

LANE COUNCIL OF GOVERNMENTS

RESOLUTION 2011-3

**JOINT RESOLUTION OF THE BOARD OF DIRECTORS AND LOCAL PUBLIC
CONTRACT REVIEW BOARD OPTING OUT OF THE ATTORNEY
GENERAL'S MODEL PUBLIC CONTRACTING RULES AND ADOPTING
NEW PUBLIC CONTRACTING RULES FOR
LANE COUNCIL OF GOVERNMENTS**

WHEREAS, it is the policy of the Lane Council of Governments (LCOG) that a sound and responsive public contracting system should allow impartial, meaningful, and open competition, preserving formal competitive selection as the standard for public contracts unless otherwise specifically exempted herein, by state law, or by subsequent ordinance or resolutions; and

WHEREAS, the Oregon Legislature adopted HB 2341 (2003 Oregon Laws, Chapter 794), which was signed by the Governor, and had an operative date of March 1, 2005. This Act repealed Oregon Revised Statutes ("ORS") Chapter 279 (with minor exceptions) and replaced it with three new subchapters: ORS 279A, 279B, and 279C. These three subchapters, together, constitute the Public Contracting Code (or Code). All LCOG rules and exemptions previously adopted under ORS chapter 279 expired on March 1, 2005; and

WHEREAS, in order to adopt new public contracting rules that differ from the Model Rules, under ORS 279A.065(5), and the rules adopted by the LCOG Board of Directors on April 28, 2005, the Board of Directors must specifically state that the Model Rules adopted by the Attorney General do not apply to LCOG, and prescribe its own public contracting rules, which may include portions of the Attorney General's Model Rules. The Local Contract Review Board may also adopt rules for public contracting not covered by the Model Rules, as long as they do not conflict with the Public Contracting Code; and

WHEREAS, the Public Contracting Code divides powers and duties for contracting into two categories: those that must be performed by the "Local Contract Review Board;" and those that must be performed by the "Contracting Agency;" and

WHEREAS, pursuant to ORS 279A.060 the LCOG Executive Committee is the Local Public Contract Review Board for LCOG and, as such, is authorized to act on all such matters on behalf of LCOG, adopt Public Contracting Rules, and establish procedures for amendment of such rules; and

WHEREAS, the Local Contract Review Board may designate certain personal service contracts or classes of service contracts as personal service contracts, which are not subject to the procedural requirements of the Public Contracting Code or the Model Rules; and

WHEREAS, LCOG recognizes it may exempt certain public improvement contracts or classes of such contracts under ORS 279C.335; and

WHEREAS, pursuant to ORS 279C.330 and 279C.335(2), the LCOG Executive Committee submits the following findings supporting a class exemption of public improvement contracts from competitive bidding requirements, where a competitive proposal process is instead desired by LCOG, in its sole discretion, which conforms to the requirements set forth in ORS 279C.400 through 279C.410:

A. Operational, budget, and financial data. Where various criteria, which may or may not include cost, must be weighed in order to select an appropriate contractor for the desired project, the formal competitive bidding process costs of up to \$5,000 are a significant budgetary waste in that the most qualified contractor for the project may not be the lowest responsible bidder;

B. Public benefits. Exempting contracts from competitive bidding requirements and instead utilizing statutory competitive proposal procedures will protect and preserve public funds, enable greater competition between the most qualified contractors, and result in a better product which meets the public's and LCOG's needs;

C. Value engineering, Specialized expertise required, Technical expertise. Only through a competitive proposal process can LCOG weigh, evaluate and select this type of expertise and determine which contractor may best provide these services. These are qualities not reflected in cost, where a determination on cost alone could forfeit these valuable and essential attributes;

D. Public safety. Utilizing a competitive proposal process as opposed to competitive bidding can ensure high quality, more safely constructed facilities through the construction period, and after completion. Capitalizing upon design and construction planning and compatibility can also allow earlier use of public facilities even while construction continues;

E. Market conditions. The increased availability of and need for technical expertise, value engineering, or other types of specialized expertise, as well as a need to investigate the compatibility, experience and availability of contractors require that certain public improvement contracts be awarded based upon an evaluation of a number of criteria, rather than simply cost; and

