

## **731-146-0010**

### **Application**

(1) The Oregon Department of Transportation (ODOT) adopts OAR 137-046-0100 through 137-046-0480 (effective January 1, 2012), the Department of Justice Model Rules, General Provisions Related to Public Contracting including the additional provisions provided in these rules.

(2) Unless the context of a specifically applicable definition in the Code or Model Rules requires otherwise, capitalized terms used in ODOT's public contracting rules (ODOT's Rules) will have the meaning set forth in the division of ODOT's Rules in which they appear, and if not defined there, the meaning set forth in Code or Model Rules.

(3) This rule applies retroactively to January 1, 2012.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.030 & 279A.065

## **731-146-0015**

### **Special Approvals for Public Contracts When Required**

(1) When Attorney General legal sufficiency review and approval is required under ORS 291.047, the Oregon Department of Transportation must seek legal approval.

(2) When ODOT contracts for services normally provided by another Contracting Agency or for services for which another Contracting Agency has statutory responsibilities, ODOT is required to seek the other Contracting Agency's approvals. Examples of these special approvals include, but are not limited to:

(a) Oregon Department of Administrative Services (DAS), Risk Management Division for providing tort liability coverage.

(b) DAS, State Services Division, Publishing and Distribution for printing services.

(c) DAS, State Controller's Division for accounting services.

(d) Office of the Treasurer, Debt Management Division for financial and bond counsel services (bond counsel services also require the approval of the Attorney General).

(e) DAS, Enterprise Information Strategy and Policy Division (EISPD) for approval of information technology procurements above the dollar threshold set forth in DAS Policy number 107-004-130 (Information Technology Investment Review/Approval). ODOT is also encouraged to use the DAS EISPD as a resource in carrying out information system-related projects. This may include:

(A) Assistance to ODOT in developing Statements of Work related to information system projects;

(B) Reviews to assure consistency with State standards and direction; and

(C) A listing of vendors that provide information system-related services.

(f) Attorney or Financial Auditing Services.

(3) The Attorney General has sole authority to contract for attorney services. Exceptions may be granted in Writing on a case-by-case basis only by the Attorney General.

(4) The Secretary of State Audits Division has sole authority to contract for financial auditing services. Exceptions may be granted in Writing on a case-by-case basis only by the Secretary of State Audits Division.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.140(2)

## **731-146-0020**

### **Reporting Requirements for Personal Services Contracts**

(1) Application. For the purposes of Division 146 only, “Personal Services” includes Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services and Related Services.

(2) The Department of Administrative Services (DAS) State Procurement Office maintains an electronic reporting system called the Oregon Procurement Information Network (ORPIN) that maintains a report form for reporting Personal Services Contracts. ODOT must submit this report form to the DAS State Procurement Office for each Contract and subsequent Contract Amendment. The report form must include ODOT’s name, not-to-exceed amount of the Contract, the name of the Contractor, the duration of the Contract, and its basic purpose. Whenever ODOT pays in a calendar year under a Personal Services Contract for services historically performed by its employees more than ODOT would have paid to its employees performing the same Work, ODOT must so report to DAS and include in the report a statement of justification for the greater costs, pursuant to ORS 279A.140(2)(h)(A)(i).

(3) ODOT must keep in the Procurement File all Personal Services Contracts, justification statements, when applicable, documentation of the selection process for each Contract, and report forms the later of six years following the Contract’s expiration or termination, or the period as may be required by applicable law, or until the conclusion of any audit, controversy, or litigation arising out of or related to the particular Contract in the Procurement File. A Procurement File may be destroyed following the conclusion of the applicable retention period.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.140(h)(A)

## **731-146-0025**

### **Independent Contractor Status For Personal Services Contracts**

(1) ODOT must develop a Statement of Work for services that will not result in an employee relationship with the potential Contractor.

(2) An independent contractor certification by Contractors must be included as a contract provision in each contract.

(3) If the nature of the services or project is such that an employee/employer relationship will exist, ODOT must hire the individual through normal personnel procedures.

(4) The Contract must include the Contractor’s legal name and address. The Contractor must provide its federal Employer Identification Number or Social Security Number to ODOT.

(5) The Contract must provide that the Contractor is responsible for federal Social Security, except those categories excluded by law, and for any federal or state taxes applicable to the contract payment.

