137-048-0130

Applicable Selection Procedures; Pricing Information; Disclosure of Proposals; Conflicts of Interest

(1) When selecting the most qualified Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, Contracting Agencies shall follow the applicable selection procedure under either OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure) or 137-048-0220 (Formal Selection Procedure). State Contracting Agencies selecting a Consultant under this section (1) may 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 only after the State Contracting Agency has selected the most qualified Consultant in accordance with the applicable selection procedure; provided, however, this restriction on a State Contracting Agency's solicitation or use of pricing policies, pricing Proposals or other pricing information does not apply to selection procedures used by the State Contracting Agency to select a Consultant when the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services for the Project do not exceed $100,000 or in an Emergency, pursuant to ORS 279C.0110(10) and (11). In following the Direct Appointment Procedure under OAR 137-048-0200, a State Contracting Agency or Local Contracting Agency may base its selection of a Consultant on any information available to the Agency prior to beginning the Direct Appointment Procedure for the Project involved. Local Contracting Agencies may 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, in any of the Local Contracting Agencies' selection procedures to select Consultants to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, pursuant to the requirements of ORS 279C.110(5).

(2) Contracting Agencies selecting a Consultant to perform Related Services shall follow one of the following selection procedures:

(a) When selecting a Consultant on the basis of qualifications alone, Contracting Agencies shall follow the applicable selection procedure under OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure), or 137-048-0220 (Formal Selection Procedure);

(b) When selecting a Consultant on the basis of price competition alone, Contracting Agencies shall follow the applicable provisions under OAR 137-048-0200 (Direct Appointment Procedure), the applicable provisions of 137-048-0210 (Informal Selection Procedure) pertaining to obtaining and evaluating price Proposals and other pricing information, or the applicable provisions of 137-048-0220 (Formal Selection Procedure) pertaining to obtaining and evaluating price Proposals and other pricing information; and

(c) When selecting a Consultant on the basis of price and qualifications, Contracting Agencies shall follow the applicable provisions under OAR 137-048-0200 (Direct Appointment Procedure), the applicable provisions of 137-048-0210 (Informal Selection Procedure) pertaining to obtaining and evaluating price and qualifications Proposals, or the applicable provisions of 137-048-0220 (Formal Selection Procedure) pertaining to obtaining and evaluating price and qualifications Proposals. For selections under the informal selection procedure of OAR 137-048-0210, Contracting Agencies may use abbreviated requests for Proposals that nevertheless meet the requirements of OAR 137-048-0210, when the Contracting Agency determines, in its sole discretion, that the characteristics of the Project and the Related Services required by the Contracting Agency would be adequately addressed by a more abbreviated request for Proposals document, generally comparable to the intermediate Procurement procedures and related documentation under ORS 279B.070 and OAR 137-047-0270. Contracting Agencies subject to this section (2) may request and consider a Proposer's pricing policies and pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, submitted with a Proposal.

(3) A Contracting Agency is not required to follow the procedures in Section (1) or Section (2) of this rule, when the Contracting Agency has established Price Agreements with more than one Consultant and is selecting a single

Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services under an individual work order or task order. Provided, however, the criteria and procedures the Contracting Agency uses to select a single Consultant, when the Contracting Agency has established Price Agreements with more than one Consultant, must meet the requirements of OAR 137-048-0270 (Price Agreements).

(4) Contracting Agencies may use electronic methods to screen and select a Consultant in accordance with the procedures described in sections (1) and (2) of this rule. If a Contracting Agency uses electronic methods to screen and select a Consultant, the Contracting Agency shall first promulgate rules for conducting the screening and selection procedure by electronic means, substantially in conformance with OAR 137-047-0330 (Electronic Procurement).

(5) For purposes of these division 48 rules, a “mixed” Contract is one requiring the Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and also provide Related Services, other Services or other related Goods under the Contract. A Contracting Agency’s classification of a procurement that will involve a “mixed” Contract will be determined by the predominant purpose of the Contract. A Contracting Agency will determine the predominant purpose of the Contract by determining which of the Services involves the majority of the total Estimated Fee to be paid under the Contract. If the majority of the total Estimated Fee to be paid under the Contract is for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, the Contracting Agency shall comply with the requirements of ORS 279C.110 and section (1) of this rule. If majority of the total Estimated Fee to be paid under the Contract is for Related Services, the Contracting Agency shall comply with the requirements of ORS 279C.120 and section (2) of this rule. If the majority of the total Estimated Fee to be paid under the Contract is for some other Services or Goods under the Public Contracting Code, the Contracting Agency shall comply with the applicable provisions of the Public Contracting Code and divisions 46, 47 and 49 of the Model Rules that match the predominant purpose of the Contract.

(6) In applying these rules, State Contracting Agencies shall support the State of Oregon’s goal of promoting a sustainable economy in the rural areas of the state.

(7) Consistent with the requirements of ORS 279C.107 and the remaining requirements of ORS 279C.100, 279C.105 and 279C.110 through 279C.125, the following provisions apply to Proposals received by a Contracting Agency for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services:

(a) The term “competitive proposal,” for purposes of ORS 279C.107, includes Proposals under OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure), 137-048-0220 (Formal Selection Procedure) or 137-048-0130(2)(c) (selection based on price and qualifications) and any Proposals submitted in response to a selection process for a work order or task order under 137-048-0270 (Price Agreements).

(b) For purposes of Proposals received by a Contracting Agency under OAR 137-048-0200 (Direct Appointment Procedure), a formal notice of intent to award is not required. As a result, while a Contracting Agency may make Proposals under 137-048-0200 (Direct Appointment Procedure) open for public inspection following the Contracting Agency’s decision to begin Contract negotiations with the selected Consultant, 137-048-0200 Proposals are not required to be open for public inspection until after the Contracting Agency has executed a Contract with the selected Consultant.

(c) In the limited circumstances permitted by ORS 279C.110, 279C.115 and 279C.120, where the Contracting Agency is conducting discussions or negotiations with Proposers who submit Proposals that the Contracting Agency has determined to be closely competitive or to have a reasonable chance of being selected for award, the Contracting Agency may open Proposals so as to avoid disclosure of Proposal contents to competing Proposers, consistent with the requirements of ORS 279C.107. Otherwise, Contracting Agencies may open Proposals in such a way as to avoid disclosure of the contents until after the Contracting Agency executes a Contract with the selected Consultant. If the Contracting Agency determines that it is in the best interest of the Contracting Agency to do so, the Contracting Agencies may make Proposals available for public inspection following the Contracting Agency's issuance of a notice of intent to award a Contract to a Consultant; and

(d) Disclosure of Proposals and Proposal information is otherwise governed by ORS 279C.107.

(8) As required by ORS 279C.307(1), pertaining to requirements to ensure the objectivity and independence of providers of certain Personal Services which are procured under ORS chapter 279C, Contracting Agencies may not:

(a) Procure the Personal Services identified in ORS 279C.307 from a Contractor or Consultant or an affiliate of a Contractor or Consultant who is a party to the Public Contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the Personal Services; or

(b) Procure the Personal Services identified in ORS 279C.307 through the Public Contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the Personal Services.

(9) The requirements of ORS 279C.307(1) and section (8) of this rule apply in the following circumstances, except as provided in sections (10) and (11) of this rule:

(a) A Contracting Agency requires the Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Public Contract or performance under a Public Contract that is subject to ORS chapter 279C. A Public Contract that is "subject to ORS chapter 279C" includes a Public Contract for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, a Public Contract for Related Services or a Public Contract for construction services under ORS chapter 279C.

(b) The Procurements of Personal Services subject to the requirements of ORS 279C.307 include, but are not limited to, the following:

(A) Procurements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, which involve overseeing or monitoring the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C;

(B) Procurements for commissioning services, which involve monitoring, inspecting, evaluating or otherwise overseeing the performance of a Contractor or Consultant providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C;

(C) Procurements for project management services, which involve administration, management, monitoring, inspecting, evaluating compliance with or otherwise overseeing the performance of a Contractor or Consultant providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, construction services subject to ORS chapter 279C, commissioning services or other Related Services for a Project;

(D) Procurements for special inspections and testing services, which involve inspecting, testing or otherwise overseeing the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C; and

(E) Procurements for other Related Services or Personal Services, which involve administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing the Public Contracts described in Section (9)(a) of this rule.

