shown on the Plans, or indicated by quantities and Pay Items, are subject to change or elimination. The Contractor is responsible for payment for excess Materials delivered to the Project Site or storage sites. Unless otherwise specified in the Contract, the Agency will not be responsible for:

- Materials the Contractor may deliver or produce in excess of Contract requirements;
- Extra expense the Contractor may incur because Materials were not ordered or produced earlier; or
- The Contractor's expenses related to Materials ordered by the Contractor that are not subsequently approved for use.

Excess Materials, ordered or produced by the Contractor, without approval of the Engineer, may be purchased by the Agency at the sole discretion of the Agency (see 00195.80).

#### **00160.20 Preferences for Materials:**

- (a) **Buy America** - If federal highway funds are involved on the Project, the Contractor will limit the quantity of foreign Materials incorporated into the Work as follows. Section 635.410 of Title 23, Code of Federal Regulations, and the Intermodal Surface Transportation Efficiency Act require that all iron or steel manufacturing processes, including without limitation the casting of ingots, for iron or steel Materials permanently incorporated into the Project must occur in the United States, unless the cost of foreign-origin iron or steel Materials does not exceed one-tenth of one percent (0.1%) of the Contract Amount or \$2,500, whichever is greater. The Contractor will not incorporate foreign-origin iron or steel Materials in excess of this amount into the Project. All foreign-origin iron or steel Materials incorporated in the Project in excess of the amount indicated above must be removed and replaced with domestic iron or steel Materials at the Contractor's expense. For purposes of this Specification, the cost of foreign-origin iron or steel Materials will be the value of the iron or steel products as of the date they are delivered to the Project Site.

Manufacturing processes include without limitation the application of coatings to finished iron or steel products or components. Coatings include epoxy coating, galvanizing, painting, and any other coating that protects or enhances the value of the steel or iron product or component.

The Contractor will provide the Engineer with a Certificate of Materials Origin, on a form furnished by the Engineer, before incorporating any iron or steel products into the Project. Unless a Certificate of Materials Origin has been provided to the Engineer, the Materials will be considered of foreign origin.

The Contractor will retain manufacturers' certificates verifying the origin of all domestic iron or steel Materials for 3 years after the date of final payment for the Project, and will furnish copies to the Engineer upon request.

- (b) **Buy Oregon** - According to [ORS 279A.120](#), the Contractor will give preference to goods or services produced in Oregon if price, fitness, availability, and quality are equal. This provision does not apply to Contracts financed wholly or in part by federal funds.
- (c) **Recycled Materials** - According to [ORS 279A.010](#), [ORS 279A.125](#), [ORS 279A.145](#), [ORS 279A.150](#), and [ORS 279A.155](#), and subject to the approval of the Engineer, the Contractor will use recycled products to the maximum extent economically feasible.

**00160.21 Cargo Preference Act Requirements** - If federal highway funds are involved on the Project, the Contractor must comply with the Cargo Preference Act and implementing regulations ([46 CFR Part 381](#)) for use of United States flag ocean vessels transporting materials or equipment acquired specifically for the Project. Strict compliance is required, including but not limited to the clauses in [46 CFR 381.7\(a\) and \(b\)](#) which are incorporated by reference. The Contractor will also include this provision in all subcontracts.

Additional information may be available at the following websites:

<https://www.fhwa.dot.gov/construction/cqit/cargo.cfm>

<https://www.fhwa.dot.gov/construction/cqit/cargo/qa.cfm>

**00160.30 Agency-Furnished Materials** - Unless otherwise specified in the Special Provisions, Materials listed as Agency-furnished will be available to the Contractor free of charge.

The Contractor will be responsible for all Materials furnished by the Agency and will pay all demurrage and storage charges. The Contractor will replace at its expense Agency-furnished Materials lost or damaged due to any cause.

The locations at which Agency-furnished Materials are available will be specified in the Special Provisions. If the locations are not listed in the Special Provisions, the Agency-furnished Materials will be furnished to the Contractor at the Project Site. In either case, all costs of handling, hauling, unloading, and placing Agency-furnished Material will be considered included in the price paid for the Pay Item involving such Material.

All Agency-furnished Materials not incorporated into the Work remains the property of the Agency. The Contractor will deliver such Materials as directed by the Engineer.

**00160.40 Agency-Furnished Sources** - The Agency may list in the Special Provisions, or show on the Plans, Borrow pits or Aggregate sources from which the Contractor may, or will, obtain Materials. These sources will be identified and referred to as Prospective or Mandatory Sources. A development plan will be included in Section 00235 of the Special Provisions when such sources are shown on the Plans.

**(a) Working in a Different Area of the Materials Source** - If the Contractor desires to work in a different area of the Materials source than that shown on the development plan, the Contractor must submit a written request stating the reasons for the requested change. If a new land use permit, development plan, or reclamation plan is needed, the Contractor must submit it and obtain approval from the Engineer before starting work in any area other than that shown on the Plans. Approval for work in a different area will not entitle the Contractor to any added compensation or adjustment of Contract Time.

The Agency will not be responsible for the availability of sources other than as stated in the Special Provisions. If the Contractor has given notice of intent to use, but does not use the source(s) on the Project, the Contractor will reimburse the Agency for any costs the Agency incurs in making such source(s) available.

**(b) Cost of Sources** - Unless otherwise specified in the Special Provisions, any Prospective or Mandatory Source will be provided by the Agency for use without payment of royalty or other charge (see [00160.50](#)).

**(c) Exhaustion of Sources** - If the Engineer determines that the quantities of specified Materials that can be produced from a Mandatory Source are insufficient for the Work, and it becomes necessary to move to another source, the Agency will pay for the reasonable cost of moving the plant to, and erecting it at, a new approved source from which specified Materials can be produced. Adjustment in hauling costs, other costs, and Contract Time will be determined as provided in [00140.30](#).

No allowance, reimbursement, compensation, or adjustment will be made for changes in the use of sources, or for moving from one source to another, except as provided above.

**00160.50 Agency-Controlled Land; Limitations and Requirements:**

- (a) **General** - The Contractor will have no property rights in, or right of occupancy on, Agency-Controlled Land. Nor will the Contractor have the right to sell, use, remove, or otherwise dispose of any material from Agency-Controlled Land, areas, or property, except as specified or by the written authorization of the Engineer.

Unless authorized in the Contract, the Contractor will not disturb any material within Rights-of-Way without written authorization from the Engineer.

Unless otherwise specified in the Contract, the ownership of all materials originating on Agency-Controlled Lands will at all times vest in, and remain within the control of, the Agency.

- (b) **Waste, Excess, and By-Product Materials** - All waste, excess, and by-product materials, collectively referred to in this Subsection as "By-Products", from the manufacture or production of Aggregate Materials from Agency-Controlled Lands will remain Agency property. Unless otherwise ordered by the Engineer in writing, By-Products will be placed as required by the development plan:

- In stockpiles at designated locations;
- At locations and in shapes that are readily accessible; and
- In such a manner as to avoid fouling areas containing useable materials, or interfering with future plant setups to use materials from the property.

The Agency will not compensate the Contractor for handling and stockpiling By-Products according to the development plan requirements. If by written order the Engineer directs the Contractor to stockpile or place designated By-Products at alternate sites, the By-Products designated must be loaded, hauled, and placed as directed, and this work will be paid for according to [00195.20](#).

**00160.60 Contractor-Furnished Materials and Sources:**

- (a) **General** - The Contractor will furnish, at its own expense, all products and Materials required for the Project from sources of its own choosing, unless such sources have been specified in the Special Provisions or Plans as Prospective or Mandatory Sources.

- (b) **Acquisition of Sources** - The Contractor will acquire, at its own expense, the rights of access to, and the use of, all sources the Contractor chooses which are not Agency-controlled and made available by the Agency to the Contractor.

- (c) **Additional Requirements** - Except for continuously-operated commercial sources, Work will not begin, nor will any Materials be accepted by the Engineer, until the Contractor has:

- (1) Given to the Engineer a copy of permits from, or proof that permits are not required from:
- The Department of Geology and Mineral Industries, as required under [ORS 517.790](#);
  - The Department of State Lands, as required under [ORS 196.815](#) (when removing material from the bed or banks of any waters or from any Wetland); and
  - Local governmental authorities having jurisdiction over land use at the source location.

- (2) Furnished to the Engineer written approval of the property owner, if other than the Contractor, for the Contractor's proposed plans of operation in, and reclamation of, the source. The Contractor will include in the document containing the property owner's written approval a summary of the requirements of the permits described above, which will be subject to the Engineer's approval.

**00160.70 Requirements for Plant Operations** - Before operating mixing plants, Rock crushers, or other Equipment, the Contractor will provide the Engineer copies of all applicable discharge permits for noise, air contaminants, and water pollutants from DEQ or applicable local jurisdictions, or a letter from DEQ or the local jurisdiction stating that no permits are required for the use of the Equipment and sites.

**00160.80 Requirements for Sources of Borrow and Aggregate** - The Contractor will conduct operations according to all applicable federal, State, and local laws (including without limitation [ORS Chapter 517](#) and [OAR 632-030](#)) when developing, using, and reclaiming all sources of Borrow material and Aggregate. The Contractor will provide erosion control at Borrow sources that are not within the Project Site. The Contractor will not operate in Wetlands except as allowed by permit. The Contractor will comply with all requirements for pollution and sediment control, including without limitation the National Pollutant Discharge Elimination System where applicable.

Except for continuously-operated commercial sources, the Contractor will also conform to the following:

- (a) If a natural growth of trees or shrubs is present, preserve a border of such to conceal land scars.
- (b) Excavate Borrow sources and Aggregate sources, except for those in streams and rivers, to provide:
- Reasonably uniform depths and widths;
  - Natural drainage so no water stands or collects in excavated areas, when practicable;
  - Slopes trimmed to blend with the adjacent terrain upon completion of operations;
  - Slopes covered with native soil, or acceptable plant rejects to support plant growth, if required by Specifications, Plans, or permits; and
  - A vegetative cover that blends with the adjacent natural growth.
- (c) Excavate in quarries so that:
- Faces will not be steeper than vertical (no overhang);
  - Vertical faces conform to Oregon OSHA standards, Division 3, and as shown on an approved development plan;
  - Floors or benches are excavated to a uniform Slope free of depressions and will drain and not interfere with the downland owner's property; and
  - Upon completion, the quarry is left appearing neat and compatible with surrounding terrain.
- (d) Obliterate haul roads specifically built for access to sources, and restore the areas disturbed by these roads as nearly as practicable to the conditions that existed before the roads were built, unless otherwise directed by the landowner or regulatory body.



## **SECTION 00165 - QUALITY OF MATERIALS**

**00165.00 General** - The Contractor will incorporate into the Work only Materials conforming to the Specifications and approved by the Engineer. The Contractor will incorporate into the Work only manufactured products made of new materials unless otherwise specified in the Contract. The Agency may require additional testing or retesting to determine whether the Materials or manufactured products meet Specifications.

Materials or manufactured products not meeting the Specifications at the time they are to be used are unacceptable and must be removed immediately from the Project Site, unless otherwise directed by the Engineer.

**00165.01 Rejected Materials** - The Engineer may reject any Materials that appear to be defective ([00150.25](#)) or that contain asbestos. The Contractor will not incorporate any rejected Materials into the Work. Rejected Materials whose defects have been corrected may not be incorporated into the Work until the Engineer has approved their use. The Engineer may order the removal and replacement by the Contractor, at Contractor's expense, of any defective Materials (refer also to [00150.20](#)).

**00165.02 Materials Conformance and Quality Compliance Documents** - For purposes of this Section, "Materials Conformance Documents" means the Contractor's quality-control, the Agency's verification, and the independent assurance test results, and the identity of the testing facility, as specified in the ODOT Manual of Field Test Procedures (MFTP), unless otherwise specified in the Contract.

For purposes of this Section, "Quality Compliance Documents" means those documents specified in ODOT's Nonfield-Tested Materials Acceptance Guide, unless otherwise specified in the Contract.

**00165.03 Testing by Agency** - When testing Materials, the Agency will conduct the tests in its central laboratory, field laboratories, or other laboratories designated by the Engineer, even though certain AASHTO, ASTM, and other Materials specifications may require testing at the place of manufacture. Results of the Agency's tests will be made available to the Contractor.

**00165.04 Costs of Testing** - When the Contract requires that the Agency performs the testing, the testing will be at the Agency's expense. The Agency will pay the cost of Contractor-requested source-review tests on unprocessed Aggregates from no more than two sources for each Project, and on no more than three unprocessed samples from each source. Additional source-review tests performed at the Contractor's request will be at the Contractor's expense.

Unless otherwise provided in the Contract, all testing required to be performed by the Contractor will be at the Contractor's expense.

**00165.10 Materials Acceptance Guides** - Unless otherwise specified elsewhere in the Contract, Materials will be accepted according to the following guides:

- (a) **Field-Tested Materials** - Field-tested Materials will be accepted according to the MFTP as modified by the City of Milwaukie. The MFTP is published once per year and is available from the ODOT Construction Section, 800 Airport Road SE; Salem, OR 97301-4798; phone 503.986.3000. The MFTP is also available on the ODOT Construction Section web site. The most current version of the MFTP on the date of Advertisement is the version in effect for the Project. City of Milwaukie modifications will be specified in the Special Provisions.
- (b) **Nonfield-Tested Materials** - Nonfield-tested Materials will be accepted according to the ODOT Nonfield Tested Materials Acceptance Guide (NTMAG), unless otherwise specified in the Contract. The NTMAG is available on the ODOT Construction Section web site. The most current version of the NTMAG on the date of Advertisement is the version in effect for the Project.

**00165.20 Materials Specifications and Test Method References** - References to Materials specifications and test methods of ODOT, WAQTC, AASHTO, ASTM, other governmental agencies, or other recognized organizations mean those officially adopted and in current use by the agency or organization on the date of Advertisement.

If there are conflicting references, or if no reference is made to Materials specifications or test method, Materials must meet the Materials specifications or test methods required by the first applicable of the following agencies and organizations:

Field-Tested Materials:

- Contract Change Orders;
- Special Provisions;
- MFTP as modified by the City of Milwaukie; and
- Standard Specifications.

Nonfield Tested Materials:

- Contract Change Orders;
- Special Provision;
- Supplemental Specifications;
- ODOT;
- Standard Specifications;
- WAQTC;
- AASHTO;
- ASTM;
- Other recognized national organizations, such as ANSI, AWWA, IMSA, and UL; and
- Industry standards in the location where the Work is being performed.

If there are conflicting references in the Contract or the Quality Assurance program, to required sampling and testing frequencies, the Contractor will sample and test the Materials according to the first applicable of the following:

Contract Change Orders;

- Special Provisions;
- Supplemental Specifications;
- MFTP; and
- Standard Specifications.

If the Contractor identifies that no reference is made, the Contractor will immediately request a clarification from the Engineer.

**00165.30 Field-Tested Materials:**

**(a) Contractor's Duties** - The Contractor must:

- Furnish Materials of the quality specified in the Contract;
- Provide and administer a quality control program as described in the Quality Assurance Manual portion of the MFTP. Upon request, the Contractor will provide to the Engineer the names, telephone numbers, and copies of certifications for all personnel performing field testing; and
- Perform other testing as required by the Contract.

**(b) Types of Tests** - The types of tests and testing methods generally required by the Agency are described in the MFTP.

**(c) Acceptance of Field-Tested Materials** The Contractor's test results for field-tested Materials will be verified by the Agency according to the Quality Assurance program outlined in the MFTP. Verification testing will be performed by the Engineer at the frequency and discretion of the Engineer, or the Engineer may choose to accept the Contractor's quality control testing in lieu of performing verification testing. If the Agency's QA test results verify the Contractor's results, the Materials will be analyzed for acceptance according to one of the following methods before the Engineer will accept them for incorporation into the Work:

- Statistically, according to [00165.40](#), to determine "Pay Factors" for produced Aggregate;
- Statistically, according to [00165.40](#), to determine "Composite Pay Factors" for mixtures; or
- Other methods determined by the Engineer.

If the Agency's verification testing reveals that the Contractor's data is incorrect, the Agency may require additional testing to determine whether the Materials meet Specifications. The Contractor will perform additional quality control testing or provide split samples to the Agency for additional testing as directed. If the Materials do not meet Specifications, the Contractor will reimburse the Agency for the cost of the additional testing, which may be deducted from monies due or to become due the Contractor under the Contract. Incorporated Materials that do not meet Specifications will be evaluated according to [00165.01](#) and [00150.25](#). If the Materials meet Specifications the Agency will pay the cost for the additional testing.

**00165.35 Nonfield-Tested Materials** - The Contractor will furnish Materials meeting Specifications, along with all Materials Conformance and Quality Compliance Documents.

**(a) Test Results Certificate** - The Certificate must:

- Be from the manufacturer verifying that the Material furnished has been sampled and tested and the test results meet the Specifications.
- Include, or be accompanied by, a copy of the specified test results (ODOT, AASHTO, ASTM, UL or other).
- Identify the testing agency and the representative responsible for the test results.
- Permit positive determination that Material delivered to the Project is the same Material covered by the test results.
- Be delivered to the Engineer with the shipment of the material.

**(b) Quality Compliance Certificate** - The Certificate from the manufacturer must:

- Verify that the Material meets the Specifications, and identify by number the specified test methods used (ODOT, AASHTO, ASTM, UL, or other);
- Permit positive determination that Material delivered to the Project is the same Material covered by the certificate; and
- Be delivered to the Engineer with the shipment of the Material, or be an identification plate or mark, decal, sticker, label, or tag attached to the container or Material.

**(c) Equipment List and Drawings** - These consist of lists of proposed Equipment and Materials, such as:

- Shop drawings
- Material lists
- Equipment lists
- Catalog description sheets
- Manufacturer's brochures

Submit these lists to the Engineer for review of conformance with the Specifications.

**(d) Certificate of Origin of Steel Materials** - When specified, complete this document (ODOT Form 734-2126) as required by [00160.20](#) for Federal-aid projects.

Materials will be subject to acceptance testing if the Engineer so elects. The Engineer may reject damaged or non-Specification Materials regardless of the Materials Conformance Documents furnished.

**00165.40 Statistical Analysis** - Statistical Analysis is not required. When [00165.30\(c\)](#) or [00165.50](#) applies the Contractor will divide the Materials into lots and sublots and randomly sample and test them as required. The Engineer will analyze the materials and determine if the Materials conform to the Specifications. If this subsection has been referenced it will be understood that Statistical Analysis is not required and the Engineer will clarify the intent according to [00150.10\(c\)](#).

**(a) Lot** - A lot is the quantity of Materials produced by a single process or JMF that is sampled and tested, as specified in this Subsection.

**(b) Sublot** - A sublot is a portion of a lot, for which a sample test value may be normally obtained.

**00165.50 Acceptance Sampling and Testing** - The Contractor will sample and test Materials for acceptance, as required by the Contract. Materials will be analyzed as determined by the Engineer for acceptance before the Engineer will accept them for incorporation into the Work. Acceptance based on Statistical Analysis is not required. When the Engineer determines the Materials or Work does not conform to the Specifications the Engineer may accept the Materials or Work with pay adjustments or reject the Materials or Work per [00150.25](#).

**00165.70 Use of Materials without Acceptable Materials Conformance Documents:**

- (a) **General** - The Contractor will not incorporate Materials into the Project prior to submittal of Materials Conformance Documents acceptable to the Engineer. The Engineer may waive this requirement temporarily if Materials are necessary for immediate traffic safety.
- (b) **Materials Incorporated for Immediate Traffic Safety** - If Materials are incorporated into the Project for immediate traffic safety before acceptable Materials Conformance Documents are available, no payment will be made for the value of the Materials, or the costs of incorporating them, until Materials Conformance Documents have been submitted to and approved by the Engineer, or the Materials are otherwise found through testing to comply with Specifications.
- (c) **Contractor's Request for Testing Assistance** - If acceptable Materials Conformance Documents are not available, the Contractor may either have the necessary tests performed at a private laboratory or request in writing that the Engineer:
- Determine if the Agency or its agents can sample and test;
  - Estimate the cost to the Contractor for the testing service; and
  - Estimate the time required to obtain the test results.

The Engineer will provide this information to the Contractor in writing. If the Contractor requests the Engineer, in writing, to proceed, the Engineer will arrange for the sampling and testing, at the Contractor's expense. If these tests determine the Material complies with the Specifications, the Materials may be incorporated into the Project, or for Materials previously incorporated according to (b) above, payment will be authorized.

**00165.75 Storage and Handling of Materials** - The Contractor will store and handle Materials so as to preserve their quality and fitness for incorporation into the Work. The Contractor will restore all storage sites to the original condition according to [00140.90](#), or to comply with any applicable permits, orders, or agreements, at the Contractor's expense.

Stored Materials:

- Must be readily accessible for inspection;
- May be stored on approved parts of the Right-of-Way; and
- May be stored on private property if written permission of the owner or lessor is obtained and furnished to the Agency.

**00165.80 Measurement** - No separate measurement will be made of Work performed under this Section.

**00165.90 Incidental Basis** - No separate or additional payment will be made for sampling, testing, certification, or other associated Work performed under this Section, whether performed by the Contractor, manufacturer, producer or supplier. No payment will be made for providing quality control personnel.

**00165.91 Fabrication Inspection Expense** - Fabrication of certain items outside of the State creates additional shop and plant inspection expense to the Agency. It is impractical, and extremely difficult, to determine the actual additional expenses incurred. Therefore, each time that inspection by or on behalf of the Agency is necessary, payment to the Contractor will be reduced by an amount computed at the following rates:

<b>Zone</b>	<b>Place of Fabrication</b>	<b>Reduction in Payment</b>
1	All of State of Oregon, and those portions of adjacent states within 50 airline miles of the Oregon border	\$0
2	Outside of Zone 1, and up to 300 airline miles from the Oregon border	\$100 per Calendar Day
3	Outside of Zone 2, up to 3,000 airline miles from the Oregon border, and within the continental United States.	Round trip coach airfare from Portland, Oregon plus \$100 per Calendar Day
4	Outside of Zone 3, or outside of the continental United States.	Round trip coach airfare from Portland, Oregon plus \$150 per Calendar Day

Calendar Day charges begin on the first day the Agency's inspector begins travel to begin work at the fabrication site, and continue without interruption through the final day of travel back to the State. The Contractor will be notified in writing of the dates of beginning and ending of Calendar Days used in computing payment reduction.

This Subsection applies to all fabricated items or manufactured Materials that are inspected by or on behalf of the Agency, which include, but are not limited to:

- Structural steel fabrication;
- Prestressed concrete members;
- Precast concrete;
- Signs;
- Preservative treatment of wood products;
- Epoxy coating of reinforcing steel; and
- Other items specifically identified in the Specifications as requiring fabrication site or in-plant inspection by the Agency.

## **SECTION 00170 - LEGAL RELATIONS AND RESPONSIBILITIES**

**00170.00 General** - The Contractor will comply with all laws, ordinances, codes, regulations and rules, (collectively referred to as "Laws" in this Section), that relate to the Work or to those engaged in the Work. Where the provisions of the Contract are inconsistent or in conflict, the Contractor will comply with the more stringent standard.

The Contractor will indemnify, defend, and hold harmless the Agency and its representatives from liability arising from or related to the violation of Laws by those engaged in any phase of the Work. This provision does not apply to Work performed by Agency employees.

In any litigation, the entire text of any order or permit issued by a governmental or regulatory authority, as well as any documents referenced or incorporated therein by reference, will be admissible for the purpose of Contract interpretation.

The characterization of provisions of the Contract as material provisions or the failure to comply with certain provisions as a material breach of the Contract will in no way be construed to mean that any other provisions of the Contract are not material or that failure to comply with any other provisions is not a material breach of the Contract.

All rights and remedies available to the Agency under applicable Laws are incorporated herein by reference and are cumulative with all rights and remedies under the Contract.

The Contract will not be construed against either party regardless of which party drafted it. Other than as modified by the Contract, the applicable rules of contract construction and evidence will apply. This Contract will be governed by and construed according to the laws of the State of Oregon without regard to principles of conflict of laws.

Any dispute between the Agency and the Contractor that arises from or relates to this Contract and that is not resolved under the provisions of [Section 00199](#) will be brought and conducted solely and exclusively within the Circuit Court for the State of Oregon in the county where the Agency's main office is located; provided, however, if a dispute must be brought in a federal forum, then it will be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event will this Subsection be construed as a waiver by the State of Oregon on any form of defense or immunity, whether sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States or otherwise, from any claim or from the jurisdiction of any court. CONTRACTOR BY EXECUTION OF THE CONTRACT HEREBY CONSENTS TO THE IN PERSONAM JURISDICTION OF THE COURTS REFERENCED IN THIS SECTION.

It is the Agency's intention to make all payments due under the Contract if funds are legally available for such purpose. The Agency reasonably believes that at the time of entering into the Contract sufficient funds are available and authorized for expenditure to finance the cost of the Contract within the Agency's appropriation or limitation, or other funding sources. Agency's payment of amounts under the Contract is contingent on the Agency receiving adequate appropriations, limitations or other expenditure authority or funds to allow the Agency to continue to make payments under the Contract. In the event the Agency becomes aware that sufficient funds are not available and authorized, the Agency will provide prompt written notice to the Contractor, and the Agency may terminate the Contract as provided in 00180.90(c).

**00170.01 Other Agencies Affecting Agency Contracts** - Representatives of regulatory bodies or units of government whose Laws may apply to the Work will have access to the Work according to [00150.20\(d\)](#). These may include but are not limited to those in the following (a), (b), (c), and (d).

**(a) Federal Agencies:**

Agriculture, Department of  
    Forest Service  
    Natural Resource Conservation Service  
Army, Department of the  
    Corps of Engineers  
Commerce, Department of  
    National Marine Fisheries Service  
Defense, Department of  
Energy, Department of  
Environmental Protection Agency (EPA)  
Federal Energy Regulatory Commission  
Geology Survey  
Health and Human Services, Department of  
Homeland Security, Department of  
    U.S. Coast Guard (USCG)  
Housing and Urban Development, Department of  
Interior, Department of  
    Heritage, Conservation, and Recreation Service  
    Bureau of Indian Affairs  
    Bureau of Land Management  
    Bureau of Mines  
    Bureau of Reclamation  
    Geological Survey  
    Minerals Management Service  
    Office of Surface Mining, Reclamation, and Enforcement  
Minerals Management Service  
National Oceanic and Atmospheric Administration  
Solar Energy and Energy Conservation Bank  
U.S. Fish and Wildlife Service  
Labor, Department of  
    Mine Safety and Health Administration



Occupational Safety and Health Administration (OSHA)  
Transportation, Department of  
Federal Highway Administration  
Water Resources Council

**(b) State of Oregon Agencies:**

Administrative Services, Department of  
Agriculture, Department of  
Natural Resources Division  
Soil and Water Conservation District  
Columbia River Gorge Commission  
Consumer and Business Services, Department of  
Insurance Division  
Oregon Occupational Safety and Health Division (OR-OSHA)  
Energy, Office of  
Environmental Quality, Department of (DEQ)  
Fish and Wildlife, Department of  
Forestry, Department of  
Geology and Mineral Industries, Department of  
Human Resources, Department of  
Labor and Industries, Bureau of  
Land Conservation and Development Department  
Parks and Recreation, Department of  
State Lands, Department of  
Water Resources Department

**(c) Local Agencies:**

City Councils  
County Courts  
County Commissioners, Boards of  
Design Commissions  
Historical Preservation Commissions  
Lane Regional Air Pollution Authority (LRAPA)  
Planning Commissions  
Port Districts  
Special Districts

**(d) Oregon Federally Recognized Tribal Governments:**

Burns Paiute Tribe  
Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians  
Confederated Tribes of Grand Ronde  
Confederated Tribes of Siletz  
Confederated Tribes of Umatilla Indian Reservation  
Confederated Tribes of Warm Springs  
Coquille Tribe  
Cow Creek Band of Umpqua Indians  
Klamath Tribe

**00170.02 Permits, Licenses, and Taxes** - As required to accomplish the Work, the Contractor must do the following:

- Obtain all necessary permits and licenses, except for those noted in 00170.03;
- Pay all applicable charges, fees and taxes, except for those noted in 00170.03;
- Give all notices required by applicable Laws, or under the terms of the Contract;
- Comply with [ORS 274.530](#) relating to lease of stream beds by Oregon Division of State Lands;
- License, in the State of Oregon, all vehicles subject to licensing;
- Comply with [ORS 477.625](#) and [ORS 527.670](#) relating to clearing and fire hazards on forest lands;
- Comply with all orders and permits issued by a governmental authority, whether local, State, or federal;
- Pay the cost of referencing and endangered survey monuments;
- Furnish a deposit for use of a City of Milwaukie hydrant meter; and
- Obtain Environmental permits, including erosion control permits issued by DEQ.