(6) Failure to comply with subsections (1) through (6) of this section may result in withdrawal of intent to award or termination of the Contract.

Stat. Auth.: ORS 279A.140(2)(h)(A)(i)

Stats. Implemented: ORS 279A.140 & 279A.070

## **731-146-0030**

### **Procurement Files**

(1) Application. This Rule applies to Procurement Files as defined in this section. “Procurement Files” means any of the following files maintained by ODOT: a solicitation,

Contract, Price Agreement, Work Order, Amendment or Contract Administration file, separately or collectively.

(2) Procurement File documentation and level of detail should be directly related to the dollar value and risk of the procurement. Each Procurement File must contain:

- (a) An executed Contract, if awarded;
- (b) The record of the actions used to develop the Contract;
- (c) A copy of the Solicitation, if any;
- (d) Any required findings or statement of justification for the selection of the Contractor and sourcing method pursuant to ORS 279A.200 through 279A.220 (Cooperative Procurement); 279B.055 through 279B.085 (seven methods for Goods or Services); 279C.100 through 279C.125 (Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying and Related Services); or 279C.300 through 279C.450 (Public Improvements);
- (e) A list of prospective Contractors notified of any Solicitation;
- (f) The method used to advertise or notify prospective Contractors of any Solicitation;
- (g) copy of each Offer that resulted in the Award of a Contract;
- (h) The method of evaluating Offers, the results of the evaluation, and basis of selection;
- (i) The record of any Negotiation of the Statement of Work, costs and results;
- (j) A record of any material Communications regarding the Solicitation by interested Contractors; and

(k) A copy of the Request for Special Procurement, if any.

(3) ODOT must maintain Procurement Files, including all documentation, for a period not less than six (6) years, except for ten (10) years beyond each Contract's expiration date for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services and Related Services or for another period in accordance with another provision of law.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.050, 279A.065(5), 279A.070 & 279A.140

## **731-146-0050**

### **Contract Administration; General Provisions**

(1) Authority. ODOT must conduct all Procurements, including Contract Administration, for Goods or Services, including Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services and Related Services, Public Works, and Public Improvements, pursuant to ORS 279A.050 and ORS 279A.075.

(2) Contract Administrator. ODOT must appoint, in Writing, a Contract Administrator as an ODOT representative for each Contract. The Contract Administrator may delegate in Writing a portion of the Contract Administrator's responsibilities to a technical representative for specific day-to-day administrative activities for each Contract.

(3) Documentation Requirements. Contract Administration documentation and level of detail should be directly related to the dollar value and risk of the procurement. In accordance with OAR 731-046-0030, documentation of Contract Administration is a part of the Procurement File, whether maintained with the Procurement file or at a separate location. Contract Administration documentation must include:

- (a) An executed Contract, if maintained separate from the Procurement File;
- (b) The record of the actions used to administer the Contract;
- (c) Contact information for the Contractor;

(d) The name and contact information for the Contract Administrator and any technical representative delegates, together with a description of duties delegated to any technical representative;

(e) All executed Amendments;

(f) Claims related to the Contract;

(g) Release of claims documents;

(h) Copies of invoices, project status reports, receiving records and Contract close-out documents, as applicable; and

(i) Other documents related to Contract Administration.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.050, 279A.065(5), 279A.070 & 279A.140

### **731-146-0060**

#### **Payment Authorization of Cost Overruns for Goods or Services including Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services and Related Services Contracts**

(1) Payments on Contracts that exceed the maximum contract consideration require approval from ODOT's Designated Procurement Officer and may require approval from the Department of Justice pursuant to OAR 137-045-0010 et seq. Approval may be provided if there is compliance with all of the following:

(a) The Original Contract was duly executed and, if required, approved by the Attorney General.

(b) The Original Contract has not expired or been terminated as of the date Written approval to increase the Contract amount is granted.

(c) The cost overrun is not associated with any change in the Statement of Work set out in the Original Contract.

(d) The cost overrun arose out of extraordinary circumstances or conditions encountered in the course of contract performance that were reasonably not anticipated at the time the Original Contract, or the most recent Amendment, if any, was signed. Such circumstances include, but are not limited to cost overruns that:

(A) Address emergencies arising in the course of the Contract that require prompt action to protect the Work already completed.