(10) The requirements of ORS 279C.307(1) and section (8) of this rule do not apply in the following circumstances, except as further specified below:

(a) To a Contracting Agency's Procurement of both design services and construction services through a single "Design-Build" Procurement, as that term is defined in OAR 137-049-0610. Such a Design-Build Procurement includes a Procurement under an Energy ~~Savings~~ Performance Contract, as defined in ORS 279A.010. Provided, however, the requirements of ORS 279C.307 do apply to a Contracting Agency's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Design-Build Contract or performance under such a Contract resulting from a Design-Build Procurement; and

(b) To a Contracting Agency's Procurement of both pre-construction services and construction services through a single Procurement of Construction Manager/General Contractor Services, as that term is defined in ORS 279C.332(3). Provided, however, the requirements of ORS 279C.307 do apply to a Contracting Agency's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Construction Manager/General Contractor Services Contract or performance under such a Contract resulting from a Procurement of Construction Manager/General Contractor Services.

(11) As permitted by ORS 279C.307(3), a Contracting Agency may apply for an exception to the requirements of ORS 279C.307(1) in the situation when the Contracting Agency anticipates that it must procure Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Public Contract or performance under a Public Contract that is subject to ORS chapter 279C, and the Contracting Agency desires to accept a Bid or other Proposal from a Contractor or Consultant that would otherwise be prohibited from bidding or proposing to provide the required Personal Services. In order for the Contracting Agency to obtain such an exception to the requirements of ORS 279C.307(1), the Contracting Agency must apply for and obtain an approved exception from the Appropriate Authority for the Contracting Agency before awarding a contract to the Contractor or Consultant under a Procurement for the required Personal Services, or before entering into an amendment of an existing Public Contract with the Contractor or Consultant to obtain the Personal Services.

(a) Application Requirements. The Contracting Agency's application to the Appropriate Authority for an exception under ORS 279C.307(3) must include the following Findings and Justifications:

(A) The Contracting Agency requires the Personal Services described in ORS 279C.307(1);

(B) Accepting a Bid or Proposal from a Contractor or Consultant that would be subject to the prohibition described in ORS 279C.307(1) is in the best interest of the Contracting Agency;

(C) Approving the exception is unlikely to encourage favoritism in awarding Public Contracts or to substantially diminish competition for Public Contracts; and

(D) Approving the exception:

(i) Is reasonably expected to result in substantial cost savings to the Contracting Agency or the public; or

(ii) Otherwise will substantially promote the public interest in a manner that could not be practicably realized by complying with the prohibition described in ORS 279C.307(1).

(b) Consultation with Legal Counsel. A Contracting Agency shall consult with the Contracting Agency's legal counsel during the exception process provided for in ORS 279C.307(3) as follows:

(A) During the process of preparing an application for the exception to ensure compliance with the requirements of ORS 279C.307 and with the other applicable provisions of ORS Chapter 279C;

(B) Pursuant to the requirements of an ORS 279C.307(3) exception approved by the Contracting Agency's Appropriate Authority; and

(C) The Contracting Agency's consultation with its legal counsel should include discussion and evaluation of mitigation measures that the Contracting Agency can include in the Procurement and in any resulting Public Contract for the Personal Services, in order to reduce any competitive advantage that the Contractor or Consultant may have or may be perceived to have, and to increase the objectivity and independence of the Contractor or Consultant during its performance of the Personal Services.

(c) Definitions. The following definitions apply to section (11) of this rule:

(A) "Appropriate Authority" means, for a State Contracting Agency, the Director of the Oregon Department of Administrative Services; for the Oregon Department of Transportation pursuant to ORS 279A.050(3)(b), the Director of Transportation; and, for a Local Contracting Agency, the Local Contracting Agency's local contract review board; and

(B) "Findings and Justifications" means the determinations, findings and justifications for a conclusion that a Contracting Agency, in seeking an exception from the objectivity and independence requirements of ORS 279C.307(1), reaches based on the considerations set forth in ORS 279C.307(3)(d) and based on sufficient supporting facts.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458
Statutes/Other Implemented: ORS 279A.065, ORS 279C.100-279C.125, OL 2009, ch. 880, sec. 11, OL 2011 & ch 458
History:
DOJ 26-2023, amend filed 12/27/2023, effective 01/01/2024
DOJ 15-2019, amend filed 12/23/2019, effective 01/01/2020
DOJ 2-2015, f. & cert. ef. 2-3-15
Reverted to DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12
DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14
DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12
DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12
DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08
DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0300
Prohibited Payment Methodology; Purchase Restrictions

(1) Except as otherwise allowed by law, a Contracting Agency shall not enter into any Contract which includes compensation provisions that expressly provide for payment of:

(a) Consultant's costs under the Contract plus a percentage of those costs; or

(b) A percentage of the Project construction costs or total Project costs.

(2) Except as otherwise allowed by law, a Contracting Agency shall not enter into any Contract in which:

(a) The compensation paid under the Contract is solely based on or limited to the Consultant's hourly rates for the Consultant's personnel working on the Project and reimbursable expenses incurred during the performance of work on the Project (sometimes referred to as a "time and materials" Contract); and

(b) The Contract does not include a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract.

(3) Except in cases of Emergency or in the particular instances noted in the subsections below, a Contracting Agency shall not purchase any building materials, supplies or equipment for any building, structure or facility constructed by or for the Contracting Agency from any Consultant under a Contract with Contracting Agency to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, for the building, structure or facility. This prohibition does not apply if either of the following circumstances exists:

(a) The Consultant is providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services under a Contract with a Contracting Agency to perform Design-Build services or Energy ~~Savings~~ Performance Contract services (see OAR 137-049-0670 and 137-049-0680); or

(b) That portion of the Contract relating to the acquisition of building materials, supplies or equipment was awarded to the Consultant pursuant to applicable law governing the award of such a Contract.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458
Statutes/Other Implemented: ORS 279A.065, OL 2011 & ch 458
History:
DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12
DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08
DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0600
Purpose

OAR 137-049-0600 to 137-049-0690 are intended to provide guidance to Contracting Agencies regarding the use of Alternative Contracting Methods for Public Improvement Contracts, as may be directed by a Contracting Agency's Contract Review Authority under ORS 279C.335. These Alternative Contracting Methods include, but are not limited to, the following forms of contracting: Design-Build, Energy ~~Savings~~ Performance ~~Contract~~ and the Construction Manager/General Contractor Method. To the extent any such Alternative Contracting Methods are utilized within the competitive bidding process set forth in 279C.335(1), these OAR 137-049-0600 to 137-049-0690 rules are advisory only and may be used or referred to by a Contracting Agency in whole, in part or not at all, within the discretion of the Contracting Agency. ~~As to ESPC contracting,~~ As to EPC contracting, OAR 137-049-0600 to 137-049-0690 sets forth the Model Rules ~~these 137-049-0600 to 137-049-0690 rules implement the requirements of ORS 279C.335 pertaining to the adoption of Model Rules~~ ~~appropriate~~ for use by all Contracting Agencies to enter into Energy Performance Contracts pursuant to ORS 279C.335(1)(f)~~govern the procedures for~~

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~~entering into ESPCs~~. As to contracting for Construction Manager/General Contractor Services requiring an exemption from competitive bidding under 279C.335(2) , OAR 137-049-0600 to 137-049-0690 include mandatory and optional provisions pertaining to the procurement of Construction Manager/General Contractor Services, pursuant to the requirements of ORS 279C.337.

Statutory/Other Authority: ORS 279C.335, 279A.065 & 351.086
Statutes/Other Implemented: ORS 279C.335, 279C.337, 279A.065 & 351.086
History:
DOJ 2-2015, f. & cert. ef. 2-3-15
Reverted to DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05
DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0610
Definitions for Alternative Contracting Methods

The following definitions shall apply to these OAR 137-049-0600 to 137-049-0690 rules, unless the context requires otherwise:

(1) Affiliate has the meaning set forth in ORS 279C.332(1).