**00170.03 Furnishing Right-of-Way and Permits** - Unless required to be obtained in the name of the Contractor, the Agency will obtain and pay for the following when they are required by the applicable Laws or by Plans or Specifications:

- All necessary Rights-of-Way;
- Permits required for crossing or encroaching upon navigable streams;
- Permits required for removing materials from or depositing materials in waterways;
- Permits required for operating in Agency-controlled source of Materials or disposal area;
- System development fees charged by local units of government;
- City of Milwaukie permits for use of the right-of-way and tree removal.

**00170.04 Patents, Copyrights, and Trademarks** - Prior to use of designs, devices, materials, or processes protected by patent, copyright, or trademark, the Contractor will obtain from the Entity entitled to enforce the patent, copyright, or trademark all necessary evidence of Contractor's legal right to use such design, device, material, or process.

The Contractor will indemnify, defend and hold harmless the Agency and all third parties and political subdivisions having a possessory or ownership interest or regulatory authority over the Project or Project Site from claims of patent, copyright or trademark infringement, and from costs, expenses and damages the Contractor or Agency may be obligated to pay as a result of such infringement during or after completing the Work.

**00170.05 Assignment of Antitrust Rights** - The Contractor irrevocably assigns to the Agency any claim for relief or cause of action the Contractor acquires during the term of the Contract, or which may accrue thereafter, by reason of any violation of:

- [Title 15 \(Commerce and Trade\), United States Code;](#)
- [ORS 646.725;](#) or
- [ORS 646.730.](#)

In connection with this assignment, it is an express obligation of the Contractor to take no action that would in any way impair or diminish the value of the rights assigned to the Agency according to the provisions of this Subsection. Further, it is the express obligation of the Contractor to take all action necessary to preserve the rights assigned. It is an express obligation of the Contractor to advise the Agency's legal counsel:

- In advance, of its intention to commence any action involving such claims for relief or causes of action;
- Immediately upon becoming aware of the fact that an action involving such claims for relief or causes of action has been commenced by some other person or persons;
- The date on which it notified the obligor(s) of any such claims for relief or causes of action of the fact of the Contractor's assignment to the Agency according to the provisions of this Subsection; and
- Immediately upon the discovery of any such antitrust claim for relief or cause of action.

In the event any payment is made to the Contractor under any such claims for relief, the Contractor will promptly pay the full sum over to the Agency. In the event the Contractor fails to make such payment, the Agency may deduct the amount from monies due or to become due the Contractor under the Contract.

**00170.07 Record Requirements** - For purposes of this Subsection the term "Contractor" includes the Contractor, all subcontractors, Material Suppliers, and providers of rented operated Equipment (except non-DBE truck drivers), at all tiers, for all subcontracts with first-tier Subcontractors, all subcontracts between the first-tier Subcontractors and their subcontractors and any other lower tier subcontracts, and "Related Entities" as that term is defined in [OAR 734-010-0400](#). The Material Suppliers included in this definition are those for Aggregates, Asphalt Cement Concrete, Portland Cement Concrete and the supply and fabrication of structural steel items or Material Suppliers that provide quotes.

**(a) Records Required** - The Contractor will maintain all records, whether created before or after execution of the Contract, or during Contract performance, or after Contract completion, to clearly document:

- The Contractor's performance of the Contract or a subcontract;
- The Contractor's ability to continue performance of the Contract or a subcontract; and
- All claims arising from or relating to performance under the Contract or a subcontract.

These records will include all records, including fiscal records, regardless of when created for the Contractor's business. The records for the Contractor's business include without limitation the:

- Bidding estimates and records, worksheets, tabulations or similar documents.
- Job cost detail reports, including monthly totals.
- Payroll records (including without limitation the ledger or register, and tax forms) and all documents which establish the periods, individuals involved, the hours for the individuals, and the rates for the individuals.
- Records that identify the Equipment used by the Contractor and subcontractors in the performance of the Contract or subcontracts, including without limitation, Equipment lists, rental contracts and any records used in setting rental rates.
- Invoices from vendors, rental agencies, and subcontractors.
- Material quotes, invoices, purchase orders and requisitions.
- Contracts with subcontractors and contracts with Material Suppliers, Suppliers and providers of rented equipment.
- Contracts or documents of other arrangements with any Related Entity as defined in OAR 734-010-0400.
- General ledger.
- Trial Balance.
- Financial statements (including without limitation the balance sheet, income statement, statement of cash flows, and financial statement notes).
- Income tax returns.
- All worksheets used to prepare bids or claims, or to establish the cost components for the Pay Items, including without limitation, the labor, benefits and insurance, Materials, Equipment, and subcontractors.

The following are examples, but not an exhaustive list, of records that would be included, if generated by the Contractor. If the Contractor generates such records, or equivalent records, they are included among the records subject to [00170.07](#).

- Daily time sheets and supervisor's daily reports.
- Collective bargaining agreements.
- Earnings records.
- Journal entries and supporting schedules.
- Insurance, welfare, and benefits records.
- Material cost distribution worksheet.

- Subcontractors' and lower tier subcontractors' payment certificates.
- Payroll and vendor's cancelled checks.
- Cash disbursements journal.
- All documents related to each and every claim together with all documents that support the amount of damages as to each claim.
- Additional financial statements (including without limitation the balance sheet, income statement, statement of cash flows, and financial notes) preceding the execution of the Contract and following final payment of the Contract.
- Depreciation records on all business Equipment maintained by the business involved, its accountant, or other Entity (If a source other than depreciation records is used to develop cost for the Contractor's internal purposes in establishing the actual cost of owning and operating Equipment, all such other source documents).

The Contractor will maintain all fiscal records in material compliance with generally accepted accounting principles, or other accounting principles that are accepted accounting principles and practices for the subject industry and adequate for the nature of the Contractor's business, and in such a manner that providing a complete copy is neither unreasonably time consuming nor unreasonably burdensome for the Contractor or the Agency. Failure to maintain the records in this manner will not be an excuse for not providing the records.

The Contractor will include in its subcontracts, purchase orders, and all other written agreements, a provision requiring all subcontractors, Material Suppliers and providers of rented operated Equipment, (except non-DBE truck drivers), at all tiers to comply with [00170.07](#). The Contractor will also require all subcontractors, Material Suppliers, and providers of rented operated Equipment, (except non-DBE truck drivers), at all tiers and Related Entities to include in their contracts, purchase orders, and all other written agreements, a provision requiring all lower tier subcontractors, Material Suppliers and providers of rented operated Equipment (except non-DBE truck drivers) to comply with [00170.07](#). The Material Suppliers to which this applies are those for Aggregates, Asphalt Cement Concrete, Portland Cement Concrete and the supply and fabrication of structural steel items or Material Suppliers that provide Material quotes and Related Entities as defined in [OAR 734-010-0400](#).

**(b) Access to Records** - The Contractor will provide the Engineer access to or a copy of all Contractor records upon request. A Project Manager's authority to request or access records is subject to [OAR 734-010-0400\(9\)](#). During the record retention period the Engineer, employees of the Agency, representatives of the Agency, or representatives of regulatory bodies or units of government may:

- Inspect, examine and copy or be provided a copy of all Contractor records;
- Audit the records, a Contract or the performance of a Contract;
- Inspect, examine and audit the records when, in the Agency's sole discretion, the records may be helpful in the resolution of any claim, litigation, administrative proceeding or controversy arising out of or related to a Contract.

Reasons for access to audit, inspect, examine and copy records include without limitation, general auditing, reviewing claims, checking for collusive bidding, reviewing or checking payment of required wages, performance and contract compliance, workplace safety compliance, evaluating related Entities, environmental compliance, and qualifications for

performance of the Contract, including the ability to perform and the integrity of the Contractor.

Where such records are stored in a computer or in other digital media, the Engineer may request, and the Contractor will provide, a copy of the data files and such other information or access to software to allow the Engineer review of the records.

Nothing in [00170.07](#) is intended to operate as a waiver of the confidentiality of any communications privileged under the Oregon Evidence Code. Nothing in [00170.07](#) limits the records or documents that can be obtained by legal process.

**(c) Record Retention Period** - The Contractor will maintain the records and keep the records accessible and available at reasonable times and places for at least 3 years from the date of final payment under the Contract, or until the conclusion of all audits, litigation, administrative proceedings, disputes and claims arising out of or related to the Contract, whichever date is later.

**(d) Public Records Requests** - If records provided under this section contain any information that may be considered exempt from disclosure as a trade secret under either [ORS 192.345\(2\)](#) or [ORS 646.461\(4\)](#), or under other grounds specified in Oregon Public Records Law, [ORS 192.311 through ORS 192.338](#), the Contractor will clearly designate on or with the records the portions which the Contractor claims are exempt from disclosure, along with a justification and citation to the authority relied upon. Entire records or documents should not be designated as a trade secret or otherwise exempt from disclosure. Only specific information within a record or document should be so designated.

To the extent allowed by the Oregon Public Records Law or other applicable law related to the disclosure of public records, Agency will not disclose records or portions of records the Contractor has designated as trade secrets to a third party, who is not a representative of the Agency, to the extent the records are exempt from disclosure as trade secrets under the Oregon Public Records Law or other applicable law, except to the extent Agency is ordered to disclose in accordance with the Oregon Public Records Law or by a court of competent jurisdiction. Application of the Oregon Public Records Law or other applicable law will determine whether any record, document or information is actually exempt from disclosure.

In addition, in response to a public records request, the Agency will not produce or disclose records so identified as exempt by the Contractor to any person other than representatives of the Agency, and others with authorized access under [00170.07\(b\)](#), without providing the Contractor a copy of the public records request, unless:

- The Contractor consents to such disclosure; or
- Agency is prohibited by applicable law or court order from providing a copy of the public records request to the Contractor.

**00170.08 Electronic Document Management** - The requirements of this Subsection do not apply to claims. Claims must be submitted on paper documents according to Section 00199.

Following Notice to Proceed, the Contractor will submit all documents for this Contract to the Agency in an electronic format. No paper documents, faxes or other similar paper methods/ or media are permitted, unless otherwise allowed or directed by the Engineer. The Contractor will be solely responsible for submitting documents to the Agency for itself and its for Subcontractors, Suppliers, vendors and other third parties.

Following Notice to Proceed, all documents for this Contract will be managed electronically, unless otherwise allowed or directed by the Engineer.

Documents submitted according to this Subsection, from the Agency to the Contractor and from the Contractor to the Agency, are official documents for the Contract and will be accepted as such by both parties.

In the event of a conflict between this Subsection and the Standard Specifications or other Special Provisions, this Subsection will control except for 00199.30.

Failure to submit documents electronically, as required by this Subsection, may result in payments being withheld according to 00195.50(e).

**(a) Electronic Submittal Requirements** - Unless otherwise allowed or directed by the Engineer, all documents submitted to the Agency for this Contract that require a signature must be signed by a person with appropriate authority by applying:

- An original handwritten signature to a document and scanning the document into PDF format;
- An electronic signature to a document and converting the document into PDF format; or
- A third-party verifiable digital signature to a PDF document;

Documents that require a signature, but do not have a signature in accordance with this Subsection, or were signed by a person without appropriate authority; or documents that were signed with a digital signature but are submitted in a form such that the digital signature is not verifiable by the Engineer, will be considered as not received and of no effect. Notice requirements will not be satisfied and payments may be withheld for any affected work items until the required documents with compliant signatures have been received.

**00170.10 Required Payments by Contractors** - The Contractor will comply with [ORS 279C.505](#) and [ORS 279C.515](#) during the term of the Contract.

**(a) Prompt Payment by Contractor for Labor and Materials** - As required by [ORS 279C.505](#), the Contractor must:

- Make payment promptly, as due, to all Entities supplying labor or Materials under the Contract;
- Pay all contributions or amounts due the Industrial Accident Fund, whether from the Contractor or a subcontractor, incurred in the performance of the Contract;
- Not permit any lien or claim to be filed against the State or any political subdivision thereof, on account of any labor or Material furnished in performance of the Contract; and
- Pay to the Department of Revenue all sums withheld from employees according to ORS 316.167.

**(b) Prompt Payment by Contractor to First-Tier Subcontractor(s)** - According to [ORS 279C.580\(3\)\(a\)](#), after the Contractor has determined and certified to the Agency that one or more of its Subcontractors has satisfactorily performed subcontracted Work, the Contractor may request payment from the Agency for the Work, and will pay the Subcontractor(s) within ten (10) Calendar Days out of such amounts as the Agency has paid to the Contractor for the subcontracted Work.



**(c) Interest on Unpaid Amount** - If the Contractor or a first-tier Subcontractor fails, neglects, or refuses to make payment to an Entity furnishing labor or Materials in connection with the Contract within 30 Days after the Contractor's receipt of payment, the Contractor or first-tier Subcontractor will owe the Entity the amount due plus interest charges that begin at the end of the 10 day period within which payment is due under [ORS 279C.580\(3\)](#) and that end upon final payment, unless payment is subject to a good-faith dispute as defined in [ORS 279C.580\(5\)\(b\)](#). As required by [ORS 279C.515\(2\)](#), the rate of interest on the amount due will be 9 percent per annum. The amount of interest will not be waived.

**(d) Agency's Payment of the Contractor's Prompt Payment Obligations** - If the Contractor fails, neglects or refuses to make prompt payment of any invoice or other demand for payment for labor or services furnished to the Contractor or a Subcontractor by any Entity in connection with the Contract as such payment becomes due, the Agency may pay the Entity furnishing the labor or services and charge the amount of the payment against monies due or to become due the Contractor under the Contract (The Agency has no obligation to pay these Entities, and ODOT will not normally do so, but will refer them to the Contractor and the Contractor's Surety).

The payment of a claim by the Agency in the manner authorized in this Subsection will not relieve the Contractor or the Contractor's Surety from obligations with respect to any such claims.

**(e) Right to Complain to the Construction Contractors Board** - If the Contractor or a subcontractor fails, neglects, or refuses to make payment to an Entity furnishing labor or Materials in connection with the Contract, the Entity may file a complaint with the Construction Contractors Board, unless payment is subject to a good-faith dispute as defined in [ORS 279C.580\(5\)\(b\)](#).

**(f) Notice of Claim Against Bond** - An Entity (which by definition includes a natural person) claiming not to have been paid in full for labor or Materials supplied for the prosecution of the Work may have a right of action on the Contractor's Payment Bond as provided in [ORS 279C.600](#) and [ORS 279C.605](#).

The Commissioner of the Bureau of Labor and Industries (BOLI) may have a right of action on the Contractor's and Subcontractors' public works bonds and Payment Bonds for workers who have not been paid in full, as provided in [ORS 279C.600](#) and [ORS 279C.605](#).

**(g) Paid Summary Report** – When required by the Engineer or for Federal Aid Highway Construction projects, the Contractor will submit a "Paid Summary Report", form 734-2882, to the Engineer certifying payments made to all of the following:

- All subcontractors
- Committed DBE suppliers
- Non-committed DBE suppliers and service providers with estimated total payments for the Project over \$10,000.

For this purpose, a committed DBE firm is one that was identified by the Contractor to meet an assigned DBE goal including DBE firms substituting for DBE firms committed as a condition of contract award.

Submit the completed and signed Paid Summary Report to the Engineer within 20 days of receipt of payment from the Agency for each month in which payments were made to each subcontractor, each committed DBE supplier, and each non-committed DBE supplier or service provider with estimated total payments for the Project over \$10,000. At the



completion of the project, submit form 734-2882 recapping the total amounts paid to each subcontractor, and each committed DBE supplier, and each non committed DBE supplier or service provider with estimated total payments for the Project over \$10,000.

The Contractor will require each subcontractor at every tier to comply with the requirement to submit form 734-2882 within 20 days of receipt of payment from its controlling contractor and provide a recap of the total amounts paid at the completion of the project or completion of their Work.

Forms will be submitted to an email address provided to the Contractor at the Preconstruction Conference.

**00170.20 Public Works Bond** - Before starting Work, the Contractor and subcontractors will each file with the Construction Contractors Board, and maintain in full force and effect, a separate public works bond, in the amount of \$30,000 unless otherwise exempt, as required by [ORS 279C.830\(3\)](#) and [ORS 279C.836](#). The Contractor will verify subcontractors have filed a public works bond before the subcontractor begins Work.

**00170.32 Protection of Navigable Waters** - The Contractor will comply with all applicable Laws, including without limitation the Federal River and Harbor Act of March 3, 1899 and its amendments.

The Contractor will not interfere with waterway navigation or impair navigable depths or clearances, except as U.S. Coast Guard or Corps of Engineer permits allow.

**00170.60 Safety, Health, and Sanitation Provisions** - The Contractor will comply with all Laws concerning safety, health, and sanitation standards. The Contractor will not require workers to perform Work under conditions that are hazardous, dangerous, or unsanitary.

Workers exposed to traffic must wear upper body garments or safety vests that are highly visible and meet the requirements of 00221.20.

Workers exposed to falling or flying objects or electrical shock must wear hard hats.

Upon their presentation of proper credentials, the Contractor will allow inspectors of the U.S. Occupational Safety and Health Administration (OSHA) and the Oregon Occupational Safety and Health Division (OR-OSHA) to inspect the Work and Project Site without delay and without an inspection warrant.

According to [ORS 468A.715](#) and [ORS 468A.720](#), the Contractor or a Subcontractor who performs Project Work involving asbestos abatement must possess a valid DEQ asbestos abatement license.

**00170.61 Industrial Accident Protection:**

**(a) Workers' Compensation** - The Contractor will provide workers' compensation coverage for on-the-job injuries as required by [00170.70\(d\)](#).

**(b) Longshoremen's and Harbor Workers' Compensation** - If Work to be performed is over or adjacent to navigable waters, the Longshoremen's and Harbor Workers' Compensation Act, ([Chapter 18, Title 33 of the USC](#)) may apply, and the Contractor will be responsible for complying with its provisions (which may include the provision of additional workers' compensation benefits to employees).

**00170.62 Labor Nondiscrimination** - The Contractor will comply with all Laws concerning equal employment opportunity, including without limitation those prohibiting discrimination because of race, religion, color, sex, disability, or national origin.

It is a material term of this Contract that the Contractor certifies by entering into this Contract that the Contractor has a written policy and practice that meets the requirements described in ORS 279A.112 (House Bill 3060, 2017) for preventing sexual harassment, sexual assault and discrimination against employees who are members of a protected class and that the Contractor will maintain the policy and practice in force during the entire term of this Contract.

**00170.63 Payment for Medical Care** - According to [ORS 279C.530](#), the Contractor will promptly, as due, make payment to any person, co-partnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the Contractor, of all sums that the Contractor agrees to pay for the services and all moneys and sums that the Contractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services.

**00170.65 Minimum Wage and Overtime Rates for Public Works Projects:**

**(a) General** - The Contractor is responsible for investigating local labor conditions. The Agency does not imply that labor can be obtained at the minimum hourly wage rates specified in State or federal wage rate publications, and no increase in the Contract Amount will be made if wage rates paid are more than those listed.

As required by [ORS 279C.520](#), the Contractor will comply with ORS 652.220 and will not unlawfully discriminate against any of the Contractor's employees in the payment of wages or other compensation for work of comparable character on the basis of an employee's membership in a protected class. "Protected class" means a group of persons distinguished by race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, or age. The Contractor's compliance with this provision constitutes a material element of the Contract and failure to comply constitutes a material breach that entitles the Agency to exercise any remedies available under the Contract, including but not limited to termination for default.

As required by ORS 279C.520, the Contractor will not prohibit any of the Contractor's employees from discussing the employee's rate of wage, salary, benefits or other compensation with another employee or another person and will not retaliate against an employee who discusses the employee's rate of wage, salary, benefits or other compensation with another employee or another person.

**(b) State Prevailing Wage Requirements** - The Contractor will comply with the prevailing wage provisions of [ORS 279C.800 through ORS 279C.870](#).

**(1) Minimum Wage Rates** - The Bureau of Labor and Industries (BOLI) determines and publishes the existing State prevailing wage rates in the publication "Prevailing Wage Rates for Public Works Contracts in Oregon". The Contractor will pay workers not less than the specified minimum hourly wage rate according to [ORS 279C.838](#) and [ORS 279C.840](#) and will include this requirement in all subcontracts.

See the Project Wage Rates page included with the Special Provisions for additional information about which wage rates apply to the project and how to access the applicable wage rates.

The applicable BOLI wage rates will be included in the Contract.

- (2) Payroll and Certified Statements** - As required in [ORS 279C.845](#), the Contractor and every subcontractor will submit written certified statements to the Engineer on the form prescribed by the Commissioner of BOLI in [OAR 839-025-0010](#) certifying compliance with wage payment requirements and accurately setting out the Contractor's or subcontractor's weekly payroll records for each worker employed upon the project.

The Contractor and subcontractors will preserve the certified statements for a period of six (6) years from the date of completion of the Contract.

**(3) Additional Retainage:**

**a. Agency** - As required in [ORS 279C.845\(7\)](#) the Agency will retain 25% of any amount earned by the Contractor on the project until the Contractor has filed the certified statements required in [ORS 279C.845](#) and in FHWA Form 1273, if applicable. The Agency will pay to the Contractor the amount retained within 14 Days after the Contractor files the required certified statements, regardless of whether a subcontractor has failed to file certified statements.

**b. Contractor** - As required in [ORS 279C.845\(8\)](#) the Contractor will retain 25% of any amount earned by a first tier subcontractor on the project until the first tier subcontractor has filed with the Agency the certified statements required in [ORS 279C.845](#) and in FHWA Form 1273, if applicable. Before paying any amount retained, the Contractor will verify that the first tier subcontractor has filed the certified statement. Within 14 Days after the first tier subcontractor files the required certified statement the Contractor will pay the first tier subcontractor any amount retained.

- (4) Owner/Operator Data** - For a project funded by the FHWA, the Contractor will furnish data to the Engineer for each owner/operator providing trucking services. Furnish the data before the time the services are performed and include without limitation for each owner/operator:

- Drivers name;
- Copy of driver's license;
- Vehicle identification number;
- Copy of vehicle registration;
- Motor vehicle license plate number;
- Motor Carrier account number;
- Copy of ODOT Motor Carrier 1A Permit; and Name of owner/operator from the side of the truck.

- (c) State Overtime Requirements** - As a condition of the Contract, the Contractor will comply with the pertinent provisions of [ORS 279C.540](#).

- (1) Maximum Hours of Labor and Overtime Pay** - According to [ORS 279C.540](#), no person will be employed to perform Work under this Contract for more than ten (10) hours in any one (1) Day, or 40 hours in any one (1) week, except in cases of necessity, emergency, or where public policy absolutely requires it. In such instances, the Contractor will pay the employee at least time and a half pay:

- For all overtime in excess of eight (8) hours a day or 40 hours in any one (1) week when the work week is five (5) consecutive days, Monday through Friday; or
- For all overtime in excess of ten (10) hours a day or 40 hours in any one (1) week when the work week is four (4) consecutive days, Monday through Friday; and
- For all Work performed on Saturday and on any legal holiday specified in [ORS 279C.540](#).

For additional information on requirements for overtime and establishing a work schedule see [OAR 839-025-0050](#) and [OAR 839-025-0034](#).

**(2) Notice of Hours of Labor** - The Contractor will give written notice to employees of the number of hours per day and days per week the employees may be required to work. Provide the notice either at the time of hire or before commencement of work on this Contract, or by posting a notice in a location frequented by employees.

**(3) Exception** - The maximum hours of labor and overtime requirements under [ORS 279C.540](#) will not apply to the Contractor's Work under this Contract if the Contractor is a party to a collective bargaining agreement in effect with any labor organization. For a collective bargaining agreement to be in effect it must be enforceable within the geographic area of the project, and its terms must extend to workers who are working on the project (see [OAR 839-025-0054](#)).

**(d) State Time Limitation on Claim for Overtime** - According to [ORS 279C.545](#), any worker employed by the Contractor is foreclosed from the right to collect any overtime provided in [ORS 279C.540](#) unless a claim for payment is filed with the Contractor within 90 Days from the completion of the contract, provided the Contractor posted and maintained a circular as specified in this provision. Accordingly, the Contractor will:

- Cause a circular, clearly printed in boldfaced 12-point type containing a copy of [ORS 279C.545](#), to be posted in a prominent place alongside the door of the timekeeper's office or in a similar place which is readily available and freely visible to any or all workers employed to perform Work; and
- Maintain such circular continuously posted from the inception to the completion of the Contract on which workers are or have been employed.

**(e) Additional Requirements When Federal Funds are Involved** - When federal funds are involved, the following requirements will apply in addition to the requirements of [00170.65\(a\) through 00170.65\(d\)](#). The Contractor will include these provisions in all subcontracts as well as ensure that all Subcontractors include these provisions in their lower tier subcontracts.

**(1) FHWA Requirements** - For Federal-Aid projects, the Contractor will comply with the provisions of FHWA Form 1273, "Required Contract Provisions Federal-Aid Construction Contracts."

**(2) Minimum Wage Rates** - The Contractor will pay each worker in each trade or occupation employed to perform any work under the contract not less than the existing State (BOLI) prevailing wage rate or the applicable federal prevailing wage rate required under the Davis-Bacon Act ([40 U.S.C. 3141](#) et seq.), whichever is higher. The Contractor will include this provision in all subcontracts.

- See the Project Wage Rates page included with the Special Provisions for additional information about which wage rates apply to the project and how to access the applicable wage rates.
- The applicable Davis-Bacon and BOLI wage rates will be included in the Contract.

- (3) Payroll and Certified Statements** - In addition to providing the payroll information and certified statements required under [ORS 279C.845](#) (see [00170.65\(b-2\)](#)), the Contractor and every subcontractor will submit written certified statements that also meet the requirements in Section IV of FHWA Form 1273 except the Contractor and every subcontractor will preserve the certified statements for a period of 6 years from the date of completion of the Contract.
- (4) Overtime** - With regard to overtime pay, the Contractor will comply with the overtime provision affording the greatest compensation required under FHWA Form 1273 and [ORS 279C.540](#).

**00170.70 Insurance:**

**(a) Insurance Coverages** - The Contractor and its Subcontractors will obtain, at its expense, and keep in effect during the term of the Contract, the insurance coverages listed below or as indicated by Special Provision of the contract. Each policy required by these provisions will be written as a primary policy, not contributing with or in excess of any coverage which the Agency may carry. A copy of each policy or a certificate satisfactory to the Agency will be delivered to the Agency prior to commencement of Work. Unless otherwise specified, each policy will be written on an "occurrence" form with an admitted insurance carrier licensed to do business in the State of Oregon and should any of the described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions. In the event the statutory limit of liability of a public body for claims arising out of a single accident or occurrence is increased above the combined single limit coverage requirements specified below, the Agency will have the right to require the Contractor to increase the Contractor's coverage by the amount of the statutory limit increase for such claims and to increase the aggregate coverage by an amount that is twice as large as the statutory increase. The adequacy of all insurance required by these provisions will be subject to approval by the Agency's Risk Manager. Failure to maintain any insurance coverage required by the contract will be cause for immediate termination for Default of this contract by the Agency. The Contractor may however, contractually obligate an appropriate Subcontractor to obtain, at the Subcontractor's expense or at the Contractor's expense, and keep in effect during the term of the Contract, pollution liability coverage, asbestos liability, lead liability, or automobile liability with pollution coverages, or such other types of insurance coverage that, before execution of the Contract, the Agency approves as types of insurance coverage that may be obtained by appropriate subcontractors for the performance of specifically approved abatement related work. If both the Contractor and an appropriate subcontractor will perform pollution related Work or other Work that would be covered by the other above-described types of insurance permitted to be obtained by an appropriate subcontractor, the insurance coverages listed below that correspond to such Work will be obtained, at the Contractor's or subcontractor's expense, and will cover the liability of the Contractor and the subcontractor, either under the same or separate insurance policies.

- **Commercial General Liability** - If indicated by Special Provision, the Contractor, and its Subcontractors, will provide Commercial General Liability Insurance covering bodily injury and property damage in a form and with coverages that are satisfactory to the Agency. This insurance must include personal and advertising injury liability and products and completed operations coverage. Coverage may be written in combination with Commercial Automobile Liability Insurance with separate limits for Commercial General Liability and Commercial Automobile Liability. Coverage will be written on an occurrence basis. Combined single limit per occurrence will not be less than the dollar amount specified in the Special Provisions. The annual aggregate limit

will not be less than the dollar amount specified in the Special Provisions. The policy will be endorsed to state that the annual aggregate limit of liability will apply separately to the Contract.

If the Contractor's Commercial General Liability Insurance limits are less than the required limits stated above, the Contractor will obtain Excess or Umbrella Liability Insurance with sufficient limits that when added to the Contractor's Commercial General Liability Insurance limits the total combined limits of Commercial General Liability Insurance and Excess or Umbrella Liability Insurance equal or exceed the above-stated Commercial General Liability Insurance limits required for this Project. The above-stated combined single limit per occurrence and the above-stated annual aggregate limit must each be met. Excess or Umbrella Liability Insurance coverage will extend to the same perils, terms, and conditions as the underlying Commercial General Liability Insurance coverage.