(B) Comply with official or judicial commands or directives issued during contract performance.

(C) Ensure that the purpose of the Contract will be realized.

(e) The cost overrun was incurred in good faith, results from the good faith performance by the Contractor, and is no greater than the prescribed hourly rate or the reasonable value of the additional Work or performance rendered.

(f) Except for the cost overrun, the Contract and its objective are within the statutory authority of ODOT and ODOT currently has funds available for payment under the Contract.

(g) An officer or employee of ODOT has presented a Written report to ODOT's Designated Procurement Officer within 60 days of the discovery of the overrun that states the reasons for the cost overrun and demonstrates to the satisfaction of ODOT's Designated Procurement Officer that the Original Contract and the circumstances of the overrun satisfy the conditions stated above.

(h) ODOT's Designated Procurement Officer approves in Writing the payment of the overrun, or such portion of the overrun amount as ODOT's Designated Procurement Officer determines may be paid consistent with the conditions of this Rule. If ODOT's Designated Procurement Officer has signed the Contract, or has immediate supervisory responsibility over performance of the Contract, that Person must designate an alternate delegate to grant or deny Written approval of payment.

(2) ODOT must obtain an Attorney General's approval of the Contract Amendment, if such approval is required by ORS 291.047, before making any overrun payment.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.065(5)(a), 279A.070 & 279A.140

### **731-147-0010**

#### **Application**

(1) The Oregon Department of Transportation adopts OAR 137-047-0000 through 137-047-0810 (effective January 1, 2012) with the exception of 137-047-0275, the Department of Justice Model Rules, Public Procurements for Goods or Services General Provisions including the additional provisions provided in these rules.

(2) This rule applies retroactively to January 1, 2012.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.015

### **731-147-0040**

#### **Special Delegated Procurements**

(1) Terms used in Division 147 rules have the same meaning as defined in ORS 279B.085.

(2) Authorization. The Chief Procurement Officer of the DAS State Procurement Office has granted approval and authority per OAR 125-246-0140, and 125-247-0288 to the ODOT Designated Procurement Officer for the following Special Procurements:

- (a) Brand Names or Products, "or Equal," Single Seller and Sole Source;
- (b) Equipment Repair and Overhaul;
- (c) Purchases of Used Personal Property; and
- (d) Reverse Auctions.

(3) The following apply to Brand Names or Products, "or Equal," Single Seller and Sole Source procurements:

(a) "Procurement of Brand Name 'or Equal' Products" means the Procurement of a product after specifying the registered Brand name of the product or requiring the same Specifications of the Brand Name product.

(b) Specifications. Solicitation Specifications for Public Contracts must not expressly or implicitly require any product of any particular manufacturer or seller except:

(A) "Or Equal" Specification. ODOT 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; and

(B) Specifying a particular make or product. ODOT may specify a Brand Name, make, or product without an "or equal" or equivalent suffix if there is no other practical method of Specification, after documenting the Procurement File with the following:

(i) A brief description of the Solicitation(s) to be covered including volume of contemplated future purchases;

(ii) The Brand Name, mark, or product to be specified; and  
(iii) The reason ODOT is seeking this procurement method, which must include at least one of the following findings in the Procurement File:

(I) 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;

(II) Specification of the Brand Name, mark or product would result in substantial cost savings to ODOT; or

(III) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies.

(c) Public Notice. ODOT must make a reasonable effort to notify all known suppliers of the specified product and invite such suppliers to submit competitive bids or proposals; or must document the Procurement File with findings of current market research to support the determination that the product is available from only one seller. Posting a notice on ORPIN for a reasonable time period satisfies this requirement.

(d) Purchasing From Sole Source, Single Seller. ODOT may purchase a particular product or service (also known as Goods or Services) available from only one source if ODOT meets the requirements of paragraphs (b)(A) and (B) of this section and a Sole-Source Procurement pursuant to ORS 279B.075. ODOT, prior to purchase, must document the Procurement File with ODOT's findings of current market research to support the determination that the product or service is available from only one seller or source. ODOT's findings must also include:

(A) A brief description of the Contract or Contracts to be covered including volume of contemplated future purchases;

(B) Description of the Goods or Services to be purchased; and

(C) The reason ODOT is seeking this procurement method, that could include the following reasons:

(i) Efficient utilization of existing Goods or Services requires the acquisition of compatible Goods or Services;

(ii) 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

(iii) The particular product is for use in a pilot or an experimental project.

