

## Personal Services Contracts

### 1. Personal Services Contracts Defined

Personal services contracts include, but are not limited to, a contract or member of a class of contracts that the local contracting agency's Local Contract Review Board (LCRB) has designated as a personal services contract pursuant to Oregon Revised Statute (ORS) 279A.055. Personal services include, but are not limited to, the following:

- a. Contracts for services performed as an independent contractor in a professional capacity (e.g., services of an accountant, attorney, data processing consultant, etc.);
- b. Contracts for services as an artist in the performing or fine arts (e.g., photographer, painter, etc.);
- c. Contracts for services that are specialized, creative and research oriented;
- d. Contracts for services as a consultant;
- e. Contracts for educational consulting services.

Personal services contracts may include: (1) public contract for architectural, engineering and land surveying and related services; or (2) other public contracts for nonconstruction services.

### 2. Eligibility

The ESD will follow ORS 670.600, Public Employees Retirement System (PERS) rules OAR 459-010-0030 and Internal Revenue Service (IRS) Ruling 87-41 in determining whether the individual or business entity qualifies as an independent contractor or is an employee of the ESD. A valid independent contractor must meet all eight of the following points:

State requirements<sup>1</sup>:

- a. The contractor must be free from the direction and the control of the employer;
- b. The contractor must obtain required business licenses;
- c. The contractor must furnish necessary tools and equipment;
- d. The contractor has authority to hire and fire employees;
- e. The contractor is paid on completion of portions of projects or on a retainer basis;
- f. The construction contractor must be registered under ORS Chapter 701. (For more information call the Construction Contractors Board at 503-378-4621 in Salem.);
- g. The contractor must file appropriate business tax returns;
- h. The contractor must represent to the public that the labor or services are provided by an independent business.

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<sup>1</sup>See ORS 670.600 for complete listing.

## PERS requirements:

In determining whether an individual is an employee or independent contractor for PERS contribution purposes, the ESD will consider the following factors:

- a. Instructions. An employee must comply with instructions about when, where and how to work. Even if no instructions are given, the control factor is present if the employer has the right to control how the work results are achieved;
- b. Training. An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods and receive no training from the purchasers of their services;
- c. Integration. An employee's services are usually integrated into the business operations because the services are important to the success or continuation of the business. This shows that the employee is subject to direction and control;
- d. Services rendered personally. An employee renders services personally. This shows that the employer is interested in the methods as well as the results;
- e. Hiring, supervising and paying assistants. An employee works for an employer who hires, supervises and pays workers. An independent contractor can hire, supervise and pay assistants under a contract that requires him/her to provide materials and labor and to be responsible only for the result;
- f. Continuing relationship. An employee generally has a continuing relationship with an employer. A continuing relationship may exist even if work is performed at recurring although irregular intervals;
- g. Set hours of work. An employee usually has set hours of work established by an employer. An independent contractor generally can set his/her own work hours;
- h. Full-time required. An employee may be required to work or be available full-time. This indicates control by the employer. An independent contractor can work when and for whom he/she chooses;
- i. Doing work on employer's premises. An employee usually works on the premises of an employer, or works on a route or at a location designated by an employer;
- j. Order or sequence set. An employee may be required to perform services in the order or sequence set by an employer. This shows that the employee is subject to direction and control;
- k. Oral or written reports. An employee may be required to submit reports to an employer. This shows that the employer maintains a degree of control;
- l. Payment by hour, week, month. An employee is generally paid by the hour, week or month. An independent contractor is usually paid by the job or on a straight commission;
- m. Payment of business and/or traveling expenses. An employee's business and travel expenses are generally paid by an employer. This shows that the employee is subject to regulation and control;
- n. Furnishing of tools and materials. An employee is normally furnished significant tools, materials and other equipment by an employer;
- o. Significant investment. An independent contractor has a significant investment in the facilities he/she uses in performing services for someone else;
- p. Realization of profit or loss. An independent contractor can make a profit or suffer a loss;
- q. Working for more than one employer at a time. An independent contractor is generally free to provide his/her services to two or more unrelated persons or firms at the same time;
- r. Making service available to general public. An independent contractor makes his/her services available to the general public;

- s. Right to discharge. An employee can be fired by an employer. An independent contractor cannot be fired so long as he/she produces a result that meets the specifications of the contract;
- t. Right to terminate. An employee can quit his/her job at any time without incurring liability. An independent contractor usually agrees to complete a specific job and is responsible for its satisfactory completion, or is legally obligated to make good for failure to complete it.

IRS requirements:

Additionally, in determining employee or independent contract status for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA) or for federal income tax withholding from wages, the ESD will consider:

- a. Behavioral control. A worker is an employee when the ESD has the right to direct and control the worker.
- b. Financial control. A worker is an independent contractor if he/she can realize a profit or incur a loss. The individual may also be an independent contractor if he/she is not reimbursed for some or all business expenses, especially if those expenses are high or if he/she has a significant investment in his/her work.
- c. Relationship of the parties. Facts weighed by the ESD will include any written contracts describing the relationship the parties intended to create; the extent to which the worker is available to perform services for other similar businesses; whether the ESD provides the worker with employee-type benefits, such as insurance, vacation pay or sick pay; and the permanency of the relationship.