When Work to be performed includes operations or activity within 50 feet of any railroad property, bridge, trestle, track, roadbed, tunnel, underpass or crossing, the Contractor will provide the Contractual Liability – Railroads CG 24 17 endorsement, or equivalent, on the Commercial General Liability policy.

- **Pollution Liability** - If indicated by Special Provision, Pollution Liability Insurance covering the Contractor's liability, or the liability of an appropriate subcontractor if the coverage is obtained by the subcontractor, for bodily injury and property damage, and environmental damage resulting from sudden, accidental and gradual pollution, and related clean-up costs incurred by the Contractor, or by the subcontractor if the coverage is obtained by the subcontractor, while performing Work required by the Contract. If the coverage is obtained by the Contractor, the coverage may be written in combination with the Commercial General Liability Insurance with separate limits for Pollution Liability and Commercial General Liability. Combined single limit per occurrence will not be less than the dollar amount specified in the Special Provisions. The annual aggregate limit will not be less than the dollar amount specified in the Special Provisions. The policy will be endorsed to state that the annual aggregate limit of liability will apply separately to the Contract.
- **Asbestos Liability** - If indicated by Special Provision, the Contractor, or the Subcontractor if the coverage is obtained by the Subcontractor, will provide an Asbestos Liability endorsement to the pollution liability coverage. If an endorsement cannot be obtained, the Contractor or Subcontractor will provide separate Asbestos Liability Insurance at the same combined single limit per occurrence and annual aggregate limit as the Pollution Liability Insurance with the policy endorsed to state that the annual aggregate limit of liability will apply separately to the Contract.
- **Lead Liability** - If indicated by Special Provision, the Contractor, or the Subcontractor if the coverage is obtained by the Subcontractor, will provide a Lead Liability endorsement to the pollution liability coverage. If an endorsement cannot be obtained, the Contractor or Subcontractor will provide separate Lead Liability Insurance at the same combined single limit per occurrence and annual aggregate limit as the Pollution Liability Insurance with the separate policy endorsed to state that the annual aggregate limit of liability will apply separately to the Contract.
- **Commercial Automobile Liability** - If indicated by Special Provision, the Contractor, and its Subcontractors, will provide Commercial Automobile Liability Insurance covering all owned, non-owned, and hired vehicles. This coverage may be written in combination with the Commercial General Liability Insurance with separate limits for Commercial Automobile Liability and Commercial General Liability. Combined single



limit per occurrence will not be less than the dollar amount indicated in the Special Provisions. If this coverage is written in combination with the Commercial General Liability, the policy will be endorsed to state that the Commercial General Liability annual aggregate limit will apply separately to the Contract.

- **Commercial Automobile Liability with Pollution Coverage** - If indicated by Special Provision, the Contractor, or the Subcontractor if the coverage is obtained by the Subcontractor, will provide Commercial Automobile Liability Insurance with Pollution coverage covering the Contractor's liability, or the liability of an appropriate subcontractor, if the coverage is obtained by the Subcontractor, for bodily injury and property damage, and environmental damage arising out of the use of all owned, non-owned, or hired vehicles while performing Work under the Contract. If the coverage is obtained by the Contractor, the coverage may be written in combination with the Commercial General Liability Insurance with separate limits for Commercial Automobile Liability with Pollution Coverage and Commercial General Liability. Combined single limit per occurrence will not be less than the dollar amount indicated in the Special Provisions. If this coverage is written in combination with the Commercial General Liability, the policy will be endorsed to state that the Commercial General Liability annual aggregate limit will apply separately to the Contract.
- (b) **Tail Coverage** - If any of the required liability insurance coverages of [00170.70\(a\)](#) are on a "claims made" basis, "tail" coverage will be required at the completion of the Contract for a duration of 24 months, or the maximum time period reasonably available in the marketplace. The Contractor will furnish certification of "tail" coverage as described, or continuous "claims made" liability coverage for 24 months following Contract completion. Continuous "claims made" coverage will be acceptable in lieu of "tail" coverage, provided its retroactive date is on or before the effective date of the Contract. If Continuous "claims made" coverage is used, the Contractor will keep the coverage in effect for a duration of not less than 24 months from the end of the Contract. This will be a condition of Final Acceptance.
- (c) **Additional Insured** - The liability insurance coverages of [00170.70\(a\)](#) will include the Agency, its officers, agents and employees as Additional Insureds, but only with respect to the Contractor's activities to be performed under the Contract. When federal transportation funding is involved, the liability coverages of [00170.70\(a\)](#) will also include the State of Oregon, the Oregon Transportation Commission and the Oregon Department of Transportation and their respective officers, members and employees as additional insureds, but only with respect to the Contractor's activities to be performed under the Contract. Coverage will be primary and non-contributory with any other insurance and self-insurance. The liability coverages of [00170.70\(a\)](#) that are permitted by the Agency to be obtained by an appropriate subcontractor will include all of the foregoing as Additional Insureds and will also include Contractor and its officers and employees as Additional Insureds.
- (d) **Workers' Compensation** - All employers, including the Contractor and its Subcontractors, if any, that employ subject workers, as defined in ORS 656.027, will comply with [ORS 656.017](#) and will provide the required Workers' Compensation coverage, unless such employers are exempt under [ORS 656.126\(2\)](#). The Contractor will ensure that each of its Subcontractors complies with these requirements.

The Contractor will certify in the Contract that the Contractor is registered by the Oregon Workers' Compensation Division either as a carrier-insured employer, a self-insured employer, an exempt employer, or is an independent contractor who will perform the Work without the assistance of others.

The Contractor will require and verify that its insurance carrier files a guaranty contract with the Oregon Workers' Compensation Division before performing any Work.

If the Contractor's and Subcontractor's, if any, operations include use of watercraft on navigable waters and employ persons in applicable positions, a Maritime Coverage Endorsement must be added to the Workers' Compensation policy, unless coverage for captain and crew is provided in a Protection and Indemnity policy.

If the Contractor and Subcontractor, if any, conducts its operations in proximity to navigable waters and employ persons in applicable positions, United States Longshore and Harbor Workers' Compensation Act coverage must be endorsed onto the Workers' Compensation policy.

The Contractor will require compliance with these requirements in all Subcontractor contracts.

- (e) Notice of Cancellation or Change** - The Contractor will not cancel, change materially, or take any action showing intent not to renew the insurance coverage(s) without 30 days' advance written notice from the Contractor or its insurer(s) to the Agency. The Contractor will be responsible for ensuring that insurance coverage(s) obtained by an appropriate subcontractor, as permitted by the Agency under [00170.70\(a\)](#), are not cancelled, changed materially, or have any action taken by the subcontractor showing intent not to renew the insurance coverage(s) without 30 days' advance written notice from the Contractor or the insurer(s) to the Agency. Any failure to comply with the reporting provisions of this insurance will not affect the coverage(s) provided to the Agency, County, City, or other applicable political jurisdiction or to the Agency's governing body, board, or Commission and its members, and the Agency's officers and employees.
- (f) Certificate(s) of Insurance** - As evidence of the insurance coverages required by this Contract, the Contractor will furnish Certificate(s) of Insurance to the Agency at the time(s) provided in [00130.50\(a\)](#). As evidence of insurance coverages required by this Contract but permitted by the Agency under [00170.70\(a\)](#) to be obtained by an appropriate subcontractor, the Contractor will furnish Certificate(s) of Insurance to the Agency for such coverages together with the Contractor's request under [00180.21](#) for approval of the subcontract with that subcontractor. The Certificate(s) will specify all of the parties who are Additional Insureds. The Contractor will obtain, or ensure that the appropriate subcontractors obtain, insurance coverages required under this Contract from insurance companies or entities acceptable to the Agency and authorized to issue insurance in the State. The Contractor, or the appropriate subcontractor, but not the Agency, will be responsible for paying all deductibles, self-insured retentions and/or self-insurance included under these provisions.
- (g) Builders' Risk** - If specified by Special Provision, the Contractor will obtain, at its expense, and keep in effect during the term of the Contract, Builders' Risk insurance on an all risks of direct physical loss basis, including, without limitation, earthquake and flood damage, for an amount equal to at least the value specified in the Special Provisions. The policy will not contain a coinsurance clause or any collapse exclusions. Any deductible will not exceed \$50,000 for each loss, except that the earthquake and flood deductible will not exceed 5% of each loss or \$50,000, whichever is greater. The policy will include the Agency as loss payee.
- (h) Builder's Risk Installation Floater** - If specified by Special Provision, the Contractor will obtain, at its expense, and keep in effect during the term of the Contract, Builder's Risk Installation Floater Insurance covering the Contractor's labor, Materials and Equipment to be used for completion of the Work performed under the Contract. The minimum amount of coverage to be carried must be equal to the full amount of the contractor's labor,



equipment, materials, or fixtures to be installed, in-transit, or stored off-site during the performance of the Contract. This insurance will include as loss payees the Agency, the Contractor and Subcontractors as their interests may appear.

**00170.71 Independent Contractor Status** - The service or services to be rendered and the Work to be completed under this Contract are those of an independent contractor as defined in ORS 670.600. The Contractor is not an officer, employee, or agent of the Agency as those terms are used in [ORS 30.265](#).

**00170.72 Indemnity/Hold Harmless** - To the fullest extent permitted by law, and except to the extent otherwise void under [ORS 30.140](#), the Contractor will indemnify, defend (with counsel approved by the Agency) and hold harmless the Agency, Agency's Authorized Representative, Architect/Engineer, Architect/Engineer's consultants, and their respective officers, directors, agents, employees, partners, members, stockholders and affiliated companies, and when federal transportation funding is involved the State of Oregon, the Oregon Transportation Commission and the Oregon Department of Transportation and their respective officers and members and employees (collectively "Indemnitees") from and against all liabilities, damages, losses, claims, expenses (including reasonable attorney fees), demands and actions of any nature whatsoever which arise out of, result from or are related to the following:

- Any damage, injury, loss, expense, inconvenience or delay described in this Subsection.
- Any accident or occurrence which happens or is alleged to have happened in or about the Project Site or any place where the Work is being performed, or in the vicinity of either, at any time prior to the time the Work is fully completed in all respects.
- Any failure of the Contractor to observe or perform any duty or obligation under the Contract Documents which is to be observed or performed by the Contractor, or any breach of any agreement, duty, obligation, responsibility, covenant, provision, requirement, representation or warranty of the Contractor contained in the Contract Documents or in any subcontract.
- The negligent acts or omissions of the Contractor, a subcontractor or anyone directly or indirectly employed by them or any one of them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.
- Any lien filed upon the project or bond claim in connection with the Work.
- Any failure to comply with all applicable Laws by the Contractor or any subcontractor, or anyone employed by any one of them, or anyone for whose acts they may be liable.

Such obligation will not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Subsection.

In claims against any person or entity indemnified under this Subsection by an employee of the Contractor, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Subsection will not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a subcontractor under workers' compensation acts, disability benefit acts or other employee benefit acts, or applicable insurance coverage.

**00170.74 Employee Drug Testing Program** - As required by [ORS 279C.505\(2\)](#), the Contractor will have in place, and maintain during the period of the Contract, an employee drug-testing program. The Agency retains the right to audit and/or monitor the program. On request by the Engineer, the Contractor will furnish a copy of the employee drug-testing program.

**00170.75 Labor Regulations** - Any person employed on the project, by the Contractor or a Subcontractor, who in the opinion of the Engineer, does not perform in a proper and skillful manner or whose conduct interferes with the progress of the work will, at the written request of the Engineer, be removed from the project. That employee must not be again employed on the project without the approval of the Engineer.

**00170.78 Conflict of Interest** - The Contractor will not give or offer any gift, loan, or other thing of value to any member of the Agency's governing body or employee of the Agency in connection with the award or performance of any Contract.

The Contractor will not rent, lease, or purchase Materials, supplies, or Equipment, with or through any Agency employee or member of the Agency's governing body.

No ex-employee of the Agency who has worked for the Agency on any phase of the Project within the prior 2 years may be employed by the Contractor to perform Work on the Project.

**00170.79 Third Party Beneficiary** - There are no third-party beneficiaries of the Contract, unless federal transportation funding is involved then the State of Oregon, the Oregon Transportation Commission and the Oregon Department of Transportation and their respective officers and members and employees, are third-party beneficiaries of the Contract.

**00170.80 Responsibility for Damage to Work:**

**(a) Responsibility for Damage in General** - The Contractor will perform Work, and furnish Materials and Equipment for incorporation into the Work, at the Contractor's own risk, until the entire Project has been completed and accepted by the Agency. The Contractor will repair all damages to Work performed, Materials supplied, and Equipment incorporated into the Work, except as otherwise provided in this Section.

**(b) Repair of Damage to Work** - Until Final Acceptance, the Contractor will promptly rebuild, repair, restore, and make good damages to all portions of the permanent or temporary Work, except to the extent the Agency has assumed responsibility according to the provisions of (c) below. The Contractor will perform all repairs of damage to Work at no additional cost to the Agency, except for repairs necessitated by damage caused by:

- Acts of God or Nature, as defined in [Section 00110](#); or
- Actions of governmental authorities.

**(c) Responsibility for Damage to Work Caused by Public Traffic** - The Contractor may apply for relief of responsibility for damage to Work caused by public traffic by submitting a signed Contractor's Request for Relief of Responsibility, form 734-2768, to the Engineer by mail, personal delivery or courier, scanned and submitted via email, or other agreed-upon method.

The Engineer will process a maximum of two forms per month and return the forms within seven (7) Calendar Days indicating each item as "approved" or "denied."

The approval of the Engineer is limited, and is made only for the purposes of determining relief of responsibility for damage to completed portions of the Work caused by public traffic. The completed portions of the Work are not considered complete, and are not finally accepted for any other purposes under the Contract.

**(1) Request for Relief** - The Agency will only accept a request for relief from and will only assume responsibility for damages caused by public traffic, to the following completed portions of the Work:

- A segment of Roadway, drainage facilities, Slopes, lighting, traffic control devices and access facilities;
- A Bridge or other Structure within a segment of Roadway;
- Traffic signals and appurtenances at an intersection;
- Permanent, passive traffic control devices;
- Complete circuits of a highway lighting system; and
- Portions of a building open to public use.

The Agency will approve a request for the Agency to assume responsibility for damages to the completed portions of the Work caused by public traffic only under the following conditions:

- The completed portions of the Work are completed according to Contract Change Orders, the Plans or approved stage construction Plans;
- The traffic control complies with approved traffic control Plans; and
- All required Materials conformance and quality compliance documents pertaining to the completed portions of the Work are on file with the Engineer (see [Section 00165](#)).

**(2) Scope of Relief** - When the Agency assumes responsibility for damage to completed portions of the Work caused by public traffic any damages will be repaired by the Contractor on a Changed Work basis, or by Agency forces, or by other means as determined by the Engineer. If completed portions of the Work are damaged by public traffic before Final Inspection, and the Agency requires the Contractor to repair the damages, the Engineer will reimburse the Contractor for the Changed Work at 75% of the total amount calculated according to [Section 00197](#).

If completed portions of the Work are damaged by public traffic after Final Inspection, and the Agency requires the Contractor to repair the damages, the Engineer will reimburse the Contractor for the Work at 100% of the total amount calculated according to [Section 00197](#).

If any additional Work is performed by the Contractor on completed portions of the Work for which the Agency has assumed responsibility for damages caused by public traffic, and the Work is performed outside of the approved stage construction Plans or approved traffic control Plans, the Contractor will become fully responsible and liable, and will make good all damages caused by public traffic at no additional cost to the Agency.

**(d) Vandalism and Theft** - Vandalism includes damage to or destruction of Work or portions of Work that remain on the Project Site resulting from vandalism, criminal mischief, arson, or other criminal or illegal behavior.

The Contractor will provide reasonable protection of the Work from vandalism until Third Notification.

Theft includes the loss of Work or portions of Work that are lost or stolen or otherwise unaccounted for from the Project Site or from Materials or fabrication locations. The Contractor will remain solely responsible for all losses caused by theft, including without limitation theft that occurs in conjunction with vandalism. Contractor will be solely responsible for replacement and repair costs associated with damage to the Work and/or the Project Site resulting from vandalism and theft.

**00170.82 Responsibility for Damage to Property and Facilities:**

- (a) In General** - As used in this Subsection, the term "Contractor" will include the Contractor's agents, Subcontractors, and all workers performing Work under the Contract; and the term "damage" will include without limitation soiling or staining surfaces by tracking or splashing mud, asphalt, and other materials, as well as damage of a more serious nature.

The Contractor will be solely responsible for damages arising from:

- The Contractor's operations;
- The Contractor's negligence, gross negligence, or intentional wrongful acts; and
- The Contractor's failure to comply with any Contract provision.

The Agency may withhold funds due the Contractor or the Contractor's Surety until all lawsuits, actions, and claims for injuries or damages are resolved, and satisfactory evidence of resolution is furnished to the Agency.

- (b) Protection and Restoration of Agency Property and Facilities** - The following requirements apply to highways, highway Structures and other improvements that are existing, under construction, or completed. The Contractor must:

- Provide adequate protection to avoid damaging Agency property and facilities;
- Be responsible for damage to Agency property and facilities caused by or resulting from the Contractor's operations; and
- Clean up and restore such damage by repair, rebuilding, replacement, or compensation, as determined by the Engineer.

- (c) Protection and Restoration of Non-Agency Property and Facilities** - The Contractor will determine the location of properties and facilities that could be damaged by the Contractor's operations, and will protect them from damage. The Contractor will protect monuments and property marks until the Engineer has referenced their location and authorized their removal. The Contractor will restore property or facilities, including public and private benchmarks, property corners, and monuments not authorized for removal, damaged by its operations to the condition that existed before the damage, at no additional compensation.

The Contractor will give at least ten (10) Work days' notice to occupants of buildings on property adjacent to the work to permit the occupants to remove vehicles, trailers, other possessions, and salvage or relocate plants, trees, fences, sprinkler systems, or other improvements designated for removal or that might be destroyed or damaged by work operations.

The Contractor will provide temporary facilities when needed, e.g., to maintain normal service or as directed by the Engineer, until the required repair, rebuilding, or replacement is accomplished.

The Contractor will protect specific service signs, e.g., business logos, and tourist-oriented directional signs (TODS) from damage, whether the signs are to remain in place or be

placed on temporary supports. The Contractor will repair or replace damaged signs at no cost to the Agency. Liquidated damages will be assessed against the Contractor in the amount of \$200 per day for each sign out of service for more than five (5) Calendar Days because of the Contractor's operations.

**00170.85 Responsibility for Defective Work** - The Contractor will make good any defective Work, Materials or Equipment incorporated into the Work, according to the provisions of [Section 00150](#).

**(a) Latent Defects** - The Contractor will remain liable for all latent defects resulting from causes other than fraud or gross mistakes that amount to fraud until the expiration of all applicable statutes of limitation and ultimate repose, the Performance Bond, Warranty Bond, or warranty period, whichever expires last. The Contractor will remain liable for all latent defects resulting from fraud or gross mistakes that amount to fraud regardless of when those latent defects may be discovered, and regardless of whether such discovery occurs outside any applicable statutes of limitation or ultimate repose or any applicable Performance Bond, Warranty Bond, or warranty period.

**(b) Contractor Furnished Warranties:**

**(1) Contractor Warranty for Specific Items** - For those Items with Specifications referencing this 00170.85(b-1) warranty, the Contractor warrants that the Work for those Items, including Changed Work, Additional Work, Incidental Work, On-Site Work, and Extra Work, and Materials and Equipment incorporated into the Work, will meet the technical and performance Specifications required under the Contract. The warranty period will be identified in each applicable Specification or elsewhere in the Contract and will begin on the date of Second Notification. The Contractor will be responsible for making good the Work, and for all repairs of damage to the Work and other improvements, natural and artificial structures, systems, equipment, and vegetation caused by, or resulting in whole or in part from, defects in warranted Materials, Equipment, and workmanship. The Contractor will be responsible for all costs caused by, or resulting in whole or in part from, defects in warranted Materials, Equipment, or workmanship.

When the Agency makes written notification of failure of an item covered by this warranty, the warranty period will stop for the effected item or the portion of the effected item that failed, as applicable, until the required repairs or replacements are made and accepted. All repaired or replaced items must meet current specifications, unless otherwise specified in the Contract, and will be warranted for the remaining warranty period.

This warranty provision will survive expiration or termination of the Contract.

**(2) General Warranty for Local Public Agency Projects** - For those Contracts that are developed, advertised, awarded, and administered by Local Public Agencies, and are not on the National Highway System, this 00170.85(b-2) warranty applies.

The Contractor will warrant all Work and workmanship, including Changed Work, Additional Work, Incidental Work, On-Site Work, and Extra Work, and Materials and Equipment incorporated in the Work, for two (2) years from the date of Third Notification, except that warranties according to 00170.85(b-1) and manufacturers' warranties and extended warranties according to 00170.85(c) will not be abridged.

The warranty described herein is an extension of the Performance Bond for a period of one year from the date of Third Notification. The Contractor will warrant all Work and workmanship, including Changed Work, Additional Work, Incidental Work, On-Site Work, and Extra Work, and Materials and Equipment Incorporated in the Work, except

that warranties according to 00170.85(b-1) and manufacturers' warranties and extended warranties according to 00170.85(c) will not be abridged.

The Contractor will be responsible for meeting the technical and performance Specifications required, making good the Work, and for all repairs of damage to the Work and other improvements, natural and artificial structures, systems, equipment, and vegetation caused by, or resulting in whole or in part from occurrences beginning during the warranty period and are the result of defects in Materials, Equipment, and workmanship. The Contractor will be responsible for all costs associated with completing the repair of the defects and for associated Work including but not limited to permitting, mobilization, traffic control, erosion control, surface restoration, site cleanup and remediation caused by, or resulting in whole or in part from, defects in Materials, Equipment, or workmanship, and other Work determined by the Engineer to be necessary to complete the repair of the defects.

Within ten (10) Calendar Days of the Agency's written notice of defects, the Contractor, or the Contractor's Surety, will vigorously and continuously correct and repair the defects and all related damage. If the Contractor or the Contractor's Surety fails to correct and repair the defects, the Agency may have the correction and repair done by others. The Contractor or Contractor's Surety will promptly reimburse the Agency for all expenses incurred to correct and repair the defects.

In the event of an emergency, where delay could result in serious loss or damage, the Agency may make emergency corrections and repairs, without written notice. The Contractor or Contractor's Surety will promptly reimburse the Agency for all expenses incurred to correct and repair the defects.

Corrections, repairs, replacements or changes will be warranted for an additional one (1) year period beginning on the date of the Agency's acceptance of the corrections, repairs, replacements or changes.

Without limiting the general applicability of other survival clauses under the Contract, this warranty provision will survive expiration or termination of the Contract.

During the Contractor's warranty period, degradation of the paving surface smoothness will be considered an indication of Work deficiencies and of unacceptable Work. The Contractor will be required to correct the surface smoothness deficiencies exceeding 0.02 feet.

**(c) Manufacturer Warranties and Guarantees:**

**(1) Manufacturer Warranties** - For those Specification Sections referencing this 00170.85(c-1) Subsection, the Contractor will furnish Warranties from the Manufacturer and signed by a Manufacturer's Representative.

The warranty period will be specified in the applicable Specification Section for which it applies.

The warranty period will begin on the date the Engineer issues Third Notification unless otherwise specified in the Contract.

When the Agency makes written notification to the Manufacturer of failure of an item covered by this warranty, the warranty period will stop for the effected item or the portion of the effected item that failed, as applicable, until the required repairs or replacements are made and accepted. All repaired or replaced items must meet current specifications, unless otherwise specified in the Contract, and will be warranted for the remaining warranty period.

Warranty work will be performed when weather permits. If, in the opinion of the Engineer, temporary repairs are necessary, the temporary repairs will be made by the Agency or an independent contractor at the Manufacturer's expense. The Manufacturer will replace all temporary repairs at no additional cost to the Agency.

The Manufacturer will provide all required traffic control during repair or replacement of failed items at no additional cost to the Agency.

- (2) Trade Practice Guarantees** - For those Items installed on the Project that have customary trade practice guarantees, the Contractor will furnish the guarantees to the Engineer at the completion of the Contract.

**00170.89 Protection of Utility, Fire-control, and Railroad Property and Services; Repair; Roadway Restoration.**

- (a) Protection of Utility, Fire-Control, and Railroad Property and Services; Coordination** - The Contractor will avoid damaging the properties of Utilities, Railroads, railways, and fire-control authorities during performance of the Work. The Contractor will cooperate with and facilitate the relocation or repair of all Utilities and Utility services, as required under [00150.50](#), and of Railroad and fire-control property and railways.

The Contractor will conduct no activities of any kind around fire hydrants until the local fire-control authority has approved provisions for continued service.

The Contractor will immediately notify any Utility, Railroad, or fire-control authority whose facilities have been damaged.

If an Entity has a valid permit from the proper authority to construct, reconstruct, or repair Utility, Railroad, or fire-control service in the Roadway, the Contractor will allow the permit holder to perform the work.

- (b) Restoration of Roadway after Repair Work** - The Contractor will restore the Roadway to a condition at least equal to that which existed before the repair work addressed under this Subsection was performed, as directed by the Engineer at no additional cost to the Agency. All restoration work required as a result of Contractor's failure to protect Utilities, Railroads, railways and fire-control facilities will be at the Contractor's expense. Restoration which constitutes Extra Work will be paid as Extra Work.

**00170.92 Fencing, Protecting Stock, and Safeguarding Excavations** - The Contractor will be responsible for loss, injury, or damage that results from its failure to restrain stock and persons.

- (a) At the Contractor's Expense** - The Contractor will restrain stock to lands on which they are confined using temporary fences or other adequate means. The Contractor will provide adequate temporary fences or other protection around excavations to prevent animals and unauthorized persons from entering.

The Contractor will repair, at Contractor's expense and to the Engineer's satisfaction, fences damaged by the Contractor's operations and the operations of the Contractor's agents, employees and Subcontractors.

- (b) At the Agency's Expense** - The Contractor will construct fences, or move and reconstruct fences, as shown on the Contract Documents or as directed by the Engineer. The Contractor will tear down and remove fencing within the Right-of-Way when no longer needed, as part of the removal Work described in and paid for according to Section 00310.

**00170.93 Trespass** - The Contractor will be responsible for its own, its agents' and employees', and its Subcontractors' trespass or encroachment upon, or damage to, property during performance of the Contract. Contractor is liable for any claims made because of their trespass or their deposit of debris of any kind on private property.

**00170.94 Use of Explosives** - The Contractor will comply with all Laws pertaining to the use of explosives. The Contractor will notify anyone having facilities near the Contractor's operations of Contractor's intended use or storage of explosives. The Contractor will be responsible for all damage resulting from its own, its agents' and employees', and its Subcontractors' use of explosives (see 00330.41 (e) and Section 00335).

## **SECTION 00180 - PROSECUTION AND PROGRESS**

**00180.00 Scope** - This Section consists of requirements for assignment of the Contract, subcontracting, time for performance, Contract responsibility, suspensions, terminations, and related provisions.

**00180.05 Assignment/Delegation of Contract** - Unless the Agency gives prior written consent, which will not be unreasonably withheld, the Contractor will not assign, delegate, sell, or otherwise transfer or dispose of any rights or obligations under the Contract, whether voluntarily or involuntarily, and whether by merger, consolidation, dissolution, operation of law, or any other manner, including without limitation:

- The power to execute or duty to perform the Contract; or
- Any of its right, title or interest in the Contract.

Any purported or attempted assignment, delegation, sale, transfer or disposition without prior Agency consent will be voidable.

If written Agency consent is given to assign, delegate, or otherwise dispose of any rights or obligations under the Contract, such consent will not relieve the Contractor or its Surety of any part of their duties, obligations, responsibilities, or liabilities under or pursuant to the Contract.

**00180.06 Assignment of Funds Due under the Contract** - Assignment of funds due or to become due under the Contract to the Contractor will not be permitted unless:

- The assignment request is made on the form acceptable to the Agency;
- The Contractor secures the written consent of the Contractor's Surety to the assignment; and
- The Engineer gives written consent to the assignment, which will not be unreasonably withheld.

**00180.10 Responsibility for Contract** - The Contractor will direct and coordinate the operations of its employees, Subcontractors and agents performing Work, and see that the Engineer's orders are carried out promptly. The Contractor's failure to direct, supervise and control its employees, Subcontractors and agents performing Work will result in one or more of the following actions, or other actions as the Engineer deems appropriate:



- Suspension of the Work;
- Withholding of Contract payments, as necessary to protect the Agency;
- Ordering removal of individuals from the Project Site; or
- Termination of the Contract.

Action by the Agency under this provision will not prejudice any other remedy it may have.

**00180.15 Agency's Right to Do Work at Contractor's Expense** - Except as otherwise provided in [00150.75](#) and 00220.60, if the Contractor neglects to prosecute the Work properly or fails to perform any provision of the Contract, the Agency may, after two (2) Calendar Days' written notice, correct the deficiencies at the Contractor's expense. In situations where the Engineer reasonably believes there is danger to life or property, the Agency may immediately and without notice correct the deficiencies at the Contractor's expense.

