

HACSA 3.d.

HACSA MEMORANDUM

TO: HACSA Board of Commissioners

PRESENTED BY: Dorothy Cummings
Administrative Services Director

AGENDA ITEM TITLE: ORDER/In the Matter of Amending the Agency's Procurement Policy

AGENDA DATE: April 5, 2006

I. MOTION

IT IS MOVED THAT THE ORDER BE APPROVED WHICH AMENDS THE AGENCY'S PROCUREMENT POLICY.

II. ISSUE

There is a need to amend HACSA's Procurement Policy to reflect statutory and Lane Manual changes.

III. DISCUSSION

A. Background

HACSA last amended its Procurement Policy in May of 2005 to reflect the major revision to Oregon's public contracting laws and the Lane Manual that became effective March 1, 2005. This new amendment reflects statutory changes to State law and amendments to Lane Manual Chapters 20 and 21 that became effective January 1, 2006.

Since HACSA's Policy is in close alignment with Lane Manual Chapters 20 and 21 and because the County is also HACSA's contract review board, we are required to submit our Policy amendments for approval.

B. Analysis

HACSA's changes are consistent with the Lane Manual and include:

- A change to the protest 'of intent to award contract' procedure (Request for Proposals);
- Clarification that if both BOLI and Davis-Bacon apply the higher of the two shall be paid;
- Increase the requirement for bid security, and performance and payment bonds from \$50,000 to \$100,000.

HACSA's policy differs with the Lane Manual where federal law preempts State law or where HACSA's policy is more restrictive.

C. Alternatives/Options

The amended Procurement Policy can be adopted in full as described, modified or returned to the Agency for further analysis.

D. Recommendation

Passage of the Proposed Motion.

E. Timing

The Procurement Policy would be amended as of the date the Order is signed.

IV. IMPLEMENTATION/FOLLOW-UP

Same as in item III. E.

V. ATTACHMENT

Housing And Community Services Agency Statement of Procurement Policy.

**THE BOARD OF COMMISSIONERS OF THE
HOUSING AND COMMUNITY SERVICES AGENCY OF
LANE COUNTY OREGON**

ORDER NO.

**)In the Matter of Adopting the Agency's
)Procurement Policy**

WHEREAS, the Agency's Procurement Policy was approved by the Board on May 11, 2005 and;

WHEREAS, the Agency wishes to amend the Procurement Policy to incorporate recent changes in the both State law and the Lane Manual;

WHEREAS, the Agency will continue to 'opt out' of the state Attorney General's Model Rules, including those currently in effect, those made available on December 2, 2005, and as they may be further amended in the future and;

WHEREAS, the Agency wishes to adopt its own public contract rules separate from the Department of Justice model rules; NOW THEREFORE, IT IS HEREBY

ORDERED, that the Agency's Procurement Policy, attached to this order, be adopted and that the Agency will 'opt out' of the State Attorney General's model rules, including the 2005 revisions.

DATED this _____ day of _____ 2006.

Chairperson, HACSA Board of Commissioners

APPROVED AS TO FORM

Date 3/28/06 lane county

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OFFICE OF LEGAL COUNSEL

In the Matter of Amending the Agency's Procurement Policy

BOLD INDICATES MATERIAL BEING ADDED
STRIKETHROUGH INDICATES MATERIAL BEING DELETED

STATEMENT OF PROCUREMENT POLICY

HOUSING AND COMMUNITY SERVICES AGENCY (HACSA)

Established for the Housing And Community Services Agency of Lane County (Agency) by Board action on September 25, 1991, amended January 1999 and amended May 2005. This Statement of Procurement Policy complies with the U.S. Department of Housing and Urban Renewal's (HUD) Annual Contributions Contract (ACC), HUD Handbook 7460.8, "Procurement Handbook for Public Housing Agencies", procurement standards of 24 CFR 85.36.

I. GENERAL PROVISIONS

A. PURPOSE

The purpose of this Statement of Procurement Policy (Statement) is to: provide for the fair and equitable treatment of all persons or firms involved in purchasing by the Agency; assure that supplies, services, and construction are procured efficiently, effectively, and at the most favorable price available to the Agency; promote competition in contracting; provide safeguards for maintaining a procurement system of quality and integrity; and assure that Agency's purchasing actions are in full compliance with applicable Federal standards, HUD regulations, and State and local laws.

B. DEFINITIONS

For definitions see Lane Manual Chapters 20, 21, and HUD Handbook 7460.8.

C. APPLICATION

This Statement applies to all contracts for the procurement of supplies, services, and construction entered into by the Agency after the effective date of this Statement. It shall apply to every expenditure of funds by the Agency for public purchasing, irrespective of the source of funds, including contracts which do not involve an obligation of funds (such as concession contracts); however, nothing in this Statement shall prevent the Agency from complying with the terms and conditions of any grant, contract, gift or bequest that is otherwise consistent with law. The term "procurement," as used in this Statement, includes both contracts and modifications (including change orders) for construction or services, as well as purchase, lease, or rental of goods, supplies and equipment. However, this statement does not apply to the acquisition of real property.

ORS Chapter 456.120 gives the Agency the power to make and execute contracts. Therefore, when considering the Public Contracting State statutes, the Agency is defined as a local contracting agency. As such, the Agency adopts these rules, and the powers and duties of the Local Contract Review Board (LCRB) set forth in ORS279A, B, & C shall be exercised and performed by the Lane County Board of Commissioners on behalf of the Agency, unless further delegated.