(2) Alternative Contracting Methods means innovative techniques for procuring or performing Public Improvement Contracts, utilizing processes other than the traditional methods involved in the design-bid-build construction contracting method (with Award of a Public Improvement Contract based solely on price, in which a final design is issued with formal Bid documents, construction Work is obtained by sealed Bid Awarded to the Responsible Bidder submitting the lowest Responsive Bid, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design-Build contracting, CM/GC forms of contracting and Energy Performance Contracts~~SPCs~~, which are specifically addressed in these OAR 137-049-0600 to 137-049-0690 rules. These methods also include other developing techniques, which include but are not limited to general "performance contracting," "cost plus time" contracting (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(I)) and “qualifications plus project approach” contracting (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(II)). Procedural requirements for these methods are identified in these OAR 137-049-0600 to 137-049-0690 rules, when a Contracting Agency uses an Alternative Contracting Method in a procurement that requires an exemption from competitive bidding under ORS 279C.335(2) or in an ~~ESPC~~Energy Performance Contract procurement that is excepted from competitive bidding under ORS 279.335(1)(f).

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(3) Construction Manager/General Contractor (or "CM/GC") has the meaning set forth in ORS 279C.332(2).

(4) Construction Manager/General Contractor Method (or “CM/GC Method”) means the Alternative Contracting Method which involves a Contracting Agency’s selection of a CM/GC to perform CM/GC Services for a project or projects.

(5) Construction Manager/General Contractor Services (or “CM/GC Services”) has the meaning set forth in ORS 279C.332(3).

(6) Design-Build means a form of Procurement that results in a Public Improvement Contract in which the construction Contractor also provides or obtains specified design services, participates on the project team with the Contracting Agency, and manages both design and construction. In this form of Contract, a single Person provides the Contracting Agency with all of the Personal Services and construction Work necessary to both design and construct the project.

(7) Early Work means construction services, construction materials and other Work authorized by the parties to be performed under the CM/GC Contract in advance of the establishment of the GMP, fixed price or other maximum, not-to-exceed price for the project. Permissible Early Work shall be limited to early procurement of materials and supplies, early release of bid or proposal packages for site development and related activities, and any other advance Work related to important components of the project for which performance prior to establishment of the GMP will materially and positively affect the development or completion of the project.

(8) Energy Conservation Measures (or "ECMs") (also known as "energy efficiency measures") means, as used in an Energy Performance Contract ~~SPC Procurement~~, any ~~equipment,~~ fixture, ~~or~~ furnishing, or system to be added to or used in an existing building or structure~~, and any repair, alteration or improvement to an existing building or structure that is designed to reduce energy consumption and related costs, including those costs related to electrical energy, thermal energy, water consumption, waste disposal, and future contract labor costs and materials costs associated with maintenance of the building or structure~~ to meet a need or requirement for: providing guarantee energy savings or performance; reducing energy consumption, greenhouse gas emissions, waste generation or water consumption; reducing costs related to energy usage and storage, water supply or waste disposal; reducing labor costs and materials costs necessary to repair, replace or maintain energy supply and storage systems, water supply systems or plumbing or waste disposal systems; or increasing renewable energy generation and storage . For purposes of these OAR 137-049-0600 to 137-049-0690 rules, use of either or both of the terms "building" or "structure" shall be deemed to include existing energy, water and waste disposal systems connected or related to or otherwise used for the building or structure when such system(s) are included in the project, either as part of the project together with the building or structure, or when such system(s) are the focus of the project. Maintenance services are not Energy Conservation Measures, for purposes of these 137-049-0600 to 137-049-0690 rules.

~~(9) Energy Savings Guarantee means the energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the Contracting Agency that certain energy savings and performance will be achieved for the project covered by the RFP, through the installation and implementation of the agreed-upon ECMs for the project. The Energy Savings Guarantee shall include, but shall not be limited to, the specific energy savings and performance levels and amounts that will be guaranteed, provisions related to the financial remedies available to the Contracting Agency in the event the guaranteed savings and performance are not achieved, the specific conditions under which the ESCO will guarantee energy savings and performance (including the specific responsibilities of the Contracting Agency after final completion of the design and construction phase), and the term of the energy savings and performance guarantee.~~

(9) ECM Design and Implementation means the third phase of the project in an Energy Performance Contract, under which the Qualified Energy Service Company completes any plans and Specifications required to implement the ECMs that have been agreed to, and the Qualified Energy Service Company performs all fabrication, construction, assembly or installation of the ECMs, and provides commissioning, construction administration and related Personal Services or Work for such implementation.

(10) Energy ~~Savings~~ Performance Contract (or "E~~S~~PC") means a Public Improvement Contract between a Contracting Agency and a Qualified Energy Service Company, in which the Qualified Energy Service Company:

(A) Identifies and assesses a need or requirement in a public improvement for: (i) Providing guaranteed energy savings or performance through an energy conservation measure; (ii) Reducing energy consumption, greenhouse gas emissions, waste generation or water consumption; (iii) Reducing costs related to energy usage and storage, water supply or waste disposal; (iv) Reducing labor and materials costs necessary to repair, replace or maintain energy supply and storage systems, water supply systems or plumbing or waste disposal systems; or (v) Increasing renewable energy generation and storage, including renewable energy from thermal energy sources; and

(B) Recommends and designs and constructs, including fabrication, assembly or installation, as appropriate, a fixture, furnishing, or system that meets the need or requirement identified in subparagraph (A). In this form of

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Contract, the Qualified Energy Service Company will provide the Contracting Agency with all of the Personal Services and construction Work necessary to identify, assess, and design and construct, including, fabrication, assembly or installation, as appropriate, the fixture, furnishing or system.
~~between a Contracting Agency and a Qualified Energy Service Company for the identification, evaluation, recommendation, design and construction of Energy Conservation Measures, including a Design-Build Contract, that guarantee energy savings or performance.~~

(11) General Conditions Work (or "GC Work") means a general grouping of project Work required to support construction operations on the project that is not included within the Contractor's overhead or fee.

(12) Guaranteed Maximum Price (or "GMP") has the meaning set forth in ORS 279C.332(4), pertaining to procurements for CM/GC Services. For Alternative Contracting Methods other than the CM/GC Method, "Guaranteed Maximum Price" or "GMP" means the total maximum price provided to the Contracting Agency by the Contractor and accepted by the Contracting Agency that includes all reimbursable costs and fees for completion of the Contract Work and any particularly identified contingency amounts, as defined by the Public Improvement Contract.

(13) Measurement and Verification (or "M & V") means, as used in an E~~S~~PC ~~Procurement~~, the examination of installed ECMs using the International Performance Measurement and Verification Protocol ("IPMVP"), or any other comparable protocol or process, to monitor and verify the operation of energy-using systems pre-installation and post-installation.

(14) Project Development Plan means a secondary phase of ~~Personal Services and Work~~the project under an EPC, ~~performed by an ESCO in an ESPC Procurement~~ under which ~~when~~ the ~~ESCO~~ Qualified Energy Service Company performs more extensive ~~design~~ assessment of the agreed-upon ECMs for the project, including preliminary design, ~~provides the detailed provisions of the ESCO's Energy Savings Guarantee that the fully installed and commissioned ECMs will achieve a particular energy savings level for the building or structure,~~ and prepares an overall report or plan summarizing the ~~ESCO's~~ Qualified Energy Service Company's Work during this secondary phase of the ~~Work~~ project and otherwise explaining how the agreed-upon ECMs will be implemented during the design and construction phase (ECM Design and Implementation)~~of the Work~~; The term "Project Development Plan" ~~can~~ may also refer to the report or plan provided by the Qualified Energy Service Company ~~ESCO~~ at the conclusion of this phase of the ~~Work~~project.

