

Eugene School District 4J

Code: **DJC**

Adopted: 7/2/73

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2/23/05

Orig. Code(s): 6710, 6710.1, 6710.2, 6710.3

Exemptions from Competitive Bidding for Public Improvement Contracts

Effective March 1, 2005, the entirely new revision of state procurement statute (ORS Chapter 279) goes into effect. With that revision, all previous exemptions promulgated under ORS Chapter 279 expire, and new exemptions must be promulgated. ORS Chapter 279 has been renamed the Public Contracting Code of the State of Oregon, and has been divided into three sections. ORS Chapter 279C governs public improvement contracts; ORS Chapter 279A governs all public contracts, including contracts for public improvements.

The following exemptions are consistent with this new legislation and are based on rules formerly adopted by the Eugene School District, based on a former template prepared by the Oregon School Boards Association, drafted from formerly adopted rules of the Oregon Department of Administrative Services (DAS), exempting certain public contracts or classes of public contracts from competitive bidding. Rules in their entirety were formerly found in Oregon Administrative Rules, Chapter 125, Divisions 300-360.

All public improvement contracts shall be based upon competitive bids, except the following:

- Contracts which have been specifically exempted under ORS 279A.025, ORS 279C.335 or 279C.345;
- Contracts covered by the class exemptions in the following set of rules developed pursuant to ORS 279C.335 and findings as defined by ORS 279C.330:

I. BRAND NAMES OR PRODUCTS, "OR EQUAL," SINGLE SELLER AND SOLE SOURCE

- A. In connection with contracts for public improvements, the district may purchase brand names or products from a single seller or sole source without competitive bidding subject to the limitations of this rule.
- B. The Board, acting as the Local Contract Review Board (LCRB) for the district, has made the findings required by ORS 279C.335(2)(a),(b) and (3), and determined that awarding a contract under this exemption is unlikely to encourage favoritism or substantially diminish competition and will result in a cost savings to the district. In approving the findings justifying this exemption, the Board has considered pertinent information regarding: (1) operational, budget and financial data; (2) public benefits; (3) value engineering; (4) specialized expertise required; (5) public safety; (6) market conditions; (7) technical complexity; and (8) funding sources. The district has determined that value engineering, specialized expertise required, public safety and technical complexity, generally do not apply to this exemption.
- C. Solicitation specifications for public contracts of the district shall not expressly or implicitly require any product of any particular manufacturer or seller except as expressly authorized in subsections C. and D. of this rule.
- D. The district may specify a particular brand name, make or product suffixed by "or equal," "or approved equal," "or equivalent," "or approved equivalent" or similar language if there is no other practical method of specification after documenting the procurement file with the following:
 - 1. A brief description of the solicitation(s) to be covered, including contemplated future purchases;
 - 2. The brand name, mark or product to be specified; and
 - 3. The reasons the district is seeking this procurement method, which shall include any of the following findings:
 - a. It is unlikely that specification of the brand name, mark or product will encourage favoritism in the award of the public contracts or substantially diminish competition; or
 - b. Specification of the brand name, mark or product would result in cost savings to the agency; or
 - c. Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies.
 - 4. The district shall make reasonable effort to notify all known suppliers of the specified product and invite such vendors to submit competitive bids or proposals.
- E. In connection with contracts for public improvements, the district may purchase a particular product or service available from only one source, after documenting the procurement file with the district's findings of current market research to support the determination that the product is available from only one seller or source. The district's findings shall include:
 - 1. A brief description of the contract or contracts to be covered, including contemplated future purchases;
 - 2. Description of the product or service to be purchased; and

3. The reasons the district is seeking this procurement method, which shall include any of the following:
 - a. Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment, supplies or services; or
 - b. The required product is data processing equipment which will be used for research where there are requirements for exchange of software and data with other research establishments; or
 - c. The particular product is for use in a pilot or an experimental project.

- F. In connection with contracts for public improvements, the district may specify a product or service available from only one manufacturer but available through multiple sellers, after documenting the procurement file with the information required in F.1-3. of this rule below, and subject to the following:
 1. If the total purchase is over \$5,000 but does not exceed \$150,000, and a comparable product or service is not available under an existing state cooperative purchasing contract, competitive quotes shall be obtained by the district and retained in the procurement file;
 2. If the purchase does not exceed \$150,000, and the comparable product or service is available under an existing state cooperative purchasing contract, authorization from DAS, Central Purchasing, to proceed with the acquisition shall be first requested and obtained. The acquisition process would then be subject to the requirements and documentation in this rule; or
 3. If the amount of the purchase exceeds \$150,000, the product or service shall be obtained through competitive bidding unless a specific exception is granted by the LCRB.