Due to an identity of interest at the governing board level, it is appropriate that Lane County Board of Commissioners act as the LCRB for the Agency and the Agency will follow the same procurement

policies and regulations as Lane County, unless there is specific conflict with applicable federal laws or regulations. Therefore, the Agency agrees to comply with the provisions of Lane Manual (LM) Chapters 20 and 21 unless so specifically stated otherwise in this policy. In addition, only some LM Chapter 20 and 21 provisions and public contract statutes may be set forth in these Agency procurement policies, in part or in their entirety. This is not intended to preclude coverage of all applicable statutes and Lane Manual rules.

D. PUBLIC ACCESS TO PROCUREMENT INFORMATION

Procurement information shall be a matter of public record to the extent provided in ORS Chapter 192, LM Chapter 20, and LM Chapter 21.

E. EXEMPTIONS AND AUTHORIZATIONS

Unless other requirements are provided under federal laws that govern the programs of the Agency, the Agency shall use the exemptions and authorizations listed in LM Chapter 20.

II. PROCUREMENT AUTHORITY AND ADMINISTRATION

A. All procurement transactions shall be administered by the Contracting Officer, who shall be the Executive Director or other individual he or she has authorized. The Executive Director shall issue operational procedures to implement this Statement.

B. This Statement and any later changes shall be submitted to the Agency Board of Commissioners for approval. The Board delegates to the Executive Director authority to enter into any procurement not in excess of \$100,000 and is responsible for ensuring that any procurement policies adopted are appropriate for the Agency.

C. When Federal grant money is involved in the procurement the Executive Director may determine that federal law preempts those citations to ORS statutes and Lane Manual regarding state purchasing laws.

D. The Agency's Board of Commissioners shall, after a recommendation from the Executive Director, award or reject all procurements over \$100,000.

E. The Agency's procurement process will include the following:

1. Procurement requirements which are subject to an annual planning process to assure efficient and economical purchasing;
2. Contracts and modifications that are in writing, clearly specifying the desired goods, supplies, services, or construction, and are supported by sufficient documentation regarding the history of the procurement, including as a minimum the method of procurement chosen, the selection of the contract type, the rationale for selecting or rejecting offers, and the basis for the contract price;
3. All advertisements of bids/proposals that comply with the requirements outlined in Lane Manual 21.105 (3) and are hereby incorporated by reference. All advertisements shall contain the phrase "Equal Opportunity Employer".
4. Solicitation procedures that are conducted in full compliance with Federal standards stated in 24 CFR 85.36, or State and local laws that are more stringent, provided they are consistent with 24 CFR 85.36;

5. An independent cost estimate that is prepared before solicitation issuance and is appropriately safeguarded for each procurement above the small purchase limitation, and a cost or price analysis is conducted of the responses received for all procurement (see F below);
6. Generally, contract award will be made to the responsive and responsible bidder offering the lowest price (for sealed bid contracts) or contract award is made to the offeror whose proposal offers the greatest value to the Agency, considering price, technical, and other factors as specified in the solicitation (for contracts awarded based on competitive proposals); unsuccessful firms are notified within ten days after contract award;
7. There are sufficient unencumbered funds available to cover the anticipated cost of each procurement before contract award or modification (including change orders), work is inspected before payment, and payment is made promptly for contract work performed and accepted; and
8. The Agency complies with applicable HUD review requirements, as provided in the operational procedures supplementing this Statement.

F. COST AND PRICE ANALYSIS

A cost or price analysis shall be performed for all procurement actions, including contract modifications. The method of analysis shall be determined as follows. The degree of analysis shall depend on the facts surrounding each procurement.

If the procurement is based on noncompetitive proposals (also see III,E), or when only one offer is received, or for other procurements as deemed necessary by the Agency (e.g., when contracting for professional, consulting, or A&E services) the offeror may be required by the Agency to submit:

- a. a cost breakdown showing projected costs and profit;
- b. commercial pricing and sales information, sufficient to enable the Agency to verify the reasonableness of the proposed price; or
- c. documentation showing that the offered price is set by law or regulation.

Cost analysis shall be performed if an offeror/contractor is required to submit a cost breakdown as part of its proposal. When a cost breakdown is submitted: a cost analysis shall be performed on the individual cost elements; the Agency shall have a right to audit the contractor's books and records pertinent to such costs. Costs shall be allowable only to the extent that they are consistent with applicable Federal cost principles (for commercial firms, Subpart 31.2 of the Federal Acquisition Regulation (FAR), 48 CFR Chapter 1). In establishing profit, the Agency shall consider factors such as the complexity and risk of the work involved, the contractor's investment and productivity, the amount of subcontracting, the quality of past performance, and industry profit rates in the area for similar work.

A comparison of prices shall be used in all cases other than those described in above.

G. CANCELLATION OF SOLICITATIONS

1. An invitation for bids, request for proposals, or other solicitation may be cancelled by the Contracting Officer before offers are due if: the Agency no longer requires the goods, supplies, services or construction; the Agency can no longer reasonably expect to fund the procurement;

proposed amendments to the solicitation would be desirable; or similar reasons.

2. A solicitation may be cancelled and all bids or proposals that have already been received may be rejected if: the goods, supplies, services, or construction are no longer required; ambiguous or otherwise inadequate specifications were part of the solicitation; the solicitation did not provide for consideration of all factors of significance to the Agency; prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds; there is reason to believe that bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or for good cause of a similar nature when it is in the best interest of the Agency.
3. The reasons for cancellation shall be documented in the procurement file and the reasons for cancellation and/or rejection shall be provided upon request to any offeror solicited.
4. A notice of cancellation shall be sent to all offerors solicited and, if appropriate, shall explain that they will be given an opportunity to compete on any resolicitation or future procurement of similar items.