(15) Qualified Energy Service Company (or "ESCO") means, as used in an Energy Performance Contract ,~~ESPC Procurement~~, a company, firm or other legal Person ~~with the following characteristics: demonstrated technical, operational, financial and managerial capabilities to design, install, construct, commission, manage, measure and verify, and otherwise implement Energy Conservation Measures and other Work on building systems or building components that are directly related to the ECMs in existing buildings and structures; a prior record of successfully performing ESPCs on projects involving existing buildings and structures that are comparable to the project under consideration by the Contracting Agency;~~ prequalified by the Oregon Department of Energy pursuant to ORS 276.915(3)(g) and listed as an approved Contractor by Oregon Department of Energy, or a company, firm or other legal Person otherwise exempted from prequalification by the Oregon Department of Energy under OAR Division 330, Chapter 130.

~~and the financial strength to effectively guarantee energy savings and performance under the ESPC for the project in question, or the ability to secure necessary financial measures to effectively guarantee energy savings under an ESPC for that project.~~

(16) Savings has the meaning set forth in ORS 279C.337(4), pertaining to CM/GC Services procurements. For other Alternative Contracting Methods, "Savings" means a positive difference between a Guaranteed Maximum Price or other maximum not-to-exceed price set forth in a Public Improvement Contract and the actual cost of the Contractor's performance of the Contract Work payable by the Contracting Agency under the terms of the

Contract, including costs for which a Contracting Agency reimburses a Contractor and fees, profits or other payments the Contractor earns.

(17) Technical Energy Audit means~~, as used in ESPC Procurement,~~ the initial phase of the project under an Energy Performance Contract, under which the Qualified Energy Service Company provides Personal Services ~~to be performed by an ESCO~~ that include~~s~~ a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to the Contracting Agency of the ESCO's findings ~~during this initial phase of the Work~~; the term "Technical Energy Audit" ~~can~~ may also refer to the report provided by the ESCO at the conclusion of this phase of the ~~Work~~project.

Statutory/Other Authority: ORS 279A.065
Statutes/Other Implemented: ORS 279C.332, 279C.335 & 279A.065
History:
DOJ 27-2023, amend filed 12/27/2023, effective 01/02/2024
DOJ 2-2015, f. & cert. ef. 2-3-15
Reverted to DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14
DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0620
Use of Alternative Contracting Methods

(1) Competitive Bidding Exemptions. ORS Chapter 279C requires a competitive bidding process for Public Improvement Contracts, unless a statutory exception applies, a class of Contracts has been exempted from the competitive bidding process, or an individual Contract has been exempted from the competitive bidding process, in accordance with 279C.335 and any applicable Contracting Agency administrative rules. Use of Alternative Contracting Methods may be directed by the Contracting Agency if that use is within the competitive bidding process, if feasible, or through an available statutory exception to the competitive bidding process. Use of Alternative Contracting Methods must be directed through a Contracting Agency's Contract Review Authority, however, when use of the Alternative Contracting Method requires an exemption to the prescribed competitive bidding requirement of 279C.335. In any of these circumstances, use of Alternative Contracting Methods must be justified in accordance with any applicable Code and Contracting Agency requirements and, if required, these OAR 137-049-0600 to 137-049-0690 rules. See 137-049-0630 regarding required Findings and restrictions on exemptions from the competitive bidding requirement under ORS 279C.335.

(2) Energy ~~Savings~~ Performance Contracts. E~~S~~PCs are excepted from the competitive bidding requirements for Public Improvement Contracts pursuant to ORS 279C.335(1)(f), if the Contracting Agency complies with the procedures set forth in OAR 137-049-0600 to 137-049-0690 or parallel administrative rules meeting the requirements of ORS 279A.065 related to the solicitation, negotiation and contracting for E~~S~~PC Work. If those procedures are not followed, an E~~S~~PC procurement may still be exempted from competitive bidding requirements for public improvements by following the general exemption procedures within ORS 279C.335.

(3) Post-Project Evaluation. ORS 279C.355 requires that the Contracting Agency prepare a formal post-project evaluation of Public Improvement projects in excess of $100,000 when the Contracting Agency does not use the competitive bidding process required by 279C.335. The purpose of this evaluation is to determine whether it was actually in the Contracting Agency's best interest to use an Alternative Contracting Method outside the competitive bidding process. The evaluation must be delivered to the Contracting Agency's Contract Review Authority within 30 Days of the date the Contracting Agency "accepts" the Public Improvement project, which event is typically defined in the Contract. In the absence of such definition, acceptance of the Project occurs on the later of the date of final payment or the date of final completion of the Contract Work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:

(a) Financial information, consisting of cost estimates, any Guaranteed Maximum Price, changes and actual costs;

(b) A narrative description of successes and failures during design, engineering and construction; and

(c) An objective assessment of the use of the Alternative Contracting Method as compared to the exemption Findings.

Statutory/Other Authority: ORS 279C.335 & 279A.065
Statutes/Other Implemented: ORS 279C.335, 279A.065, 279C.355 & 351.086
History:
DOJ 2-2015, f. & cert. ef. 2-3-15
Reverted to DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14
DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0640
Competitive Proposals; Procedure

Contracting Agencies may utilize the following RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS 279C.330 to 279C.337, 279C.400 to 279C.410 and OAR 137-049-0600 to 137-049-0690, unless other applicable statutes control a Contracting Agency's use of competitive Proposals for Public Improvement Contracts. Also see the subdivision of rules in this division 49 entitled “Formal Procurement Rules,” 137-049-0200 to 137-049-0480, and RFP related rules under the Alternative Contracting Methods subdivision at 137-049-0640 to 137-049-0660. For E~~S~~PCs, either the ~~following~~ ECP RFP ~~process~~ Procedure as further specified in OAR 137-049-0680(6) ~~45, 137-049-0650, 137-049-0660 and 137-049-0680~~or the Non-Competitive Selection procedure specified in OAR 137-049-0680(7) shall be utilized, if a Contracting Agency desires the Procurement process to be exempt from the competitive bidding requirements of ORS 279C.335. The RFP process for the Alternative Contracting Methods identified in OAR 137-049-0600 to 137-049-0690 includes the following steps:

(1) Proposal Evaluation. Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. Proposal evaluation shall be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors shall:

(a) Be reasonable estimates based on information available to the Contracting Agency;

(b) Treat all Proposals equitably; and

(c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to the Contracting Agency. See ORS 279C.305. ~~For ESPC Proposal evaluations, the Contracting Agency may provide in the RFP that qualifications-based evaluation factors will outweigh the Contracting Agency's consideration of price-related factors, due to the fact that prices for the major components of the Work to be performed during the ESPC process contemplated by the RFP will likely not be determinable at the time of Proposal evaluation.~~ For CM/GC Services Proposal evaluations, the Contracting Agency must comply with ORS 279C.337.

(2) Evaluation Factors.

(a) In basic negotiated construction contracting, where the only reason for an RFP is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that could affect the cost or quality of the Work.

(b) In CM/GC contracting, in addition to (a) above, those factors may also include the ability to respond to the technical complexity or unique character of the project, analyze and propose solutions or approaches to complex project problems, analyze and propose value engineering options, analyze and propose energy efficiency measures or alternative energy options, coordinate multiple disciplines on the project, effectively utilize the time available to commence and complete the improvement, and related matters that could affect the cost or quality of the Work.

(c) In Design-Build contracting, in addition to (a) and (b) above, those factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design-builder team experience and related matters that could affect the cost or quality of the Work.