- G. In connections with contract(s) for public improvements, if the district intends to make several purchases of the product of a particular manufacturer or seller for a period not to exceed five years, the district will so state in the solicitation file and in the solicitation document, if any. Such documentation shall be sufficient notice as to subsequent purchases. If the total purchase amount is estimated to exceed \$100,000, this shall be stated in the advertisement for bids or proposals.

Findings of Fact/Conclusion of Compliance with Law (Brand Names or Products, “or Equal,” Single Seller and Sole Source)

It is unlikely that this special procurement will encourage favoritism in the awarding of public contracts or substantially diminish competition for such contracts as required by ORS 279B.085 (3)(a). This rule requires the district to make a good faith effort to determine that no other sources are available for the specified products. The district maintains open lists from which vendors are contacted for quotations and utilizes electronic means of determining new vendors on an ongoing basis. In addition, as required by ORS 279C.335(2)(b) the awarding of a public improvement contract subject to the above described exemption should result in substantial cost savings by virtue of the ability to reduce solicitation costs when it is known that comparable products are not available, or when specifying another product solely to meet a competition requirement might lead to lower initial cost but longer lifetime cost.

II. PRODUCT PREQUALIFICATION

- A. For contracts for public improvements, when specific design or performance specifications must be met or such specifications are impractical to create or reproduce for a type of product to be purchased, the district may specify a list of approved or qualified products by reference to the prequalified product(s) of particular manufacturers or vendors in accordance with the following product prequalification procedure:
1. The district will make reasonable efforts to notify all known manufacturers and vendors of competing products of the district's intent to compile a list of prequalified products. The notice will explain the opportunity manufacturers and vendors of competing products will have to apply to have their product(s) included on the district's list of prequalified products. At its discretion, the district may provide notice by advertisement in the *Daily Journal of Commerce* or other appropriate trade publication; or instead of advertising, the district may provide written notice to those manufacturers and vendors appearing on the appropriate list maintained by the district; and
 2. The district will accept manufacturer and vendor applications to include products in the district's list of prequalified products up to 15 calendar days prior to the initial advertisement for bids or proposals for the type of product to be purchased, unless otherwise specified in the advertisement or in the district's written notice.
- B. The Board, acting as the LCRB for the district, has made the findings required by ORS 279C.335(2)(a)(b) and determined that awarding a contract subject to the district's product prequalification rule is unlikely to encourage favoritism or substantially diminish competition and will result in a cost savings to the district. In approving the findings justifying the use of product prequalification, the Board has considered pertinent information regarding: (1) operational, budget and financial data; (2) public benefits; (3) value engineering; (4) specialized expertise required; (5) public safety; (6) market conditions; (7) technical complexity; and (8) funding sources. The district has determined that special expertise required, generally, does not apply to this rule.
- C. If the district denies an application for including a product on a list of prequalified products, the district shall promptly provide the applicant with a written notice of the denial and include the reason for denial. The applicant may submit a written appeal within [10] calendar days to the district business manager to request review and reconsideration of the denial.

Findings of Fact

1. There are occasions when the district needs to establish a list of prequalified products before it invites bids for contracts for public improvements to furnish the products. The district may have a specific performance or design need, but it is impractical for the district to create a specification for the type of products to be purchased. An example is audiovisual equipment. There is a tremendous variety of audiovisual products offered in the market. The equipment technology is complex and constantly changing. It would be very burdensome and time consuming for the district to generate nonbrand name, generic performance specifications for such equipment every time it wants to make a purchase.

Also, competition would be poorly served because bidders and proposers would not know in advance whether their offered product would meet the general specification substantially enough to be considered a responsive offer. The decision to make an award would be slow, because each product offered would have to be analyzed against the district's specification. Slow down in the award process affects both bidders, who are asked to hold their bids open until award is made, and district programs, because staff is not able to order the equipment they need until the contract is awarded.

In this case, it might be more cost efficient for the district to prequalify products and establish a list of approved products before invitations to bid are sent out. The prequalification process can be done some time before the need for a new contract. Once the prequalified product list is established, the bidding and contract award process can go quickly and smoothly.

2. A second occasion when prequalification of products will be useful is when the specific design or performance specifications for a product are so exacting that the district must have time to carefully consider what is offered in the market that may or may not meet the specifications and, if necessary, reconsider its options before issuing an invitation to bid.
3. This rule sets out a process of prequalification which requires the use of advertisement or other appropriate means to notify vendors of competing products of their opportunity to submit items for prequalification. The district maintains vendor mailing lists which are open to all interested vendors. The district uses these lists routinely to notify vendors of its intentions to prequalify products or to invite bids on products.
4. Subsection C. of this rule provides vendors with an appeal process to follow if their application for prequalification is denied.