WHEREAS, the LCOG Board of Directors additionally requests that LCOG's local contract review board approve the classes of special procurements and public improvement contract exemptions set forth in the attached rules, based upon the following findings:

A. Any exemptions from competitive bidding requirements allowed under the following rules will not encourage favoritism in the awarding of public contracts nor substantially diminish competition for public contracts because such exemptions still require alternative contracting procedures which ensure: (1) reasonable competition; (2) the best contract price for the public; and (3) a cost-effective process for both contractors and LCOG;

B. The awarding of public contracts pursuant to any such exemptions will result in substantial cost savings to the public contracting agency because LCOG will avoid costs associated with unnecessary documentation and procedures, where it is unmerited by the type and/or relatively low cost of the project; and

C. The awarding of public contracts pursuant to any of the requested exemptions also substantially promotes the public interest in a manner that could not practicably be realized by formal competitive solicitation procedures, given the fact that such exemptions facilitate smooth operation of LCOG's administration and operations, include procedures and mechanisms to ensure the best product, service or outcome is obtained at the least cost to the public and LCOG, and LCOG's proposed Public Contracting Rules address areas of public contracting left unresolved by the Code and the Attorney General's Model Rules which are essential for LCOG operations, such as the purchase of used personal property, and the disposition of surplus personal property;

NOW, THEREFORE, it is resolved as follows:

1. The LCOG Executive Committee is hereby designated to continue as the Local Contract Review Board of LCOG and shall have all of the rights, powers and authority necessary to carry out the provisions of Chapters 279A, 279B, and 279C (the "Public Contracting Code") and attached Rules. Except as otherwise provided in this Resolution, the definitions established in the attached Rules apply herein. The term "Contracting Agency" as used in the attached Rules includes Contracting Agency's chief administrative officer, his or her designee, or any other purchasing agent, as designated by LCOG policy. Those individuals are hereby designated as LCOG's Contracting Agency and may exercise all authorities, powers and duties granted to a Contracting Agency under the Public Contracting Code and attached Rules, unless otherwise established by LCOG policy.

2. The above recitals are hereby adopted by the LCOG Executive Committee, sitting as the Local Contract Review Board, and the LCOG Board of

Directors as findings of fact supporting approval of the Directors' request for classes of special procurement and public improvement contract exemptions.

3. The Model Rules adopted by the Attorney General pursuant to ORS 279A.065 do not apply to LCOG. Instead, LCOG hereby prescribes the following Rules, which include portions of the Attorney General's Model Rules, as the Rules of Procedure that LCOG will use for its public contracting: Public Contracting Rules Chapter 137, Divisions 46, 47, 48 and 49. While the numbering of these Rules reflects the numbering system of the Attorney General's Model Rules, they incorporate LCOG changes to the Model Rules, and, therefore, are not the Attorney General's promulgated administrative rules. LCOG exemptions are also set forth in these Rules, as numbered Exemptions 1 through 18 (E-1 through E-18). All above-referenced Rules are attached to this Resolution and incorporated herein by this reference.

4. In accordance with ORS 279A.065(5)(b), LCOG shall review its Public Contracting Rules, adopted herein, each time the Attorney General modifies its Model Rules in order to determine whether amendments are required to ensure statutory compliance.

5. Amendments to these Rules and new rules shall be adopted after a public hearing of the Public Contract Review Board. The subject matter of the amendment or new rule and hearing information, including date, time, and place of the hearing, shall be published in a newspaper of general circulation not less than three (3) nor more than fifteen (15) days prior to the date of the public hearing. Additionally, a notice of the hearing may be posted on the main entry door of the building where the meeting will be held not later than three (3) days prior to the date of the meeting.

6. Special procurement requests and approvals shall be made in accordance with Division 47 of the attached Rules and ORS 279B.085. Public improvement contract exemption procedures, including notice and public hearing requirements, shall be in accordance with Division 49 of the attached Rules and ORS 279C.335.

7. The Model Cost Accounting Guidelines developed by the Oregon Department of Administrative Services, pursuant to Section 3, Chapter 869, Oregon Laws 1979, are hereby adopted as LCOG's Cost Accounting System to apply to public improvement projects exceeding \$5,000 and constructed with LCOG's own equipment or personnel. ORS 279C.310. For such public improvement projects estimated to cost more than \$125,000, LCOG shall also comply with the requirements of ORS 279C.305(3).

