

RESOLUTION NO. 535

A RESOLUTION ADOPTING PUBLIC CONTRACTING RULES AND PROCEDURES

WHEREAS, the City of Aurora ("City") is an Oregon municipal corporation which is subject to Oregon's public contracting laws; and

WHEREAS, in 2003 the Oregon Legislature substantially revised the Oregon Public Contracting Code, and most of these revisions took effect March 1, 2005; and

WHEREAS, on March 1, 2005, the City's existing public contracting rules became void, and the City is required to adopt new public contracting rules consistent with the revised Public Contracting Code; and

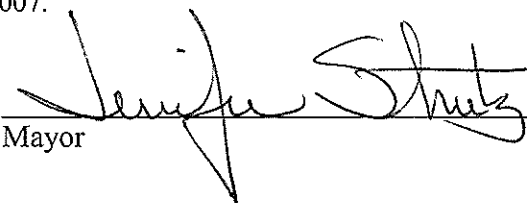
WHEREAS, ORS 279A.065(5) provides that a local contracting agency may adopt its own rules of procedure for public contracting that:

- (A) Specifically state that the model rules adopted by the Attorney General do not apply to the contracting agency; and
- (B) Prescribe the rules of procedure that the contracting agency will use for public contracts, which may include portions of the model rules adopted by the Attorney General;

NOW, THEREFORE, BE IT RESOLVED:

1. That, except as otherwise provided herein, the City hereby adopts the Oregon Attorney General's Model Public Contracting Rules (2004) ("Model Rules") as the contracting rules for the City, as such Model Rules now exist or are later modified.
2. That the City adopts the public contracting rules described in Exhibit A, which is attached to this Resolution and incorporated herein by reference. The Rules described in Exhibit A shall be in addition to, and shall supersede any conflicting provisions in, the Model Rules.
3. That the City shall regularly review changes in the Public Contracting Code and the Model Rules to ensure that the Exhibit A Rules are consistent with current law.

APPROVED AND ADOPTED on 7/10, 2007.


Mayor

ATTEST:

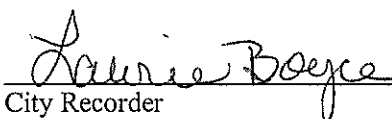

City Recorder

EXHIBIT A

PUBLIC CONTRACTING RULES AND PROCEDURES

A. Personal Services.

(1) **Definition.** As adopted by the City's Local Contract Review Board in Resolution No. 535, "Personal Services" shall be defined to include those services that require specialized technical, creative, professional or communication skills or talents, unique and specialized knowledge, or the exercise of discretionary judgment, and for which the quality of the service depends on attributes that are unique to the service provider. Such services shall include, but are not limited to: architects; engineers; surveyors; attorneys; accountants; auditors; computer programmers; artists; designers; performers; and consultants. The City Manager or designee shall have the authority to determine whether a particular service is a "personal service" under this definition.

(2) **Contracts for Personal Services other than Architectural, Engineering and Surveying Services and Related Services.** These personal services contracts shall be awarded according to the procedures described in ORS 279B.065; ORS 279B.080. However, by separate resolution, the Local Contract Review Board may authorize certain personal services contracts, or a class of personal services contracts, to be exempted from competitive proposal requirements according to the requirements of ORS 279B.085. Contracts exempted from competitive proposal processes may be awarded by direct appointment. Personal services contracts existing on the effective date of these Rules may be extended by direct appointment.

(3) **Contracts with architects, engineers, and land surveyors.** Unless otherwise provided in this Section, contracts for Architectural, Engineering and Surveying Services and Related Services shall be awarded according to the procedures for competitive proposals described in ORS 279B.065-279B.080 and these rules, and consistent with ORS 279C.110.