Action by the Agency under this provision will not prejudice any other remedy it may have.

**00180.20 Subcontracting Limitations:**

- (a) **General** - The Contractor's own organization will perform Work amounting to at least 30% of the original Contract Amount. The value of subcontracted Work is the full compensation to be paid to the Subcontractor(s) for all pay items in the subcontract(s).
- (b) **Own Organization** - The term "own organization", as used in [Section 00180](#), includes only employees of the Contractor, Equipment owned or rented by the Contractor, Incidental rental of operated Equipment, truck hauling of Materials not included in or requiring a subcontract, and Materials and Equipment to be incorporated into the Work purchased or produced by the Contractor.
- (c) **Rental of Operated Equipment** - The use of Equipment rented with operators, except truck hauling of materials which is addressed in [00180.20\(e\)](#), will be allowed without a subcontract only when the following requirements are met:
  - (1) **Written Request** – For a Federal Aid Highway Construction project, the Contractor has submitted to the Engineer a written request describing the work or service to be provided, its estimated cost, and the estimated duration. The Engineer must approve the request before the work or service is provided.
  - (2) **Limitations** - The use of Equipment rented with operators is limited to performing minor, Incidental, short-duration work or services under the direct supervision of the Contractor or subcontractor, with Equipment not customarily owned, rented, leased, or operated by a Contractor, or with Equipment that is temporarily unavailable to the Contractor.
  - (3) **Submittals** - The Contractor will provide the Engineer with a copy of the rental agreement or purchase order covering the work or service to be provided. The Contractor will make certain that the provider of approved work or services submits payrolls required under [Section 00170](#) and complies with applicable Contract provisions, including without limitation [00170.07](#). The work or service provider will not be considered a subcontractor under the Contract, but the work or services will be considered to have been performed by the Contractor's own organization for the purposes of determining compliance with 00180.20(a).
  - (4) **Revocation of Approval** - The Engineer may revoke approval for the work or services provided through rented, operated Equipment at any time the Engineer determines

that the work is outside that authorized under [00180.20\(c-2\)](#). Unless the Contractor promptly submits to the Engineer a subcontract agreement for consent under 00180.21, the work or service provider will be immediately removed from the Project Site.

- (d) Disadvantaged Business Enterprise (DBE)** - Every agreement to perform Work, including without limitation subcontracts, trucking services agreements, purchase orders, and rental agreements, will indicate whether the Work will be performed by a DBE or non-DBE.
- (e) Trucking** - For all truck hauling of Materials not performed with trucks owned or rented and operated by the Contractor. This Section does not apply to delivery of materials by or for or from a Supplier. If the services under Rental of Operated Equipment or Trucking are provided by a committed DBE firm, a subcontract is required under 00180.21. For this purpose a committed DBE firm is one that was identified by the Contractor to meet an assigned DBE goal, including DBE firms substituting for DBE firms committed as a condition of Contract Award.

**(1) Trucking Services Agreement** - The Contractor will submit at the pre-construction meeting one or more proposed trucking services agreements for all trucking services for hauling materials. The proposed agreements will include:

- Statement specifying whether the services will be provided by a DBE;
- Statement specifying whether the services will be provided by an owner/operator;
- Prompt payment clause (10 days) ([ORS 279C.580](#));
- Interest penalty clause ([ORS 279C.580](#));
- Lower tier clause ([ORS 279C.580](#));
- Statement about the provider's ability to file a complaint with the Construction Contractors Board ([ORS 279C.515](#));
- Statement that workers will be paid not less than the specified minimum hourly rate of wage ([ORS 279C.830](#)) as applicable;
- Provision requiring the provider to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under [ORS 279C.836 \(4\) or \(9\)](#) or has elected to not file a bond under [ORS 279C.836 \(7\) or \(8\)](#) or is otherwise not applicable;
- Insurance clauses that include Commercial Automobile Liability and Workers Compensation ([ORS 656.017](#) unless exempt under [ORS 656.126](#));
- Provision requiring the provider to comply with applicable Contract provisions including without limitation Record Requirements in [00170.07](#); and
- Construction Contractors Board License Number if applicable.

The Agency must review and consent to the proposed trucking services agreements prior to use.

**(2) Limitations** - The approved trucking services agreements will be used for all trucking services for hauling Materials not provided by trucks owned or rented and operated by the Contractor except for trucking services provided by committed DBEs that require a subcontract under [00180.21](#). The Contractor will execute a trucking services agreement with every trucking services provider for hauling Materials prior to the trucking services provider doing any Work on the Project Site.

**(3) Submittals** - The Contractor will provide the Engineer with an executed copy of the trucking services agreement not later than two (2) Days after the trucking services

provider for hauling Materials has started work. The Contractor will make certain that the provider of approved trucking services submits payrolls required under Section 00170, complies with applicable Contract provisions, including without limitation [00170.07](#), and complies with applicable trucking services agreement provisions. The work or service provider will not be considered a subcontractor under the Contract, but will be considered to have been performed by the Contractor's own organization for the purposes of determining compliance with 00180.20(a). If the trucking services are provided by an owner/operator:

- Attach a copy of the data required under [00170.65\(b-4\)](#) to the trucking services agreement; and
- Each truck must have the name of the owner/operator clearly displayed on the side of the truck.

**(4) Revocation of Approval** - The Engineer may revoke approval for trucking services provided under the trucking services agreement at any time the Engineer determines that the work or service is outside that authorized under [00180.20\(e\)](#). Upon revocation of approval, the service provider will be immediately removed from the Project Site.

#### **00180.21 Subcontracting:**

**(a) General** - For a Federal Aid Highway Construction project, the Contractor will not subcontract or perform any portion of the Contract by other than the Contractor's own organization without the Agency's prior written consent. A request for consent to subcontract, at any tier, solely for the furnishing of a labor force will not be considered.

For a Federal Aid Highway Construction project, a written request for consent to subcontract any portion of the Contract at any tier will be submitted to the Engineer, and when required by the Engineer, will be accompanied by background information showing that the organization proposed to perform the Work is experienced and equipped for such Work. The Agency will review the Contractor's submission to verify compliance with Contract requirements, confirm the percentage of Work subcontracted, and evaluate the proposed Subcontractor's ability to perform the Work. If the Agency approves the Contractor's request to subcontract, the Agency will provide written notice of its determination to give or withhold consent to the Contractor's request as follows:

- If the subcontractor is not providing any of the insurance coverages as permitted under [00170.70\(a\)](#), the Agency will respond within 7 Calendar Days after the Engineer's receipt of the request.
- If the subcontractor is providing any of the insurance coverages as permitted under [00170.70\(a\)](#), the Agency will respond within 35 Calendar Days after the Engineer's receipt of the request (28 Calendar Days for the Agency to review and approve the Certificates of Insurance required by [00170.70\(f\)](#) plus 7 Calendar Days to review and approve the subcontract request).

The Engineer may revoke consent to subcontract. If the Engineer revokes consent to subcontract, the subcontractor will be immediately removed from the Project Site.

**(b) Submittal of Requests** - The Contractor must submit requests for consent to subcontract any portion of the Contract, at any tier, on the Agency's form, available from the Engineer. The Contractor will attach a duplicate original subcontract agreement. The Contractor must also submit in writing any amendments or modifications proposed to Agency-approved subcontract agreements, at any tier, before the affected Work begins. The Agency's written consent will be required before such amendments or modifications become effective.

**(c) Substitution of Disclosed Subcontractors** - The Contractor may only substitute a previously undisclosed first-tier Subcontractor according to the provisions of [ORS 279C.585](#). The Contractor will provide the Engineer with a written notification that identifies the name of the proposed new Subcontractor and the reason for the substitution. Authorized reasons for substitution are limited to the following circumstances (see [ORS 279C.585\(1\) through ORS 279C.585\(10\)](#)):

- The disclosed Subcontractor fails or refuses to execute a written contract that is reasonably based either upon the Project Plans and Specifications, or the terms of the Subcontractor's written Bid, after having had a reasonable opportunity to do so;
- The disclosed Subcontractor becomes bankrupt or insolvent;
- The disclosed Subcontractor fails or refuses to perform the contract;
- The disclosed Subcontractor fails or refuses to meet the bond requirements of the prime Contractor that had been identified prior to the Bid submittal;
- The Contractor demonstrates to the Agency that the Subcontractor was disclosed as the result of an inadvertent clerical error;
- The disclosed Subcontractor does not hold a license from the Construction Contractors Board and is required to be licensed by the board;
- The Contractor determines that the Work performed by the disclosed Subcontractor is not in substantial compliance with the Plans and Specifications, or that the Subcontractor is substantially delaying or disrupting the progress of the Work;
- The disclosed Subcontractor is ineligible to work on a public improvement according to the applicable statutory provisions;
- The substitution is for "good cause" as defined by State Construction Contractors Board rule; or
- The substitution is reasonably based on the Contract alternates chosen by the Agency.

**(d) Terms of Subcontracts** - All subcontracts will provide that Work performed under the subcontract will be conducted and performed according to, and will include the pertinent requirements, provisions, terms, and conditions of the Contract. Compliance with [00170.07](#) is required. All subcontracts, including Contractor's with the first-tier Subcontractors and those of the first-tier Subcontractors with their subcontractors, and any other lower tier subcontracts will contain a clause or condition that if the Contractor or a subcontractor fails, neglects, or refuses to make payment to an Entity furnishing labor or Materials in connection with the Contract, the Entity may file a complaint with the Construction Contractors Board, unless payment is subject to a good-faith dispute as defined in [ORS 279C.580](#). Additionally, according to the provisions of [ORS 279C.580](#), subcontracts must include:

- (1)** A payment clause that obligates the Contractor to pay the first-tier Subcontractor for satisfactory performance under the subcontract within ten (10) Calendar Days out of amounts the Agency pays to the Contractor under the Contract.
- (2)** A clause that requires the Contractor to provide the first-tier Subcontractor with a standard form that the first-tier Subcontractor may use as an application for payment or as another method by which the Subcontractor may claim a payment due from the Contractor.
- (3)** A clause that requires the Contractor, except as otherwise provided in this subsection, to use the same form and regular administrative procedures for processing payments during the entire term of the subcontract. The Contractor may change the form or the

regular administrative procedures the Contractor uses for processing payments if the Contractor:

- Notifies the Subcontractor in writing at least 45 Calendar days before the date on which the Contractor makes the change; and
  - Includes with the written notice a copy of the new or changed form or a description of the new or changed procedure.
- (4) An interest penalty clause that obligates the Contractor, if the Contractor does not pay the first-tier Subcontractor within 30 Calendar Days after receiving payment from the Agency, to pay the first-tier Subcontractor an interest penalty on amounts due in each payment the Contractor does not make in accordance with the payment clause included in the subcontract under [00180.21\(d-1\)](#). The Contractor or first-tier Subcontractor is not obligated to pay an interest penalty if the only reason that the Contractor or first-tier Subcontractor did not make payment when payment was due is that the Contractor or first-tier Subcontractor did not receive payment from the Agency or the Contractor when payment was due. The interest penalty applies to the period that begins on the day after the required payment date and ends on the date on which the amount due is paid; and will be computed at the rate specified in [00170.10\(c\)](#).
- (5) A clause that requires the Contractor's first-tier Subcontractor to include a payment clause and an interest penalty clause that conform to the standards of [ORS 279C.580](#) (see [00180.21\(d-1\)](#) and [00180.21\(d-4\)](#)) in each of the first-tier Subcontractor's subcontracts and to require each of the first-tier Subcontractor's subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or Material supplier.

These payment clauses will require the Contractor to return all retainage withheld from the Subcontractor, whether held by the Contractor or the Agency, as specified in [00195.50\(d\)](#).

As required by [ORS 279C.800 through ORS 279C.870](#), subcontracts must include:

- A provision requiring the subcontractor to have a public works bond filed with the Construction Contractors Board before starting Work on the Project, unless exempt.
- A provision requiring that the workers will be paid not less than the specified minimum hourly rate of wage.

As and when applicable, the Contractor will require in its subcontracts that subcontractors maintain the certifications required by [ORS 279A.107](#).

**(e) Contractor's Responsibilities** - As a condition of the Agency's grant of consent to subcontract, whether or not stated in the subcontract agreement itself, the Contractor will remain solely responsible for administration of the subcontract, including but not limited to:

- Performance of subcontracted Work;
- Progress of subcontracted Work;
- Payments for accepted subcontracted Work; and
- Disputes and claims for additional compensation regarding subcontracted Work.

The Engineer's consent to subcontract will not create a contract between the Agency and the Subcontractor, will not convey to the Subcontractor any rights against the Agency,

and will not relieve the Contractor or the Contractor's Surety of any of their responsibilities under the Contract.

**(f) Failure to Comply** - Failure to comply with [00180.21](#) will be cause for the Engineer to take action reasonably necessary to obtain compliance. This action may include, but is not limited to:

- Suspension of the Work;
- Withholding of Contract payments as necessary to protect the Agency; and
- Termination of the Contract.

**00180.22 Payments to Subcontractors and Agents of the Contractor** - To the extent practicable, the Contractor will pay in the same units and on the same basis of measurement as listed in the Schedule of Items for subcontracted Work or other Work not done by the Contractor's own organization. The Agency will not be responsible for any overpayment or losses resulting from overpayment by the Contractor to subcontractors and to its other agents, work providers, service providers, and trucking services providers.

If requested in writing by a first-tier Subcontractor, the Contractor will send to the Subcontractor, within ten (10) Calendar Days of receiving the request, a copy of that portion of any invoice or request for payment submitted to the Agency, or pay document provided by the Agency to the Contractor, specifically related to any labor, Equipment, or Materials supplied by the first-tier Subcontractor.

**00180.30 Materials, Equipment, and Work Force** - The Contractor will furnish suitable and sufficient Materials, Equipment, and personnel to properly prosecute and complete the Work. The Contractor will use only Equipment of adequate size and condition to meet the requirements of the Work and Specifications, and to produce a satisfactory quality of Work. Upon receipt of the Engineer's written order, the Contractor will immediately remove, and not use again on the Project without the Engineer's prior written approval, Equipment that, in the Engineer's opinion, fails to meet Specifications or produce a satisfactory product or result.

The work force will be trained and experienced for the Work to be performed. Upon receipt of the Engineer's written order, the Contractor will immediately remove from the Project Site, and will not employ again on the Project without the Engineer's prior written approval, any supervisor or employee of the Contractor or any subcontractor who, in the Engineer's opinion, does not perform satisfactory Work or whose conduct interferes with the progress of the Work.

If the Contractor fails to remove Equipment or persons as ordered, or fails to furnish suitable and sufficient Materials, Equipment and personnel for the proper prosecution of the Work, the Engineer may suspend the Work by written notice until such orders are complied with and such deficiencies are corrected, or the Engineer may terminate the Contract under the provisions of [00180.90\(a\)](#).

**00180.31 Required Materials, Equipment, and Methods** - The Engineer's decisions under this Section are final.

**(a) General** - When the Equipment and methods to be used are not specified in the Contract, any Equipment or methods that accomplish the Work as required by the Contract will be permitted.

When the Contract specifies certain Equipment or methods, the Contractor will use the Equipment or methods specified unless otherwise authorized by the Engineer in writing.

The Contract, if awarded, will be on the basis of material and equipment described in the drawings or specified in the specifications. Consideration of possible substitute items is at the sole discretion of the Agency. Whenever indicated in the bid proposal that a substitute item of material or equipment may be furnished or used by Contractor, if acceptable to the Engineer, application for such acceptance will not be considered by the Engineer until after the bid date.

Contractor will submit sufficient information as provided below to allow Engineer to determine that the item of material or equipment proposed is essentially equivalent to that named and therefore an acceptable substitute. The procedure for review by the Engineer will consist of the following, including any other requirements as the Engineer decides is appropriate under the circumstances:

- Request to review proposed substitute items of material or equipment will not be accepted by Engineer from anyone other than Contractor.
- If Contractor wishes to furnish or use a substitute item of material or equipment, Contractor will first make written application to Engineer for acceptance thereof, certifying that the proposed substitute will perform adequately the functions and achieve the results called for by the general design, and be suited to the same use as that specified.
- The application will state the extent, if any, to which the evaluation and acceptance of the proposed substitute will prejudice Contractor's achievement of substantial completion on time, whether or not acceptance of the substitute for use in the Work will require a change in any of the contract documents (or in the provisions of any other direct Contract with Owner for work on the project) to adapt the design to the proposed substitute and whether or not incorporation or use of the substitute in connection with the Work is subject to payment of any license fee or royalty.
- Engineer may require Contractor to furnish additional data about the proposed substitute.
- Acceptance of substitute items is the sole discretion of the Engineer and all data to be provided by Contractor in support of any proposed substitute item will be at Contractor's expense.

**(b) Substitution of Materials and Equipment to be Incorporated into the Work** - After execution of the Contract, the Engineer may approve substitution of Materials and Equipment to be incorporated into the Work as follows:

**(1) Reasons for Substitution** - The Engineer will consider substitution only if:

- The proposed Materials or Equipment are equal to or superior to the specified items in construction, efficiency and utility; or
- Due to reasons beyond the control of the Contractor, the specified Materials or Equipment cannot be delivered to the Project in sufficient time to complete the Work in proper sequence.

**(2) Submittal of Request** - The Contractor will submit requests for substitution to the Engineer, including manufacturers' brochures and other information needed to verify equality of the proposed item(s).



**(c) Substitution of Equipment Specified to Perform Work** - The Agency encourages development of new or improved Equipment and innovative use of Equipment. When the Specifications require Equipment of a particular size or type to be used to perform certain portions of the Work, the Contractor may submit a request to the Engineer to use Equipment of a different size or type. The request will not be considered as a cost reduction proposal under [00140.70](#). The request must:

- Be in writing and include a full description of the Equipment proposed and its intended use;
- Include the reasons for requesting the substitution; and
- Include evidence, obtained at the Contractor's expense and satisfactory to the Engineer, that the proposed Equipment is capable of functioning as well as or better than the specified Equipment.

The Engineer will consider the Contractor's request and will provide a written response to the Contractor, either permitting or denying use of the proposed Equipment.

Permission may be granted on a trial basis to test the quality of Work actually produced, subject to the following:

- There will be no cost to the Agency, either in Contract Amount or in Contract Time;
- The permission may be withdrawn by the Engineer at any time if, in the Engineer's opinion, the Equipment is not performing in all respects equivalent to the Equipment specified in the Contract;
- If permission is withdrawn, the Contractor will perform the remaining Work with the originally-specified Equipment; and
- The Contractor will remove and replace non-specification Work resulting from the use of the Contractor's proposed Equipment, or otherwise correct it as the Engineer directs, at no additional compensation.

**(d) Substitution of Methods** - The Agency encourages development of new, improved, and innovative construction methods. When the Plans or Specifications require a certain construction method for a portion of the Work, the Contractor may submit a request for a change by following the provisions of [00140.70](#), "Cost Reduction Proposals."

**00180.32 Alternative Materials, Equipment, and Methods** - Whenever the Contract authorizes certain alternative Materials, Equipment, or methods of construction for the Contractor's use to perform portions of the Work, and leaves the selection to the Contractor, the Agency does not guarantee that all listed alternative Materials, Equipment, or methods of construction can be used successfully throughout all or any part of the Work.

The Contractor will employ only those alternatives that can be used to satisfactorily perform the Work. No additional compensation will be paid for corrective work necessitated by the Contractor's use of an inappropriate alternative.

**00180.40 Limitation of Operations:**

**(a) In General** - The Contractor will comply with all Contract provisions and must:

- Conduct the Work at all times so as to cause the least interference with traffic, and
- Not begin Work that may allow damage to Work already started.



- Not perform work at the project site on a day not defined as a work day according to subsection [00110.20](#).
- Conduct all Work during the times and limitations specified in MMC 16.24 unless otherwise approved by the Engineer.

**(b) On-Site Work** - The Contractor will not begin On-Site Work until the Contractor has:

- Received Notice to Proceed;
- Filed with the Construction Contractors Board the public works bond as required in [00170.20](#);
- An approved Project Work schedule;
- An approved Traffic Control Plan;
- An approved Pollution Control Plan;
- An approved Erosion and Sediment Control Plan;
- Met with the Engineer at the required preconstruction conference; and
- Assembled all Materials, Equipment, and labor on the Project Site, or has reasonably assured that they will arrive on the Project Site, so the Work can proceed according to the Project Work schedule.

**(c) Project Restrictions** - No construction, materials delivery, layout activity, equipment maintenance, or startup or movement of machinery will occur on Monday through Friday between 9:00 p.m. and 7:00 a.m. and on weekends between 5:00 p.m. and 8:00 a.m. unless otherwise approved by the Agency. All night-time work is subject to the City of Milwaukie noise ordinance limitations unless Contractor obtains a variance in accordance with MMC 8.08

In addition to the requirements set forth in Section 170.65, Contractor will notify the City Engineer of any overtime operations as soon as possible. Normal working hours will be defined as the period of time between 8:00 a.m. and 5:00 p.m. Monday through Friday, excluding holidays. Agency also recognizes the following additional holidays:

- Martin Luther King Day – Third Monday in January
- Presidents Day – Third Monday in February
- Veterans Day – November 11
- Day after Thanksgiving – Fourth Friday in November
- Christmas Eve – The afternoon when Christmas falls on a Tuesday through Friday

For overtime work requested by the Contractor, the Contractor will pay the applicable wage rate for the City Engineer's Inspector, engineering and operations personnel, and other staff required at the project during the overtime hours.

Toilet accommodations will be provided and maintained for the use of the employees on the job site. The accommodations will be in approved locations, properly screened from public observance and will be maintained in a strictly sanitary manner. The Contractor will obey and enforce all other sanitary regulations and orders and will take precautions against infectious diseases. The Contractor will maintain at all times, satisfactory sanitary conditions around all tool and supply houses and on all other parts of the Work in accordance with OSHA requirements.

**00180.41 Project Work Schedules** - The Contractor will submit a Project Work schedule meeting the requirements of this Subsection to the Engineer. The Project Work schedule is intended to identify the sequencing of activities and time required for prosecution of the Work. The schedule is used to plan, coordinate, and control the progress of construction. Therefore, the Project Work schedule will provide for orderly, timely, and efficient prosecution of the Work, and will contain sufficient detail to enable both the Contractor and the Engineer to plan, coordinate, analyze, document, and control their respective Contract responsibilities. Sufficient detail will also include all required double shifts, overtime work, or combination of both necessary to complete Contract Work within the Contract Time.

Contractor's activity related to developing, furnishing, monitoring, and updating these required schedules is Incidental.

The Contractor will submit a supplemental "look ahead" Project Work schedule each week to the Engineer. The "look ahead" Project Work schedule is supplemental to the Type A, B, or C schedule specified below. The supplemental "look ahead" Project Work schedule will:

- Identify the sequencing of activities and time required for prosecution of the Work.
- Provide for orderly, timely, and efficient prosecution of the Work.
- Contain sufficient detail to enable both the Contractor and the Engineer to plan, coordinate, analyze, document, and control their respective Contract responsibilities.

The supplemental "look ahead" Project Work schedule will be written in common terminology and show the planned Work activities broken down into logical, separate activities by area, stage, and size and include the following information:

- The resources the Contractor, subcontractors, or services will use.
- The locations of each activity that will be done including the limits of the work by mile posts, stations, or other indicators.
- The time frames of each activity by Calendar Days, shifts, and hours.
- All anticipated shoulder, lane, and road closures.

At a minimum, the Contractor will prepare a bar chart that:

- Shows at least three (3) weeks of activity including the week the bar chart is issued.
- Uses a largest time scale unit of one (1) Calendar Day. Smaller time scale units may be used if needed.
- Is appropriate to the activities.
- Identifies each Calendar Day by month and day.

Include the Contract name, Contract number, Contractor's name, and date of issue on each page of the bar chart.

The Contractor will submit the supplemental "look ahead" Project Work schedule starting at First Notification and continuing each week until Second Notification has been issued and all punch list items and final trimming and clean-up has been completed. The Contractor will meet with the Engineer each week to review the supplemental "look ahead" Project Work schedule. If the Engineer or the Contractor determines that the current supplemental "look ahead" Project Work schedule requires changes or additions, either notations can be made on the current schedule

or the Engineer may require the submittal of a revised supplemental "look ahead" Project Work schedule. Review of the current and subsequent supplemental "look ahead" Project Work schedules does not relieve the Contractor of responsibility for timely and efficient execution of the Contract.

One of the following Type "A", "B", or "C" schedules will be required under the Contract. The type of schedule will be Type "A" unless otherwise identified in the Special Provisions.

The Contract schedule should include provisions for progress meetings held as necessary during the course of the project. Upon 48 hours' notice (two (2) Working days) the Engineer may call a progress meeting with the contractor.

**(a) Type "A" Schedule** - When a Type "A" schedule is required, the Contractor will do the following:

**(1) Schedule** – At least ten (10) Calendar Days prior to the preconstruction conference, the Contractor will provide to the Engineer four copies of a Project Work schedule, including a time-scaled bar chart and narrative, showing:

- Expected beginning and completion dates of each activity, including all staging; and
- Elements of the Traffic Control Plan as required under 00221.06.

The schedule will show detailed Work activities as follows:

- Construction activities;
- The time needed for completion of the utility relocation work;
- Submittal and approval of Materials samples and shop drawings;
- Fabrication, installation, and testing of special Materials and Equipment; and
- Duration of Work, including completion times of all stages and their sub phases.

For each activity, the Project Work schedule will list the following information:

- A description in common terminology;
- The quantity of Work, where appropriate, in common units of measure;
- The activity duration in Calendar Days; and
- Scheduled start, completion, and time frame shown graphically using a time-scaled bar chart.

The schedule will show the Work broken down into logical, separate activities by area, stage, or size. The duration of each activity will be verifiable by manpower and Equipment allocation, in common units of measure, or by delivery dates.

The bar chart must be prepared as follows:

- The length of bar will represent the number of workdays scheduled.
- The time scale will be appropriate for the duration of the Contract.
- The time scale will be in Calendar Days.
- The smallest unit shown will be 1 Calendar Day.
- The first day and midpoint of each month will be identified by date.
- Distinct symbols will be used to denote multiple shift, holiday, and weekend Work.

Each page of the bar chart will include a title block showing the Contract name and number, Contractor's name, date of original schedule, and all update dates; and a legend containing the symbols used, their definitions, and the time scale, shown graphically. To ensure readability the bar chart will be drawn on a reasonable size of paper up to a maximum of 36 inch by 36 inch, using multiple sheets when needed.

Within seven (7) Calendar Days after the preconstruction conference, the Engineer and the Contractor will meet to review the Project Work schedule as submitted. The Engineer will review the schedule for compliance with all Contract Time limitations and other restraints. Review of this and subsequent schedules by the Engineer will not relieve the Contractor of responsibility for timely and efficient execution of the Contract. Within 10 Calendar Days of this meeting, the Contractor will resubmit to the Engineer four copies of the Project Work schedule, including required revisions.

**(2) Review by the Engineer** - The Project Work schedule may need revision as the Work progresses. Therefore, the Contractor will periodically review the Project Work schedule and progress of the Work with the Engineer. If the Engineer or the Contractor determines that the Project Work schedule no longer represents the Contractor's own plans or expected time for the Work, a meeting will be held between the Engineer and the Contractor. At this meeting, the Contractor and the Engineer will review Project events and any changes for their effect on the Project Work schedule.

The Contractor will compile an updated Project Work schedule incorporating any changes to the Project completion time(s). The bar chart will reflect the updated information. The Contractor will submit four copies of the updated Project Work schedule to the Engineer within seven (7) Calendar Days after the meeting. The report must include without limitation the following:

- Sufficient narrative to describe the past progress, anticipated activities, and stage Work;
- A description of any current and expected changes or delaying factors and their effect on the construction schedule; and
- Proposed corrective actions.

**(b) Type "B" Schedule** - When a Type "B" Schedule is required, the Contractor will do the following:

**(1) Initial Schedule** - At least ten (10) Calendar Days prior to the preconstruction conference, the Contractor will provide to the Engineer four copies of a time-scaled bar chart Project Work schedule showing:

- Expected beginning and completion date of each activity, including all staging; and
- Elements of the Traffic Control Plan as required under 00221.06.

The initial schedule will show all Work intended for the first 60 Days of the Contract to the level of detail described in (2) below, and will show the priority and interdependence (sequencing and network logic) of all major segments of the remainder of the Work.

**(2) Detailed Schedule** - In addition to the above requirements, and within 30 Calendar Days after the Notice to Proceed, the Contractor will provide the Engineer one digital copy and four paper copies of a detailed time-scaled bar chart Project Work schedule indicating the critical course of the Work. The digital copy will be compatible with the

current version of Microsoft, Primavera P6 by Oracle, or another scheduling program approved by the Engineer.