H. CONTRACT NEGOTIATIONS

Contract negotiations are allowed for competitively bid goods and services as stated in this Policy, the Lane Manual, and the solicitation documents.

As outlined in ORS279C.340, public improvement contracts that have been competitively bid and all responsive bids from responsible bidders exceed the Agency's cost estimate, the Agency 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 contract within the Agency's cost estimate.

III. PROCUREMENT METHODS

A. SMALL AND INTERMEDIATE PROCUREMENTS

Any purchase not exceeding \$100,000 may be made in accordance with the small and intermediate procurements procedures authorized in this section. Contract requirements shall not be artificially divided so as to constitute a small or intermediate purchase under this section (except as may be reasonably necessary to comply with Section VIII of this Statement).

1. Petty Cash

Small purchases under \$25 which can be satisfied by local sources may be processed through the use of a petty cash account. The Finance Director shall ensure that the account is established in an amount sufficient to cover small purchases made during a reasonable period (two weeks) and that security is maintained and only authorized individuals have access to the account.

The account shall be periodically audited by the Accounting Supervisor to validate proper use and to verify that the account total equals cash on hand plus the total of accumulated vouchers.

2. Small Purchases Not Exceeding Less Than \$5,000

For purchases **less than ~~not exceeding~~ \$5,000**, the award may be direct without competitive selection. Use of competitive quotes are encouraged, particularly for new purchases or projects.

3. Intermediate Purchases Equal To Or Exceeding Exceeding \$5,000 But Not \$100,000

For purchases **equal to or exceeding \$5,000 but not \$50,000** no less than three offerors shall be solicited to submit price quotations, which may be obtained in person, by telephone, or in writing.

Award shall be made to the offeror providing the lowest acceptable quotation, unless justified in writing based on price and other specified factors as outlined in the solicitation documents.

For intermediate purchases exceeding \$50,000 but not \$100,000, departments shall prepare a written solicitation, three offerors shall be solicited to submit quotes, the quotes must be written, and unsuccessful quoters shall have the right to protest the award decision in accordance with HUD's Instructions to Bidders/Offerors and/or (as applicable to the funding source) LM 21.105(13) (a) and (b). The written solicitation shall provide notice of the right to protest the award. If non-price factors are used, they shall be disclosed to all those solicited. If three quotes are not available for a purchase **equal to or exceeding \$5,000 but not \$100,000**, a lesser number will suffice provided that a written record is made of the effort to obtain the quotes and the names, addresses, and/or telephone numbers of the offerors and persons contacted, and the date and amount of each quotation shall be recorded and maintained as a public record.

The Executive Director or a delegate shall have the discretion to require a written contract in lieu of a Purchase Order whenever it is determined to be in the best interest of the Agency.

B. REQUEST FOR PROPOSALS (RFP)

1. Conditions for Use

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

2. When Required and Requirements

Proposals submitted in response to an RFP are offers as are bids. See OAR 137-047-0310, 137-049-0280. Unless otherwise specified in ORS 279A, B, or C, LM Chapter 21, or these rules, references to "bids" and "bidder" and "invitation to bid" shall, to the extent practicable within the proposal process be deemed equally applicable to "proposals," "proposers," and "requests for proposals." The RFP process must generally comply with the requirements for sealed bids, unless otherwise stated, and shall comply with any requirements in ORS 279B.060 and ORS 279C.400. In addition, all RFP documents shall state:

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

- c. Provide for an opportunity to protest the solicitation in accordance with LM 21.107 (6);
- d. The contract terms;
- e. Describe the right of appeal as listed below under Appeal of Recommendation Committee, and the right to protest award pursuant to VII, B below;
- f. Invite the submission of sealed, written offers to be publicly opened at a designated time and place;
- g. Describe the method of contract selection, including award without negotiation, negotiation with highest ranked proposer, competitive negotiations, multiple-tiered competition or any combination of these methods or any other method authorized by these rules.
- h. An RFP process, if appropriately authorized for a public improvement contract, is not required to include first-tier subcontractor disclosure and reciprocal preference for non-resident bidders.

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

Advertisements and Proposals. LM 21.105(3) and (5). References to "bid" or "bidder" there include "proposal" or "proposer."

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

3. Opening

LM 21.105(7) applies except that references to "bid" or "bidder" there include "proposal" or "proposer." However, proposals need not be read aloud, and the Agency is only required to record and make available a list of the proposers after the opening.

4. Evaluation of Proposals

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

5. Methods of Selection

For non-public improvement contracts, the Agency may use any one or combination of methods of contractor selection set forth in ORS 279B.060. OAR 137-047-0262 and 137-047-0261, except (2) and (6) are adopted. Prior to initial closing, the Agency shall provide an opportunity to protest as in LM 21.105(6); and after the notice of intent to award, an opportunity to protest the award as in LM 21.105(13) with the ability to protest exclusion from any phase of a multi-step or multi-tiered process based on criteria in OAR 137-047-0720(2) which is adopted, if such opportunity was not previously provided. In addition, the Agency may use portions of these methods of contractor selection to

develop a multi-tiered competitive process designed to identify, at one or more stages, a class of proposers that fall within a competitive range based on criteria established for that stage, or to otherwise eliminate from consideration a class of lower ranked proposers. In doing so, the Agency shall provide notice of the method of selection in the RFP, evaluate all responsive proposals, and provide at least an opportunity to protest the solicitation process or document, and the award as set forth in this subsection.