A contract for Architectural, Engineering and Surveying Services may be entered into by direct appointment if such contract is estimated not to exceed \$ 15,000.00 in a calendar year, or if the project described in the contract consists of work that has been substantially described, planned or otherwise previously studied or rendered in an earlier contract with the consultant that was awarded under these Rules, and the new contract is a continuation of that project.

B. Delegation.

(1) Except as otherwise provided in these rules, the powers and duties of the Local Contract Review Board under the Public Contracting Code must be exercised and performed by the City Council.

(2) Unless expressly limited by the Local Contract Review Board or these Rules, all powers and duties given or assigned to contract agencies by the Public

Contracting Code may be exercised or performed by the Mayor or the Mayor's designee, including the authority to enter into emergency contracts pursuant to ORS 279B.080.

(3) All public contracts estimated to cost \$ 5,000.00 or more in a calendar year must be approved by the City Council. All public contracts estimated to cost less than \$ 5,000.00 in a calendar year may be entered into by the Mayor or designee without Council approval. However, emergency contracts may be entered into by either the Council or the Mayor or designee pursuant to paragraph G of these Rules, regardless of dollar limits, subject to ORS 294.455.

C. Special Procurements and Exemptions.

(1) The Local Contract Review Board may exempt from competitive bidding certain contracts or classes of contracts for procurement of goods and services according to the procedures described in ORS 279B.085.

(2) The Local Contract Review Board may exempt certain contracts or classes of contracts for public improvements from competitive bidding according to the procedures described in ORS 279C.335. When exempting a public improvement from competitive bidding, the Local Contract Review Board may authorize the contract to be awarded using a Request for Proposal process for public improvements, according to the processes described in OAR 137-049-0640 through 137-049-0690.

D. Small Procurements (Under \$5,000).

(1) Public contracts under \$5,000 are not subject to competitive bidding requirements. The Mayor or designee shall make a reasonable effort to obtain competitive quotes in order to ensure the best value for the City.

(2) The City may amend a public contract awarded as a small procurement beyond the \$5,000 limit in accordance with OAR 137-047-0800, provided the cumulative amendments do not increase the total contract price to a sum that is greater than twenty-five percent (25%) of the original contract price.

E. Intermediate Procurements.

(1) A contract for procurement of goods and services estimated to cost between \$5,000 and \$150,000 in a calendar year, or a contract for a public improvement that is estimated to cost between \$5,000 and \$100,000 in a calendar year, may be awarded according to the processes for intermediate procurements described in ORS 279B.070.

(2) The City may amend a public contract awarded as an intermediate procurement beyond the stated limitations in accordance with OAR 137-047-0800, provided the cumulative amendments shall not increase the total contract price to a sum that is greater than twenty-five percent (25%) of the original contract price.

F. Methods for Awarding Contracts Using Request for Proposal Process.

In making an award using the request for proposal process in ORS 279B.060, the City may use any evaluation method determined to be most appropriate for the selection process, including, but not limited to, the processes described in ORS 279B.060(6)(b), as well as direct appointment of personal services contracts if direct appointment is determined to be most advantageous to the City. The evaluation process(es) to be used shall be stated in the Request for Proposals. OAR 137-047-0261 through 137-047-0263 shall apply to evaluation of proposals.

G. Emergency Contracts.

(1) "Emergency" shall be defined as follows: "Circumstances that (a) could not have reasonably been foreseen; (b) create a substantial risk of loss, damage, or interruption of services or a substantial threat to property, public health, welfare or safety; and (c) require prompt execution of a contract to remedy the condition."

(2) The Mayor or a designee of the Mayor shall have authority to determine when emergency conditions exist sufficient to warrant an emergency contract. The nature of the emergency and the method used for the selection of the contractor shall be documented.

(3) Emergency contracts may be awarded as follows:

(a) Goods and Services. Emergency contracts for procurement of goods and services may be awarded pursuant to ORS 279B.080 and section C, "Delegation," of these Rules.

(b) Public Improvements. The City hereby adopts OAR 137-049-0150 as its contracting rules for awarding a public improvement contract under emergency conditions.