3. Personal Services Contracts - Procurement Requirements

- a. Contracts for personal services less than or equal to \$25,000 within a 12-month period, shall, where practical, be based on written or verbal quotes or may be procured through direct negotiations with the contractor.
- b. Contracts for personal services that are greater than \$25,000 but do not exceed \$75,000 may be based on three written or verbal quotes, or response to a RFP as deemed appropriate by the superintendent or designee.
- c. Contracts for personal services greater than \$75,000 shall be based on written solicitations, request for qualifications or the RFP process.
- d. The ESD may enter into a personal services contract when the amount of the services does not exceed \$150,000 without obtaining formal quotes or utilizing the RFP process when only one contractor or sole source provides the services as follows:

- (1) The superintendent or designee shall make the following written findings for inclusion in the contract file:
  - (a) That the efficient utilization of existing good requires the acquisition of compatible goods or services;
  - (b) That the goods or services required for the exchange of software or data with other public or private agencies are available from only one source;
  - (c) That the goods or services are for use in a pilot or an experimental project; or
  - (d) Other findings that support the conclusion that the goods or services are available from only one source.

- e. If the cost of the services is more than \$150,000, the ESD may award a contract on a sole source basis, only with Board approval and if prior to the award:
  - (1) Notice of the ESD's intent to contract for the services, including the general specifications of the intended contract, is advertised in at least one newspaper or trade journal of general circulation in the area where the services are to be performed;
  - (2) The advertised notice is published at least 14 days before award of contract to allow prospective contractors a reasonable opportunity to submit a protest of the ESD's intent to contract through the sole source process unless the superintendent gives prior written approval to reduce the number of days based on extraordinary circumstances that do not meet the criteria for an Emergency Procurement pursuant to OAR 137-047-0280; and
  - (3) The protest shall be submitted in writing to the ESD by the closing date and time of the advertisement notice. It shall state the reason the contract should be competitively solicited.

Protests shall be heard by the Board, whose decision shall be final.

#### 4. ITB/RFP Requirements

- a. An invitation to bid (ITB) or RFP will be used as a formal competitive solicitation that describes the specific services to be performed within a defined period of time. The solicitation will set forth criteria and methods for screening, selecting and ranking the most qualified proposal(s). The solicitation document may result in contracts with more than one provider.
- b. The solicitation document must provide that the ESD is not responsible for any cost incurred while submitting proposals and that all proposers who respond do so at their own expense.
- c. The solicitation document must, at a minimum, include:
  - (1) Requirements for solicitation documents under ORS 279B.055 (2) and 279B.060 (2):
    - (a) A time and date by which the bids or proposals must be received and a place at which bids must be submitted, and may, in the sole discretion of the contracting agency, direct or permit the submission and receipt of bids or proposals by electronic means;
    - (b) The name and title of the person designated for receipt of bids or proposals and the person designated by the contracting agency as the contact person for the procurement, if different;
    - (c) A procurement description;
    - (d) A time, date and place that prequalified applications, if any, must be filled and the classes of work, if any, for which bidders must be prequalified in accordance with ORS 279B.120;
    - (e) A statement that the contracting agency may cancel the bid or procurement, or reject any of all bids in accordance with ORS 279B.100;
    - (f) A statement that "Contractors shall use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this document." if the invitation to bid is issued by a state contracting agency;
    - (g) A statement that requires the contractor or subcontractor to possess an asbestos abatement license, if required under ORS 468A.710; and
    - (h) All contractual terms and conditions applicable to the procurement.

- (2) Requirements for solicitation documents under OAR 137-047-0255 (2) and 137-047-0260 (2):
- (a) General Information.
- (i) Notice of any pre-offer conferences as follows:
- 1) The time, date and location of any pre-offer conferences; and
  - 2) Whether attendance at the conference will be mandatory or voluntary; and
  - 3) A provision that provides that statements made by the contracting agency's representatives at the conference are not binding upon the contracting agency unless confirmed by written addendum.
- (ii) The form and instructions for submission of proposals and any other special information, e.g., whether proposals may be submitted by electronic means;
- (iii) The time, date and place of opening;
- (iv) The office where the solicitation document may be reviewed;
- (v) For bidders, a statement whether the bidder is a "resident bidder," as defined in ORS 279A.120 (1);
- (vi) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 179A.110 (4); and
- (vii) How the contracting agency will notify proposers of addenda and how the contracting agency will make addenda available.
- (b) Contracting Agency Need.
- The character of the goods and services the contracting agency is purchasing including, if applicable, a description of the acquisition, specifications, delivery or performance schedule, inspection and acceptance requirements.
- (c) Bid/Proposal and Evaluation Process.
- (i) The anticipation solicitation schedule, deadlines, protest process and evaluation process;
- (ii) The contracting agency shall set forth selection criteria in the solicitation document in accordance with the requirements of ORS 279B.060 (2)(h)(E); and
- (iii) If the contracting agency intends to award contracts to more than one proposer pursuant to OAR 137-047-0600 (4)(d), the contracting agency must identify in the solicitation document the manner in which it will determine the number of contracts it will award.
- (d) Applicable preferences described in ORS 279A.125 (2) and 282.210.
- (e) For contracting agencies subject to ORS 305.385, contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
- (f) All contract terms and conditions, including a provision indicating whether the contractor can assign the contract, delegate its duties, or subcontract the goods or services without prior written approval from the contracting agency.