~~(d) In ESPC contracting, in addition to the factors set forth in subsections (a), (b) and (c) above, those factors may also include sample Technical Energy Audits from similar projects, sample M & V reports, financial statements and related information of the ESCO for a time period established in the RFP, financial statements and related information of joint venturers comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline consultant), past performance of the ESCO in meeting energy guarantee Contract levels, the specific Person that will provide the Energy Savings Guarantee to be offered by the ESCO, the ESCO's management plan for the project, information on the specific methods, techniques and equipment that the ESCO will use in the performance of the Work under the ESPC, the ESCO's team members and consultants to be assigned to the project, the ESCO's experience in the Energy Savings Performance Contracting field, the ESCO's experience acting as the prime contractor on previous ESPC projects (as opposed to a sub-contractor or consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular project between the Contracting Agency and the ESCO, the ESCO's equipment performance guarantee policies and procedures, the ESCO's energy savings and cost savings guarantee policies and procedures, the ESCO's project cost guarantee policies and procedures, the ESCO's pricing methodologies, the price that the ESCO will charge for the Technical Energy Audit phase of the Work and the ESCO's fee structure for all phases of the ESPC.~~

(3) Contract Negotiations. Contract terms may be negotiated to the extent allowed by the RFP and OAR 137-049-0600 to 137-049-0690, provided that the general Work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See 137-049-0650. Terms that may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that could affect the cost or quality of the Work. For the CM/GC Method, terms that may be negotiated also include the specific scope of pre-construction services, the GC Work, any Early Work and other construction Work to be performed by the CM/GC, and any other terms that the Contracting Agency has identified as being subject to negotiation, consistent with the requirements of OAR 137-049-0690. ~~In ESPC contracting, terms that may be negotiated also include the scope of preliminary design of ECMs to be evaluated by the parties during the Technical Energy Audit phase of the Work, the scope of Personal Services and Work to be performed by the ESCO during the Project Development Plan phase of the Work, the detailed provisions of the Energy Savings Guarantee to be provided by the ESCO and scope of Work, methodologies and compensation terms and conditions during the design and construction phase and M & V phase of the Work, consistent with the requirements of OAR 137-049-0680.~~

Statutory/Other Authority: ORS 279C.335 & 279A.065
Statutes/Other Implemented: ORS 279C.335, 279A.065 & 351.086
History:

DOJ 2-2015, f. & cert. ef. 2-3-15
Reverted to DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14
DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0645
Requests for Qualifications

As provided by ORS 279C.405(1), Contracting Agencies may utilize a Request for Qualifications (“RFQ”) to obtain information useful in the preparation or distribution of a Request for Proposals (“RFP”). When using an RFQ as the first step in a two-step solicitation process, in which distribution of the RFPs will be limited to the firms identified as most qualified through their submitted statements of qualification, Contracting Agencies shall first advertise and provide notice of the RFQ in the same manner in which RFPs are advertised, specifically stating that RFPs will be distributed only to the firms selected in the RFQ process. In such cases the Contracting Agencies shall also provide within the RFQ a protest provision substantially in the form of OAR 137-049-0450(5) regarding protests of the Competitive Range. Thereafter, contracting agencies may distribute RFPs to the selected firms without further advertisement of the solicitation.

Statutory/Other Authority: ORS 279C.405 & 279A.065
Statutes/Other Implemented: ORS 279C.405
History:
DOJ 27-2023, amend filed 12/27/2023, effective 01/02/2024
DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08
DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

137-049-0670
Design-Build Contracts

(1) General. The Design-Build form of contracting, as defined at OAR 137-049-0610(3), has technical complexities that are not readily apparent. Contracting Agencies shall use this contracting method only with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to use the Design-Build process, the Contracting Agency must be able to reasonably anticipate the following types of benefits:

(a) Obtaining, 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) Integrating 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) Reducing 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) Shortening 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) Obtaining 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) Authority. Contracting Agencies shall utilize the Design-Build form of contracting only in accordance with the requirements of these OARs 137-049-0600 to 137-049-0690 rules. See particularly 137-049-0620 on "Use of Alternative Contracting Methods" and 137-049-0680 pertaining to E~~S~~PCs.

(3) Selection. Design-Build selection criteria may include those factors set forth above in OAR 137-049-0640(2)(a), (b) and (c).

(4) QBS Inapplicable. Because the value of construction Work predominates the Design-Build form of contracting, the qualifications based selection (QBS) process mandated by ORS 279C.110 for State Contracting Agencies in obtaining certain consultant Personal Services is not applicable.

(5) Licensing. If a Design-Build Contractor is not an Oregon licensed design professional, the Contracting Agency shall require that the Design-Build Contractor disclose in its Written Offer that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(2)(g) regarding the offer of architectural services, and 672.060(11) regarding the offer of engineering services that are appurtenant to construction Work.

(6) Performance Security. ORS 279C.380(1)(a) provides that for Design-Build Contracts the surety's obligation on performance bonds, or the Bidder's obligation on cashier's or certified checks accepted in lieu thereof, includes the preparation and completion of design and related Personal Services specified in the Contract. This additional obligation, beyond performance of construction Work, extends only to the provision of Personal Services and related design revisions, corrective Work and associated costs prior to final completion of the Contract (or for such longer time as may be defined in the Contract). The obligation is not intended to be a substitute for professional liability insurance, and does not include errors and omissions or latent defects coverage.

(7) Contract Requirements. Contracting Agencies shall conform their Design-Build contracting practices to the following requirements:

(a) Design Services. The level or type of design services required must be clearly defined within the Procurement documents and Contract, along with a description of the level or type of design services previously performed for the project. The Personal Services and Work to be performed shall be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.

(b) Professional Liability. The Contract shall clearly identify the liability of design professionals with respect to the Design-Build Contractor and the Contracting Agency, as well as requirements for professional liability insurance.

(c) Risk Allocation. The Contract shall clearly identify the extent to which the Contracting Agency requires an express indemnification from the Design-Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty Work claims.

(d) Warranties. The Contract shall clearly identify any express warranties made to the Contracting Agency regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.

(e) Incentives. The Contract shall clearly identify any economic incentives and disincentives, the specific criteria that apply and their relationship to other financial elements of the Contract.

(f) Honoraria. If allowed by the RFP, honoraria or stipends may be provided for early design submittals from qualified finalists during the solicitation process on the basis that the Contracting Agency is benefited from such deliverables.

Statutory/Other Authority: ORS 279C.335 & 279A.065
Statutes/Other Implemented: ORS 279C.335, 279A.065, 279C.110 & 351.086
History:
DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0680
Energy ~~Savings~~ Performance Contracts (E~~S~~PC)

(1) Generally. These OAR 137-049-0600 to 137-049-0690 rules include a limited, efficient method for Contracting Agencies to enter into E~~S~~PCs for public improvements outside the competitive bidding requirements of ORS 279C.335 for existing buildings or structures, but not for new construction. See ORS 279C.335(1)(f). If a Contracting Agency chooses not to utilize the E~~S~~PC Procurement methods provided for by these OAR 137-049-0600 to 137-049-0690 rules, the Contracting Agency may still enter into a ~~n~~ E~~S~~PC by complying with the competitive bidding exemption process set forth in ORS 279C.335, or by otherwise complying with the Procurement requirements applicable to any Contracting Agency not subject to all the requirements of ORS 279C.335.

(2) E~~S~~PC Contracting Method. The E~~S~~PC form of contracting for public improvements, ~~,~~ as defined at OAR 137-049-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the Contracting Agency, as well as the additional technical complexities associated with ~~a~~ an ~~Design-Build~~Energy Performance Contract, which includes various project phases requiring a combination of Personal Services and construction Work ~~t~~. Contracting Agencies shall only utilize the E~~S~~PC contracting method with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the E~~S~~PC contracting process, the Contracting Agency must be able to reasonably anticipate one or more of the following types of benefits:

(a) Obtaining, through an ESCO, the following types of integrated Personal Services and Work: facility profiling, energy baseline studies, ECMs, Technical Energy Audits, project development planning, engineering design, plan preparation, cost estimating, life cycle costing, construction administration, project management, construction, fabrication, assembly or installation, quality control, operations and maintenance staff training, commissioning services, M & V services and required documentation as a fully integrated function ~~with a single point of responsibility~~;

(b) Obtaining, through an ESCO ~~, an Energy Savings Guarantee~~guaranteed energy savings or performance;

(c) Integrating the Technical Energy Audit phase and the Project Development Plan phase into the ECM D~~d~~esign ~~and construction~~and Implementation phase ~~of Work~~ on the project;

(d) Reducing the risk of design flaws, misunderstandings and conflicts inherent in the construction process, through the integration of E~~S~~PC Personal Services and Work;

(e) Obtaining innovative design solutions through the collaboration of the members of the ESCO integrated E~~S~~PC team;

(f) Integrating cost-effective ECMs into an existing building or structure, so that the ECMs pay for themselves through savings realized over the useful life of the ECMs;

(g) Preliminary design, development ~~,~~ and, implementation ~~and an Energy Savings Guarantee~~ of ECMs into an existing building or structure through an E~~S~~PC, as a distinct part of a major remodel of that building or structure that is being performed under a separate remodeling Contract; ~~and~~or

(h) Satisfying local energy efficiency design criteria or requirements.