Conclusion of Compliance with Law (Product Prequalification)

Where prequalification of products is appropriate, it is unlikely that this exemption will encourage favoritism in the awarding of public contracts or diminish competition for such contracts as required by ORS 279C.335 (2)(a). There are several safeguards in the rule to prevent this, including notice, advertising, time and appeal process requirements to ensure that vendors are given a fair and open opportunity to participate in the prequalification process.

The prequalification of products process is a time-consuming effort for the district. It is not a shortcut procurement method. The district would use this method only after balancing cost-saving considerations, such as the ability of the district to create or generate nonbrand name generic specifications for types of

products or the need for lengthy product evaluation prior to contract award. If the prequalification method is chosen, it will result in a cost savings to the district as required by ORS 279C.335 (2)(b) because the normal method of product selection is too cumbersome and costly to pursue.

III. PROJECTS WITH COMPLEX SYSTEMS OR COMPONENTS

- A. For contracts for public improvements with significant components that are inherently complex and are also complex to procure through competitive bid, the district may, at its discretion, use RFP competitive procurement methods subject to the conditions described in ORS 279C and conditions enumerated in this exemption.

- B. The Board, acting as the LCRB for the district, has made the findings required by ORS 279C.335(2)(a)(b) and determined that awarding a contract subject to the district's product prequalification rule is unlikely to encourage favoritism or substantially diminish competition and will result in a cost savings to the district. In approving the findings justifying the use of product prequalification, the Board has considered pertinent information regarding: (1) operational, budget and financial data; (2) public benefits; (3) value engineering; (4) specialized expertise required; (5) public safety; (6) market conditions; (7) technical complexity; and (8) funding sources. In general, public safety might be the only one of the above criteria that would not be applicable. All of the other criteria might apply, in whole, or more likely in some combination, on a project-by-project basis.

Findings of Fact/Conclusion of Compliance with Law (Projects with Complex Systems or Components)

Contracts for public improvements occasionally incorporate the procurement of systems, materials, or other components, for which it is difficult to impossible to create an equal specifications basis for competitive bid. On these occasions it is necessary for the District to evaluate a number of factors in addition to price, which may include, but not be limited to: Specific and detailed and potentially alternate proposals for the required systems, materials or components, past performance, maintenance agreements, on-site or other procurements would include: Contracts for the providing and installing of computerized controls for building HVAC systems; contracts for artificial surface outdoor multipurpose athletic fields; etc. In both of the stated examples, multiple systems with different costs and different performances are available, making procurement by RFP a more suitable and appropriate choice than competitive bid.

ORS 279C enumerates how RFP's are to be used if authorized by a LCRB. The criteria in ORS 279C ensure that competitive means will be used and selection will be fair and impartial. As a result, it is unlikely that this process will encourage favoritism in the awarding of public contracts or substantially diminish competition for such contracts as required by ORS 279C.335 (2)(a). The awarding of contracts pursuant to this process will result in optimal value to the district based on selection by the district of the best competitive proposal that meets the stated evaluative criteria. This meets the test of ORS 279C.335 (2)(b).

The RFP process allows the District to evaluate a number of factors that can be evaluated in life cycle costing. The awarding of contracts pursuant to this exemption will result in cost savings to the district as required by ORS 279C.335 (2)(b).

This class exemption is intended to be used for the types of procurements described in the findings, where the specific system, materials, or component represents a significant portion of the project. (Significant is intended to mean something more than diminimus, but not necessarily the majority of the project by cost). This class exemption is not intended to be used for CM/GC projects or other methods of alternative procurement unless these projects meet the requirements of this class exemption. CM/GC projects and others, not meeting the requirements of this class exemption, may still be procured by RFP, provided that a project or contract specific exemption is promulgated by the LCRB.

IV. REQUIREMENTS CONTRACTS (BLANKET PURCHASE ORDERS, PRICE AGREEMENTS)

- A. For contracts for public improvements, the District may establish requirements contracts for the purposes of minimizing paper work, achieving continuity of product, securing a source of supply, reducing inventory, combining district requirements for volume discounts, standardization among schools and departments and reducing lead time for ordering.
- B. The Board, acting as the LCRB for the district, has made the findings required by ORS 279C.335(2)(a)(b) and determined that awarding a contract subject to the district's product prequalification rule is unlikely to encourage favoritism or substantially diminish competition and will result in a cost savings to the district. In approving the findings justifying the use of product prequalification, the Board has considered pertinent information regarding: (1) operational, budget and financial data; (2) public benefits; (3) value engineering; (4) specialized expertise required; (5) public safety; (6) market conditions; (7) technical complexity; and (8) funding sources. The district has determined that special expertise required, generally, does not apply to this rule.
- C. The district may enter into a requirements contract (also known as a blanket purchase order or price agreement) whereby it is agreed to purchase goods or services for an anticipated need at a pre-determined price or price discount from a price list, provided the contract is let by an appropriate competitive procurement process.
- D. Once a requirements contract is established, schools and departments may purchase the goods and services for a public improvement contract from the awarded contractor without first undertaking additional competitive solicitation.
- E. Schools and departments shall use requirements contracts established by the district, unless otherwise specified in the contract, allowed by law or these rules or specifically authorized by the superintendent or designee.
- F. The term of any district requirements contract, including renewals, shall not exceed five years unless otherwise exempted pursuant to ORS 279C.335.