- d. Bids or proposals must be advertised at least once in a newspaper of general circulation in the area where the contract is to be performed and in as many additional issues and publications as may be necessary or desirable to achieve adequate competition unless the contracting agency uses electronic advertising.
- e. Unless otherwise specified in rules adopted pursuant to ORS 179A.065, the LCRB will give notice at least seven days before the solicitation closing date.
- f. All advertisements shall describe at minimum the requirements under OAR 137-047-0300 (3):
  - (1) Where, when, how and for how long the solicitation document may be obtained;
  - (2) A general description of the goods or services to be acquired;
  - (3) The interval between the first date of notice and closing, which will be at least seven days, unless a shorter period is in the public interest and it will not substantially affect competition;
  - (4) The date that persons must file applications for prequalification if prequalification is a requirement and the class of goods or services is one for which persons must be prequalified;
  - (5) The office where contract terms, conditions and specifications may be reviewed;
  - (6) The name, title and address of the individual authorized by the contracting agency to receive offers;
  - (7) The scheduled opening; and
  - (8) Any other information the contracting agency deems appropriate.

## 5. Screening and Selection Procedures

- a. The superintendent or designee shall review, score and rank all responsive proposals according to the evaluation criteria in the ITB or RFP and applicable law. The contracting agency will award the contract to the lowest responsible bidder or proposer or multiple responsible bidders or proposers in accordance with ORS 279B.055 (10) and 279B.060 (10), and OAR 137-047-0600.
- b. To determine whether the bidder or proposer has met the standards of responsibility under ORS 279B.110 (2) and OAR 137-047-0640 (1)(c)(F), the LCRB will consider whether the bidder or proposer has:
  - (1) Available the appropriate financial, material, equipment, facility and personnel resources and expertise, or the ability to obtain the resources and expertise, necessary to indicate the capability of the bidder or proposer to meet all contractual responsibilities;
  - (2) A satisfactory record of performance.<sup>2</sup> The contracting agency will document in the solicitation file its basis for determining that the offeror is not responsible because the offeror does not meet this requirement;

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<sup>2</sup>A contracting agency should review carefully the offeror's record of contract performance if the offeror is or recently has been materially deficient in contract performance. In reviewing the offeror's performance, the contracting agency should determine whether the offeror's deficient performance was expressly excused under the terms of the contract, or whether the offeror took appropriate corrective action. The contracting agency may review the offeror's performance on both private and public contracts.

- (3) A satisfactory record of integrity.<sup>3</sup> The contracting agency will document its basis for determining that the offeror is not responsible because the offeror does not meet this requirement;
  - (4) Qualified legally to contract with the contracting agency;
  - (5) Supplied all necessary information in connection with the inquiry concerning responsibility. If an offeror fails to promptly supply information requested by the contracting agency concerning responsibility, the contracting agency shall base the determination of responsibility upon any available information, or may find the bidder or proposer not to be responsible; and
  - (6) Not been debarred by the contracting agency under ORS 279B.130.
- c. Final ranking will be based on all information obtained during the evaluation process. Price will be considered, but will not necessarily govern selection of the contractor(s).
  - d. Contracts entered into may be amended, provided the original contract allows for the particular amendment and the services to be provided under the amendment are included within or directly related to, the scope of the project or the scope of the services described in the solicitation document.
  - e. Documentation
 

Documentation providing evidence of competition shall be maintained by the ESD for all contracts entered into by the ESD.
  - f. Fingerprinting
 

If the scope of the work performed by a contractor(s) or his/her employee(s) may result in direct, unsupervised contact with students, he/she will be required to submit to fingerprinting and criminal records checks as required by law.
  - g. Payment
 

Payment will be made only upon completion of the performance of specific portions of the project or on the basis of an annual or periodic retainer as specified by the ESD in the personal services contract.

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<sup>3</sup>A contracting agency may determine that an offeror lacks integrity because of a lack of business ethics such as a violation of environmental laws or false certification made to the contracting agency. A contracting agency may find that an offeror is not responsible based on a lack of integrity of a person having influence or control over the offeror.