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8. All previously adopted resolutions establishing public contracting rules for LCOG are hereby repealed.

DATED this 22nd day of September, 2011.

Chris Pryor, Chair
Board of Directors
Local Public Contract Review Board

George Kloeppe
Executive Director

Findings in Support of the Adoption of Public Contracting Regulations Including Special Procurement Rules and Exemptions to Certain Public Improvement Competitive Bidding Requirements

1. The 2003 Oregon legislature adopted new public contracting laws, repealing and replacing nearly all of the previous state law on public contracting, all with an effective date of March 1, 2005.
2. One provision of the new law invalidated all local contracting board rules, requiring that local contracting boards adopt new rules regulating their local public contracting procedures.
3. The Oregon Attorney General has developed Model Rules for Public Contracting. Unless the local contracting board adopts its own regulations, the Model Rules will apply. The Model Rules were developed for statewide applicability, and with the intent that every agency or local government in the state would adopt alternative or supplemental rules. The Model Rules do not reflect the special characteristics of Lane County or some of the operational requirements of LCOG. For example, the Model Rules do not have any provisions for some common and important contracting procedures, such as purchases of goods and services with a total value of less than \$5,000.
4. LCOG has determined that the Attorney General Model Rules are of limited applicability to LCOG. Therefore, LCOG finds that the Model Rules adopted by the Attorney General shall not apply to LCOG.
5. Except where LCOG has adopted specific Regulations, or made a specific determination regarding a particular public contract procurement process, LCOG adopts the Model Rules adopted and in effect on March 2, 2005, as published in the Attorney General's 2004 annual publication Public Contract Manual, as a part of the LCOG Regulations, to apply to future contract proceedings.
6. There are no fundamental changes to the State Public Contracting Law adopted to be effective March 1, 2005, as it applies to LCOG. The procedures developed by LCOG under the previous public contracting law served LCOG well, providing for efficient contracting that preserved competition and allowing effective contracting without adding unnecessary cost for LCOG. Wherever possible it is appropriate to maintain the established LCOG public contracting procedures, adapted as necessary to current requirements.
7. The proposed exemptions to the public improvement contracting requirements included in LCOG's Resolution do not significantly modify the process for public improvement contracting set forth in ORS Chapter 279C. Specific exemptions, such as the adoption of categories of public improvements similar to those set forth in the Model Rules, and the application of appropriate portions of the Model Rules, are unlikely to encourage favoritism in the awarding of public contracts, are unlikely to substantially diminish competition and will provide a substantial cost savings to LCOG.
8. The election to provide for the potential of applying LCOG rules for procurement of goods and services to an opportunity for LCOG to seek the services of architects, engineers, land

surveyors and related services does not preclude LCOG using qualifications based selection either by itself, or in conjunction with a review of qualifications based on cost or price of services, will not encourage favoritism, should encourage competition and will allow LCOG to take advantage of any cost savings.

9. Adoption of rules for electronic procurement reflects the growing importance of electronic communication and continues LCOG's policy of leading local governments in developing a diversity of methods to communicate important matters to the public. The safeguards put in place concerning electronic procurement will assure that competition is preserved, favoritism is avoided and LCOG will be able to take advantage of any cost savings that exists.

10. The selection of special procurement rules for certain processes governing the acquisition of goods and services will not diminish effective competition, will protect against favoritism in the selection of contractors and will allow for cost savings by LCOG. The special procurement procedures promote the public interest in a manner that could not be realized using standard solicitation processes. The Lane County market often includes small firms that could not afford to prepare a full scale response to proposals or other formal solicitation. Selection of alternate methods that make the participation of such small firms more likely will increase the opportunity for effective competition and will certainly promote the public interest. Appropriate elimination of bid bonds will result in lower cost proposals for smaller solicitations and will therefore result in lower costs for LCOG. The occasional use of special solicitation processes for goods and service, and some public improvements will allow LCOG the opportunity to make timely solicitations, thus taking advantage of seasonal or other variations in the general cost of services and improvements, resulting in more efficient use of staff time, and a potential cost savings for LCOG.