6. Bid, Payment and Performance Security

Unless otherwise provided in the RFP bid, payment and performance security requirements may be waived if the contract will not be a public improvement or other construction contract or if it will be for a public improvement equal to or less than ~~\$50,000~~ **\$100,000**. Bid, payment and performance securities shall be provided if the contract will be for a public improvement of ~~\$50,000~~ **\$100,000** or more.

7. Mistakes in Bids

See III, C (Sealed Bids), 4. for process. References to "bid" includes "proposal."

8. Rejection

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

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

10. Protest of Intent to Award Appeal of Evaluation Committee Recommendation

Anyone responding to an RFP who is not recommended for award by the evaluation committee may ~~protest~~ **protest** appeal the recommendation to the Executive Director or the Board depending on the authority to make the award.

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

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

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

(d) The grounds for **protest appeal** are:

- (i) Different criteria were used to evaluate different proposals.
- (ii) The evaluation committee unfairly applied the evaluation criteria to a proposal.
- (iii) A member or members of the evaluation committee had a relationship with a proposer that represented a conflict of interest.
- (iv) The criteria used to evaluate the proposals did not pertain to the services or products requested.
- (v) A member or members of the evaluation committee demonstrated bias toward a proposal or a proposer.
- (vi) The Agency abused its discretion in rejecting the protestor's proposal as nonresponsive.**
- (vii) The evaluation of the proposals is otherwise in violation of any application provisions of ORS279A.**

The Executive Director, **or the Board if applicable**, shall evaluate any **protest appeal** before rendering a decision and shall state the conclusions reached and reasons either in writing or on the record in a public meeting. Any decision to overturn the recommendation of the **Evaluation Committee** shall be based on a finding that one of the criteria above occurred to the substantial prejudice of the appellant.

The **protest appeal** procedures and limits set forth herein to be followed by the Agency are directory and not mandatory and failure to follow or complete the action in the manner provided shall not invalidate the decision.

The protestor must be eligible and next in line to be awarded the contract if the protest was successful.

41. Notice of Intent to Award

~~LM 21.105(12). References to "bid" and "bidder" shall include "proposal" and "proposer."~~

42. Protests of Award

~~See LM 21.105(13). References to "bid documents" includes "request for proposal documents" and references to "bid" include "proposal."~~

C. SEALED BIDS

1. Conditions for Use

Generally, a competitive sealed bidding process is required for all public contracts unless exempt or excepted in ORS 279A, B, or C, or a LM Chapter 20 exemption rule, or such authorities provide for formal bidding as an option. The Agency may use competitive sealed bidding when not required if the following conditions are present:

- a. The Executive Director deems this to be the most appropriate method.
- b. A complete, adequate, and realistic specification or purchase description is available.
- c. Two or more responsible bidders are willing and able to compete effectively for the work.
- d. The procurement lends itself to a firm fixed price contract.
- e. The selection of the successful bidder can be made principally on the basis of price.

Sealed bidding will be used for public improvement contracts, except as provided in ORS 279C.335. For other construction contracts, sealed bidding is the preferred method for construction procurement. For procurement under Capital Fund, sealed bidding shall be used for all construction and equipment contracts exceeding the small and intermediate purchase limitation.

2. Solicitation and Receipt of Bids

An invitation for bids for public improvement contracts shall be issued including specifications and all contractual terms and conditions applicable to the procurement, and including:

- a. A description of the project.
- b. The office where the specifications for the project may be reviewed.
- c. If applicable, the date that prequalification applications must be filed under ORS279C.430 and the class or classes of work for which bidders must be pre qualified.
- d. The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement.
- e. The name and title of the person designated for receipt of bids.
- f. The date, time, and place for both the receipt of bids and the public bid opening.
- g. **A statement that, if the bid is subject to State prevailing wages rates and/or the Davis-Bacon Act that no bid will be received or considered unless the bid contains a statement by the bidder as part of its bid that the provisions of ORS279C.840 or 40 U.S.C. 276a are to be complied with. Also see the requirements of ORS279C.830, for projects where State prevailing wage rates apply (or projects where both BOLI and Davis-Bacon rates apply).**
- h. A statement as to whether the bidder is a resident bidder, as defined in ORS 279A.120. (State funding only)
- i. A statement that the Agency may reject any bid not in compliance with all prescribed public bidding procedures and requirements, and may reject for good cause any or all bids upon a finding of the Agency that it is in the public interest to do so.
- j. A statement indicating whether or not a contractor or subcontract must be licensed under ORS468A.720.
- k. A statement that a bid for a public improvement contract may not be received or considered by the Agency unless the bidder is licensed by the Construction Contractors Board or the State Landscape Contractors Board.
- l. All advertisements for bids/proposals shall comply with LM21.105(3) and shall contain the phrase 'Equal Opportunity Employer.'
- m. A surety bond, irrevocable letter of credit issued by an insured institution as defined in ORS 706.008, cashier's check or certified check as bid security unless waived in C.5. below.
- n. A statement that award will be made to the lowest responsible and responsive bidder whose bid meets the requirements of the invitation for bids, unless process is canceled or bids rejected by Agency. (See LM Chapter 20, LM Chapter 21, and ORSA, B, & C for other allowed methods of award.)

Generally, the invitation to bid requirements in ORS 279B.055 shall be included in non-public improvement and goods and services contracts, unless the federal funding source requires otherwise.