(e) Single Manufacturer, Multiple Sellers. ODOT may specify Goods or Services available from only one manufacturer, but available through multiple sellers, if ODOT meets the requirements of paragraphs (b)(A) and (B) of this section and the following:

(A) If the total purchase is \$5,000 or more but does not exceed \$150,000 and a comparable product or service is not available under an existing Mandatory Use Contract, competitive quotes must be obtained and retained in the Procurement File for Intermediate Procurements; or

(B) If the purchase exceeds \$150,000, and the comparable Good or Services is not available under an existing Mandatory Use Contract, ODOT must follow the Solicitation process for Competitive Sealed Bids or Competitive Sealed Proposals.

(f) Single Manufacturer, Multiple Purchases. If ODOT intends to make several purchases of the product of a particular manufacturer or seller for a period not to exceed five (5) years, ODOT must so state in the Procurement file, the Solicitation Document, if any, and the public notice described in paragraph (b)(B) of this section. Such documentation and public notice constitute sufficient notice as to subsequent purchases. If the total purchase amount is estimated to exceed \$150,000, this must be stated in the advertisement for Bids or Proposals.

(g) If ODOT competitively solicits, it must comply with the rules for that method of Solicitation pursuant to ORS 279B.055 through 279B.075 and 137-047-0255 through 137-047-0263.

(h) Nothing in this rule exempts ODOT from obtaining the approval of the Attorney General for legal sufficiency review requirement pursuant to ORS 291.047.

(i) ODOT must comply with ORS 200.035, notwithstanding this rule.

(4) The following apply to Equipment Repair and Overhaul procurements:

(a) Conditions. ODOT may enter into a Public Contract for equipment repair or overhaul without competitive bidding, subject to the following conditions:

(A) Service or parts required are unknown and the cost cannot be determined without extensive preliminary dismantling or testing; or

(B) Service or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source; and

(b) Process and Criteria. ODOT must use competitive methods wherever possible to achieve best value and must document in the Procurement File the reasons why a competitive process was deemed impractical. If the anticipated purchase exceeds \$5,000, ODOT must post notice on ORPIN. The resulting Contract must be in Writing and ODOT's Procurement File must document the use of this Special Procurement rule by number to identify the sourcing method. Nothing in this rule waives the Department of Justice legal sufficiency review requirement if applicable under ORS 291.047.

(5) The following apply to Purchase of Used Personal Property procurements:

(a) Authorization. Subject to the provisions of this rule, ODOT may purchase used property or equipment without competitive bidding and without obtaining competitive quotes, if, at the time of purchase, ODOT has determined and documented that the purchase will:

(A) Be unlikely to encourage favoritism or diminish competition; and

(B) Result in substantial cost savings or promote the public interest.

(b) "Used personal property or equipment" means the property or equipment which has been placed in its intended use by a previous owner or user for a period of time recognized in the relevant trade or industry as qualifying the personal property or equipment as "used," at the time of ODOT's purchase. "Used personal property or equipment" generally does not include property or equipment if ODOT was the previous user, whether under a lease, as part of a demonstration, trial or pilot project, or similar arrangement.

(c) Process and Criteria:

(A) For purchases of used personal property or equipment with a cost not exceeding \$150,000, ODOT must, where feasible, obtain three competitive Quotes, unless ODOT has determined and documented that a purchase without obtaining competitive Quotes will result in cost savings and will not diminish competition or encourage favoritism.

(B) For purchases of used personal property or equipment exceeding \$150,000, ODOT must use competitive methods wherever possible to achieve best value and must document in the Procurement File the reasons why a competitive process was deemed impractical. If the anticipated purchase amount exceeds \$5,000, ODOT must post notice on ORPIN. The resulting Contract must be in Writing and ODOT's Procurement File must document the use of this Special Procurement rule by number to identify the sourcing method. Nothing in this rule waives the Department of Justice legal sufficiency review requirement if applicable under ORS 291.047.