Detailed work schedule activities will include the following:

- Construction activities;
- The time needed for completion of the utility relocation work;
- Submittal and approval of Material samples and shop drawings;
- Procurement of critical Materials;
- Fabrication, installation, and testing of special Material and Equipment; and
- Duration of Work, including completion times of all stages and their sub phases.

For each activity, the Project Work schedule will list the following information:

- A description in common terminology;
- The quantity of Work, where appropriate, in common units of measure;
- The activity duration in normal workdays; and
- Scheduled start, completion, and time frame shown graphically using a time-scaled bar chart.

The schedule will show the Work broken down into logical, separate activities by area, stage, or size. The duration of each activity will be verifiable by manpower and Equipment allocation, in common units of measure, or by delivery dates.

The bar chart must be prepared as follows:

- The length of bar will represent the number of normal workdays scheduled.
- The time scale will be appropriate for the duration of the Contract.
- The time scale will be in normal workdays (every day except Saturday, Sunday, and legal holidays).
- The smallest unit shown will be one (1) Calendar Day.
- The first day and midpoint of each month will be identified by date.
- Distinct symbols will be used to denote multiple shift, holiday, and weekend Work.

The bar chart drawing(s) will include a title block showing the Contract name and number, Contractor's name, date of original schedule, and all update dates; and a legend containing the symbols used, their definitions, and the time scale, shown graphically. To ensure readability the bar chart will be drawn on a reasonable size of paper up to a maximum of 36 inch x 36 inch, using multiple sheets when needed.

Within 10 Calendar Days after submission of the Project schedule the Engineer and the Contractor will meet to review the Project schedule as submitted. Within 10 Days of the review meeting, the Contractor will resubmit to the Engineer one digital and four paper copies of the Project schedule, including required revisions.

The accepted Project schedule will represent all Work, as well as the planned sequence and time for the Work. Review of this and subsequent schedules by the Engineer will not relieve the Contractor of responsibility for timely and efficient execution of the Contract.

**(3) Review and Reporting** - The Project Work schedule may require revision as the Work progresses. Therefore, the Contractor will monitor and when necessary revise the Project Work schedule as follows:

**a. Review with the Engineer** - The Contractor will perform ongoing review of the Project Work schedule and progress of the Work with the Engineer. If the Engineer or the Contractor determines that the Project Work schedule no longer represents the Contractor's own plans or expected time for the Work, a meeting will be held between the Engineer and the Contractor. At this meeting, the Contractor and the Engineer will review Project events and any changes for their effect on the Project Work schedule. After any necessary action has been agreed upon, the Contractor will make required changes to the Project Work schedule.

The Contractor will collect information on all activities worked on or scheduled to be worked on during the previous report period, including shop drawings, Material procurement, and Contract Change Orders that have been issued. Information will include commencement and completion dates on activities started or completed, or if still in progress, the remaining time duration.

The Contractor will develop detailed sub-networks to incorporate changes, Additional Work, and Extra Work into the Project Work schedule. Detailed sub-networks will include all necessary activities and logic connectors to describe the Work and all restrictions on it. The restraints will include those activities from the Project Work schedule that initiated the sub-network as well as those restrained by it.

The Contractor will evaluate this information and compare it with the Contractor's project schedule. If necessary, the Contractor will make an updated bar chart schedule to incorporate the effect changes may have on the Project completion time(s). For any activity that has started, the Contractor will add a symbol to show the actual date the activity started and the number of normal workdays remaining until completion. For activities that are finished, a symbol will be added to show the actual date. The Contractor will submit one digital and four paper copies of the updated bar chart to the Engineer within seven (7) Days after the progress meeting, along with a progress report as required by "b." below.

**b. Progress Report** - The Contractor will submit a progress report to the Engineer each month. The report must include the following:

- Sufficient narrative to describe the past progress, anticipated activities, and stage Work;
- A description of any current and expected changes or delaying factors and their effect on the construction schedule; and
- Proposed corrective actions.

**(c) Type "C" Schedule** - When a Type "C" Schedule is required, the Contractor will do the following:

**(1) Initial Schedule** - At least ten (10) Calendar Days prior to the preconstruction conference, the Contractor will provide to the Engineer one digital copy and four paper copies of a time-scaled bar chart Project Work schedule. The digital copy will be compatible with the current version of Microsoft, Primavera P6 by Oracle, or another scheduling program approved by the Engineer. The initial schedule must show:

- The expected beginning and completion date of each activity, including all stages and phases;

- The time needed for completion of the utility relocation work; and
- The elements of the traffic control plan as required under 00225.05.

A logic diagram and a time-scaled bar chart will be acceptable in lieu of a time-scaled logic diagram.

The initial schedule will show all Work intended for the first 60 Days of the Contract to the level of detail described in (2) below, and will show the priority and interdependence (sequencing and network logic) of all major segments of the remainder of the Work.

**(2) Detailed Project Work Schedule** - In addition to the above requirements, and within 30 Calendar Days after First Notification, the Contractor will provide the Engineer one digital copy and four paper copies of a detailed time-scaled critical path method (CPM) network Project Work schedule and computer analysis printout, both clearly indicating the critical path. The digital copy will be compatible with MS Project 2003, Primavera P3, SureTrak Project Manager 3.0, or another scheduling program approved by the Engineer. The first submitted detailed time-scaled critical path method (CPM) network Project Work schedule will also contain a listing of the quantity of Work for each activity, when appropriate, in common units of measure.

Detailed work schedule activities will include the following:

- Construction activities;
- Any limitations of operation specified in [00180.40](#);
- The time needed for completion of the utility relocation work;
- Implementation of TCP for each stage and phase;
- Submittal and approval of Material samples, mix designs, and shop drawings;
- Agency timeframes to process and return Contractor submitted plans, working drawings, equipment lists and other submittals;
- Procurement of critical Materials;
- Fabrication, installation, and testing of special Material and Equipment;
- Duration of Work, including completion times of all stages and their sub-phases; and
- Specified cure times for all concrete elements.

The activities will be separately identifiable by coding or use of sub-networks or both. The duration of each activity will be verifiable and consistent with the description in the Project narrative required in (3) below.

Detailed sub-networks will include all necessary activities and logic connectors to describe the Work and all restrictions on it. In the restraints, include those activities from any Project Work schedule that initiated the sub-network as well as those restrained by it.

The time scale used on the Contractor's detailed time-scaled critical path method (CPM) network Project Work schedule will be appropriate for the duration of the activities and the Project duration. The time scale will be in normal workdays, defined as every day except Saturday, Sunday and legal holidays, with calendar dates identified no less than the first and midpoint of each calendar month. The smallest unit shown will be 1 Day. The network will show the length of the activity or part scaled to

accurately represent the number of normal workdays scheduled. Distinct symbols or graphics will be used to show multiple shift, holiday, or weekend work.

The schedule network drawing(s) will include a title block showing the Contract name and number, Contractor's name, date of original schedule, and all update dates; and a legend containing the symbols used, their definitions, and the time scale, shown graphically. To ensure readability the drawings will be on a reasonable size of paper up to a maximum of 36 inch x 36 inch, using multiple sheets when needed.

The Contractor will include a tabulation of each activity in the computer mathematical analysis of the network diagram. The following information represents the minimum required for each activity:

- Event (node) number(s) for each activity;
- Maintain event (node) numbers throughout the Project;
- Activity description;
- Original duration of activities (in normal workdays);
- Estimated remaining duration of activities (in normal workdays);
- Earliest start date and actual start date (by calendar date);
- Earliest finish date and actual finish date (by calendar date);
- Latest start date (by calendar date);
- Latest finish date (by calendar date); and
- Slack or float time (in workdays).

Computer print-outs will consist of at least a node sort and an "early start/total-float" sort.

Within 14 Calendar Days after submission of the detailed time-scaled critical path method (CPM) network Project Work schedule, the Engineer and the Contractor will meet to review the detailed time-scaled critical path method (CPM) network Project Work schedule as submitted. Within 7 Calendar Days of the meeting, the Contractor will resubmit to the Engineer one digital and four paper copies of the detailed time-scaled critical path method (CPM) network Project Work schedule, including required revisions.

This first accepted detailed time-scaled critical path method (CPM) network Project Work schedule, also called the accepted Project Work schedule, will represent all Work, as well as the planned sequence and time for the Work. Review and acceptance of any Project Work schedules and Project narratives by the Engineer will not relieve the Contractor of responsibility for timely and efficient execution of the Contract.

**(3) Project Narrative** - In addition to the above requirements, and within 30 Calendar Days after First Notification, the Contractor will provide to the Engineer a final written Project narrative that discusses the planning, coordinating, scheduling and resourcing of the Work. The Project narrative will include the following written description:

- Plans for staging the project.
- All critical activities.
- All near critical activities defined as those with less than 30 Days of float.



- All subcontractor activities that are critical, near critical, and those that are greater than two weeks in duration.
- Labor resourcing, by stage and phase, to include the number of crews, average crew size and planned night/weekend shifts including that of subcontractors.
- Equipment allocation, by stage and phase to include mobilization, demobilization and planned activities including that of subcontractors.
- Notifications required under the Contract during each stage and phase which may include but is not limited to road closures, lanes closures, night work, cold plane pavement removal, and pile driving.
- Provide discussion on addressing reasonably predictable weather conditions and their impact on all weather sensitive activities. Also, provide discussion on other weather limitations that may affect the project schedule.
- Submittal and approval of material samples, mix designs, and shop drawings.
- Procurement of critical materials.
- Plans for dealing with "unique" construction items.
- Coordination of utilities and any immediate concerns for impacts/delays.
- Constructability issues.
- Cost Reduction Proposals and/or immediate requests for changes to the specifications.
- Concerns/issues that need to be addressed within the first 90 Days following First Notification.

The accepted Project narrative will represent all critical and near critical Work, as well as the planned sequence and time for the Work.

**(4) Review and Reporting** - The Project Work schedule may require revision as the Work progresses. Therefore, the Contractor will monitor and when necessary revise the Project Work schedule as follows:

**a. Review with the Engineer** - The Contractor will perform ongoing review of the accepted Project Work schedule and progress of the Work with the Engineer. If the Engineer or the Contractor determines that the accepted Project Work schedule no longer represents the Contractor's own plans or expected time for the Work, a meeting will be held between the Engineer and the Contractor. At this meeting, the Contractor and the Engineer will review Project events and any changes for their effect on the accepted Project Work schedule. After any necessary action has been agreed upon, the Contractor will make required changes to the accepted Project Work schedule and associated Project narrative. Upon acceptance by the Engineer, this will become the new accepted Project Work schedule and associated Project narrative.

The Contractor will collect information on all activities worked on or scheduled to be worked on during the previous report period, including shop drawings, Material procurement, and Contract Change Orders that have been issued. Information will include actual start and completion dates on activities started or completed, or if still in progress, the remaining time duration.

The Contractor will develop detailed sub-networks to incorporate changes, Additional Work, and Extra Work into the Project Work schedule. Detailed sub-networks will include all necessary activities and logic connectors to describe the Work and all restrictions on it. The restraints will include those activities from the Project Work schedule that initiated the sub-network as well as those restrained by it. The procedure for acceptance of the revised or updated Project Work schedule as the new accepted Project Work schedule will be as provided above.

The Contractor will evaluate this information each month and compare it with the accepted Project Work schedule. The Contractor will make an updated bar chart schedule to incorporate the effect changes may have on the Project completion time(s). For any activity that has started, the Contractor will add a symbol to show the actual date the activity started and the number of normal workdays remaining until completion. For activities that are finished, a symbol will be added to show the actual date. The Contractor will submit , digitally and in paper, copies of the updated bar chart to the Engineer within seven (7) Days after the progress meeting, along with a progress report as required by "b." below.

**b. Progress Report** - Each month the Contractor will submit a progress report and an update of the Project Work schedule to the Engineer. The report and updated schedule will be submitted both digitally and in paper copy and will include the following:

- A sufficient description, in narrative form, to describe the past progress, anticipated activities, and stage Work;
- A description of any current and expected changes or delaying factors and their effect on the construction schedule;
- Proposed corrective actions;
- Proposals to keep the Project on schedule in the event of a delay; and
- Any changes to the logic as compared to the accepted Project Work schedule.

**(d) Substitution of Schedules** - When a Type "A" schedule is required, a Type "B" or Type "C" schedule may be substituted for the Type "A" schedule.

When a Type "B" schedule is required, a Type "C" schedule may be substituted for the Type "B" schedule.

**(e) Specified Contract Time Not Superseded by Schedule Revisions** - The completion dates in any Project Work schedule and any revised or updated Project Work schedules will be within the Contract Time(s) specified for the Project, or within adjusted Contract Times approved according to [00180.80\(c\)](#). Acceptance of any Project Work schedule or any revised or updated Project Work schedules will not constitute approval of any completion dates that exceed such Contract Time(s). If the Contractor believes that additional Contract Time is due, the Contractor will submit, with a revised Project Work schedule, a request for adjustment of Contract Time according to [00180.80\(c\)](#). A request for an adjustment of Contract Time will be evaluated using the most recently accepted Project Work schedule.

**(f) Float Time** - Float time shown on the Project Work schedule, including any time between a Contractor's scheduled completion date and the specified Contract Time(s), does not exist for the exclusive use of either party to the Contract and belongs to the Project.

**(g) Schedules Do Not Constitute Notice** - Submittal of a Project Work schedule, with supporting Project narrative, does not constitute or substitute for any notice the Contractor is required under the terms of the Contract to give the Agency.

**(h) Failure to Provide Schedule** - The Project Work schedule is essential to the Agency. The Contractor's failure to provide the schedule, schedule information, progress reports, Project narratives, or schedule updates when required will be cause to suspend the Work, or to withhold Contract payments as necessary to protect the Agency, until the Contractor provides the required information to the Engineer.

**00180.42 Preconstruction Conference** - Unless otherwise approved in writing by the Engineer, before any Work is performed and within 30 Calendar Days of the Notice to Proceed, the Contractor will meet with the Engineer for a preconstruction conference at a time mutually agreed upon.

The preconstruction conference and organizational meeting will be held at a City of Milwaukie Building (or via a virtual meeting) prior to commencement of construction activities. Conduct the meeting to review responsibilities and personnel assignments.

Attendees should include authorized representatives of the Owner, the Engineer, consultants, the Contractor and Contractor's Superintendent, major subcontractors, manufacturers, suppliers and other concerned parties will each be represented at the conference. All participants at the conference will be familiar with the project and authorized to conclude matters relating to the Work.

Agenda: Discuss items of significance that could affect progress including such topics as:

- Tentative construction schedule
- Critical Work sequencing
- Designation of responsible personnel
- Procedures for processing field decisions and Change Orders
- Procedures for processing Applications for Payment
- Distribution of Contract Documents
- Submittal of Shop Drawings, Product Data and Samples
- Use of the premises
- Office, Work, and storage areas
- Equipment deliveries and priorities
- Safety procedures
- Security
- Housekeeping
- Working hours
- Subcontractors

**00180.43 Commencement and Performance of Work** - From the time of commencement of the Work to the time of Final Acceptance the Contractor will:

- Provide adequate Materials, Equipment, labor, and supervision to perform and complete the Work within the Contract Time or the adjusted Contract Time;
- Perform the Work as vigorously and as continuously as conditions permit, and according to a Project Work schedule that ensures completion within the Contract Time or the adjusted Contract Time;
- Not voluntarily suspend or slow down operations without prior written approval from the Engineer, and if approved submit an updated Project Work schedule according to 00180.41 that ensures completion within the Contract Time or the adjusted Contract Time; and
- Not resume suspended Work without the Engineer's written authorization.

**00180.50 Contract Time to Complete Work:**

**(a) General** - The time allowed to complete the Work or Pay Item is stipulated in the Solicitation Documents, and will be known as the "Contract Time" (see [00110.20](#)).

**(b) Kinds of Contract Time** - The Contract Time will be expressed in one or more of the following ways:

**(1) Fixed Date Calculation** - The calendar date on which the Work or Pay Item will be completed; or

**(2) Calendar Day Calculation** - The number of Calendar Days from a specified beginning point in which the Work or Pay Item will be completed.

**(3) Work Day Calculation** - The number of Work Days from a specified beginning point in which the Work or Pay item will be completed.

**(c) Beginning of Contract Time** - When the Contract Time is stated in Calendar Days, counting of Contract Calendar Days will begin on the day the Contractor begins On-Site Work as defined in 00110.20. When the Contract Time is stated in Work Days, counting of Contract Work Days will begin with the 10<sup>th</sup> Work Day following the date of the Notice to Proceed or the first day of work, whichever comes first.

**(d) Recording Contract Time** - All Contract Time will be recorded and charged to the nearest one-half Day.

Once Contract Time has commenced, the assessment of Contract Time will continue uninterrupted until the specified number of Days is exhausted.

For days when in the judgement of the Engineer, weather conditions preclude work, the Contractor will not work and Contract Time will not be assessed. A full Contract Day will be assessed for days when, in the judgment of the Engineer, the Contractor is able to work at least at 60% efficiency rate, or for 60% of the day.

For Fixed Date Contracts, normally expected inclement weather conditions are considered in the Engineer's selection of the completion date, and time extensions will only be considered for reasons shown in [00180.50\(e\)](#) and for weather conditions which in the opinion of the Engineer have an extraordinarily low statistical probability. Low statistical probability will be determined using historical weather data from a government website for

the previous ten (10) years in which weather that occurs within seven (7) years of the 10-year period is considered reasonable and predictable.

On Contracts with Calendar Day or Work Day counts, the Engineer will furnish the Contractor a weekly statement of Contract Time charges. The statement will show the number of Calendar Days counted for the preceding week and the number of Calendar Days remaining prior to the established completion date.

For Contracts with fixed completion dates for Pay Items, the Engineer will furnish the Contractor a weekly statement of Contract Time charges only after expiration of the Contract Time. The statement will show the number of Calendar Days of liquidated damages that have been assessed, if any.

These statements will include any exclusions from, or adjustments to, Contract Time.

**(e) Exclusions from Contract Time** - Regardless of the way Contract Time is expressed in the Contract, certain Calendar Days will not be charged against Contract Time. These exclusions will be allowed when the Contractor is prevented from performing Work due to one of the following reasons, resulting in delay:

- Acts of God or Nature;
- Court orders enjoining prosecution of the Work;
- Strikes, labor disputes or freight embargoes that, despite the Contractor's reasonable efforts to avoid them, cause a shutdown of the entire Project or one or more major operations. "Strike" and "labor dispute" may include union action against the Contractor, a Subcontractor, a Materials supplier, or the Agency; or
- Suspension of the Work by written order of the Engineer for reasons other than the Contractor's failure or neglect.

**(f) Time Calculation Protest** - In the event the Contractor disputes the accuracy of the statement of Contract Time charges, it will immediately contact the Engineer and attempt to resolve the dispute. If the dispute cannot be resolved informally, the Contractor will submit a formal written protest to the Engineer within 7 Calendar Days of the date the Engineer mailed or delivered the statement. Failure to submit a formal written protest within the seven (7) Calendar Day period constitutes the Contractor's approval of the time charges, or adjusted time charges, itemized in the statement.

**(g) End of Contract Time** - When the Engineer determines that the On-Site Work has been completed, except for the items listed below, the Engineer will issue a Second Notification.

The Second Notification will list:

- The date the time charges stopped;
- Final trimming and cleanup tasks (see [00140.90](#));
- Equipment to be removed from the Project Site;
- Minor corrective work not involving additional payment to be completed; and
- Submittals, including without limitation all required certifications, bills, forms, warranties, certificate of insurance coverage ([00170.70\(b\)](#)), and other documents, required to be provided to the Engineer before Third Notification will issue.

The Contractor will complete all tasks listed in the Second Notification in an expeditious manner within the time frame proposed by the Contractor and accepted by the Engineer. Unless otherwise agreed by the Agency, failure of the Contractor to complete all tasks listed in the Second Notification within the time frame accepted, will result in the Agency

rescinding the Second Notification. Counting of time charges will resume upon expiration of the accepted time frame.

**00180.60 Notice of Delay** - The Contractor will notify the Engineer of any delay that will likely prevent completion of the Work or a Pay Item by the date specified in the Project Work schedule. The notice will be in writing and will be submitted within seven (7) Calendar Days of when the Contractor knew or should have known of the delay. The notice will include, to the extent available, the following:

- The reasons or causes for the delay;
- The estimated duration of the delay and the estimated resulting cumulative delay in Contract completion;
- Except for [00180.50\(e\)](#) and 00180.65 delays, whether or not the Contractor expects to request an adjustment of Contract Time due to the delay;
- Whether or not the Contractor expects to accelerate due to the delay; and
- Whether or not the Contractor expects to request additional compensation due to the delay. Except for [00180.50\(e\)](#) and 00180.65 delays, failure to include this information will constitute waiver of the Contractor's right to later make such a request.

**00180.65 Right-of-Way and Access Delays** - Right-of-Way and access delays will be taken into consideration in adjusting Contract Time, and in approving additional compensation if the performance of the Work is delayed because of the Agency's failure to make available to the Contractor:

- Necessary Rights-of-Way;
- Agency-owned or Agency-controlled Materials sources that are offered in the Contract for the Contractor's use; or
- Access to, or rights of occupancy of, buildings and other properties the Contractor is required to enter or to disturb according to Contract requirements.

If the ending date of an anticipated delay is stated in the Special Provisions, only the delay occurring after that date will be considered for adjusting Contract Time or providing additional compensation.

**00180.70 Suspension of Work:**

**(a) General** - The Engineer has authority to suspend the Work, or part of the Work, for any of the following causes:

- Failure of the Contractor to correct unsafe conditions;
- Failure of the Contractor to carry out any provision of the Contract;
- Failure of the Contractor to carry out orders issued by the Engineer, the Agency, or any regulatory authority;
- Existence of conditions unsuitable to proper or safe performance of the Work; or
- Any reason considered by the Agency to be in the public interest.

When Work has been suspended for any reason, the Contractor will not resume Work without the Engineer's written authorization.

**(b) Contractor's Responsibilities during and after Suspension** - During periods of suspension of the Work, the Contractor will continue to be responsible for protecting and repairing the

Work according to 00170.80, and for ensuring that a single designated representative responsible for the Project remains available according to 00150.40.

When Work is resumed after suspension, unless otherwise specified in the Contract, the Contractor will perform the following at no additional compensation:

- Replace or repair any Work, Materials, and Equipment to be incorporated into the Work that was lost or damaged because of the temporary use of the Project Site by the public; and
- Remove Materials, Equipment, and temporary construction necessitated by temporary maintenance during the suspension, as directed by the Engineer.

**(c) Compensation and Allowances for Suspension** - Compensation and allowance of additional Contract Time due to suspension of any portion of the Work will be authorized only for Agency-initiated suspensions for reasons other than the Contractor's failure or neglect (refer to [00180.50\(e\)](#), [00180.65](#), and [00195.40](#)).

#### **00180.80 Adjustment of Contract Time:**

**(a) General** - Contract Time established for the Work will be subject to adjustment, either by increase or decrease, for causes beyond the control of the Contractor, according to the terms of this Subsection. After adjustment, the Contract Time will become, and be designated as, the "Adjusted Contract Time". Except as provided in [00180.65](#) and [00195.40](#), an adjustment of Contract Time will be the Contractor's only remedy for any delay arising from causes beyond the control of the Contractor.

**(b) Contractor's Request Not Required** - The Engineer may increase or decrease the Contract Time or the Adjusted Contract Time if Change Orders or Extra Work orders issued actually increase or decrease the amount of time required to perform the Work. The Engineer may also increase Contract Time in the event of Right-of-Way and Access delays (see [00180.65](#)), and those delays due to causes beyond the Contractor's control specified in [00180.50\(e\)](#). The Engineer will promptly inform the Contractor of adjustments made to Contract Time according to this Subsection, and will include the reasons for adjustment.

If the Agency anticipates delay during performance of the Contract, and specifies its expected duration in the Special Provisions, the Engineer will only consider additional delay beyond the stipulated duration in determining whether to adjust Contract Time.

**(c) Contractor's Request Required** - In the event the Contractor believes that additional Contract Time is due, the Contractor will submit to the Engineer a timely request for adjustment of Contract Time. The Engineer will not consider untimely requests. The Agency regards as timely only those requests for adjustment of Contract Time that:

- Accompany a proposed revised Project Work schedule submitted according to [00180.41](#), for comparison with the last revision of the Project Work schedule; or
- Are not otherwise deemed waived and are submitted within 14 Days after the date of Second Notification, if Second Notification has been issued.

The Engineer will not grant an adjustment of Contract Time for events that occurred prior to the date of the last revision of the Project Work schedule. The Engineer will not authorize, nor the Agency pay, acceleration costs incurred by the Contractor prior to its submittal of a request for adjustment of Contract Time to which the acceleration costs relate.

The Contractor's request for adjustment of Contract Time will be submitted to the Engineer on a form provided by, or in a format acceptable to, the Engineer, and will include a copy of the written notice required under [00180.60](#). The request must include without limitation:

- Consent of the Contractor's Surety if the request totals more than 30 Calendar Days of additional Contract Time;
- Sufficient detail for the Engineer to evaluate the asserted justification for the amount of additional Contract Time requested;
- The cause of each delay for which additional Contract Time is requested, together with supporting analysis and data;
- Reference to the Contract provision allowing Contract Time adjustment for each cause of delay;
- The actual or expected duration of delay resulting from each cause of delay, expressed in Calendar Days; and
- A schedule analysis based on the current approved Project Work schedule for each cause of delay, indicating which activities are involved and their impact on Contract completion.

**(d) Basis for Adjustment of Contract Time** - In the adjustment of Contract Time, the Engineer will consider causes that include, but are not limited to:

- Failure of the Agency to submit the Contract and bond forms to the Contractor for execution within the time stated in [00130.50](#), or to submit the Notice to Proceed within the time stated in [00130.90](#);
- Errors, changes, or omissions in the Supplemental Drawings, quantities, or Specifications;
- Performance of Extra Work;
- Failure of the Agency or Entities acting for the Agency to act promptly in carrying out Contract duties and obligations;
- Acts or omissions of the Agency or Entities acting for the Agency that result in unreasonable delay referenced in [00195.40](#);
- Causes cited in [00180.50\(e\)](#); and
- Right-of-way and access delays referenced in [00180.65](#).

The Engineer will not consider requests for adjustment of Contract Time based on any of the following:

- Contentions that insufficient Contract Time was originally specified in the Contract;
- Delays that do not affect the specified or Adjusted Contract Time;
- Delays that affect the Contractor's planned early completion, but that do not affect the specified or adjusted Contract Time;
- Shortage or inadequacy of Materials, Equipment or labor;
- Work stoppage required by the Engineer to determine the extent of Work defects
- Time for the Contractor to correct the Work defects from date of notification of the defects until the correction work is completed and has been approved by the Engineer. Late delivery of Materials and Equipment to be incorporated into the Work, except under those conditions referenced in [00180.50\(e\)](#);
- Different area of Material source in [00160.40\(a\)](#);
- Substitution of Equipment in [00180.31\(c\)](#);
- Reasonably predictable weather conditions; or



- Other matters within the Contractor's control or Contract responsibility.

**(e) Consideration and Response by Agency** - The Engineer will only consider a Contractor's request for Contract Time adjustment submitted according to the requirements of [00180.80\(c\)](#). The Engineer may elect not to consider claimed delays that do not affect the specified or adjusted Contract Time required to complete the Work.

The Engineer may adjust Contract Time for causes not specifically identified by the Contractor in its request.

The Engineer will review a properly submitted request for Contract Time adjustment, and within a reasonable time will advise the Contractor of the Engineer's findings. If the Contractor disagrees with the Engineer's findings, the Contractor may request review according to the procedure specified in [00199.40](#).

#### **00180.85 Failure to Complete on Time; Liquidated Damages:**

**(a) Time is of the Essence** - Time is of the essence in the Contractor's performance of the Contract. It is essential and in the public interest that the Contractor prosecute the Work vigorously to Contract completion.

The Agency does not waive any rights under the Contract by permitting the Contractor to continue to perform the Contract, or any part of it, after the Contract Time or adjusted Contract Time has expired.

**(b) Liquidated Damages** - Delays in the Contractor's performance of the Work may inconvenience the traveling public, interfere with business and commerce, and increase cost to the taxpayers. Because the Agency finds it is unduly burdensome and difficult to demonstrate the exact dollar value of such damages, the Contractor agrees to pay to the Agency, not as a penalty but as liquidated damages, the amount specified in the Special Provisions for each Calendar Day the Work remains incomplete after the expiration of the Contract Time or adjusted Contract Time applicable to the Work.

Payment by the Contractor of liquidated damages does not release the Contractor from its obligation to fully and timely perform the Contract according to its terms. Nor does acceptance of liquidated damages by the Agency constitute a waiver of the Agency's right to collect any additional damages it may sustain by reason of the Contractor's failure to fully perform the Contract according to its terms. The liquidated damages will constitute payment in full only of damages incurred by the Agency due to the Contractor's failure to complete the Work on time.