All bids received shall be time-stamped but not opened and shall be stored in a secure place until bid opening. A bidder may withdraw its bid at any time prior to bid opening.

3. Bid Opening and Award

Bids shall be opened publicly and in the presence of at least one witness. An abstract of bids shall be recorded and the bids shall be available for public inspection as set forth in LM 21.105(7). Award shall be made as provided in the invitation for bids by written notice to the successful bidder. See also LM Chapter 20, LM Chapter 21 If equal low bids are received, from responsible bidders award shall be made by drawing lots unless otherwise noted in the invitation for bids.

4. Mistakes in Bids

Correction or withdrawal of inadvertently erroneous bids may be permitted, where appropriate, before bid opening by written or telegraphic notice received in the office designated in the invitation for bids prior to the time set for bid opening. After bid opening, corrections in bids may be permitted only if the bidder can show by clear evidence that a mistake of a nonjudgmental character was made, the nature of the mistake, and the bid price actually intended. A low bidder alleging a nonjudgmental mistake may be permitted to withdraw its bid if the mistake is clearly evident on the face of the bid document but the intended bid is unclear or the bidder submits convincing evidence that a mistake was made.

All decisions to allow correction or withdrawal of bid mistakes shall be supported by a written determination signed by the Contracting Officer. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the Agency or fair competition shall be permitted.

The Agency reserves the right to waive technical defects, discrepancies and minor irregularities, and to not award a contract when it finds such action to be in the public interest. See OAR 137-049-0350 and OAR 137-047-0470.

5. Bid Security

Unless otherwise provided below, all bids shall require as bid security a surety bond, cashier's check or certified check of the bidder in an amount not to exceed 10 percent of the bid. The dollar amount or percentage required as security shall be stated in the bid documents.

Pursuant to LM 21.106, the Executive Director is delegated authority to waive the bid security requirement described above prior to bid opening for any goods or services contract and any public improvement or construction contract as defined in ORS 279C.320(1) equal to or less than **\$100,000** **\$50,000**, if he or she finds:

- a. That waiving the bid security requirement will probably result in lower bids or an increased number of bids, and
- b. That waiving the bid security requirement will not endanger completion of the project if rebidding is necessary because the successful bidder is unable or unwilling to sign the contract or provide any required performance bond, and
- c. That the potential for cost to the Agency of rebidding the project is outweighed by the benefits. The Contracting Officer shall document the findings required above in the bid file.

6. Payment and Performance Security

For construction contracts exceeding ~~\$100,000~~ \$50,000, and for good and services contracts exceeding \$100,000 where it is the Agency's best interest to do so, contractors shall be required to submit the following:

- a. a performance bond for 100% of the contract price or
 - (a) a 20% cash escrow or
 - (b) a 25% irrevocable letter of credit.
- b. a payment bond for 100% of the contract price.

In cases of emergency or as described in ORS 279C.389(4), the requirement for a performance and payment bond may be excused if the declaration of such emergency is made in accordance with LM 21.128.

Notwithstanding the above, bid guarantee and performance/payment bond requirements must meet granting agency requirements.

D. PERSONAL AND PROFESSIONAL SERVICE CONTRACTS

Personal and professional service contracts are those for the rendering of services where the particular skill or experience of the contractor is of primary importance, or which involve a relationship of special trust and confidence between the Agency and the contractor. See LM20.097 to determine whether a proposed contract is one for personal or professional service as opposed to one for materials and service.

Personal or professional service contracts shall not be used to engage persons who would be deemed Agency employees, rather than independent contractors. Two of the primary differences are the amount of control the Agency has the right to exercise over the individual and the method of payment. That an Agency employee supervises or has the right to supervise the individual (i.e., assign work, review work, review performance) is an indicator the individual would be an employee, not an independent contractor. That the individual is paid for time and services is an indicator the person is an employee, whereas, that he or she is paid for results or for a total project is an indicator the individual is an independent contractor. All personal and professional services contractors must meet the independent contractor standards of ORS 670.600.

1. Selection of Personal or Professional Service Contractors

Personal or professional service contracts are exempt from sealed bids procurement; however, the following selection procedures shall be utilized, except with regard to required qualification based selection for engineers, architects, and land surveyors for certain public works projects:

- a. For contracts of \$10,000 or less, the Contracting Officer or designee may negotiate a contract with any qualified contractor of his or her selection.
- b. For contracts greater than \$10,000 and not exceeding \$50,000 and for all retainer type contracts, the Contracting Officer or designee shall solicit at least three prospective contractors **either orally or in writing** who appear to meet the minimum requirements for the proposed contract, inform each in reasonable detail of the contract and determine the prospective contractor's interest and ability to perform the contract. **If three quotes are not available, a lesser number will suffice provided that a written record is made of the effort to obtain the quotes.**

- c. For contracts greater than \$50,000 but equal to or less than \$100,000, the Contracting Officer or designee shall comply with (b) above , except that they will prepare a written solicitation, including but not limited to specification/scope of work and receive written offers. Unsuccessful offerors shall have the right to protest the award decision to the Board in accordance with procedures set forth in LM 21.105 (13) (a) and (b).
- d. For contracts greater than \$100,000 the Contracting Officer or designee shall comply with (c) above, and conduct interviews of at least the two most qualified prospective contractors, if two or more are available. Interviews may be either by telephone, in person, or by written questions. When the Contracting Officer deems it appropriate, he or she may solicit prospective contractors by advertisement or by competitive proposals. Unsuccessful offerors shall have the right to protest the award decision to the Board in accordance with procedures set forth in LM 21.105 (13) (a) and (b).