Findings of Fact

- 1. This rule permits the district to enter into requirements public improvement contracts, in which the vendor agrees to provide specified goods and services over the term of the contract at the bid price or discount rate. A requirements contract is useful when the purchase of the goods or services are routine and repetitive.

2. Requirements contracts are a common method of minimizing paper work, achieving continuity of product, securing a source of supply, reducing inventory, obtaining volume discounts, standardizing usage among schools and departments and reducing lead time for ordering.
3. The district establishes requirements contracts as a result of open competitive bidding or RFP (if authorized) processes, unless otherwise exempted.
4. The district limits the term of requirements contracts, including all renewal options, to a maximum of five years before competitive rebidding must be done, unless otherwise exempted.
5. The district may use the requirements contracts established by other public agencies, subject to certain conditions of state law, Board policy and administrative regulation.

Conclusion of Compliance with Law (Requirements Contracts (Blanket Purchase Orders, Price Agreement))

It is unlikely that this exemption will result in favoritism in the awarding of public improvements contracts or diminish competition for such contracts, as required by ORS 279C.335 (2)(a). The district will only enter into requirements contracts which result from open competitive bidding processes.

The awarding of district requirements public improvement contracts will result in a cost savings to the district, as required by ORS 279C.335 (2)(b). It would be costly and inefficient to make routine, repetitive purchases of goods and services through individual transactions. Also, the guaranteed volume of a requirements contract allows the district to get better prices from bidders.

V. WAIVER OF BID SECURITY REQUIREMENTS (PUBLIC IMPROVEMENT CONTRACTS UNDER \$100,000)

- A. The LCRB may, at its discretion, waive the bid security requirements of ORS 279C.390, if the amount of the contract for the public improvement is less than \$100,000. Although the bid security requirements of ORS 279C. 390 is waived for public improvement contracts under \$100,000, the District may impose a bid or quote security requirement for projects under \$100,000, when deemed to be in the best interest of the district.

Findings of Fact/Conclusion of Compliance with Law (Waiver of Bid Security Requirements-Public Improvement Contracts under \$100,00)

This rule allows the LCRB to waive bid security requirements for certain public improvement contracts. Waiver of the bid security is provided for by statute without a requirement for findings.

VI. WAIVER OF PERFORMANCE AND PAYMENT SECURITY REQUIREMENTS (PUBLIC IMPROVEMENT CONTRACTS UNDER \$50,000)

- A. The LCRB may, at its discretion, waive the performance/payment security requirements of ORS 279C.390 if the amount of the contract for the public improvement is less than \$50,000. Although the performance/payment security requirements of ORS 279C.390 is waived for public improvement contracts under \$50,000, the District may impose a performance/payment security requirement for projects under \$50,000 when deemed to be in the best interest of the District, and it is deemed by the District that competition will not be substantially diminished.
- B. As of the drafting of this exemption in January of 2005, the office of the State Attorney General has introduced into the 2005 Legislature a technical amendment to ORS 279C that would waive the performance/payment security requirement for public improvement contracts under \$50,000.

Findings of Fact/Conclusion of Compliance with Law (Waiver of Performance and Payment Security Requirements-Public Improvement Contracts under \$50,000)

This rule allows the LCRB to waive performance/payment security requirements for certain public improvement contracts. Waiver of the performance/payment security is provided for by statute without a requirement for findings.

This exemption has been drafted to be consistent with the proposed technical amendment to ORS 279C, as described in finding B above.

END OF POLICY

Legal Reference(s):

[ORS Chapter 279](#)

[OAR 125-030-0000 to -0100](#)

[OAR 125-300-0000 to -0100](#)

[OAR 125-310-0005 to -0500](#)

[OAR 125-320-0010 to -0025](#)

[OAR 125-330-0030 to -0700](#)

[OAR 125-360-0010 to -0030](#)

[OAR 137-030-0000 to -0155](#)

[OAR 137-035-0000 to -0080](#)

[OAR 137-040-0000 to -0590](#)

Oregon Attorney General's Model Public Contract Rules Manual, Department of Justice (January 2001).

Cross Reference(s):

D

J - Purchase of Supplies, Service and Equipment