If the Contract is terminated according to [00180.90\(a\)](#), and if the Work has not been completed by other means on or before the expiration of Contract Time or adjusted Contract Time, liquidated damages will be assessed against the Contractor for the duration of time reasonably required to complete the Work.

#### **00180.90 Termination of Contract and Substituted Performance:**

**(a) Termination for Default** - Termination of the Contract for default may result if the Contractor:

- Fails to comply with the requirements for records;
- Violates any material provision of the Contract;
- Disregards applicable laws and regulations or the Engineer's instructions;
- Refuses or fails to supply enough Materials, Equipment or skilled workers for prosecution of the Work in compliance with the Contract;

- Fails to make prompt payment to Subcontractors;
- Makes an unauthorized general assignment for the benefit of the Contractor's creditors;
- Has a receiver appointed because of the Contractor's insolvency;
- Is adjudged bankrupt and the court consents to the Contract termination; or
- Otherwise fails or refuses to faithfully perform the Contract according to its terms and conditions.

If the Contract is terminated by the Agency, upon demand the Contractor and the Contractor's Surety will provide the Engineer with immediate and peaceful possession of the Project Site, and of all Materials and Equipment to be incorporated into the Work, whether located on and off the Project Site, for which the Contractor received progress payments under [00195.50](#).

If the Contract is terminated for default, neither the Contractor nor its Surety will be:

- Relieved of liability for damages or losses suffered by the Agency because of the Contractor's breach of Contract; or
- Entitled to receive any further progress payments until the Work is completed. However, progress payments for completed Work that remain due and owing at the time of Contract termination may be made according to the terms of [00195.50](#), except that the Engineer will be entitled to withhold sufficient funds to cover costs incurred by the Agency as a result of the termination. Final payment to the Contractor will be made according to the provisions of [Section 00195](#).

If a termination under this provision is determined by a court of competent jurisdiction to be unjustified, the termination will be deemed a termination for public convenience.

**(b) Substituted Performance** - According to the Agency's procedures, and upon the Engineer's recommendation that sufficient cause exists, the Agency, without prejudice to any of its other rights or remedies and after giving the Contractor and the Contractor's Surety at least ten (10) Calendar Days' written notice, may:

- Terminate the Contract;
- Substitute the Contractor with another Entity to complete the Contract;
- Take possession of the Project Site;
- Take possession of Materials on the Project Site;
- Take possession of Materials not on the Project Site, for which the Contractor received progress payments under [00195.50](#);
- Take possession of Equipment on the Project Site that is to be incorporated into the Work;
- Take possession of Equipment not on the Project Site that is to be incorporated into the Work, and for which the Contractor received progress payments under [00195.50](#); and
- Finish the Work by whatever method the Agency deems expedient.

If, within the ten (10) Calendar Days' notice period provided above, the Contractor and/or its Surety corrects the basis for declaration of default to the satisfaction of the Engineer, or if the Contractor's Surety submits a proposal for correction that is acceptable to the Engineer, the Contract will not be terminated.

- (c) Termination for Public Convenience** - The Engineer may terminate the Contract for convenience in whole or in part whenever the Engineer determines that termination of the Contract is in the best interest of the public.

The Engineer will provide the Contractor and the Contractor's Surety seven (70 Calendar Days' written notice of termination for public convenience. After such notice, the Contractor and the Contractor's Surety will provide the Engineer with immediate and peaceful possession of the Project Site, and of Materials and Equipment to be incorporated into the Work, whether located on and off the Project Site, for which the Contractor received progress payments under [00195.50](#).

If the Contract is terminated for public convenience, neither the Contractor nor its Surety will be relieved of liability for damages or losses suffered by the Agency as a result of defective, unacceptable or unauthorized Work completed or performed.

Compensation for Work terminated by the Engineer under this provision will be determined according to the provisions of [00195.70\(b\)](#).

## **SECTION 00190 - MEASUREMENT OF PAY QUANTITIES**

**00190.00 Scope** - The Engineer will measure pay quantities for accepted Work according to the United States standard measure unless otherwise provided in the Contract. Unless otherwise specified in the Contract, the Engineer will round off all quantity computations using the following convention:

- The final significant digit will not be changed when the succeeding digit is less than 5.
- The final significant digit will be increased by one when the succeeding digit is 5 or greater.

The measurement provisions contained in the Specifications for each Pay Item will supplement or modify the above convention by:

- Imposing measurement limitations
- Describing measurement or computation procedures
- Giving conversion factors or adjustment conditions
- Providing for determination of reasonably accurate and representative Pay Item quantities

Measurements required or allowed to be made by the Contractor will be subject to the Engineer's verification. The Engineer's decision about measurement is final.

**00190.10 Measurement Guidelines** - Measurement of quantities will be made on the following bases, unless otherwise specified in the Contract:

- (a) Unit Basis** - Unit will be each, unless otherwise specified in the Contract and will be determined by actual count of units in place.
- (b) Length Basis** - Length will be feet or mile, unless otherwise specified in the Contract and will be determined by measuring the length at least to the nearest 0.1 foot or at least to the nearest 0.1 mile, as applicable, unless otherwise specified in the Contract. Measurements will be limited to the dimensions shown or specified, or as directed by the Engineer.
- (c) Area Basis** - Area will be square foot, square yard, or acre, unless otherwise specified in the Contract and will be determined by measuring the width and the length (or height) at

least to the nearest 0.1 foot and computed at least to the nearest 0.1 square foot, nearest 0.1 square yard, or nearest 0.1 acre, as applicable, unless otherwise specified in the Contract.

**(d) Weight Basis** - Weight will be pound or ton, unless otherwise specified in the Contract and will be determined as follows:

**(1) Pound** - Pound weight will be determined by the net weight identified on the manufacturer's packaged labels, subject to periodic check weighing. Weight by pound will be measured at least to the nearest 1.0 pound unless otherwise specified in the Contract.

Provide a certificate with each shipment together with a certified copy of the weight of each delivery. If the check weight is less than the manufacturer weight by more than 0.4%, the discrepancy will be resolved by the Engineer.

**(2) Ton** - Ton weight will be determined on Contractor-provided scales as required under 00190.20 unless otherwise allowed by the Specifications. Weight by ton will be measured at least to the nearest 0.01 ton unless otherwise specified in the Contract.

If bituminous materials, portland cement, lime, and similar bulk Materials are shipped by truck or rail, the supplier's shipping invoice with net scale weights, or volumes converted to weights, may be used for Pay Item quantity determination in place of weights determined on the Contractor-provided vehicle scales.

Shipping invoice weights of the supplier's truck or transport will be subject to periodic check weighing on the Contractor's vehicle scales, or other scales designated, according to 00190.20. If the check weight is less than the supplier weight by more than 0.4%, the discrepancy will be resolved by the Engineer.

No payment will be made:

- For quantities in excess of the supplier weight
- When Materials have been lost, wasted, or otherwise not incorporated into the Work
- For additional hauling costs resulting from the check weighing

**(e) Volume Basis** - Volume will be cubic yard truck measure or in-place measure, gallons, foot board measure (FBM), or thousand foot board measure (MFBM), unless otherwise specified in the Contract and will be measured at least to the nearest 0.1 cubic yard, nearest 1.0 gallon, nearest 0.1 FBM, or nearest 0.1 MFBM, as applicable, unless otherwise specified in the Contract.

Truck measure will be the measured and calculated maximum "water level" capacity of the vehicle. Quantities will be determined at the point of delivery, with no allowance for settlement of Material during transit. When required to facilitate measurement, the vehicle load will be leveled at the point of delivery. Payment will not be made for Material in excess of the maximum "water level" capacity. Deductions will be made for loads below the maximum "water level" capacity.

When bituminous materials are measured by volume, the volume will be measured at 60 °F or will be corrected to the volume at 60 °F using the correction factors found in the MFTP (ODOT TM 321).

**(f) Time Basis** - Time will be hour, Day, or year, unless otherwise specified in the Contract, and will be measured to at least the nearest 0.5 hour, nearest 1.0 Day, or nearest 1.0 year, as applicable, unless otherwise specified in the Contract.

**(g) Standard Manufactured Items** - If standard manufactured items, such as fence, wire, plates, rolled shapes, pipe, conduit and other similar items are specified in the Contract by properties such as gauge, unit weight, or section dimensions, the manufacturing tolerances established by the industry involved will be accepted unless more stringent tolerances are cited in the Contract.

**(h) Lump Sum Basis** - Lump sum, when used, means the Work described will be completed and accepted without measurement unless changes are ordered in writing by the Engineer. If estimated quantities of the Work to be performed are listed in the Special Provisions, they provide only a basis for adjusting payment amounts. Estimated quantities are approximate only, and are made from a reasonable interpretation of the Contract Documents. Computations based on the details and dimensions shown on the Contract Documents are not guaranteed to equal estimated quantities.

If the Agency issues no Change Order, the Agency will make no pay adjustment for quantities based on the Contractor's computations that overrun or underrun the estimated quantities.

If the Agency issues Change Orders for changes in the Work, the Engineer will measure such changes according to the standards set by [00195.20](#) to determine adjustment of payment.

#### **00190.20 Contractor to Provide Vehicle Weigh Scales:**

**(a) General** - If the Specifications require measurement by weighing on vehicle weigh scales, the Contractor will provide vehicle weigh scales and will transport Materials to the scales. Subject to the Engineer's approval, weights may be determined by plant or hopper scales according to 00190.30.

Contractor-provided scales will be furnished, installed and maintained by the Contractor or its supplier, or, subject to the Engineer's approval, may be commercial scales located in the vicinity of the Project.

Unless otherwise provided in the Contract, Pay Items to be measured by weight will include all Contractor costs for providing, maintaining, inspecting, and testing scales; for furnishing appropriate weigh tickets; for self-printing scales; and for transporting Materials to the scales or to check weighing.

**(b) Requirements** - The scales must conform to [ORS Chapter 618](#), or the laws of the state in which they are located, and NIST Handbook 44, and must be:

- Licensed by the Oregon Department of Agriculture, or by the analogous regulatory body for scales located outside the State;
- Technically suitable for weighing the Materials;
- Properly installed and maintained; and
- Accurate to the required tolerances.

The weight of any Materials weighed by anyone other than the Engineer will be subject to check weighing as the Engineer directs.

**(c) Approaches** - Vehicle scale approaches must be:

- At each end of the scale platform;
- Straight and in line with the platform; and

- Long enough to accommodate combination vehicles longer than the scale platform so that they are level and allow release of brakes before weighing.

**(d) Inspections** - Contractor will have all scales certified, that is inspected and their accuracy tested, by the Oregon Department of Agriculture, an analogous regulatory body for scales located outside the State, or a scale service company as follows:

- Before use if installed at a new site;
- 60 Calendar Days after initial inspection;
- As otherwise required by the Oregon Department of Agriculture, or an analogous regulatory body for scales located outside the State; and
- When the Engineer directs additional inspections.

No Materials weighed on scales without current certifications according to this Subsection will be accepted. The Contractor will provide a copy of all required certifications to the Engineer.

Testing by a scale service company within the State of Oregon will comply with [ORS Chapter 618](#).

If additional inspections directed by the Engineer confirm that the scale accuracy is within the required tolerances, the Agency will pay the cost for inspecting and testing the scales. If the scale accuracy is not within these tolerances, the Contractor will pay the cost for inspecting and testing the scales.

**(e) Inspection Results** - If an inspection indicates the scales have been under-weighing (indicating less than the true weight), the Agency will make no additional payment to the Contractor for Materials previously weighed.

If an inspection indicates the scales have been over-weighing (indicating more than the true weight), the weights will be reduced for Materials received after the time the Engineer determines the overweighing began or, if that is not possible, after the last acceptable certification of the scales. The reduction will be the amount of error in excess of the 0.2% maintenance tolerance allowed in the Contract.

**(f) Contractor-Provided Weigh Technician** - The Contractor will provide a technician to operate Contractor-provided vehicle weigh scales. The Agency may observe procedures and require check weighing according to the following:

**(1) Scale with Automatic Printer** - If the scales have an automatic weigh memo printer that does not require manual entry of gross weight information, the Agency may periodically have a representative at the scales to observe the weighing procedures. In addition, the Engineer may periodically check the weight for a load of Materials by directing the haul vehicle to reweigh on a different scale that has been inspected and certified according to 00190.20(b) and 00190.20(d).

If a different scale is not available within a 30 mile round trip from the regular haul route the Agency will allow check weighing on an approved alternate basis. Check weights within 0.4% of the Contractor-provided weight are acceptable.

The Engineer will resolve discrepancies found by check weighing. Agency employee costs will be paid by the Agency. The Contractor will pay all other costs resulting from the check weighings, including without limitation the use of other scales.

When 2,000 tons or less of all types of Materials are received from a scale, check weighing will be at the discretion of the Engineer.

The Contractor will make at least one check weighing on projects where more than 2,000 Tons of all types of Materials are received from a scale. If more than 50 tons per Day of all types of Materials are received from a scale, the Contractor will make random check weighings at least once every ten (10) Days on which more than 50 tons is received or at each interval that 10,000 Tons has been weighed, whichever occurs first, or as directed by the Engineer. The check weighing frequency does not apply to total quantities less than 2,000 Tons of all types of Materials from a scale. The Contractor will provide the Engineer with the results of the check weighing.

**(2) Scale Without Automatic Printer** - If the scales require manual entry of gross weight information, the Agency may periodically have a representative weigh witness at the scales to observe the weighing procedures. The Contractor will inform the Engineer of its intent to use a scale without an automatic printer at least three (3) working Days before weighing begins or before the Contractor changes to a scale that does not have an automatic printer. The Contractor will pay costs for the weigh witness. The hourly cost of the weigh witness will be as stated in the Special Provisions. In addition, the Engineer may periodically check the weight for a load of Materials by directing the haul vehicle to reweigh on a different scale that has been inspected and certified according to 00190.20(b) and 00190.20(d).

If a different scale is not available within a 30 mile round trip from the regular haul route the Agency will allow check weighing on an approved alternate basis. Check weights within 0.4% of the Contractor-provided weight are acceptable.

The Engineer will resolve discrepancies found by check weighing. Agency employee costs for check weighings will be paid by the Agency. The Contractor will pay all other costs resulting from the check weighings, including without limitation the use of other scales.

If more than 50 tons per Day of all types of Materials are received from a scale, the Contractor will make random check weighings at least every tenth day on which more than 50 tons is received or at each interval that 10,000 tons has been weighed, whichever occurs first, or as directed by the Engineer. The Contractor will make at least one check weighing on all projects where materials are received from a scale without an automatic printer. The Contractor will provide the Engineer with the results of the check weighing.

**(3) Duties of Weigh Technician** - The Contractor's weigh technician will:

- Determine twice a Day, or as otherwise directed by the Engineer, the empty haul weights (tare weights) of hauling vehicles, unless vehicles are tared before each load;
- Furnish daily a listing of the tare weights if 10 or more loads are hauled during that Day;
- Furnish a note listing the net weight for each consecutive ten loads with the following load;
- Furnish a daily listing of the net weights and total weight for each type of Material hauled during that Day; and
- Furnish a legible, serially numbered weigh memo for each load of Materials to the Agency's Materials receiver at the point of delivery, or as directed by the Engineer. The memo must identify the Project, the Materials, the date, net weight (gross and tare as appropriate), and identification of vehicle, driver and weigh technician.

**(g) Agency-Provided Weigh Technician** - If the Contractor provides vehicle weigh scales without a weigh technician meeting the requirements of this Subsection, the Agency will provide a weigh technician at the Contractor's expense. The hourly cost for the weigh technician will be as stated in the Special Provisions. The Contractor will provide a weighhouse for the weigh technician as specified in the Special Provisions. The Agency's weigh technician will:

- Determine tare weights;
- Prepare weigh memos for each load;
- Compile the weigh records; and
- Not participate in the production of Materials or the loading of haul vehicles.

**00190.30 Plant Scales** - The Contractor, with the Engineer's written approval, may weigh plant-mixed Materials on scales that have either:

- An automatic weight batching and mixing control printer system; or
- A weigh hopper printer system.

Any additional costs resulting from the use of these scales will be borne by the Contractor. Check weighing will be done according to [00190.20\(f\)](#).

Except for [00190.20\(c\)](#) regarding approaches, the Contractor's use of plant scales will comply with all provisions of [00190.20](#).

The Engineer's approval for the Contractor's use of plant scales to determine pay weights will be rescinded if check weighing or scale inspections indicate the scales do not consistently determine weights within the tolerances allowed by state law.

## **SECTION 00195 – PAYMENT**

### **00195.00 Scope and Limit:**

**(a) General** - The Agency will pay only for measured Pay Item quantities incorporated into the Work or performed according to the terms of the Contract. The Contractor understands and agrees that Pay Item quantities listed in the Schedule of Items do not govern payment.

Payment constitutes full compensation to the Contractor for furnishing all Materials, Equipment, labor, and Incidentals necessary to complete the Work; and for risk, loss, damage, and expense arising from the nature or prosecution of the Work or from the action of the elements, subject to the provisions of [00170.80](#). The Contractor will include the costs of bonds and insurance for the Project in the unit price for each Pay Item of Work to be performed.

**(b) Essential or Incidental Materials or Work** - When the Specifications state that the unit price for a Pay Item is compensation for certain Materials or Work essential or Incidental to the Pay Item, the same Materials or Work will not be measured or paid under any other Pay Item.



**00195.10 Payment For Changes in Materials Costs** - On certain projects, as identified in the Special Provisions, an escalation/de-escalation clause with respect to certain materials will be in effect during the life of the Contract.

The Agency reserves all of its rights under the Contract, including, but not limited to, its rights for suspension of the Work under [00180.70](#) and its rights for termination of the Contract under [00180.90](#), and escalation/de-escalation provisions will not limit those rights.

**00195.12 Steel Material Price Escalation/De-Escalation Clause** - Subsections 00195.12, 00195.12(a), 00195.12(b), 00195.12(c), and 00195.12(d) contain the price escalation/de-escalation clause relating to steel materials (as defined in 00195.12(d)). This exclusive steel material price escalation/de-escalation clause, and the steel escalation/de-escalation program described in 00195.12 through 00195.12(d), are in effect for the life of this Contract regardless of the number of steel material Pay Items, if any, that are included, and whether or not the Contractor elects to participate in the steel escalation/de-escalation program according to 00195.12(d).

**(a) Steel Material Price Escalation/De-Escalation Participation** - The Contractor may select individual Pay Items to include in the steel escalation/de-escalation program from those Pay Items listed for this Project under 00195.12(d) by following the directions provided in 00195.12(d). The Contractor is not obligated to select any Pay Items. Before or within seven (7) Calendar Days after the date of the preconstruction conference, the Contractor will submit in writing to the Project Manager the Pay Items selected by the Contractor to be included in the steel escalation/de-escalation program, in the manner required under 00195.12(d). If the Contractor elects to not participate in the steel escalation/de-escalation program for the Project, no response from the Contractor is required. If the Contractor fails to inform the Project Manager of Pay Items to include in the steel escalation/de-escalation program in the manner and within the time limits stated in 00195.12(d) (or the Contractor otherwise elects not to participate in the program), the Contractor thereby elects not to participate in the program and forfeits all present and future rights to participate in the program for this Project.

The Agency reserves all of its rights under the Contract, including, but not limited to, its rights for suspension of the Work under [00180.70](#) and its rights for termination of the Contract under [00180.90](#), and this steel material price escalation/de-escalation provision will not limit those rights. Adjustment for fluctuations in the cost of steel material will apply only to the Pay Items individually selected by the Contractor from the Pay Items listed under 00195.12(d), and will be made using the respective steel cost basis (CB) listed.

**(b) Monthly Steel Materials Value (MV) and Base Steel Materials Value (BV)** - The Monthly Steel Materials Value (MV) will be established by the Agency from the IDWPUSISTEEL1 Bureau of Labor Statistics (BLS), Producer Price Indexes (PPI) using non-seasonally adjusted indexes only. Preliminary numbers may be referenced on the IDWPUSISTEEL1 BLS PPI for 6 months or more before IDWPUSISTEEL1 BLS PPI determines they are final numbers.

The Base Steel Materials Value (BV) for this Project will be the MV published on the Agency website for the month of the bid opening for this Project. The agency will only publish values on the ODOT website for use after the IDWPUSISTEEL1 BLS PPI establishes the numbers as final numbers. The final values of MV and BV will be available at the Agency website. See the ODOT web site page included with the Special Provisions for the web site address where the final values of MV and BV are available.

The Agency has no control of when the IDWPUSISTEEL1 BLS PPI establishes final values. The Agency steel material price escalation/de-escalation adjustments made under 00195.12

through 00195.12(d) may not be reflected on payments made to the Contractor for up to 2 months after the IDWPUSISTEEL1 BLS PPI applicable values become final. This timing for steel material price escalation/de-escalation adjustments is an agreed term of this Contract and will not constitute late payment under [ORS 279C.570](#), nor will the Agency be responsible to pay interest on any such steel material price adjustments.

If the Agency-selected index ceases to be available for any reason, the Agency in its discretion will select and begin using a substitute price source or index to establish the MV each month. The MV will only apply to Pay Items selected by the Contractor and provided in writing to the Project Manager from the Pay Item list contained under, and in the manner and within the time limits required by 00195.12(d). The Agency does not guarantee that steel material will be available at any stated or implied materials price.

- (c) Monthly Steel Materials Price Adjustment** - If the Contractor has properly informed the Project Manager of Pay Items to include in the steel escalation/de-escalation program as required by 00195.12(a) and 00195.12(d), a price adjustment evaluation will be made for the Pay Items individually selected. No adjustments will be made using the BV or MV until such time as they are listed as final values by the IDWPUSISTEEL1 BLS PPI. The price adjustment as calculated in this provision for a given Pay Item will use the MV for the month the Work associated with that Pay Item is performed and added to the monthly progress estimate. A price adjustment for that Pay Item will only be made if the MV for the month the Work associated with the Pay Item is performed and added to the monthly progress estimate differs by more than 10% from the BV. A price adjustment will be made, as and when required by 00195.12 through 00195.12(d), only for the Pay Items, if any, that were selected by the Contractor in the manner and within the time limits required under 00195.12(a) and 00195.12(d).

The Monthly Steel Materials Price Adjustment will be determined as follows:

- If the MV is within 10% ± of the BV, there will be no adjustment.
- If the MV is more than 110% of the BV, then:
  - $PA = (((MV-BV) \div BV) - 0.10) \times (CB \times PIP)$
- If the MV is less than 90% of the BV, then:
  - $PA = (((MV-BV) \div BV) + 0.10) \times (CB \times PIP)$

Where:

PA = Price Adjustment, dollars

MV = Monthly Steel Materials Value from BLS PPI for the month determined above (after becomes final)

BV = Base Steel Materials Value from month of the bid opening (after becomes final)

PIP = Amount paid for the Pay Item for the month for which the adjustment is made

CB = Cost Basis for the applicable steel material, in percent (see 00195.12(d))

- (d) Steel Materials Pay Item Selection** - The Agency has a process using estimated quantities to determine which Pay Items containing steel material qualify for the steel escalation/de-escalation program by meeting a minimum threshold, and are therefore included in the eligible Pay Items listed in the Special Provisions.

For purposes of 00195.12 through 00195.12(d), "steel material" means structural and reinforcing steel, steel studs, sheet piling, guardrail, ductile iron pipe and other steel products used for the construction, reconstruction or major renovation of a road or highway.

The Contractor may elect to participate in the steel escalation/de-escalation program for this Project by marking the list in the Special Provisions checking each box next to each Pay Item the Contractor wants included in the program and submitting this information in writing, signed and dated by the Contractor, to the Project Manager before or within seven (7) Calendar Days after the date of the preconstruction conference. The steel material price escalation/de-escalation clause for price adjustments for fluctuations in the cost of steel material will apply only to the Pay Items selected by the Contractor, from the Pay Item list included in the Special Provisions, and provided in writing to the Project Manager in the manner and within the time limits stated above.

If the Contractor fails to inform the Project Manager of Pay Items to include in the steel escalation/de-escalation program in the manner and within the time limits stated above (or the Contractor otherwise elects not to participate in the program), the Contractor thereby elects not to participate in the program and forfeits all present and future rights to participate in the program for this Contract and this Project.

**00195.13 Asphalt Cement Material Price Escalation/De-Escalation Clause** - Subsections 00195.13, 00195.13(a), 00195.13(b), 00195.13(c), and 00195.13(d) contain the price escalation/de-escalation clause relating to asphalt cement materials (as defined in 00195.13(d)).

**(a) Monthly Asphalt Cement Material Price (MACMP)** - The Monthly Asphalt Cement Material Price (MACMP) will be established by ODOT each month. For information regarding the calculation of the MACMP, and for the actual MACMP, go to the ODOT website at:

[http://www.oregon.gov/ODOT/HWY/ESTIMATING/asphalt\\_fuel.shtm](http://www.oregon.gov/ODOT/HWY/ESTIMATING/asphalt_fuel.shtm)

If the ODOT selected index ceases to be available for any reason, the Agency in its discretion will select and begin using a substitute price source or index to establish the MACMP each month. The MACMP will apply to all asphalt cement including but not limited to paving grade, polymer modified, and emulsified asphalts, and recycling agents. The Agency does not guarantee that asphalt cement will be available at the MACMP.

**(b) Base Asphalt Cement Material Price (Base)** - The Base price for this Project is the MACMP published on the ODOT website for the month immediately preceding the bid opening date.

**(c) Monthly Asphalt Cement Adjustment Factor** - The Monthly Asphalt Cement Adjustment Factor will be determined each month as follows:

- If the MACMP is within  $\pm 5\%$  of the Base, there will be no adjustment
- Price Adjustment =  $[(\text{MACMP} - \text{BASE}) \times (\text{MF Asphalt Cement Content } (\%)) \times (\text{Tons of Asphalt incorporated into the project that month})]$

**(d) Asphalt Cement Price Adjustment** - If specified in the Special Provisions, an asphalt cement escalation/de-escalation clause will be in effect during the life of the Contract. A price adjustment will be made for each pay item in the bid schedule containing asphalt cement. The price adjustment as calculated in 00195.13(c) above will use the MACMP for the month the asphalt is incorporated into the Project. The Agency reserves all of its rights under the Contract, including, but not limited to, its rights for suspension of the Work under 00180.70 and its rights for termination of the Contract under 00180.90, and this escalation/de-escalation provision will not limit those rights.

### **00195.20 Changes to Plans or Character of Work:**

- (a) **Insignificant Changed Work** - If the changes made under [00140.30](#) do not significantly change the character or unit cost of the Work to be performed under the Contract, the Agency will pay for such work at the Pay Item price.

If the Work involved in the change is measured on a lump sum basis and its character is not significantly changed, payment for the Changed Work will be determined:

- As described in the applicable Section of the Specifications;
- If not described there, on a theoretical unit price determined by dividing the Contractor's lump sum price by the estimated quantity of the Pay Item listed in the Special Provisions; or
- If neither of the above apply, the Engineer will make an equitable adjustment.

- (b) **Significant Changed Work** - If the changes made under [00140.30](#) significantly alter the character, unit cost, or lump sum cost of the Work, the Agency will adjust the Contract. The Contractor will not be entitled to compensation for any loss in profits resulting from elimination of, reduction of, or other change to, a part of the Work.

Any such adjustments may be less than, but will not be more than the amount justified by the Engineer on the basis of the established procedures set out in [Section 00197](#) for determining rates for Extra Work, but those procedures will account for the decrease or elimination of Work as well as for increases in the Work. This does not limit the application of [Section 00199](#).

The term "Significant Changed Work" will apply only to that circumstance in which the character of the Work, as changed, differs materially in kind, nature, or unit cost from that involved or included in the originally proposed construction.

For purposes of this Section, "Significant" is defined as:

- a) An increase or decrease of more than 25 percent of the total cost of the Work calculated from the original proposal quantities and the unit contract prices; or,
- b) An increase or decrease of more than 25 percent in the quantity of any one major contract item.

For condition b) above, a major item is defined as any item that amounts to 10 percent or more of the original total contract price.

**00195.30 Differing Site Conditions** - Upon written notification, as required in 00140.40, the Engineer will investigate the identified conditions. If the Engineer determines that the conditions materially differ and cause an increase or decrease in the cost or time required to perform any Work under the Contract, an adjustment in the Contract Amount or Contract Time, excluding loss of anticipated profits, will be made, and the Contract modified accordingly, in writing. The Engineer will notify the Contractor as to whether or not an adjustment of the Contract is warranted.

No Contract adjustment which benefits the Contractor will be allowed unless the Contractor has provided the required written notice. Any such adjustments will be made according to [00195.20](#).