Other provisions in LM 21.118 not inconsistent with the above shall apply, including but not limited to qualification based selection for engineers, architects, and land surveyors. For additional details and guidance, especially as it relates to the solicitation and selection methods for architects, engineers, land surveyors, and related services, see the requirements outlined in LM21.118.

2. Amendments

The selection procedures stated above shall be utilized for any amendment of a personal or professional services contract which is more than 50 percent of the original contract amount, or when the aggregate of amendments are more than 50 percent of the original amount. However, they need not be utilized if the scope of the amendment was clearly included in the original selection such that prospective contractors understood this amendment would occur.

3. Criteria

The following criteria shall be considered, as appropriate, in the evaluation and selection of personal or professional service contractors:

- a. Specialized experience in the type of work to be performed.
- b. Capacity and capability to perform the work within necessary time and other limitations.
- c. Educational and professional record, including past record of performance on contracts with governmental agencies and private parties with respect to cost control, quality of work, ability to meet schedules, and contract administration.
- d. Availability to and familiarity with the area in which the specific work is located.

4. Waiver

The selection procedures described above for initial contracts and amendments may be waived by the Executive Director for any of the following reasons:

- a. An emergency exists which could not have been reasonably foreseen and which requires prompt execution of a contract, or
- b. The contractor is the only person within a reasonable area who performs this type of work, or

- c. When good cause is demonstrated to the Executive Director, such that he or she believes award of the contract without utilizing the selection procedures in is the public's interest.

E. NONCOMPETITIVE PROPOSALS/SPECIAL PROCUREMENTS

1. Procurements shall be conducted competitively to the maximum extent possible. Procurement by noncompetitive proposals may be used only when the award of a contract is not feasible using small purchase procedures, intermediate purchase procedures, sealed, bids, or competitive proposals, and one of the following applies:
 - a. The item is available only from a single source; based on a reasonable effort to notify all known potential contractors and written findings are made in accordance with LM 21.111(1). See also LM21.111 (6) for ad requirements for single source purchases in excess of \$100,000).The Executive Director shall be delegated authority to make sole source determinations. This authority may be further delegated.
 - b. An emergency exists that could not have been reasonably foreseen or is beyond the control of the Agency or its employees seriously threatens the public health, welfare, or safety, or endangers property, or would otherwise cause serious injury to the Agency, as may arise by equipment failure or similar event. Written findings shall be made in accordance with LM 21.128(2). In such cases, there must be an immediate and serious need for supplies, services, or construction and the emergency procurement shall be limited to those supplies, services, or construction necessary to meet the emergency. The Executive Director or his designee shall have the authority to declare an emergency under \$100,000;
 - c. After an appropriately conducted competitive process no proposers or bidders are identified, the LCRB may exempt the procurement from competitive bidding or approve a special procurement in accordance with LM 20.265, as applicable. See LM20.265.
2. Each procurement based on noncompetitive proposals under \$100,000 shall be approved by the Executive Director or his designee.
3. The request for exemption shall contain the information listed in LM20.265.

F. BRAND NAME

Specifications shall not expressly or implicitly require any product of a particular manufacturer or seller except pursuant to this rule or the class-specific authorizations in LM Chapter 20. For non-public improvement contracts, the Agency may identify products by brand names so long as it includes language similar to "or equal," "or equivalent," or "equal or superior to." The Agency shall determine, in its sole discretion, whether an offeror's alternative product is "equal" or "equivalent," or "superior." Division Directors shall be delegated authority to determine that only an identified brand name will meet the Agency's need and shall document such decision in writing, subject to any review and reversal by the Executive Director, in his or her discretion. Any written decision must be based on one or more of the criteria in ORS 279B.215(2).

In order to use a particular brand name for public improvement contracts, the LCRB must first grant an exemption for current and contemplated future purchases. Applications shall 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 Agency is seeking the exemption.

The LCRB may grant exemptions if any of the following conditions are met:

1. The exemption is not likely to encourage favoritism in awarding public improvement contracts or substantially diminish competition, or
2. The specification of a product by brand name or mark, or the product of a particular manufacturer or seller would result in substantial cost savings to the Agency, or
3. 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, or
4. Efficient utilization of existing equipment or supplies requires acquisition of compatible equipment or supplies.

G. CONSTRUCTION MANAGER/GENERAL CONTRACTOR (CM/GC)

A request for proposal procedure may be used for the selection of CM/GC firms who will be required to establish guaranteed maximum prices for constructing public improvements, subject to the following conditions:

1. Contractual requirements are stated clearly in the solicitation document. The contract shall describe the methods by which the CM/GC shall competitively select other contractors and subcontractors to perform the work of the improvement. Further, the contracts shall describe the methods by which the CM/GC and its affiliated or subsidiary entities, if any, may compete to perform the work of the improvement; such methods shall include, at a minimum, public opening of sealed bids at a pre-announced time and place.
2. Evaluation criteria to be applied in selecting the CM/GC firm are stated clearly in the solicitation document. Criteria used to identify the CM/GC firm which best meets the public contracting needs may include, but are not limited to, cost, quality, experience relevant to the improvement to be constructed, and time required to commence and complete the improvement.

H. REQUIREMENTS AND PRICING CONTRACTS

Requirements contracts, or pricing agreements, provide for the establishing of unit prices for goods or services (including personal services) when the Agency knows it will need them, but is unable to determine the quantity in advance. Generally, the vendor agrees to supply some or all of the Agency's requirements within a specified period of time. Competitive selection and contract/amendment execution authority is governed by the rules which apply to the underlying contract type, i.e., materials, materials and services, services, personal or professional services. See LM 21.120 (1) – (4) for additional requirements.

