

# Public Contracting

## The 10,000 Foot View



# Overview



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# What is a Public Contract

“[A] sale or other disposal, or a purchase, lease, rental or other acquisition by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, ordinary repair or maintenance necessary to preserve a public improvement.” A contract for the purchase, sale or lease of personal property (goods) or services.

May include or exclude professional or other services.

A contract for architectural, engineering, surveying and related services

A contract for the construction of public improvements

# Public Contracts are *NOT*

- Intergovernmental Agreements
- Grants
- Real property purchases and sales
- Others listed under ORS 279A.025.

## Be Careful

The AG concluded that prevailing wage still applies if a city contracts with a private corporation to build a public improvement even if the contract doesn't have to follow ORS 279A, 279B, and 279C

# Who's Who?

- Local Contract Review Board
  - Typically it's your city council, but city council's can designate authority to other persons.
- Contracting Agency
  - The entity seeking to solicit the contract – your city.

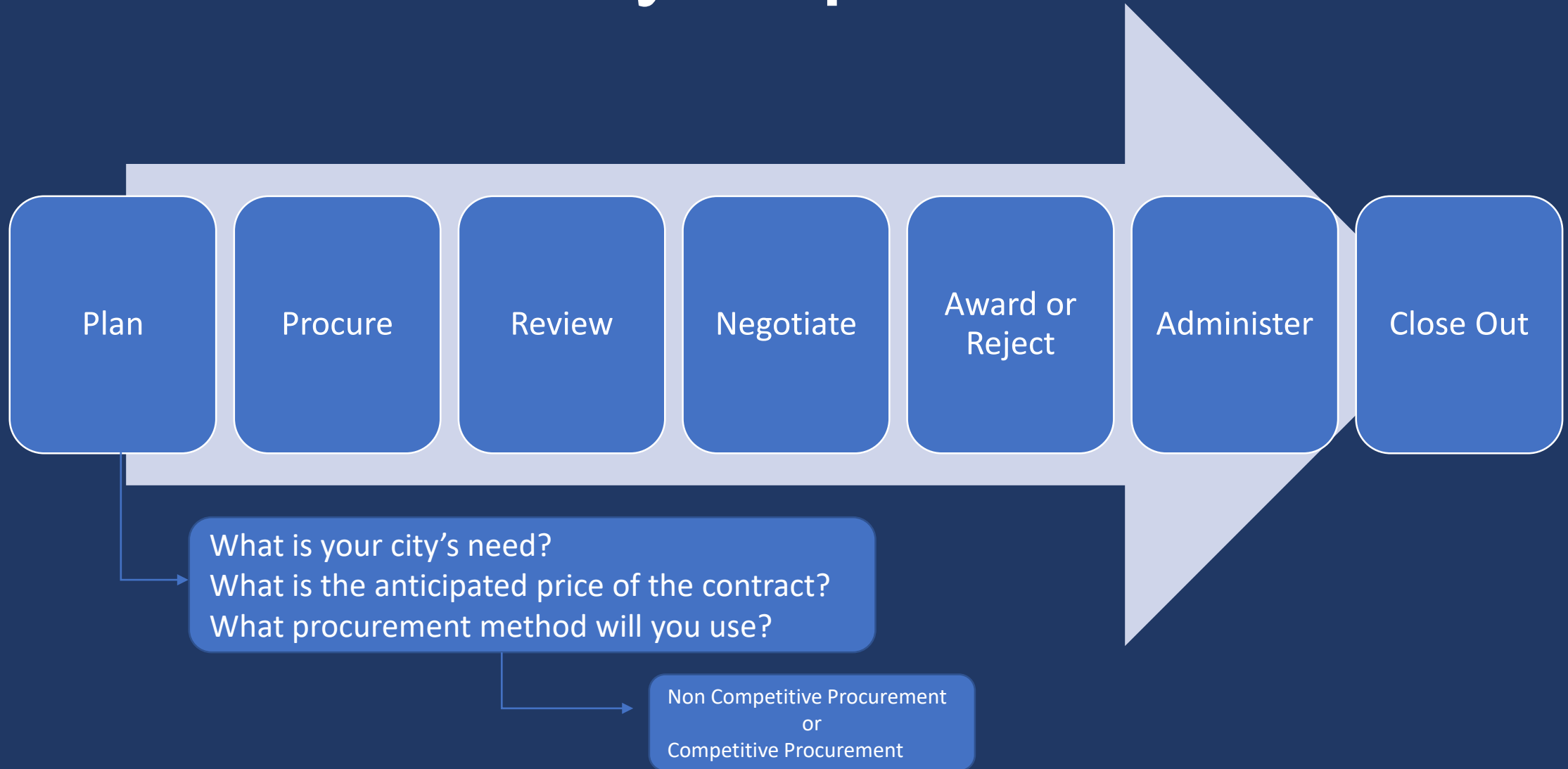
City	Delegated Authority
Yachats	City Manager is Purchasing Agent.  PW Directors/Recorder can execute contracts up to \$50,000.  Dept. Heads can execute contracts up to \$25,000.
Waldport	City Manager is Purchasing Agent.  City Manager can negotiate contracts up to \$10,000.
Lincoln City	City Manager is Purchasing Agent.  City Manager can execute a contract up to \$150,00 for goods and services.  City Manager can execute a contract up to \$100,000 for professional and personal service.
Newport	City Manger can execute a contract that does not exceed \$50,000.  City Manager shall advise Council of all contracts in excess of \$5,000.