**00195.40 Unreasonable Delay by the Agency** - If the Contractor believes that performance of all or any portion of the Work is suspended, delayed, or interrupted for an unreasonable period of time in excess of that originally anticipated or customary in the construction industry, due to

acts or omissions of the Agency, or persons acting for the Agency, and that additional compensation, Contract Time, or both, are due the Contractor because of the suspension, delay or interruption, the Contractor will immediately file a written notice of delay according to [00180.60](#). The Contractor will then promptly submit a properly supported request for any additional compensation, Contract Time, or both, according to the applicable provisions in [00180.60](#) through [00180.80](#) and [Section 00199](#).

The Engineer will promptly evaluate a properly submitted request for additional compensation. If the Engineer determines that the delay was unreasonable, and that the cost required for the Contractor to perform the Contract has increased as a result of the unreasonable suspension, delay or interruption, the Engineer will make an equitable adjustment, excluding profit, and modify the Contract in writing accordingly. The Engineer will notify the Contractor of the determination and whether an adjustment to the Contract is warranted.

Under this provision, no Contract adjustment will be allowed:

- Unless the Contractor has provided the written notice required by [00180.60](#);
- For costs incurred more than 10 Calendar Days before the Engineer receives the Contractor's properly submitted written request;
- For any portion of a delay that the Engineer deems to be a reasonable delay, or for which an adjustment is provided for or excluded under other terms of the Contract; or
- To the extent that performance would nevertheless have been suspended, delayed or interrupted by causes other than those described in this Subsection.

#### **00195.50 Progress Payments and Retained Amounts:**

**(a) Progress Payments** - The Agency's payment of progress payments, or determination of satisfactory completion of Pay Items or Work or release of retainage under 00195.50(d), will not be construed as Final Acceptance or approval of any part of the Work, and will not relieve the Contractor of responsibility for defective Materials or workmanship or for latent defects and warranty obligations.

The estimates upon which progress payments are based are not represented to be accurate estimates. All estimated quantities are subject to correction in the final estimate. If the Contractor uses these estimates as a basis for making payments to Subcontractors, the Contractor assumes all risk and bears any losses that result.

**(1) Progress Estimates** - At the same time each month, the Engineer will make an estimate of the amount and value of Pay Item Work completed. The amount of Work completed will be the sum of the estimated number of units completed for unit price Pay Items plus the estimated percentage completed of lump sum Pay Items.

The estimated value of the Work completed will then be determined by using the Contract unit price for unit price Pay Items, and by using one of the following methods to determine the value of the lump sum Pay Items:

- The "theoretical unit price" when the Special Provisions contain an estimated number of units;
- A Contractor-submitted, Engineer-approved Schedule of Values, when there is no theoretical unit price available; or
- Engineer's determination, when there is neither an available theoretical unit price, nor an approved, Contractor-submitted Schedule of Values.

The amounts to be allowed for lump sum Pay Items in progress payments will not exceed the reasonable value of the Work performed, as determined by the Engineer.

Incidentals such as formwork, falsework, shoring, and cribbing will be included in the unit prices for the various Pay Items requiring their use, unless specified as a separate Pay Item. No payment will be made for Pay Items that include Incidentals until units or portions of such Pay Item Work are in place and completed. The costs of Incidentals will be paid in proportion to the percentage of Pay Item Work completed.

- (2) Value of Materials on Hand** - The Engineer will make no allowance or estimate of the amount and value of acceptable Materials on hand, i.e., already delivered and stored according to [00195.60\(a\)](#), to be incorporated into the Work.
- (3) Value of Work Accomplished** - The sum of the values in (1) and (2) above will be collectively referred to in this Subsection as the "value of Work accomplished", subject to (4) below.
- (4) Limitations on Value of Work Accomplished** - In determining the "value of Work accomplished", the Engineer's estimate will be based on the unit prices for the various Pay Items. Any amounts not included in progress payments due to substantial mathematical unbalancing of Pay Item prices will be included in the final payment issued according to [00195.90\(b\)](#).
- (5) Reductions to Progress Payments** - With each progress payment, the Contractor will receive a Contract payment voucher and summary setting forth the value of Work accomplished reduced by the following:
- Amounts previously paid;
  - Amounts deductible or owed to the Agency for any cause specified in the Contract;
  - Additional amounts retained to protect the Agency's interests according to Subsection (e) below.

- (b) Retainage** - The amount to be retained from progress payments will be 5% of the value of Work accomplished, and will be retained in one of the forms specified in Subsection (c) below. If the Agency determines that satisfactory progress is not being made on the Work, the Agency may withhold up to 10% of the value of Work accomplished from subsequent progress payments. No retainage will be withheld from Work performed as Force Account Work, escalation/de-escalation, bonuses, or other items decided by the Agency.

As provided in [00170.65\(b\)\(3\)](#), in addition to any retainage, a withholding of 25% of amounts earned will be withheld and released according to [ORS 279C.845](#) when the Contractor fails to file the certified statements required in [ORS 279C.845](#), FHWA Form 1273, and [00170.65](#).

- (c) Forms of Retainage** - Retainage will be deducted from progress payments and held by the Agency until final payment is made according to [00195.90](#), unless otherwise specified in the Contract.

If the contract price exceeds \$500,000, the Agency will place amounts deducted as retainage into an interest-bearing escrow account. Interest on the retainage amount accrues from the date the payment request is approved until the date the retainage is paid to the Contractor to which it is due, as required by [ORS 279C.570\(2\)](#).

The Contractor will execute such documentation and instructions respecting the interest-bearing escrow account as the Agency may require in order to protect its interests, including but not limited to a provision that no funds may be paid from the account to



anyone without the Agency's advance written authorization. Amounts retained and interest earned will be included in the final payment to Contractor made in accordance with [00195.90](#), unless otherwise specified in the Contract.

Any retainage withheld on Work performed by a Subcontractor will be released to the Contractor according to 00195.50(d).

**(d) Reduction of Retainage** - As the Work progresses, the amounts to be retained under (b) of this Subsection are subject to reduction in the Engineer's sole discretion. Retainage reductions will be considered only as follows:

- When the Work is 97.5% or more completed, the Engineer may, without application by the Contractor, reduce the retained amount to 100% of the value of the Work remaining.
- For a project funded by the FHWA, when a subcontractor has satisfactorily completed all of its Work, it may request release of retainage for that Work from the Contractor. The Contractor will request reduction of retainage in the amount withheld for the subcontractor's Work after certifying to the Agency that the subcontractor's Work is complete, and that all contractual requirements pertaining to the subcontractor's Work have been satisfied. Within 60 Calendar Days of the end of the month in which the Agency receives the Contractor's certification regarding the subcontractor's Work, the Agency will either notify the Contractor of any deficiencies which require completion before release of retainage, or verify that the subcontractor's Work complies with the Contract and release all retainage for that Work with the next scheduled progress payment. Within 10 Calendar Days of receipt of retainage, the Contractor will pay to the subcontractor all such retainage released except for latent defects or warranty.
- The Agency will only release retainage for satisfactorily completed portions of the Work represented by Pay Items in the Schedule of Items, or by Pay Items added by Change Order. Work not represented by a Pay Item, but which constitutes part of an uncompleted Pay Item, will not be regarded as satisfactorily completed Work for the purposes of this Subsection.

If retainage has been reduced or eliminated, the Agency reserves the right to protect its interests by retaining amounts from further progress payments at the rates provided in 00195.50(b).

**(e) Withholding Payments** - In addition to any other rights the Agency may have to withhold payments under other provisions of the Contract, the Engineer may withhold such amounts from progress payments or final payment as may reasonably protect the Agency's interests until the Contractor has:

- Complied with all orders and directives issued by the Engineer according to the contract terms;
- Corrected or cured its failure to comply with the Contract;
- Satisfied all legal actions filed against the Agency, the Agency's governing body and its members, and Agency employees that the Contractor is obliged to defend. (see [00170.72](#)); and
- Paid all liquidated and delinquent debt owed to the State or any department or agency of the State. (In addition to Agency's other rights and remedies, the Agency may also undertake collection by administrative offset, or garnishment if applicable, of all monies due to recover such debt. Offsets or garnishment may be initiated after the Contractor has been given notice if required by law.)

Notwithstanding [ORS 279C.555](#) or [ORS 279C.570](#) or 00195.50(d), if a Contractor is required to file statements on the prevailing rate of wages, but fails to do so, the Agency will withhold 25% of any amount earned as required in [00170.65](#).

- (f) **Prompt Payment Policy** - Payments will be made promptly according to [ORS 279C.570, ORS 279C.580 and other applicable legal requirements](#).

**00195.60 Advance Allowance for Materials on Hand** - The Agency will not authorize an advance allowance for Materials on Hand.

**00195.70 Payment under Terminated Contract** - Payment for Work performed under a Contract that is terminated according to the provisions of [00180.90](#) will be determined under (a) or (b) of this Subsection.

- (a) **Termination for Default** - Upon termination of the Contract for the Contractor's default, the Agency will make no further payment until the Project has been completed. The Agency will make progress payments to the party to whom the Contract is assigned, but may withhold an amount sufficient to cover anticipated Agency costs, as determined by the Engineer, to complete the Project.

Upon completion of the Project, the Engineer will determine the total amount that the defaulting Contractor would have been entitled to receive for the Work, under the terms of the Contract, had the Contractor completed the Work (the "cost of the Work").

If the cost of the Work, less the sum of all amounts previously paid to the Contractor, exceeds the expense incurred by the Agency in completing the Work, including without limitation expense for additional managerial and administrative services, the Agency will pay the excess to the Contractor, subject to the consent of the Contractor's Surety, but only to the extent that such excess is applied to Work performed by the Contractor prior to the date of termination or to reimburse payments made by the Contractor or its surety to complete the Work.

If the expense incurred by the Agency in completing the Work, including without limitation expense for additional managerial and administrative services, exceeds the cost of the Work less the sum of all amounts previously paid to the Contractor, the Contractor or the Contractor's Surety will pay to the Agency the amount of the excess expense.

The Engineer will determine the expense incurred by the Agency and the total amount of Agency damage resulting from the Contractor's default. That determination will be final as provided in [00150.00](#).

If a termination for default is determined by a court of competent jurisdiction to be unjustified, it will be deemed a termination for public convenience, and payment to the Contractor will be made as provided in Subsection (b) below.

- (b) **Termination for Public Convenience:**

(1) **General** - Full or partial termination of the Contract will not relieve the Contractor of responsibility for completed or performed Work, or relieve the Contractor's Surety of the obligation for any just claims arising from the completed or performed Work.

(2) **Mobilization** - If mobilization is not a separate Pay Item, and payment is not otherwise provided for under the Contract, the Agency may pay the Contractor for mobilization expenses, including moving Equipment to and from the Project Site. If allowed, payment of mobilization expenses will be based on cost documentation submitted by the Contractor to the Engineer.



**(3) All Other Work** - The Agency will pay the Contractor at the unit price for the number of Pay Item units of completed, accepted Work. For units of Pay Items partially completed, payment will be as mutually agreed, or, if not agreed, as the Engineer determines to be fair and equitable. No claim for loss of anticipated profits will be allowed. The Agency will purchase Materials left on hand according to 00195.80.

**00195.80 Allowance for Materials Left on Hand:**

**(a) Purchase of Unused Materials** - If Materials are delivered to the Project Site, or otherwise acceptably stored at the order of the Engineer, but not incorporated into the Work due to complete or partial elimination of Pay Items, changes in Plans, or termination of the Contract for public convenience according to [00180.90](#), will become the property of the contractor.

**00195.90 Final Payment:**

**(a) Final Estimate** - As soon as practicable after Final Inspection of the Project, as provided in [00150.90](#), the Engineer will prepare a final estimate of the quantities of the Pay Items completed. With this estimate of quantities as a base, the total amount due the Contractor will be determined according to the terms of the Contract including without limitation any amounts due for Extra Work performed.

**(b) Final Payment** - The amount of final payment will be the difference between the total amount due the Contractor and the sum of all payments previously made. All prior partial estimates and payments will be subject to correction in the final estimate and payment.

After computation of the final amount due, and after Third Notification of the Project, final payment will be mailed to the Contractor's last known address as shown in the records of the Agency.

Beginning 30 Calendar Days after the date of Third Notification, interest will begin to accrue at the rate established by [ORS 279C.570](#) on any money due and payable to the Contractor as final payment, determined as described above. No interest will be paid on money withheld due to outstanding amounts owed by the Contractor under the provisions of [00170.10](#).

**(c) No Waiver of Right to Make Adjustment** - The fact that the Agency has made any measurement, estimate, determination or certification either before or after completion of the Project, Final Acceptance, Agency assumption of possession of the Project Site, determination of satisfactory completion of Pay Items or Work or release of retainage under [00195.50\(d\)](#) or payment for any part of the Work, will not prevent either party from:

- Showing the true amount and character of the Work;
- Showing that any measurement, estimate, determination or certification is incorrect;
- Recovering from the other party damages that may have been suffered because the other party failed to comply with the Contract.

**(d) No waiver of rights** - Neither inspection by the Owner, through the Engineer or any of its employees, nor any order by the Owner for payment of money, payment for or acceptance of the whole or any part of the Work by the Owner or Engineer, nor any extension of time, nor any possession taken by the Owner or its employees, will operate as a waiver of any provision of this Contract, or any power herein reserved to the Owner, or

any right to damages herein provided; nor will any waiver of any breach in this Contract be held to be a waiver of any other subsequent breach.

#### **00195.95 Error in Final Quantities and Amounts:**

- (a) Request for Correction of Compensation** - If the Contractor believes the quantities and amounts detailed in the final Contract payment voucher, prepared by the Engineer according to [00195.90](#), to be incorrect, the Contractor will submit an itemized statement to the Engineer detailing all proposed corrections.

This statement must be submitted to the Engineer within 90 Calendar Days from the date the voucher was mailed to the Contractor, according to [00195.90\(b\)](#). Any request for compensation not submitted and supported by an itemized statement within the 90 Calendar Day period will not be paid by the Agency. This does not limit the application of [Section 00199](#).

#### **(b) Acceptance or Rejection of Request:**

- (1) Consideration of Request** - The Engineer will consider and investigate the Contractor's request for correction of compensation submitted according to 00195.95(a), and will promptly advise the Contractor of acceptance or rejection of the request in full or in part.
- (2) Acceptance of Request** - If the Engineer accepts the Contractor's request(s) in full or in part, the Engineer will prepare a post-final Contract payment voucher, including all accepted corrections, and will forward it to the Contractor.
- (3) Rejection of Request** - If the Engineer rejects the request(s) in full, the Engineer will issue a written notice of rejection and mail it to the Contractor.
- (4) Contractor Objection to Revised Voucher or Notice of Rejection** - If the Contractor disagrees with the revised voucher or notice of rejection, the Contractor may request review according to the procedure specified in [00199.40](#). If the Contractor fails to submit a request for [00199.40](#) review within 30 Calendar Days after the Engineer mails a post-final Contract payment voucher or notice of rejection, the Contractor waives all rights to a claim based on errors in quantities and amounts.

If the Engineer rejects the Contractor's request on the basis that the issue was not one that qualified for treatment under this Section, no review according to [00199.40](#) will be allowed.

### **SECTION 00196 - PAYMENT FOR EXTRA WORK**

**00196.00 General** - Only work not included in the Contract as awarded but deemed by the Engineer to be necessary to complete the Project (see [00140.60](#)) will be paid as Extra Work. Regardless of alterations and changes, any item of Work provided for in the Contract will not constitute Extra Work. Payment for alterations and changes to Work will be made according to [00195.20](#).

Compensation for Extra Work will be paid only for Work authorized in writing by the Engineer and performed as specified. Work performed before issuance of the Engineer's written authorization will be at the Contractor's risk. Extra Work will be paid as determined by the Engineer, according to 00196.10 and [00196.20](#).

**00196.10 Negotiated Price** - If the Engineer can reasonably determine a price estimate for Extra Work, the Engineer may then give written authorization to the Contractor to begin the Extra Work. As soon as practicable, but within ten (10) Calendar Days after that authorization, the Contractor will respond in writing to the Engineer's Extra Work price estimate by submitting to the Engineer an Extra Work price quote. The price quote will detail the following items related to the Extra Work:

- Types and amounts of Materials
- Hours of Equipment use and hours of labor
- Travel
- Overhead and profit
- Other costs associated with the proposed Extra Work

Pending approval of the price quote, the Engineer will maintain force account records of the Extra Work. As soon as practicable, but within ten (10) Calendar Days of receipt of a properly supported price quote, the Engineer will review the price quote and advise the Contractor if it is accepted or rejected. The Engineer will not accept a price quote that cannot be justified on a Force Account basis. If the Contractor's price is accepted, the Engineer will issue a Change Order, and the Extra Work will be paid at the accepted price.

**00196.20 Force Account** - If the Engineer and the Contractor cannot agree on a price for the Extra Work, the Engineer may issue a Force Account Work order requiring the Extra Work to be paid as Force Account Work. Force Account Work records and payment will be made according to Section 00197.

## **SECTION 00197 - PAYMENT FOR FORCE ACCOUNT WORK**

**00197.00 Scope** - The Materials, Equipment and labor rates and procedures established in this Section apply to Extra Work ordered by the Engineer to be performed as Force Account Work. With the exceptions identified in 00197.01(b), these rates and procedures also apply to other Work when according to other Sections this Section 00197 applies, including without limitation the following:

- 00140.70 - Cost Reduction Proposals
- 00195.20 - Changes to Plans or Character of Work
- 00195.30 - Differing Site Conditions
- 00199.30(b) - Claims Requirements

### **00197.01 General:**

**(a) Extra Work on a Force Account Basis** - Before ordering Force Account Work, the Engineer will discuss the proposed work with the Contractor, and will seek the Contractor's comments and advice concerning the formulation of Force Account Work specifications. The Engineer is not bound by the Contractor's comments and advice, and has final authority to:

- Determine and direct the Materials, Equipment and labor to be used on the approved Force Account Work; and
- Determine the time of the Contractor's performance of the ordered Force Account Work.

Force account work performed by subcontractors will be measured and paid for on the same basis and in the same manner as force account work performed directly by the Contractor.

If the Engineer orders the performance of Extra Work as Force Account Work, the Engineer will record, on a daily basis, the Materials, Equipment, labor, and Special Services used for the Force Account Work during that day. The Engineer and the Contractor will sign the record daily to indicate agreement on the Materials, Equipment, labor, and Special Services used for the Force Account Work performed on that day.

The following will be reflected on the daily record:

- Materials used in the Force Account Work as directed by the Engineer, except those furnished and paid under rental rates for use of Equipment;
- Equipment which the Engineer considers necessary to perform the Force Account Work. Equipment hours will be recorded to the nearest quarter hour;
- Labor costs, including that of Equipment operators and supervisors in direct charge of the specific operations while engaged in the Force Account Work;
- Special Services; and
- The Engineer's and Contractor's signatures confirming its accuracy.

Failure to present documentation for Force Account Work in proper form within thirty (30) days after the close of the month in which the work covered was performed will constitute a waiver on the part of the Contractor of Contractor's rights to present such claim thereafter or to receive payment thereof.

The Contractor will submit a proposed operation plan for performance of the Force Account Work that includes materials, equipment and labor. The Contractor will obtain approval from the Engineer for Subcontractors used on Force Account Work.

- (b) Other Work** - When according to other Sections this Section 00197 applies, the following exceptions apply to the Work under those other Sections, except for Extra Work ordered by the Engineer to be performed as Force Account Work 00197.01(a) does not apply.

Cost Efficiency - Agency will not be responsible for additional costs that are a direct or indirect result of the Contractor's inefficient means and methods or that reasonably could have been avoided if the Materials, Equipment, labor or services had been obtained at a more commercially reasonable cost.

Standby Time - Equipment that is necessary for the Work but is not being operated to progress the Work will be considered to be on standby and will be limited to the standby rates and hour limitations in [00197.20\(e\)](#). Equipment costs will be limited to a combination of operating time and standby time of not more than eight (8) hours in a 24 hour period or 40 hours in a one (1) week period. The Equipment must be onsite and available for use to be eligible for standby time.

For a period of seven (7) or fewer Calendar Days: If a continuous period of standby time for a piece of Equipment does not exceed seven (7) Calendar Days, the accumulated standby cost for that continuous period of standby time will be limited to the standby rates and hour limitations in [00197.20\(e\)](#).

For a period of more than seven (7) Calendar Days: Unless the Engineer has otherwise agreed in advance in writing, if a continuous period of standby time for a piece of Equipment exceeds seven (7) Calendar Days, the accumulated standby cost will be limited to:

- For the first seven (7) Calendar Days, the standby rates and hour limitations in [00197.20\(e\)](#), and
- For the portion of the continuous period of standby time after the first seven (7) Calendar Days, the lesser of:
  - The standby rates and hour limitations in [00197.20\(e\)](#); or
  - The cost for moving that piece of Equipment to and from the Project Site according to [00197.20\(d\)](#).

#### **00197.10 Materials:**

- (a) General** - The Contractor will be paid for Materials actually used in the Force Account Work as directed by the Engineer, except for those furnished and paid for under rental rates included with the use of Equipment. Payments will be at actual cost, including transportation costs to the specified location, from the supplier to the purchaser, whether the purchaser is the Contractor, a Subcontractor, or other forces. All costs are subject to the provisions of this Subsection.
- (b) Trade Discount** - If a commercial trade discount is offered or available to the purchaser, it will be credited to the Agency, even though the discount may not have actually been taken. The Agency will not take any discounts for prompt or early payment, whether or not offered or taken.
- (c) Not Directly Purchased From Supplier** - If Materials cannot be obtained by direct purchase from and direct billing by the supplier, the cost will be considered to be the price billed to the purchaser less commercial trade discounts, as determined by the Engineer, but not more than the purchaser paid for the Materials. No markup other than actual handling costs will be permitted.
- (d) Purchaser-Owned Source** - If Materials are obtained from a supply or source wholly or partly owned by the purchaser, the cost will not exceed the price paid by the purchaser for similar Materials furnished from that source on Pay Items, or the current wholesale price for the Materials delivered to the Project Site, whichever is lower.

#### **00197.20 Equipment:**

- (a) General** - Equipment approved by the Engineer to perform the Force Account Work will be eligible for payment at the established rates only during the hours it is operated or on standby if so ordered by the Engineer. Equipment hours will be recorded on the daily record to the nearest quarter hour.

Except as modified by these provisions, Equipment use approved by the Engineer will be paid at the rental rates given in the most current edition of the EquipmentWatch Cost Recovery (Blue Book) published by EquipmentWatch, a division of Penton Business Media,

Inc., and available from EquipmentWatch (phone 1.800.669.3282 or web <http://equipmentwatch.com>).

**(b) Equipment Description** - On the billing form for Equipment costs, the Contractor will submit to the Engineer sufficient information for each piece of Equipment and its attachments to enable the Engineer to determine the proper rental rate from the Blue Book.

**(c) Rental Rates (without Operator):**

**(1) Rental Rate Formula** - Rental rates for Equipment will be paid on an hourly basis for Equipment and for attachments according to the following formula:

$$\text{Hourly Rate} = \frac{\text{Monthly Base Rate} \times \text{Rate Adjustment Factor}}{176 \text{ hours/month}} + \text{Hourly Operating Rate}$$

Some attachments are considered "standard Equipment" and are already included in the monthly base rate for the Equipment. This information can be obtained from EquipmentWatch.

**(2) Monthly Base Rate** - The monthly base rate used above for the machinery and for attachments represents the major costs of Equipment ownership, such as depreciation, interest, taxes, insurance, storage, and major repairs.

**(3) Rate Adjustment Factor** - The rate adjustment factor used above will be determined by applying only the Model Year Adjustment to the Blue Book Rates. The Regional and User Defined Ownership/Operating Adjustments will not apply.

**(4) Hourly Operating Rate** - The hourly operating rate used above for the machinery and for attachments represents the major costs of Equipment operations, such as fuel and oil, lubrications, field repairs, tires or ground engaging components, and expendable parts.

**(5) Limitations** - If multiple attachments are included with the rental Equipment, and are not considered "standard Equipment", only the attachment having the higher rental rate will be eligible for payment, provided the attachment has been approved by the Engineer as necessary to the Force Account Work.

Rental will not be allowed for small tools that have a daily rental rate of less than \$5, or for unlisted Equipment that has a fair market value of \$400 or less.

The above rates apply to approved Equipment in good working condition. Equipment not in good working condition, or larger than required to efficiently perform the work, may be rejected by the Engineer or accepted and paid for at reduced rates.

**(d) Moving Equipment** - If it is necessary to transport Equipment located beyond the Project Site exclusively for Force Account Work, the actual cost to transport the Equipment to, and return it from, its On-Site Work location will be allowed as an additional item of expense. However, the return cost will not exceed the original delivery cost. These costs will not be allowed for Equipment that is brought to the Project Site for Force Account Work if the Equipment is also used on Pay Item or related Work.

If transportation of such Equipment is by common carrier, payment will be made in the amount paid for the freight. No markups will be allowed on common carrier transportation costs. If the Equipment is hauled with the Contractor's own forces, transportation costs will include the rental rate of the hauling unit and the hauling unit operator's wage. If Equipment is transferred under its own power, the rental rate allowed for transportation time will be 75% of the appropriate hourly rate for the Equipment, without attachments, plus the Equipment operator's wage.

- (e) **Standby Time** - If ordered by the Engineer, standby time will be paid at 40% of the hourly rental rate calculated according to this Subsection, excluding the hourly operating rate. Rates for standby time that are calculated at less than \$1 per hour will not be paid. Payment will be limited to not more than 8 hours in a 24-hour period or 40 hours in a 1 week period.
- (f) **Blue Book Omissions** - If a rental rate has not been established in the Blue Book, the Contractor may:
- If approved by the Engineer, use the rate of the most similar model found in the Blue Book, considering such characteristics as manufacturer, capacity, horsepower, age and fuel type;
  - Request EquipmentWatch to furnish a written response for a rental rate on the Equipment, which will be presented to the Engineer for approval; or
  - Request that the Engineer establish a rental rate.
- (g) **Outside Rental Equipment** - If Contractor-owned or Subcontractor-owned Equipment is not available, and Equipment is rented from outside sources, payment will be based on the actual paid invoice. Approval of the Engineer to rent from outside sources must be obtained prior to renting the equipment.

If the invoice specifies that rental rate does not include fuel, lubricants, field repairs, and servicing, an amount equal to the Blue Book hourly operating cost may be added for those items that were excluded.

The Agency may reduce the payment when the invoice amount plus allowance is higher than the amount authorized under (c) through (f) of this Subsection.

The provisions of [00180.20\(c\)](#) apply to owner-operated Equipment.

**00197.30 Labor** - The Contractor will be paid for all labor engaged directly on Force Account Work, including Equipment operators and supervisors in direct charge of the specific force account operations, as follows:

- (a) **Wages** - The actual wages paid to laborers and supervisors, if those wages are paid at rates not more than those for comparable labor currently employed on the Project, or at the recognized, current, prevailing rates in the locality of the Project.
- (b) **Required Contributions** - The actual cost of industrial accident insurance, unemployment compensation contributions, payroll transit district taxes, and social security for old age assistance contributions incurred or required under statutory law and these Specifications. The actual cost of industrial accident insurance is the National Council on Compensation Insurance (NCCI) rate for the assigned risk pool for the appropriate work class multiplied by the experience modification factor for the Contractor.
- (c) **Required Benefits** - The actual amount paid to, or on behalf of, workers as per diem and travel allowances, health and welfare benefits, pension fund benefits, or other benefits when such other benefits are required by a collective bargaining agreement or other employment contract generally applicable to the classes of labor employed on the Project.

No work will be authorized which involves workers which would be paid overtime unless overtime is authorized in advance by the Engineer.



**00197.40 Invoices for Special Services** - Invoices for Special Services that reflect current market pricing may be accepted without complete itemization of Materials, Equipment, and labor costs, if the itemization is impractical or not customary. The invoice for Special Services must show credit for commercial trade discounts offered or available.

No percentage markup will be allowed other than that specified in 00197.80.

**00197.80 Percentage Allowances** - To the Contractor's actual costs incurred, as limited in this Section 00197, amounts equal to a percentage markup of such costs will be allowed and paid to the Contractor as follows:

<b>Subsection</b>	<b>Percent</b>
00197.10 Materials	17
00197.20 Equipment	17
00197.30 Labor	22
00197.40 Special Services	17

When a Subcontractor performs ordered Force Account Work, the Contractor will be allowed a supplemental markup of 8% on each Force Account Work order.

These allowances made to the Contractor will constitute complete compensation for overhead, general and administrative expense, profit, and all other Force Account Work costs that were incurred by the Contractor, or by other forces that the Contractor furnished. No other reimbursement, compensation, or payment will be made.

**00197.90 Billings** - Billings for Force Account Work by the Contractor will be submitted for the Engineer's approval on forms provided by the Agency or approved by the Engineer. Billings for Materials (other than incidental items out of the inventory of the Contractor or Subcontractors), rental Equipment from sources other than the Contractor or Subcontractors, and Special Services, will be accompanied by copies of invoices for the goods and services. The invoices must be fully itemized showing dates, quantities, unit prices, and complete descriptions of goods and services provided. Invoices for amounts of \$10 or less per invoice are not required, unless requested by the Engineer.