(3) Authority. Contracting Agencies desiring to pursue an ~~exemption~~ exception from the competitive bidding requirements of ORS 279C.335 (and, if applicable, ORS 351.086), shall utilize the E~~S~~PC form of contracting only in accordance with the requirements of these OAR 137-049-0600 to 137-049-0690 rules.

(4) ~~No~~ Findings ~~Required~~. A Contracting Agency is only required to comply with the E~~S~~PC contracting procedures set forth in these OAR 137-049-0600 to 137-049-0690 rules in order for the E~~S~~PC to be ~~exempt~~ excepted from the competitive bidding processes of ORS 279C.335. No Findings are required for an E~~S~~PC to be ~~exempt~~ excepted from the competitive bidding process for Public Improvement Contracts pursuant to 279C.335(1)(f). Should a Contracting Agency subject to the requirements of ORS 279C.335 choose to not comply with the EPC contracting procedures set forth in these OAR 137-049-0600 to 137-049-0690 rules, the Contracting Agency may still enter into an EPC for a public improvement by complying with the competitive bidding exemption process set forth in ORS 279C.335(2). In such case, findings will be required. ~~, unless the Contracting Agency is subject to the requirements of 279C.335 and chooses not to comply with the ESPC contracting procedures set forth in OAR 137-049-0600 to 137-049-0690.~~

(5) ~~Selection~~Competitive Bidding Exception Procurement Process. If a Contracting Agency desires the EPC procurement process to be excepted from the competitive bidding requirements of ORS 279C.335, the Contracting Agency shall utilize either the ECP Request for Proposal procedure or Non-Competitive Selection procedure, as further specified in OAR 137-049-0680(6) and OAR 137-049-0680(7), respectively.

(6) ECP Request for Proposals Procedure.

(a) Solicitation Documents. In addition to the Solicitation Document requirements of OAR 137-049-0200, EPC RFP Solicitation Documents shall conform to the following standards:

(i) Selection Criteria. The Contracting Agency shall set forth the selection criteria in the Solicitation Document. The Contracting Agency shall evaluate Proposals only in accordance with the criteria set forth in the RFP and applicable law. Because the value of construction Work predominates in the EPC method of contracting, the qualifications based selection (QBS) process mandated by ORS 279C.110 for State Contracting Agencies in obtaining certain consultant services is not applicable for competitive procurements for EPCs. The Contracting Agency shall evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.

(ii) Evaluation Factors. The Contracting Agency shall set forth the evaluation factors in the Solicitation Document. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such factors shall: (a) Be reasonable estimates based on information available to the Contracting Agency; (b) Treat all Proposals equitably; and (c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to the Contracting Agency. See ORS 279C.305. Proposal evaluation shall be as objective as possible.

The Contracting Agency may provide in the RFP that qualifications-based evaluation factors will outweigh the Contracting Agency's consideration of price-related factors, due to the fact that prices for the major components of the Work to be performed during the EPC process contemplated by the RFP will likely not be determinable at the time of Proposal evaluation.

In addition to price, evaluation factors may include the following for EPC Procurements: (a) firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that could affect the cost or quality of the Work; (b) the ability to respond to the technical complexity or unique character of the project, analyze and propose solutions or approaches to complex project problems, analyze and propose value engineering options, analyze and propose energy efficiency measures or alternative energy options, coordinate multiple disciplines on the project, effectively utilize the time available to commence and complete the improvement, and related matters that could affect the cost or quality of the Work; (c) design professional qualifications, specialized experience, preliminary design submittals, technical merit, design-builder team experience and related matters that could affect the cost or quality of the Work; or (d) sample Technical Energy Audits from similar projects, sample M & V reports, financial statements and related information of the ESCO for a time period established in the RFP, financial statements and related information of joint venturers comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline consultant), past performance of the ESCO in meeting guaranteed energy savings or performance through an ECM, the ESCO's management plan for the project, information on the specific methods, techniques and equipment that the ESCO will use in the performance of the Work under the EPC, the ESCO's team members and consultants to be assigned to the project, the ESCO's experience in the Energy Performance Contracting field, the ESCO's experience acting as the prime contractor on previous EPC projects (as opposed to a sub-contractor or consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an EPC project or the inability or unwillingness of the ESCO to complete an EPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with EPC projects and the assignment of risk in the particular project between the Contracting Agency and the ESCO, the ESCO's equipment performance guarantee policies and procedures, if any, the ESCO's energy savings and cost savings guarantee policies and procedures, if any, the ESCO's project cost guarantee policies and procedures, if any, the ESCO's pricing methodologies, the price that the ESCO will charge for the Technical Energy Audit phase of the project and the ESCO's fee structure for all phases of the EPC.

(iii) Discussion and Negotiation with Proposers prior to award.

Subject to ORS 279C.410(4), the Solicitation Document may provide for discussions and negotiations with Proposers to be conducted for the purpose of Proposal evaluation prior to award.

When the Contracting Agency is willing to allow submission of revised Proposals following discussions, in the Solicitation Document, the Contracting Agency shall identify the specific terms and conditions or provisions of the Solicitation Document that are subject to discussion and negotiation and authorize Proposers to propose certain alternative terms and conditions in lieu of the terms and conditions the Contracting Agency has identified. The Contracting Agency shall describe the evaluation, discussion and negotiation processes, including how the Contracting Agency will establish the Competitive Range, if any, in the Solicitation Document.

(iv) Competitive Range. The anticipated size of any Competitive Range must be stated in the Solicitation Document, but may be decreased if the number of Proposers that submit responsive Proposals is less than the specified number, or may be increased as provided in OAR 137-049-0680(6)(c)(A);

(v) Number of Contract Awards. When the Contracting Agency intends to Award Contracts to more than one Proposer, the Contracting Agency shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. The Contracting Agency shall also include the criteria it will use to determine how the Contracting Agency will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular Contractor to provide Personal Services or Work from those Contractors Awarded Contracts.

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(vi) Clarifications. In evaluating Proposals, a Contracting Agency may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer shall submit Written and Signed clarifications and such clarifications shall become part of the Proposer's Proposal.

(b) RFP Cancellation. Nothing in this rule shall restrict or prohibit the Contracting Agency from canceling the solicitation at any time.

(c) RFP Competitive Range; Protest; Award.

(A) Determining Competitive Range.

(i) If the Contracting Agency does not cancel the solicitation, after the Opening the Contracting Agency will evaluate all Proposals in accordance with the evaluation criteria set forth in the RFP. After evaluation of all Proposals in accordance with the criteria set forth in the RFP, the Contracting Agency will rank the Proposers based on the Contracting Agency's scoring and determine the Competitive Range.

(ii) The Contracting Agency may increase the number of Proposers in the Competitive Range if the Contracting Agency's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number of Proposers greater than the initial Competitive Range are closely competitive, or have a reasonable chance of being determined the best Proposer after the Contracting Agency's evaluation of revised Proposals submitted in accordance with the process described in this rule.

(iii) Protesting Competitive Range. The Contracting Agency shall provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not within the Competitive Range may protest the Contracting Agency's evaluation and determination of the Competitive Range in accordance with OAR 137-049-0450.

(d) Intent to Award; Discuss or Negotiate. After the protest period provided in accordance with these rules expires, or after the Contracting Agency has provided a final response to any protest, whichever date is later, the Contracting Agency may either:

(A) Provide Written notice to all Proposers in the Competitive Range of its intent to Award the Contract to the highest-ranked Proposer in the Competitive Range.