H. Disposal of Surplus Property.

(1) "Surplus Property" is defined as any personal property of the City that has been determined by the Mayor or designee as being of no use or value to the City.

(2) The Mayor or designee may dispose of surplus property as follows: The Mayor shall submit a request to the City Council for a declaration that certain property is of no further use or value to the City. The City Council shall, by resolution, declare such property "surplus" and authorize the means by which the Mayor may dispose of the property, including granting the Mayor discretion to dispose of the property in any appropriate manner. The City Council may require an appraisal of the property prior to disposition.

(3) Surplus property may be disposed of in the manner that is most advantageous to the City or the community at large, including, but not limited to, the following:

EXHIBIT A

- (a) Public Auction. Auctions must be sufficiently advertised in the manner that is most likely to obtain a competitive bidding pool for the property. Employees of the City may purchase surplus property from the City only at an advertised auction, and only if the employee submits the highest bid for such property.
- (b) Donation. Surplus property may be donated or sold to any non-profit organization, any other local government, or any state or federal program created to dispose of surplus property.
- (c) Disposal. Surplus property determined to be of insufficient value to merit auction or donation may be disposed of in any appropriate manner.

I. Appeals of Prequalification Decisions and Debarment Decisions.

(1) Review of the City's prequalification and debarment decisions shall be as set forth in ORS 279B.425. The following additional procedures shall apply to hearings on such decisions by the LCRB:

- (a) Notices shall be submitted in writing to the Mayor. Appeals filed after the filing period stated in ORS 279B.425 shall not be heard.
- (b) Upon opening of the hearing, City staff shall explain the City's decision being appealed and the justification thereof. The appellant shall then be heard. Time for the appellant's testimony shall be established by the Mayor. The appellant may submit any testimony or evidence relevant to the decision or the appeal. Any party requesting time to testify in support of the appeal shall then be heard, subject to time limits established by the Mayor.
- (c) Once all testimony and evidence in support of the appeal is heard, any party requesting time to testify in support of the City's decision shall be provided time to be heard, with time limits established by the Mayor. Any party testifying in opposition to the appeal may submit any testimony or evidence relevant to the decision or the appeal. Once all testimony in opposition to the appeal has been heard, the appellant may request time to provide rebuttal testimony. At the conclusion of the rebuttal testimony, if any, the Mayor shall close the hearing.
- (d) When issued in writing according to the requirements of ORS 279B.425, the LCRB's decision and order shall be final.

J. Concession Agreements.

(1) A "concession agreement" is a contract that authorizes and requires a private entity or individual to promote or sell, for its own business purposes, specified

types of goods or services from a site within a building or upon land owned by the City, and under which the concessionaire makes payments to the City based, in whole or in part, on the concessionaire's sales revenues. The term "concession agreement" does not include an agreement which is merely a flat-fee or per-foot rental, lease, license, permit, or other arrangement for the use of public property.

(2) Concession agreements are not required to be competitively bid. However, when it is in the City's best interests to do so, the City may obtain competitive proposals for concession agreements using the procedures described in ORS 279B.060.

K. Purchases from Federal Catalogs.

(1) By Resolution No. 535, the LCRB has adopted the following rules for procurement of goods from federal catalogues:

Subject to applicable Council approval requirements stated in the City's Contracting Rules, the City may purchase goods from federal catalogues without competitive bidding when the procurement is pursuant to 10 USC 381, the Electronic Government Act of 2002 (Public Law 107-347). Purchases under other federal laws will be permitted upon a finding by the Local Contract Review Board that the law is similar to such Act in effectuating or promoting transfers of property to contracting agencies.