I. COOPERATIVE PROCUREMENTS

The Agency may participate in, sponsor, conduct, or administer cooperative procurements as set forth in ORS 279A.200 through ORS 279A.225

IV. CONTRACTOR QUALIFICATIONS AND DUTIES

A. CONTRACTOR RESPONSIBILITY

Procurements shall be conducted only with responsible contractors, i.e., those who have the technical and financial competence to perform and who have a satisfactory record of integrity. Before awarding a contract, the Agency shall review the proposed contractor's ability to perform the contract successfully, the contractor's integrity (including a review of the List of Parties Excluded from Federal Procurement and Nonprocurement Programs published by the U.S. General Services Administration).

The Agency reserves the right to examine the contractor's record of past performance (including contacting previous clients of the contractor, such as other PHA's), financial and technical resources, and past compliance with public policy. If a prospective contractor is found to be nonresponsible, a written determination of nonresponsibility shall be prepared and included in the contract file, and the prospective contractor shall be advised of the reasons for the determination.

B. SUSPENSION AND DEBARMENT

Contracts shall not be awarded to debarred, suspended, or ineligible contractors. Contractors may be suspended, debarred, or determined ineligible in accordance with HUD regulations (24 CFR Part 24), ORS 279B.130, or ORS 279C.440 .

V. TYPES OF CONTRACTS, CLAUSES, AND CONTRACT ADMINISTRATION

A. CONTRACT TYPES

Any type of contract which is appropriate to the procurement and which will promote the best interests of the Agency may be used, provided that the cost-plus-a-percentage-of-cost and percentage of construction cost methods are prohibited. All procurement shall include the clauses and provisions necessary to define the rights and responsibilities of the parties. A cost reimbursement contract shall not be used unless it is likely to be less costly or it is impracticable to satisfy the Agency's needs otherwise, and the proposed contractor's accounting system is adequate to allocate costs in accordance with applicable cost principles (for commercial firms, Subpart 31.2 of the Federal Acquisition Regulation (FAR), found in 48 CFR Chapter 1). A time and material contracts may be

used only if a written determination is made that no other contract type is suitable, and the contract includes a ceiling price that the contractor exceeds at its own risk.

B. OPTIONS

Options for additional quantities or performance periods may be included in contracts, provided that:

1. the option is contained in the solicitation;
2. the option is a unilateral right of the Agency;
3. the contract states a limit on the additional quantities and the overall term of the contract;
4. the options are evaluated as part of the initial competition;

5. the contract states the period within which the options may be exercised;
6. the options may be exercised only at the price specified in or reasonably determinable from the contract; and
7. the options may be exercised only if determined to be more advantageous to the Agency than conducting a new procurement.

C. CONTRACT CLAUSES

In addition to containing a clause identifying the contract type, all contracts shall include any clauses required by Federal statutes, executive orders, and their implementing regulations, as provided in 24 CFR 85.36(i), and applicable provision from LM 21.130.

The operational procedures required by section IIA of this statement shall contain the text of all clauses and required certifications (such as required non-collusive affidavits) used by the Agency.

Unless otherwise approved by the Executive Director, all contracts shall require the contractor to defend, indemnify and hold the Agency, its officers, agents, and employees harmless from all damages, losses and expenses including but not limited to attorney fees and to defend all claims, proceedings, lawsuits and judgments arising out of the contractor's performance or failure to perform the contract.

D. CONTRACT ADMINISTRATION

A contract administration system designed to insure that contractors perform in accordance with their contracts shall be maintained.

The operational procedures shall contain guidelines for inspection of supplies, services, or construction, as well as monitoring contractor performance, status reporting on construction contracts, and similar matters. For cost reimbursement contracts with commercial firms, costs are allowable only to the extent that they are consistent with the cost principles in FAR Subpart 31.2.

VI. SPECIFICATIONS

A. GENERAL

All specifications shall be drafted so as to promote overall economy for the purposes intended and to encourage competition in satisfying the Agency's needs. Specifications shall be reviewed prior to solicitation to ensure that they are not unduly restrictive or represent unnecessary or duplicative items. Functional or performance specifications are preferred. Detailed product specifications shall be avoided whenever possible. Consideration shall be given to consolidating or breaking out procurement to obtain a more economical purchase (but see VIII below). For equipment purchases, lease versus purchase analysis should be performed to determine the most economical form of procurement.

B. LIMITATIONS

The following specification limitations shall be avoided: geographic restrictions* not mandated or encouraged by applicable Federal law (except for architect-engineer contracts, which may include geographic location as a selection factor if adequate (competition is available); unnecessary bonding or experience requirements; brand name specifications (unless a written determination is made that only the identified item will satisfy the Agency's needs); brand name or equal specifications (unless they list the minimum essential characteristics and standards to which the item must conform to satisfy its intended use). Nothing in this procurement policy shall preempt any State licensing laws.

*See State Reciprocal Preference Law for state funded procurement.

C. PROTEST OF SPECIFICATIONS

The Contracting Officer shall respond promptly to any protest of specifications submitted in accordance with LM 21.105(6). Unless otherwise stated in the bid, a protest with respect to a public improvement contract must be filed 10 calendar days before bid opening and with respect to all other contracts, five calendar days before bid opening.