(i) An unsuccessful Proposer may protest the Contracting Agency's intent to Award in accordance with OAR 137-049-0450.

(ii) After the protest period provided in accordance with OAR 137-049-0450 expires, or after the Contracting Agency has provided a final response to any protest, whichever date is later, the Contracting Agency shall commence final Contract negotiations with the highest-ranked Proposer in the Competitive Range; or

(B) Engage in discussions with Proposers in the Competitive Range and accept revised Proposals from them, and, following such discussions and receipt and evaluation of revised Proposals, conduct negotiations with the Proposers in the Competitive Range.

(e) Discussions; Revised Proposals. If the Contracting Agency chooses to enter into discussions with and receive revised Proposals from the Proposers in the Competitive Range, the Contracting Agency shall proceed as follows:

(A) Initiating Discussions. The Contracting Agency shall initiate oral or Written discussions with all of the Proposers in the Competitive Range regarding their Proposals with respect to the provisions of the RFP that the Contracting

Agency identified in the RFP as the subject of discussions. The Contracting Agency may conduct discussions for the following purposes:

(i) Informing Proposers of deficiencies in their initial Proposals;

(ii) Notifying Proposers of parts of their Proposals for which the Contracting Agency would like additional information; or

(iii) Otherwise allowing Proposers to develop revised Proposals that will allow the Contracting Agency to obtain the best Proposal based on the requirements and evaluation criteria set forth in the RFP.

(B) Conducting Discussions. The Contracting Agency may conduct discussions with each Proposer in the Competitive Range necessary to fulfill the purposes of this section, but need not conduct the same amount of discussions with each Proposer. The Contracting Agency may terminate discussions with any Proposer in the Competitive Range at any time. However, the Contracting Agency shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with Contracting Agency before the Contracting Agency notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.

(i) In conducting discussions, the Contracting Agency: shall treat all Proposers fairly and shall not favor any Proposer over another; shall not discuss other Proposers' Proposals; shall not suggest specific revisions that a Proposer should make to its Proposal; ~~,~~ and shall not otherwise direct the Proposer to make any specific revisions to its Proposal.

(ii) At any time during the time allowed for discussions, the Contracting Agency may: Continue discussions with a particular Proposer; terminate discussions with a particular Proposer and continue discussions with other Proposers in the Competitive Range; or conclude discussions with all remaining Proposers in the Competitive Range and provide notice to the Proposers in the Competitive Range to submit revised Proposals.

(C) Revised Proposals. If the Contracting Agency does not cancel the solicitation at the conclusion of the Contracting Agency's discussions with all remaining Proposers in the Competitive Range, the Contracting Agency shall give all remaining Proposers in the Competitive Range notice of the date and time by which they must submit revised Proposals. This notice constitutes the Contracting Agency's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in the Contracting Agency's notice.

(i) Upon receipt of the revised Proposals, the Contracting Agency shall evaluate the revised Proposals based upon the evaluation criteria set forth in the RFP, and rank the revised Proposals based on the Contracting Agency's scoring.

(ii) The Contracting Agency may conduct discussions with and accept only one revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the RFP.

(f) Intent to Award; Protest. The Contracting Agency shall provide Written notice to all Proposers in the Competitive Range of the Contracting Agency's intent to Award the Contract. An unsuccessful Proposer may protest the Contracting Agency's intent to Award in accordance with OAR 137-049-0450. After the protest period provided in accordance with that rule expires, or after the Contracting Agency has provided a final response to any protest, whichever date is later, the Contracting Agency shall commence final Contract negotiations.

(g) Negotiations.

(A) Initiating Negotiations. The Contracting Agency may determine to commence negotiations with the highest-ranked Proposer in the Competitive Range following the:

(i) Initial determination of the Competitive Range; or

(ii) Conclusion of discussions with all Proposers in the Competitive Range and evaluation of revised Proposals.

(B) Conducting Negotiations. Scope. The Contracting Agency may negotiate:

(i) The statement of work for each stage of the project;

(ii) Contract performance, methods of construction or fabrication, assembly or installation, timing, assignment of risk in specified areas, fee, and other matters that could affect the cost or quality of the Work, as well as the scope of preliminary identification and assessment of ECMs to be evaluated by the parties during the Technical Energy Audit phase of the Work, the scope of Personal Services and Work to be performed by the ESCO during the Project Development Plan phase of the Work, and scope of Work, methodologies and compensation terms and conditions during the ECM Design and Implementation and M & V phases of the project.

(iii) The Contract Price as it is affected by negotiating the statement of work; and

(iv) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the RFP. Accordingly, Proposers shall not submit, and the Contracting Agency shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the RFP.

(C) Continuing Negotiations. If the Contracting Agency terminates negotiations with a Proposer, the Contracting Agency may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this rule until the Contracting Agency has:

(i) Determined to Award the Contract to the Proposer with whom it is currently negotiating; or

(ii) Completed one round of negotiations with all Proposers in the Competitive Range, unless the Contracting Agency provided for more than one round of discussions or negotiations in the RFP, in which case the Contracting Agency may proceed with any authorized further rounds of discussions or negotiations.

(D) Terminating Discussions or Negotiations. At any time during discussions or negotiations conducted in accordance with this rule, the Contracting Agency may terminate discussions or negotiations with the Proposer with whom it is currently conducting discussions or negotiations if the Contracting Agency reasonably believes that:

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

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

~~. ESPC selection criteria may include those factors set forth above in OAR 137-049-0640(2)(a), (b), (c) and (d). Since the Energy Savings Guarantee is such a fundamental component in the ESPC contracting process, Proposers must disclose in their Proposals the identity of any Person providing (directly or indirectly) any Energy Savings Guarantee that may be offered by the successful ESCO during the course of the performance of the ESPC, along with any financial statements and related information pertaining to any such Person.~~

~~(6) QBS Inapplicable. Because the value of construction Work predominates in the ESPC method of contracting, the qualifications based selection (QBS) process mandated by ORS 279C.110 for State Contracting Agencies in obtaining certain consultant services is not applicable.~~

(7) Non-Competitive Selection Procedure

(a) General. A Contracting Agency may enter into an Energy Performance Contract for a public improvement with an ESCO prequalified by the Oregon Department of Energy pursuant to ORS 276.915(3)(g) without first conducting a competitive procurement under OAR 137-049-0680(6) if:

(i) the Contracting Agency enters such contract in accordance with these OAR 137-049-0600 to 137-049-0690 rules; and

(ii~~.~~) the Contracting Agency and prequalified ESCO negotiate and include, as a component of the EPC, a performance guarantee for the benefits that the EPC will provide to the Contracting Agency.

(b) Performance Guarantee. The performance guarantee must include: (i~~.~~) the ESCO's performance obligations and responsibilities for achieving the purposes of the EPC; (ii~~.~~) the conditions under which the ESCO will guarantee savings, reductions, benefits, or other purposes of the EPC;~~-~~ (iii~~.~~) the terms during which the performance guarantee will remain, and (~~-~~iv~~.~~) remedies available to the Contracting Agency, including damages and appropriate equitable relief, if an ECM designed and constructed, including fabrication, assembly or install,~~-~~ by the ESCO under the EPC fails to achieve the savings, reductions, benefits or other purposes specified in the EPC.

The form of the performance guarantee may include a personal or corporate guarantee, or a third-party guarantee in the form of a bond. Other forms may be considered on an individual basis at the discretion of the Contracting Agency.

(c) Contract Negotiation. In addition the performance guarantee, contract terms that may be negotiated include the details of Contract performance, methods of construction or fabrication, assembly or installation, timing, assignment of risk in specified areas, fee, and other matters that could affect the cost or quality of the Work, as well as scope of preliminary identification and assessment of ECMs to be evaluated by the parties during the Technical Energy Audit phase of the Work, the scope of Personal Services and Work to be performed by the ESCO during the Project Development Plan phase of the Work, and scope of Work, methodologies and compensation terms and conditions during the ECM Design and Implementation and M & V phases of the project.