July 3, 2007

Laurie Boyce
21420 Main St NE
Aurora OR 97002

Re: **Changes to Public Contracting Code**
Our File No. 49821-36401

Dear Laurie:

E. ANDREW JORDAN

Admitted In:
Oregon

Direct Dial
(503) 598-5511

E-mail
andy.jordan@jordanschradler.com

Enclosed is a model resolution that will bring the City into minimal compliance with the 2003 changes in the Public Contracting Code which became effective March 1, 2005. Please take note of the following:

Local Contract Review Board. If the City's local contract review board ("LCRB") is something other than the City Council, or if you would like some other body to provide this function, the City Council will need to adopt a resolution establishing or re-establishing that body as your LCRB. The attached Resolution does not do this. If the City's LCRB is currently the City Council, or if you have never formally established an LCRB, no further action is needed. Under the new laws, the City Council will, by default, become the LCRB for the City unless you have provided otherwise.

Some of the new statutes require certain actions to be taken by the LCRB before the City is authorized to act under its rules. These actions are summarized in the attached Resolution of the Local Contract Review Board, which should be adopted by the LCRB concurrently with the new contracting rules.

Model Rules. The attached Resolution adopts the Attorney General's Model Public Contracting Rules (2004) ("Model Rules") as the City's contracting rules wherever possible. Local contracting agencies are not required to adopt the Model Rules, but must adopt rules of some kind in order to have authority to take certain kinds of actions. As the following information explains, there are many opportunities or requirements under the new laws for local contracting agencies to adopt rules, and in most cases there is a Model Rule that applies. However, in certain cases – such as when defining personal services and disposing of surplus property – there is no applicable

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Model Rule. Therefore, local contracting agencies must adopt rules of their own, or be without the authority to act beyond what is permitted in the statutes.

Specific Provisions. The following explains certain areas of note under the Public Contracting Code:

- 1. Public Notice of Solicitations.** ORS 279B.055(4)(e) requires local public contracting agencies to adopt rules prescribing the requirements for providing public notice of solicitations for purchases of goods and services. ORS 279B.055(4)(b) requires a public notice to be published at least once in at least one newspaper of general circulation in the area where the contract is to be performed, and in as many additional issues and publications as the contracting agency may determine. ORS 279B.055(4)(f) states that, unless the agency's contracting rules provide otherwise, the notice must be published at least seven days before the solicitation closing date. ORS 279B.060(4) requires the same rules for publication of requests for proposals. No rules are required if the City opts to follow statutory requirements. Therefore, the attached Resolution adopts no additional rules for advertisement of solicitation. However, if the City wants to require a solicitation to be published more frequently and/or in additional places than required in statute, or if the City wants to change the minimum period of time for publishing the advertisement, it must adopt rules describing the processes for advertising such contracts.

ORS 279C.360 and ORS 279B.055 also require the LCRB to authorize rules permitting advertisement of a contract or contracts by electronic publication. Note, however, that a public improvement contract of \$125,000 or more still must be advertised at least once in a trade newspaper of general statewide circulation, pursuant to ORS 279C.360(1). The applicable Model Rule is OAR 137-047-0330, which will apply under the attached Resolution.

- 2. Personal Services.** The LCRB must define this term by separate resolution, and the definition may include any contract or type of contract the City chooses. It may include architects, engineers and surveyors, but is not required to do so. If these types of consultants are included in the definition, however, additional requirements are imposed under ORS 279C.105, 279C.110, and 279C.115. Unless the City intends to award contracts to these professionals differently from other types of personal services contracts, including them in the

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definition is recommended. A proposed definition is provided in the attached Resolution.

In addition, the City must adopt its own procedures for screening, selection, and award of personal services contracts. Options include:

- Preparing these rules from scratch;
- Awarding personal services like any other procurement, pursuant to ORS 279B.050 to 279B.085;
- Adopting the procedures described in the Model Rules for state agencies, at OAR 137-048-0200 through 137-048-0230, for awarding personal services contracts. Note, however, that these are more complex than probably are necessary for most cities, and limit the City's ability to directly appoint a consultant. They could be used as a guideline, and modified as needed.
- Some combination of these methods.