VII. APPEALS AND REMEDIES

A. GENERAL

It is the Agency's policy to attempt to resolve all contractual issues informally at the Agency level, without litigation. Disputes shall not be referred to HUD until all administrative remedies have been exhausted at the Agency level. When appropriate, the Agency may consider the use of informal discussions between the parties by individuals who did not participate substantially in the matter in dispute, to help resolve the differences. HUD will only review protests in cases of violations of Federal law or regulations and failure of the Agency to review a complaint or protest.

B. BID PROTESTS

Unless otherwise stated in the bid documents, any protest against the award of a contract must be received within seven days after the notice of intent to award (which must be provided to bidders at least fourteen (14) days before award), or the protest will not be considered. For non-public improvement contracts the applicable grounds for protest are set forth in ORS 279B.410 (1). The protest for a public improvement contract shall specify the applicable grounds as set forth in OAR 137-049-0450(4)(c). All bid protests shall be in writing, submitted to the Contracting Officer or designee, who shall issue a written decision on the matter. The Contracting Officer may, at his or her discretion, suspend the procurement pending resolution of the protest, if warranted by the facts presented.

C. CONTRACT CLAIMS

All claims by a contractor relating to performance of a contract shall be submitted in writing to the Contracting Officer or designee for a written decision. The contractor may request a conference on the claim. The Contracting Officer's decision shall contain information regarding the contractor's appeal rights to the Executive Director of the Agency.

VIII. ASSISTANCE TO SMALL AND OTHER BUSINESSES

A. REQUIRED EFFORTS

1. Consistent with Presidential Executive Orders 11625, 12138, and 12432, and Section 3 of the HUD Act of 1968, the Agency shall make efforts to ensure that small and minority-owned businesses, women's business enterprises, labor surplus area businesses, and individuals or firms located in or owned in substantial part by persons residing in the area of an Agency project are used when possible. Such effort shall include, but shall not be limited to:
 - a. Including such firms, when qualified, on solicitation mailing lists;
 - b. Encouraging their participation through direct solicitation of bids or proposals whenever they are potential sources;
 - c. Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by such firms;
 - d. Establishing delivery schedules, where the requirements permits, which encourage participation by such firms;
 - e. Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce;
 - f. Including in contracts a clause requiring contractors, to the greatest extent feasible, to provide opportunities for training and employment for lower income residents of the project area and to award subcontracts for work in connection with the project to business concerns which are located in, or owned in substantial part by persons residing in the area of the project, as described in 24 CFR 135;
 - g. Requiring prime contractors, when subcontracting is anticipated, to take the steps listed in Section VIII. A. 1. a through f to the greatest extent feasible.

B. DEFINITIONS

1. A small business is defined as a business which is: independently owned; not dominant in its field of operation; and not an affiliate or subsidiary of a business dominant in its field of operation. The size standards in 13 CFR 121 shall be used, unless the Agency determines that their use is inappropriate.
2. A minority-owned business is defined as a business which is at least 51% owned by one or more minority group members; or, in the case of a publicly-owned business, one in which at least 51% of its voting stock is owned by one or more minority group members, and whose management and daily business operations are controlled by one or more such individuals. Minority group members include, but are not limited to Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Asian Indian Americans, and Hasidic Jewish Americans.
3. A women's business enterprise is defined as a business that is at least 51% owned by a woman or women who are U.S. citizens and who also control or operate the business.
4. A labor surplus area business is defined as a business which, together with its immediate subcontractors, will incur more than 50% of the cost of performing the contract in an area of concentrated unemployment or underemployment, as defined by the U.S. Department of

Labor in 20 CFR 654, Subpart A, and in lists of labor surplus areas published by the Employment and Training Administration.

5. A business concern located in the area of the project, is defined as an individual or firm located within the relevant Section 3 covered project area, as determined pursuant to 24 CFR 135.15, listed on HUD's registry of eligible business concerns, and meeting the definition of small business above. A business concern owned in substantial part by persons residing in the area of the project is defined as a business concern which is 51% or more owned by persons residing within the Section 3 covered project, owned by persons considered by the U.S. Small Business Administration to be socially or economically disadvantaged, listed on HUD's registry of eligible business concerns, and meeting the definition of small business above.

IX. ETHICS IN PUBLIC CONTRACTING

A. GENERAL

The Agency shall adhere to the following code of conduct, consistent with applicable State or local law. Violations to this code of conduct shall be handled in accordance with the Agency's Personnel Policy.

B. CONFLICT OF INTEREST

No employee, officer or agent of this Agency shall participate directly or indirectly in the selection or in the award or administration of any contract if a conflict, real or apparent, would be involved. Such conflict would arise when a financial or other interest in a firm selected for award is held by:

1. An employee, officer or agent of the Agency involved in making the award;
2. His/her relative (including father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister);
3. His/her partner; or,
4. An organization which employs, is negotiating to employ, or has an arrangement concerning prospective employment of any of the above.

C. GRATUITIES, KICKBACKS, AND USE OF CONFIDENTIAL INFORMATION

Agency officers, employees or agents shall not solicit or accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or subcontractors. Where the gift is an unsolicited item of nominal intrinsic value the Agency has set a \$25 limit on such unsolicited gifts.

Agency officers, employees, or agents shall not knowingly use confidential information for actual or anticipated personal gain.

D. PROHIBITION AGAINST CONTINGENT FEES

Contractors shall not retain a person to solicit or secure an Agency contract for a commission, percentage, brokerage, or contingent fee, except for bona fide employees or bona fide established

commercial selling agencies.