Costs included on the billings will comply with [00197.01\(a\)](#) and [00197.10](#) through [00197.40](#).

When a billing for Force Account Work has been paid at the Project level, no further corrections will be made because of further review if those corrections amount to less than \$10.

## **SECTION 00199 - DISAGREEMENTS, PROTESTS, AND CLAIMS**

**00199.00 General** - This Section details the process through which the parties agree to resolve any disagreement concerning additional compensation or concerning a combination of additional compensation and Contract Time (see [00180.80](#) for disagreements and claims concerning additional Contract Time only, and [00195.95](#) for disagreements and claims concerning correction of final compensation). The Agency will not consider direct



disagreements, protests, or claims from subcontractors, Suppliers, or any other Entity not a party to the Contract.

**00199.10 Procedure for Resolving Disagreements** - When disagreements occur concerning additional compensation or a combination of additional compensation and Contract Time, the Contractor will first pursue resolution through the Engineer of all issues in the dispute, including without limitation the items to be included in the written notice in 00199.20. If the discussion fails to provide satisfactory resolution of the disagreement, the Contractor will follow the protest procedures outlined in 00199.20. If the Engineer denies all or part of the Contractor's protest, and the Contractor desires to further pursue the issues, the Contractor will submit a claim for processing according to [00199.30](#).

**00199.15 Inappropriate Protest or Claim** - It will be presumed that the Contractor submits a protest or claim for additional compensation in good faith, based upon facts which reasonably support the Contractor's position and with full knowledge and understanding of the injury done to the Agency when notice of differing Project Site conditions or claims for additional compensation are not submitted in a timely manner as required under the Contract. Accordingly, the submission of a protest or claim without the concurrent submission of evidence that reasonably supports the protest or claim, or the submission of a protest or claim in an untimely manner will constitute a waiver of the protest or claim.

**00199.20 Protest Procedure** - If the Contractor disagrees with anything required in a Change Order or other written or oral order from the Engineer, including any direction, instruction, interpretation, or determination, or if the Contractor asserts a disagreement or dispute on any other basis, except [0195.95](#), that, in the Contractor's opinion, entitles or would entitle the Contractor to additional compensation or a combination of compensation and Contract Time, the Contractor will do all of the following in order to pursue a protest and preserve its claim:

- (a) Oral Notice** - Give oral notice of protest to the Engineer and outline the areas of disagreement before starting or continuing the protested Work.
- (b) Written Confirmation of Oral Notice** - Not later than the end of the next business day following the day that oral notice of protest is given, deliver written documentation to the Engineer of the oral notice that includes the notice of protest and the areas of disagreement.
- (c) Written Notice** - File a proper written notice of protest with the Engineer within 7 Calendar Days after receiving the protested order. In the notice the Contractor will:
  - Describe the acts or omissions of the Agency or its agents that allegedly caused or may cause damage to the Contractor or to the Project, citing specific facts, persons, dates and Work involved;
  - Describe the Contractor's proposed alternative to the Work ordered, if any, which will avoid damage to Contractor or to the Project;
  - Describe the nature of the damages;
  - Cite the specific Contract provision(s), if any, that support the protest;

- Include the estimated dollar cost, if any, of the protested Work, and furnish a list of estimated Materials, Equipment and labor for which the Contractor might request additional compensation; and
- If additional compensation is estimated to be due, include the estimated amount of additional time required, if any.

**FAILURE TO COMPLY WITH THIS NOTICE REQUIREMENT RENDERS THE NOTICE IMPROPER AND WILL CONSTITUTE A WAIVER OF ANY CLAIM FOR ADDITIONAL COMPENSATION OR A COMBINATION OF ADDITIONAL COMPENSATION AND CONTRACT TIME FOR ANY PART OF THE PROTESTED WORK.**

- (d) Engineer's Record and Response** – The Engineer will file a copy of each written notice of protest in the Project records and will issue a written response to the protest within seven (7) business days of receipt of a timely filed written notice of protest. The Engineer has no responsibility to evaluate the protest unless the Contractor has timely filed a proper notice submitting all of the above information.
- (e) Final Documentation of Claim** - Within 60 Calendar Days following completion of the protested work, Contractor will provide the Engineer with complete documentation of protested work, listing exact materials, equipment and labor used for the work and the dollar amount requested for each. If the claim is accepted, no additional compensation will be awarded based on documentation submitted after this deadline. If the claim is denied or if the Contractor is not satisfied with the decision by the Engineer, the amount claimed by the Contractor in any subsequent Step or proceeding may not exceed the dollar amount requested under this subsection.
- (f) Records** - Keep complete records of all costs and time incurred throughout the protested Work, and allow the Engineer access to those and other supporting records. Provide daily records of protested Work, on a weekly basis, on a schedule to be set by agreement with the Engineer.
- (g) Comparison of Records** - Provide the Engineer adequate facilities for keeping cost and time records of the protested Work. The Contractor and the Engineer will compare records and either bring them into agreement at the end of each day, or record and attempt to explain any differences.
- (h) Work to Proceed** - In spite of any protest, proceed promptly with the Work ordered by the Engineer.
- (i) Evaluation of Protest** - The Engineer has no responsibility for evaluating a protest that is not timely filed, or for which adequate supporting documentation has not been made available to the Engineer. Provided the procedures above are followed, the Engineer will promptly evaluate all protests, after the Contractor has fully complied with the requirements described in 00199.20(c), Written Notice. If the protest is denied, the Engineer will notify the Contractor in writing of the reasons for full or partial denial. If a protest is found to be valid, the Engineer will, within a reasonable time, make an equitable adjustment of the Contract. Adjustment of time will be evaluated according to [00180.80](#).
- The Engineer has no responsibility for evaluating and may reject a protest that does not comply with 00199.20(b). If the protest is rejected, the Engineer will notify the Contractor in writing of the reasons for rejection.
- (j) Protest Evaluation by Third Party Neutral** - If the Engineer agrees that the Contractor has fully complied with the requirements described in 00199.20(b), and if the Engineer fully or

partially denies, in writing, the Contractor's protest according to 00199.20(f), the Contractor may request that a mutually selected Third Party Neutral review the protest. Procedures for selecting, using, and paying for the cost of the Third Party Neutral will be specified by Change Order.

If the Contractor does not accept the Engineer's evaluation of the protest, or either the Contractor or Engineer disagrees with the resolution recommended by the Third Party Neutral, the Contractor may pursue a claim as described in 00199.30.

### **00199.30 Claims Procedure:**

- (a) General** - If the Contractor believes that additional compensation is due, or a combination of additional compensation and Contract Time, and has pursued and exhausted all the procedures provided in [00199.10](#) and [00199.20](#) to resolve a disagreement and protest, the Contractor may file a claim.

The Agency's Contract is with the Contractor. There is no contractual relationship between the Agency and any subcontractors, Suppliers or any Entity other than the Contractor. It is the Contractor's responsibility to fully evaluate any claim before presenting it to the Agency. In addition, when a claim includes Work done or costs incurred by any subcontractors, Suppliers, or any Entity other than the Contractor, the Contractor remains solely responsible for presenting the claim to the Agency.

Claims that include Work done or costs incurred by subcontractors, Suppliers, or any Entity other than the Contractor will not be considered by the Agency unless the Contractor has:

- Completed and provided its own written evaluation of the claim;
- Verified by its own independent review and evaluation of the amount of compensation sought; and
- Certified the claim in accordance with 00199.30(b) (Part 10).

- (b) Claims Requirements** - At any time during the progress of the Work, but not later than 45 Calendar Days following the date of the Second Notification, the Contractor will submit to the Engineer in writing, claims for additional compensation or a combination of additional compensation and Contract Time additional to that specified in the Contract. For a claim not submitted within the 45 day limit, that has not met the requirements of [00199.20](#), or is not filed as provided in 00199.30, the Contractor waives any claim for additional compensation or for additional compensation and Contract Time, and the Agency may reject the claim.

Written claims to the Engineer or the Agency by the Contractor will be delivered to the Agency address shown in the Special Provisions, unless a different address is agreed to by the Engineer, and will be delivered:

- By U.S. Postal Service first class mail or priority mail (which at the sender's option may include certified or registered mail return receipt requested); or
- By overnight delivery service of a private industry courier.

Claims will be considered as having been received by the Agency:

- At the time of actual receipt or seven (7) Calendar Days after the postmarked date when deposited for delivery by first class or priority mail, whichever is earlier; or
- At the time of actual receipt or three (3) Calendar Days after deposit with a private industry courier for overnight delivery service, whichever is earlier.

The Agency reserves the right at any time and at any step in the claim decision or review process to request additional information, records or documentation related to the claim or the Contract either directly or through agents working toward resolution of the disputed or claimed events and issues.

Claims will be made in writing, and must include all information, records and documentation necessary for the Agency to properly and completely evaluate the claim.

To be considered, claims for additional compensation, or for additional compensation and Contract Time, will be completed according to 00199.30 and will be submitted with the required information and in the format below and labeled as required below for each claimed issue:

- (Part 1)** Summary (label page 1.1 through page 1.X) - In the summary, include a detailed, factual statement of the claim for additional compensation and Contract Time, if any, with necessary dates and locations of Work involved in the claim and the dates of when the event arose. Also include detailed facts supporting the Contractor's position relative to the Engineer's decision ([see 00199.20\(f\)](#));
- (Part 2)** Proof of notice (label page 2.1 through page 2.X) - Submit a copy of the written notice, with all attachments, that was given to the Agency. Include the date when that written notice and the date when oral notice was given;
- (Part 3)** Copies of the Contract Specifications that support the Contractor's claim (label page 3.1 through page 3.X);
- (Part 4)** Theory of entitlement supporting the claim (label page 4.1 through page 4.X) - Include a narrative of how or why the specific Contract Specifications support the claim and a statement of the reasons why such Specifications support the claim;
- (Part 5)** Itemized list of claimed amounts (label page 5.1 through page 5.X) - Claimed damages that resulted from the event with a narrative of the theories and records and documents used to arrive at the value of the damages;
- (Part 6)** Additional Contract Time requests (label page 6.1 through page 6.X) - If the claim is for a combination of additional compensation and Contract Time, submit a copy of the schedule that was in effect when the event occurred and a detailed narrative which explains how the event impacted Contract Time. In addition, if an Agency-caused delay is claimed:
  - Include the specific days and dates under claim;
  - Provide detailed facts about the specific acts or omissions of the Agency that allegedly caused the delay, and the specific reasons why the resulting delay was unreasonable; and
  - Provide a schedule evaluation that accurately describes the impacts of the claimed delay.
  - Also see [00180.80](#) for additional requirements regarding claims for Contract Time and causes that are eligible and ineligible for consideration;
- (Part 7)** Copies of actual expense records (label page 7.1 through page 7.X) - Include documents that contain the detailed records and which support and total to the exact amount of additional compensation sought. Include the information and calculations necessary to support that amount. That amount may be calculated on the basis of [Section 00197](#), if applicable, or may be calculated using direct and indirect costs presented in the following categories:

- Direct Materials;
- Direct Equipment. The rate claimed for each piece of Equipment will not exceed the actual cost. In the absence of actual Equipment costs, the Equipment rates will not exceed 75 percent of those calculated under the provisions of [00197.20](#). For each piece of Equipment, the Contractor will include a detailed description of the Equipment and attachments, specific days and dates of use or standby, and specific hours of use or standby;
- Direct labor;
- Job overhead;
- General and administrative overhead; and
- Other categories as specified by the Contractor or the Agency;

**(Part 8)** Supporting records and documents (label page 8.1 through page 8.X) - Include copies of, or excerpts from the following:

- Any documents that support the claim, such as manuals standard to the industry and used by the Contractor; and
- Any daily reports or diaries related to the event, photographs or media that help explain the issue or event (optional), or all other information the Contractor chooses to provide (optional);

**(Part 9)** Certification (label page 9.1 through 9.X) - A certified statement, signed by a person authorized to execute Change Orders, by the Contractor, subcontractor, Supplier, or Entity, originating the claim, as to the validity of facts and costs with the following certification:

*Under penalty of law for perjury or falsification, the undersigned, (Name), (Title), (Company) certifies that this claim for additional compensation for Work on the Contract is a true statement of the actual costs incurred (in the amount of \$\_\_\_\_\_, exclusive of interest) and is fully documented and supported under the Contract between the parties.*

Signature: \_\_\_\_\_

Date: \_\_\_\_\_, 20\_\_

Subscribed and sworn before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
Notary Public

My commission expires \_\_\_\_\_.

**(Part 10)** Contractor evaluation of a lower tier claim (label page 10.1 through 10.X) - If the claim includes Work done or costs incurred by any subcontractors, Suppliers, or any Entity other than the Contractor, the following are required:

- Data required by the other Subsections of 00199.30(b);
- Copies of the Contractor's, subcontractor's, Supplier's and Entity's, at all tiers above the level of which the claim originates, separate evaluation of entitlement;

- Copies of the Contractor's, subcontractor's, Supplier's and Entity's, at all tiers above the level of which the claim originates, independent verification and evaluation of the amount of damages sought; and
- A person authorized to execute Change Orders on behalf of the Contractor, subcontractor, Supplier and Entity, at all tiers above the level of which the claim originates, must sign a statement with the following certification:

*Under penalty of law for perjury or falsification, the undersigned, (Name) (Title), (Company) certifies that this claim originating from the subcontractor, Supplier or Entity (Company) for additional compensation for Work on the Contract is a reasonable statement, independently verified, of the costs incurred (in the amount of \$\_\_\_\_\_, exclusive of interest) and is fully documented and supported under the Contract between the parties.*

Signature: \_\_\_\_\_

Date: \_\_\_\_\_, 20\_\_

Subscribed and sworn before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
Notary Public

My commission expires \_\_\_\_\_.

If the Engineer determines that additional information, records or documentation is needed to allow proper evaluation of the claim submittal, the Engineer will request the information, records or documentation. The Contractor will submit to the Engineer within 14 Calendar Days, or as otherwise agreed by the parties, the required additional information, records and documentation.

If the Engineer determines that the claim submittal with the additional information, records and documentation submitted is incomplete and not accepted as a claim, the Engineer will notify the Contractor in writing and the submittal will be rejected and will not be considered under 00199.40.

**(c) Records Requirements** - The Contractor must comply with [00170.07](#).

**(d) Compliance Required** - Full compliance by the Contractor with the provisions of this Section is a condition precedent to the commencement of any lawsuit by the Contractor to enforce any claim.

**00199.40 Claim Decision; Review; Exhaustion of Administrative Remedies** - The Agency intends to resolve all claims at the lowest possible administrative level. The Engineer will also determine whether multiple claims should be advanced separately or together.

If the Engineer denies the claim for additional compensation or a combination of additional compensation and Contract Time, in full or in part, according to 00199.40(a), the Contractor may request review of the denial. The disputed claim for additional compensation or a combination of additional compensation and Contract Time may then be resolved, in full or in part, at any of the progressive steps of claim review procedure as specified in (b) through (e) of this Subsection.

If the Engineer has denied a claim, in full or in part, for Contract Time only according to [00180.80](#), or has denied a claim, in full or in part, for correction of final compensation according to [00195.95](#), those disputed claims may then be resolved, in full or in part, at either of the two progressive steps of claim review procedure as specified in (b) through (c) of this Subsection.

A person authorized by the Contractor to execute Change Orders on behalf of the Contractor must be present and attend all claim hearings. For all claims, all of the actions and review under each step of the review process will occur before the review can be advanced to the next higher step.

If, at any step in the claim decision or review process, the Contractor fails to promptly submit requested information or documentation that the Agency deems necessary to analyze the claim, the Contractor is deemed to have waived its right to further review, and the claim will not be considered properly filed and preserved.

**(a) Decision by the Engineer** - The Engineer will, as soon as practicable, consider, investigate, and evaluate a Contractor's claim for additional compensation, or for a combination of additional compensation and Contract Time, if submitted as required by [00199.30](#).

Once the Engineer determines the Agency is in receipt of a properly submitted claim, the Engineer will arrange a meeting, within 21 Calendar Days or as otherwise agreed by the parties, with the Contractor in order to present the claim for formal review and discussion.

If the Engineer determines that the Contractor must furnish additional information, records or documentation to allow proper evaluation of the claim, the Engineer will schedule a second meeting, to be held within 14 Calendar Days or as otherwise agreed by the parties, at which the Contractor will present the requested information, records and documentation.

The Engineer will provide a written decision to the Contractor within 30 Calendar Days of the last Engineer-level meeting.

If the Contractor does not accept the Engineer's decision, the Contractor may, within 10 Calendar Days of receipt of the written decision, request in writing that the Engineer arrange a review at Step 1 (see (b) below).

**(b) Step 1: Engineering Director Level Review** - The Contractor will request that the Engineer arrange a meeting with the Engineering Director in order to present the denied or partially denied claim for formal review and discussion. The meeting will take place within 21 Calendar Days of the Agency's receipt of the request, or as otherwise agreed by the parties.

If the Engineering Director determines that the Contractor must furnish additional information, records or documentation to allow proper evaluation of the claim, the Engineering Director will schedule a second meeting, to be held within 14 Calendar Days, or as otherwise agreed by the parties, at which the Contractor will present the requested information, records and documentation.

The Engineering Director will provide a written decision to the Contractor within 30 Calendar Days of the last meeting with the Engineering Director.

The claim is subject to [00199.60](#), if not all of the records requested by the Engineering Director were furnished. If applicable, advancement of the claim is subject to the provisions of [00199.60](#) regarding waiver and dismissal of the claim or portions of the claim.

If the Contractor does not accept the decision, the Contractor may, within 180 Calendar Days from the date of receipt of the Engineering Director written decision or within 90



Calendar Days of the date of Second Notification, whichever is later, initiate Step 2 as set forth in subsection (c) below.

- (c) Step 2: Agency Level Review** - The Contractor will request a meeting with the Contract Administration Engineer, to present the claim, for final Agency review. The presentation will take place within 21 Calendar Days of the Agency's receipt of the Contractor's written request, or as otherwise agreed by the parties.

If the Contract Administration Engineer determines that the Contractor must furnish additional information or documentation to allow proper analysis of the claim, the Contract Administration Engineer will schedule a second meeting, to be held within 14 Calendar Days or as otherwise agreed by the parties, at which the Contractor will present the requested information or documentation.

The Contract Administration Engineer will provide a written decision to the Contractor within 30 Calendar Days of the final Step 2 meeting.

If the Contractor does not accept the Step 2 decision, the Contractor may, within 10 Calendar Days of receipt of the written decision, request in writing through the Engineer that the claim be advanced to Step 3 or 4 (see (d) and (e) below), as applicable. For purposes of determining which process to use for claims under Step 3 or 4 concerning a combination of additional compensation and Contract Time or for Contract Time only, the value of the claim or portion of the claim for Contract Time will be assumed to be the appropriate Liquidated Damages given in [00180.50](#) of the Special Provisions multiplied by the number of Calendar Days in question.

**(d) Step 3: Arbitration**

- (1) Claims Less Than \$100,000** - At this step, the claim will be resolved by binding arbitration before a single arbitrator according to the Construction Industry Arbitration Rules of the American Arbitration Association or such other arbitration service and rules as agreed by the parties.

Arbitration filing costs and any arbitrator's fees will be divided equally between the Agency and the Contractor.

- (2) Claims of \$100,000 to \$500,000** - At this step, the Contractor will present the claim to a Claims Review Board (referred to as "Board") for consideration, review and recommended resolution. The Board will be comprised of three persons. ODOT will establish and maintain, in consultation with representatives of the construction industry, a panel of more than 12 qualified individuals available to serve on Boards.

If a claim within the scope of this step is properly referred for Board consideration and review, copies of biographies of all persons on the panel will be sent to the Contractor. Within 20 Calendar Days after the biographies are mailed, the Contractor and the Engineer will each nominate, in writing, three individuals from the panel available to serve on the Board. Each party will affirm the availability of its nominees.

Within 10 Calendar Days after receipt of the nominations, the Contractor and the Engineer will (a) each appoint to the Board one of the three nominated by the other, (b) inform each other of the appointment, and (c) advise their three nominees, in writing, of the appointments. The two appointees, now Board Members, will select one of the remaining members of the panel to serve as the Board Chair. If the two appointees cannot agree on the selection of the Board Chair, the Circuit Court in the



county in which the Agency's main office is located will resolve the dispute. In this event, the Engineer will act through the Agency's legal counsel to request the Circuit Court to appoint one of the remaining members of the panel to serve as the Board Chair.

The Board may request the Engineer to designate a person not associated with the Contract to act as the recording secretary for the Board. The recording secretary is not a Board member, and will only assist the Board with administrative tasks related to its consideration and review of the referred claim.

The Agency and the Contractor will equally share the costs of the Board members. The Agency will pay the costs of the Board's recording secretary.

Members of the Board are to act impartially and independently in the consideration of facts and conditions surrounding the dispute. Board recommendations concerning the dispute are considered advisory only, will not be binding on either party, and will not constitute evidence in any legal proceeding for any reason.

The Board will schedule and conduct an informal hearing at which the Contractor and the Agency will each have an opportunity to present evidence and argument. The Contractor and the Agency will each submit a brief written summary of the claim to each Board member and the other party at least 10 Calendar Days before the hearing. Unless directed otherwise by the Board Chair, the summary will include, for each issue under dispute:

- A short statement describing the disputed issue;
- A short position statement by the party on the issue;
- A clear and concise explanation of the contractual basis for that position, including specific reference to Contract Documents;
- A clear and concise description of the costs claimed for each issue, including without limitation specific documents demonstrating productivity, time and costs; and
- Exhibits, including without limitation copies of plan sheets, extracts from the Standard Specifications, Supplemental Specifications, and Special Provisions, correspondence, photographs, or other evidence to support the position.

The proceedings will be conducted in a manner determined by the Chair, in consultation with the other Board members. Unless directed otherwise by the Chair, the hearing will be conducted according to the following guidelines:

- The hearing will be informal;
- The witnesses will not be sworn;
- The Contractor will present its case first;
- The Agency will then present its case;
- Both parties will then have opportunity to present rebuttal;

- The Board may ask questions and, to promote open discussion of the issues, both parties may respond or emphasize issues;
- The parties' attorneys may observe the hearing and may respond to direct questions from the Board, but may not make factual presentations or legal arguments; and
- The Board will conclude the hearing when it appears to the Board Chair that each party has had sufficient opportunity to support its case and the Board has no further questions.

Within ten (10) Calendar Days after conclusion of the hearing, the Board will forward to the Agency's designated representative and the Contractor the Board's written recommendation for resolution of the claim. Within ten (10) Calendar Days of its receipt of the Board's recommendation, the Agency will provide to the Contractor the Agency's written decision regarding the claim.

If the Contractor does not accept the Agency's decision regarding the claim, the Contractor may proceed to litigation as described in Step 4 (see (e) below).

**(3) Claims Over \$500,000** - If the Contractor and the Engineer agree, the parties may employ the Step 3 Board review process according to 00199.40(d-2). If not, the Contractor may proceed to Step 3 (see (d) below).

**(e) Step 4: Litigation** - This step applies to:

- Claims over \$500,000;
- Appeals of arbitration awards issued in Step 3 at 00199.40(d)(1) above, according to [ORS 36.600 through ORS 36.740](#); and
- Appeals of Agency decisions issued under Step 3 at 00199.40(d)(2) above.

The Contractor must follow each step in order, and exhaust all available administrative remedies before resort to litigation. Litigation of a claim that cannot be resolved in Steps 1-3 will be initiated by filing a complaint in the Circuit Court for the State of Oregon in the county where the Agency's main office is located within 6 months from the date of the final decision that exhausted the Contractor's available administrative remedies under this section 00199.

In any litigation, the entire text of any order or permit issued by a governmental or regulatory authority, as well as any documents referenced or incorporated therein by reference, will be admissible for the purpose of Contract interpretation.

The Contract will not be construed against either party regardless of which party drafted it. Other than as modified by the Contract, the applicable rules of contract construction and evidence will apply. This Contract will be governed by and construed according to the laws of the State of Oregon without regard to principles of conflict of laws.

In no event will this Subsection be construed as a waiver by the Agency or by the State of Oregon on any form of defense or immunity, whether sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States or otherwise, from any claim or from the jurisdiction of any court.

**(f) Payment of Costs, Expenses and Attorney's Fees** – Neither party will be entitled to an award for reasonable costs and expenses incurred after the initiation of Step 2, including

costs and expenses incurred for arbitration, trial de novo and on appeal. Costs and Expenses will include, but will not be limited to, reasonable attorney fees and expenses, arbitrator fees and expenses, and costs of discovery

The Contractor must comply with [00170.00](#).

**00199.50 Mediation** - Notwithstanding the formal claims procedure specified above, the parties may enter into nonbinding mediation by mutual agreement at any time, in which case the parties may also agree to suspend the time requirements in [Section 00199](#) pending the outcome of the mediation process. The rules, time and place for mediation, as well as selection of the mediator, will be established by mutual agreement. Costs will be divided equally between the Contractor and the Agency. Either party may terminate mediation at any time upon five (5) Calendar Days' notice to the other, after which the time requirements of [Section 00199](#) will be automatically reinstated and will resume from the point at which the time requirements were suspended.

**00199.60 Review of Determination Regarding Records** - If not all of the records requested by the Agency under [00199.40\(c\)](#) Step 2 were provided, then the Agency will determine:

- If the records are of the type described in [00170.07](#); and
- If the records have not been maintained or the records, or access to the records, has not been provided to the Agency as required by [00170.07](#) and this Section; and
- If the records are material and necessary for proper evaluation of part or all of the claim; and
- The portions of the claim for which the records are material and necessary for proper evaluation.

If the Agency makes the foregoing determinations, then subject to the review process described below, all portions of the claim for which the Agency determined the records are material and necessary for proper evaluation are immediately waived and irrevocably dismissed.

Even if the records have not been maintained or the records, or access to the records, have not been provided to the Agency in a given instance, the Agency may determine that sufficient records have been provided for the Agency to properly evaluate the claim in that instance. If the Agency makes this determination, the claim or portions of the claim will not be waived or dismissed under this provision.

If Contractor does not accept the Agency written determination that the records are material and necessary for proper evaluation of part or all of the claim, and the portions of the claim for which the records are material and necessary, Contractor may, within 14 Calendar Days of receipt of the Agency determination, request, in writing, a review of such determination by the Engineering Director (or designee). If Contractor does not request a review of the Agency determination, the Agency determination will then become the Agency's final determination as of the expiration of the time limit to request review.

If Contractor requests the review, the Engineering Director (or designee) will schedule a review meeting within 14 Calendar Days, or as otherwise agreed by the parties, of when the Engineering Director (or designee) receives the written review request. The Agency and Contractor will each have an opportunity to explain their respective positions at the review meeting in a manner determined by the Engineering Director (or designee).

Within 10 Calendar Days of the review meeting, the Engineering Director (or designee) will issue a written proposed finding of whether the records not maintained or not provided to the Agency, or for which access was not provided to the Agency, are material and necessary for proper evaluation of part or all of the claim. If the Engineering Director (or designee) makes that finding, then Engineering Director (or designee) will also make a proposed written finding as to what portions of the claim the records are material and necessary and, therefore, waived and irrevocably dismissed.

Even if records have not been maintained or records, or access to the records, have not been provided to the Agency in a given instance, the Engineering Director (or designee) may determine that sufficient records have been provided for the Agency to properly evaluate the claim in that instance. If Engineering Director (or designee) makes this determination, then the claim or portions of the claim will not be waived or dismissed under this provision.

The Engineering Director's (or designee) findings will be submitted to the Contractor. The Engineering Director's (or designee) findings are the Agency's final determination.

If the Agency's final determination is that the records are material and necessary for proper evaluation of part or all of the claim, then the claim or that portion of the claim for which the records are material and necessary is waived and irrevocably dismissed, unless Contractor provides the records, or access to the records, to the Agency within 5 Calendar Days of the Agency's final determination. If Contractor provides the records, or access to the records, within this time limit, the Agency will schedule a meeting with the Contractor within 14 Calendar Days or as otherwise agreed by the parties, to discuss the records.

The Agency's final determination that records are material and necessary for proper evaluation of part or all of the claim, and the Agency's final determination of the portions of the claim for which the records are material and necessary, will be final and binding.

If the entire claim is waived and irrevocably dismissed pursuant to the Agency's final determination there will be no further decision by the Agency on the claim or further review of the claim under [00199.40](#) and the claim will not be eligible for mediation under [00199.50](#). If only portions of the claim are waived and irrevocably dismissed pursuant to the Agency's final determination, the Agency will provide a written decision to the Contractor regarding the remaining portions of the claim within 30 Calendar Days of the final Step 2 meeting, or the Agency's final determination regarding the records, whichever is later. There will be no further decision by the Agency on or further review under [00199.40](#) of the portions of the claim waived and irrevocably dismissed pursuant to Agency's final determination and those portions will not be eligible for mediation under [00199.50](#).