The attached Resolution adopts the procedures provided in statute for issuing requests for proposals, and adopts additional authority for the City to directly appoint a personal services contractor if separately authorized by the LCRB, using the special procurement process in ORS 279B.085.

With respect to architects, engineers and land surveyors, ORS 279C.105 requires local contracting agencies to adopt procedures for screening and selection under ORS 279C.110 or 279C.120. ORS 279C.100(3) permits direct appointment of such contractors if the value of the contract does not exceed a certain threshold amount. The statute also establishes criteria that may be considered in making the selection. (The City may adopt a process for choosing between equally qualified candidates, but this process is not addressed in the attached Resolution.) Finally, ORS 279C.115 permits local contracting agencies to establish criteria for determining when a contractor can be directly appointed to continue an existing project. The attached Resolution provides a basic rule for awarding these types of contracts.

3. **Delegation.** Various portions of the Public Contracting Code authorize action by either the LCRB or the "contracting agency." The authority of the LCRB cannot be delegated. However, ORS 279A.075 allows authority granted to the agency (i.e., City) to

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be delegated and subdelegated, but rules are required to do so. Without rules, authority may not be delegated. The Model Rules do not address delegation by local contracting agencies. Therefore, cities must affirmatively adopt rules describing what authority can be delegated, and to whom. The attached Resolution includes a paragraph delegating certain authority to the City Manager or designee, and provides a template for establishing the dollar value of contracts the Manager is authorized to approve.

4. **Special Procurements and Exemptions.** Authority for granting a special procurement exemption can only be exercised by the LCRB. ORS 279B.085 authorizes these exemptions for goods and services. ORS 279C.335 authorizes these exemptions for public improvements. The statute describes the processes for advertising and bidding such contracts, so no rules are required to use these processes. However, ORS 279C.400 states that a request for proposal process cannot be used to award a public improvement contract unless the City has adopted rules for that purpose. The attached Resolution includes a proposed rule.
5. **Small Procurements (Under \$5,000).** The process for awarding “small procurements” (contracts for goods and services not exceeding \$5,000) is left to the discretion of the City. ORS 279B.065. However, rules should be adopted to authorize amendment of a small procurement contract so long as the amendment does not increase the amount payable under the contract and any prior amendments more than 25% of the original cost of the contract.
6. **Intermediate Procurements.** In comparison with a small procurement, the process for awarding an “intermediate procurement” is described in statute, at ORS 279B.070, so no rules describing this process are required. Similarly, rules must be adopted to authorize a contract awarded under this section to be amended to exceed \$150,000.

In addition, temporary language immediately following ORS 279C.410 states that a public improvement contract for up to \$100,000 may be awarded using the informal bidding process, but only if the City has adopted rules authorizing this, including rules governing how such contracts may be amended. The attached Resolution proposes basic rules for these processes.