~~(7) Licensing. If the ESCO is not an Oregon licensed design professional, the Contracting Agency shall require that the ESCO disclose in the ESPC that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and 672.060(11) regarding the offer of engineering services that are appurtenant to construction Work.~~

~~(8) Performance Security. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the ESCO must provide a performance bond and a payment bond, each for 100% of the full Contract Price, including the construction Work and design and related Personal Services specified in the ESPC Design-Build Contract, pursuant to ORS 279C.380(1)(a). For ESPC Design-Build Contracts, these "design and related services" include conventional design services, commissioning services, training services for the Contracting Agency's operations and maintenance staff, and any similar Personal Services provided by the ESCO under the ESPC Design-Build Contract prior to final completion of construction. M & V services, and any Personal Services or Work associated with the ESCO's Energy Savings Guarantee are not included in these 279C.380(1)(a) "design and related services." Nevertheless, a Contracting Agency may require that the ESCO provide performance security for~~

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~~M & V services and any Personal Services or Work associated with the ESCO's Energy Savings Guarantee, if the Contracting Agency so provides in the RFP.~~

(8~~9~~) Contracting Requirements. Contracting Agencies shall conform their E~~S~~PC contracting practices to the following requirements:

(a) General ~~ESPC Contracting Practices~~. An E~~S~~PC involves a multi-phase project, which includes the following contractual elements:

(A) ~~A~~ A description of the four phases of the EPC project, which include the following: (i) The Technical Energy Audit phase; (ii) The Project Development Plan phase; (iii) The ECM Design and Implementation phase; and (iv) The M&V services phase. ~~A final phase of the Work, whereby the ESCO, independently or in cooperation with an independent consultant hired by the Contracting Agency, performs M & V services to ensure that the Energy Savings Guarantee identified by the ESCO in the earlier phases of the Work and agreed to by the parties has actually been achieved.~~

(B) Comprehensive contract provisions that not only describe and govern the relationship of the parties, but also include the ~~contractual structure which includes general Contract terms describing the relationship of the parties, the various phases of the Work, the~~ contractual terms governing the Technical Energy Audit phase ~~for the project~~, the contractual terms governing the Project Development Plan ~~for the project~~phase, the contractual terms governing the ~~final~~ ECM Design and Implementation phase, ~~design and construction of the project~~, the contractual terms governing the performance of the M & V services ~~for the project~~phase, and the detailed provisions of the ESCO's ~~Energy Savings~~Performance Guarantee for the project if the EPC is entered into pursuant to OAR 137-049-0680(7).

(C) Design-Build Contracting Requirements for EPCs. Parties agree that upon authorization of the ECM Design and Implementation phase, the ECP constitutes a Design-Build contract, which must include the following:

(i) Design Services. The level or type of design services required during the ECM Design and Implementation phase must be clearly defined within the Contract, along with a description of the level or type of design services previously performed for the project. The Personal Services and Work to be performed shall be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.

(ii) Professional Liability. The EPC shall clearly identify the liability of design professionals with respect to the ESCO and the Contracting Agency, as well as requirements for professional liability insurance.

(iii) Risk Allocation. The EPC shall clearly identify the extent to which the Contracting Agency requires an express indemnification from the ESCO for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty Work claims.

(iv) Warranties. The EPC shall clearly identify any express warranties made to the Contracting Agency regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.

(v). Performance Security. The ESCO must provide a performance bond and a payment bond, each for 100% of the full Contract Price, including the construction, assembly or installation Work and design and related specified in the EPC, pursuant to ORS 279C.380(1)(a). Design and related services include conventional design services, commissioning services, training services for the Contracting Agency's operations and maintenance staff, and any similar Personal Services provided by the ESCO in the ECM Design and Implementation phase under the EPC prior to final completion of construction, assembly, or installation. M & V services, and any Personal Services or Work associated with the ESCO's Performance Guarantee, if required under the EPC, are not included in these 279C.380(1)(a) design and related services. Nevertheless, a Contracting Agency may require that the ESCO provide performance security for M & V services and any Personal Services or Work associated with the ESCO's Performance Guarantee, if the Contracting Agency so provides in the RFP or negotiations with the ESCO.

~~(B) The various phases of the ESCO's Work will include the following:~~

~~(i) The Technical Energy Audit phase of the Work;~~

~~(ii) The Project Development Plan phase of the Work;~~

~~(iii) A third phase of the Work that constitutes a Design-Build Contract, during which the ESCO completes any plans and Specifications required to implement the ECMs that have been agreed to by the parties to the ESPC, and the ESCO performs all construction, commissioning, construction administration and related Personal Services or Work to actually construct the project; and~~

~~(iv) A final phase of the Work, whereby the ESCO, independently or in cooperation with an independent consultant hired by the Contracting Agency, performs M & V services to ensure that the Energy Savings Guarantee identified by the ESCO in the earlier phases of the Work and agreed to by the parties has actually been achieved.~~

~~(b) Design-Build Contracting Requirements in ESPCs. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the Contracting Agency shall conform its Design-Build contracting practices to the Design-Build contracting requirements set forth in OAR 137-040-0560(7) above.~~

(b~~c~~) Pricing Alternatives. The Contracting Agency may utilize one of the following pricing alternatives in an E~~S~~PC:

(A) A fixed price for each phase ~~of the Personal Services and Work~~ to be provided by the ESCO;

(B) A cost reimbursement pricing mechanism, with a maximum not-to-exceed price or a GMP; or

(C) A combination of a fixed fee for certain components of the Personal Services to be performed, a cost reimbursement pricing mechanism for the construction Work, including assembly or installation, to be performed with a GMP, a single or annual fixed fee for M & V services to be performed for an identified time period after final completion of the construction, assembly or installation Work, and a single or annual ~~Energy Savings~~Performance Guarantee ~~fixed~~ fee payable per the terms of the performance guarantee if the EPC is entered into pursuant to OAR 137-049-0680(7)~~for an identified time period after final completion of the construction Work that is conditioned on certain energy savings being achieved at the facility by the ECMs that have been implemented by the ESCO during the project (in the event an annual M & V services fee and annual Energy Savings Guarantee fee is utilized by the parties, the parties may provide in the Design-Build Contract that, at the sole option of the Contracting Agency, the ESCO's M & V services may be terminated prior to the completion of the M & V/Energy Savings Guarantee period and the Contracting Agency's future obligation to pay the M & V services fee and Energy Savings Guarantee fee will likewise be terminated, under terms agreed to by the parties).~~

(c~~d~~) Permitted E~~S~~PC Scope of Work. The scope of Work under the E~~S~~PC is restricted to identifying and assessing a need or requirement in a public improvement for (i) Providing guaranteed energy savings or performance through an energy conservation measure; (ii) Reducing energy consumption, greenhouse gas emissions, waste generation or water consumption; (iii) Reducing costs related to energy usage and storage, water supply or waste disposal; (iv)

Reducing labor and materials costs necessary to repair, replace or maintain energy supply and storage systems, water supply systems or plumbing or waste disposal systems; or (v) Increasing renewable energy generation and storage, including renewable energy from thermal energy sources;~~,~~ and~~,~~ implementation, including design, construction, fabrication, and assembly or ~~and~~ installation of ECMs, as well as other Work on building systems or building components that are directly related to the ECMs. ~~, and that, as an integrated unit, will pay for themselves over the useful life of the ECMs installed.~~ The permitted scope of Work for ESPCs resulting from a solicitation under these 137-049-0600 to 137-049-0690 rules does not include maintenance services for the project facility.

(d) Licensing. If the ESCO is not an Oregon licensed design professional, the Contracting Agency shall require that the ESCO disclose in the EPC that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and 672.060(11) regarding the offer of engineering services that are appurtenant to construction Work.

Statutory/Other Authority: ORS 279C.335 & 279A.065
Statutes/Other Implemented: ORS 279C.335, 279A.065, 279C.110 & 351.086
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