(6) The following apply to Reverse Auction procurements:

(a) Process. A Reverse Auction means a process for the purchase of Goods or Services by a buyer from the lowest Bidder. ODOT, as the buyer, must conduct Reverse Auctions by first publishing a Solicitation that describes its requirements, and the Contract terms and conditions. Then, ODOT must solicit online Bids from all interested Bidders through an Internet-based program. The Solicitation must set forth a start and end time for Bids and specify any combination of the following type of information to be disclosed to Bidders during the Reverse Auction:

- (A) The prices of the other Bidders or the price of the most competitive Bidder;
- (B) The rank of each Bidder (e.g., (i) “winning” or “not winning” or (ii) “1st, 2nd, or higher”);
- (C) The scores of the Bidders if ODOT chooses to use a scoring model that weighs non-price factors in addition to price; or
- (D) Any combination of paragraphs (A), (B) and (C) of this subsection.

(b) Before the Reverse Auction commences, Bidders must be required by ODOT to assent to the Contract terms and conditions, either in Writing or by an Internet “click” agreement. The Bidders then compete for the award of a Contract by offering successively lower prices, informed by the price(s), ranks, and scores, separately or in any combination thereof, disclosed by ODOT. The identity of the Bidders must not be revealed during this process. Only the successively lower price(s), ranks, scores and related details, separately or in any combination thereof, will be revealed to the participants. ODOT may cancel this Solicitation if it determines that it is in ODOT’s or the State’s best interest. At the end of the Bidding process, and if the solicitation has not been cancelled, ODOT must award any potential Contract to the lowest Responsible Bidder or in the case of multiple awards, lowest Responsible Bidders pursuant to ORS 279A.055(10)(b). This process allows ODOT to test and determine the suitability of the Goods or Services before making the Award. ODOT must comply with the following public notice procedures for this type of Solicitation:

- (A) ODOT must disclose the Reverse Auction process in the Solicitation Documents.
- (B) ODOT must provide initial notice of this Solicitation through ORPIN.
- (C) ODOT must give subsequent notices of the price(s) offered, rank(s), score(s) and related details to the initial Bidders, as described in the Solicitation Document.
- (D) ODOT must issue a Notice of Intent to award at least seven (7) calendar days prior to making the Award.

(c) Prequalification. For each Solicitation, under ORS 279B.085, on a case-by-case basis, ODOT may determine whether prequalification of suppliers is needed. If prequalification is used, ODOT must pre-qualify suppliers and provide an appeal process in accordance with ORS 279B.120 and related rules.

(7) The following process applies to Advertising Contracts: ODOT must use competitive methods wherever possible to achieve best value and must document in the Procurement File the reasons why a competitive process was deemed to be impractical. If the anticipated purchase exceeds \$5,000, ODOT must post notice on ORPIN. The resulting Contract must be in Writing and the Procurement File must document the use of this Special Procurement Rule by number to identify the sourcing method. Nothing in this rule waves the Department of Justice Legal Sufficiency Review requirement, if applicable under ORS 291.047.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070  
Stats. Implemented: ORS 279B.085

**CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING,  
PHOTOGRAMMETRIC MAPPING, TRANSPORTATION PLANNING, LAND  
SURVEYING AND RELATED SERVICES CONTRACTS**

**731-148-0010**

**Application**

(1) The Oregon Department of Transportation adopts OAR 137-048-0100 through 137-048-0320 (effective January 1, 2012), the Department of Justice Model Rules, Consultant Selection: Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, Land Surveying, and Related Services Contracts.

(2) This rule applies retroactively to January 1, 2012.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

**731-149-0010**

**Application**

(1) The Oregon Department of Transportation adopts OAR 137-049-0100 through 137-049-0910 (effective January 1, 2012), the Department of Justice Model Rules, General Provisions Related to Public Contracts for Construction Services. The adoption of the Department of Justice Model Rules by this rule does not apply to any contracts that are subject to OAR chapter 731, division 5 or 7.

(2) The Public Improvements Contracts as well as the Public Contracts for ordinary construction Services that are not Public Improvements shall also comply with OAR 731-007-0335.

(3) This rule applies retroactively to January 1, 2012.

Stat. Auth: ORS 279A.065

Stats. Implemented: ORS 279A.065