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7. **Methods for Awarding Contracts Using Request for Proposal Process.** ORS 279B.060 authorizes contracting agencies to award procurement contracts using the proposal process, but subsections (2)(h)(D) and (6)(b)(H) require that rules be adopted before the City may use evaluation methods other than a simple ranking of proposals. The Model Rules provide comprehensive rules addressing this requirement, and are adopted by the Resolution. However, the Model Rules do not provide for direct appointment of a personal services contractor, which can be authorized by these rules if desired. A suggested provision to supplement the Model Rules is provided in the Resolution.
8. **Emergency Contracts.** ORS 279B.080 permits the head of a contracting agency, or someone else designated by rule, to make or authorize others to make emergency procurements of goods or services in an emergency. Beyond the delegation, no additional rules are required for emergency procurement of goods and services. However, under emergency conditions, a public improvement contract may be awarded without competitive bidding, and the performance and payment bond requirements may be waived, only according to the City's adopted rules. See ORS 279C.335(5) and ORS 279C.380(4). The Resolution includes rules addressing both of these requirements.
9. **Disposal of Surplus Property.** ORS 279A.185 requires local contracting agencies to adopt rules for the disposal of personal property. If such rules are not adopted, the contracting agency must competitively bid the sale of such property. The Model Rules do not address disposal of surplus property for local contracting agencies. The Resolution includes proposed rules.
10. **Sole Source Acquisitions.** If the City wants the authority to declare that goods or services are only available from a sole source, it must adopt rules addressing this, pursuant to ORS 279B.075. The Resolution adopts the applicable Model Rule, OAR 137-047-0275.
11. **Mistakes and Withdrawal of Bids.** ORS 279B.055(7) makes the adoption of rules a prerequisite to allowing correction and withdrawal of bids. Therefore, cities must either adopt the applicable Model Rules, or prepare and adopt their own Rules. Cities that adopt their own rules must, at minimum, comply with ORS 279B.055(7). The Resolution adopts the applicable Model Rules, OAR 137-047-0440, OAR 137-047-0460, and OAR 137-047-0470.

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12. **Negotiation With Lowest Bidder When All Bids For Public Improvement Contract Exceed Cost Estimate.** ORS 279C.340 requires the City to adopt rules to authorize negotiation with the lowest bidder when all bids for a public improvement exceed the project budget. The Resolution adopts the applicable Model Rule, OAR 137-049-0430.
13. **Protests Relating to Procurement of Goods and Services.** Contracting agencies must provide a reasonable time and manner for affected persons to protest a request for approval from the contract review board for a special procurement of goods or services (ORS 279B.400); the terms, specifications and requirements of a solicitation (ORS 279B.405(3),(6)) and procurement awards (ORS 279B.410). The Resolution adopts the applicable Model Rules, OAR 137-047-0700 through 137-047-0750.
14. **Appeals of Prequalification Decisions and Debarment Decisions.** Pursuant to ORS 279B.425(5) the LCRB must adopt rules of procedure for conducting hearings of these appeals. The applicable Model Rule (137-047-0760) refers the process back to ORS 279B.425, which provides most of the procedural requirements for the appeal. However, under this statute, state agencies are required to follow procedures for contested case hearings, provided in ORS 183.415(3) to (6) (notice, hearing, record); ORS 183.425 (depositions or subpoenas of material witnesses); ORS 183.440 (subpoenas in contested cases); ORS 183.450 (evidence); and ORS 183.452 (representation of agencies). These processes are likely more formal than most cities require. The Resolution establishes a basic hearing procedure that may be used, instead.
15. **Concession Agreements.** Most cities don't enter into concession agreements. For those that do, it is likely that a concession agreement is not a "public contract" because it does not involve the "purchase, lease, or sale" by the public body. However, a public entity that enters into concession agreements should consider addressing these processes in their contracting rules. The attached Resolution includes rules for entering into these types of contracts.
16. **Purchases from Federal Catalogues.** ORS 279A.180 requires contracting agencies to adopt rules if they intend to purchase goods available from federal agencies under federal purchasing programs, such as law enforcement equipment and computer equipment. The procurement must be made under 10 USC 381, the Electronic

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Government Act of 2002 (Public Law 107-347) “or other federal law that is determined by the Local Contract Review Board to be similar to such Act in effectuating or promoting transfers of property to contracting agencies.” The attached Resolution includes basic rules governing this process.

Timeline. The City’s existing contracting rules became void on March 1, 2005. Until new rules are adopted, the Model Rules will apply by operation of law, thus there is no danger that the City will be without contracting rules at all. However, because the Model Rules do not address certain authority for local contracting agencies, applying only the Model Rules will leave some gaps in the City’s contracting authority. Therefore, the attached Resolution should be adopted as soon as possible.

Sincerely,

JORDAN SCHRADER PC

E. Andrew Jordan

Enclosure