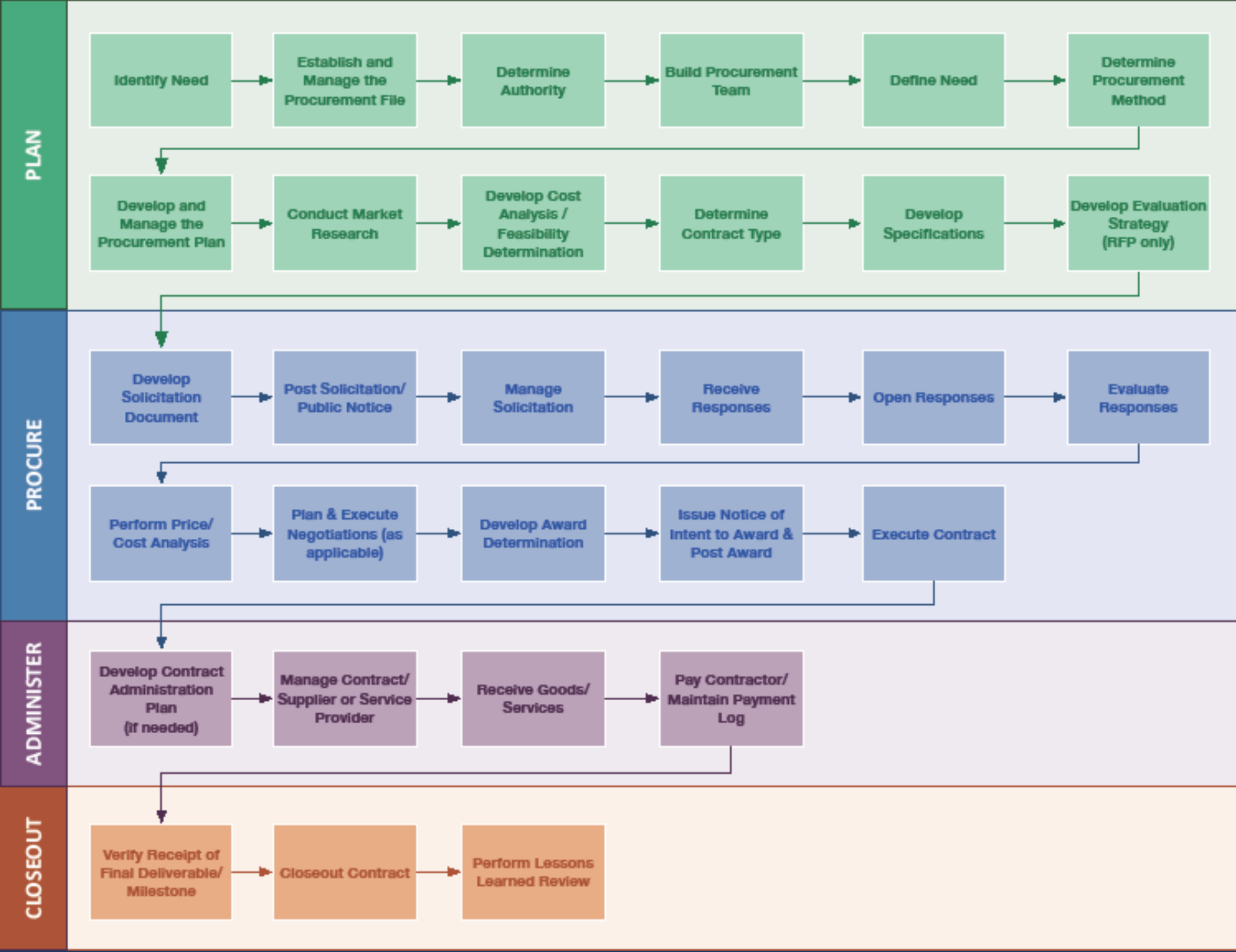
# Sources of Law

- The Public Contracting Code
  - ORS Chapter 279A – *All Contracts*
  - ORS Chapter 279B – *Goods and Services*
  - ORS Chapter 279C – *Design & Construction*
- The AG Model Rules
  - OAR Chapter 137, Division 46 – *All Contracts*
  - OAR Chapter 137, Division 47 – *Goods and Services*
  - OAR Chapter 137, Division 48 – *A&E, Land Surveying*
  - OAR Chapter 137, Division 49 – *Construction Services*
- Local Policies
  - Local municipal codes (did your city adopt or specifically reject the AG Model Rules).



# Procurement Key Steps







# Non -Competitive Procurement

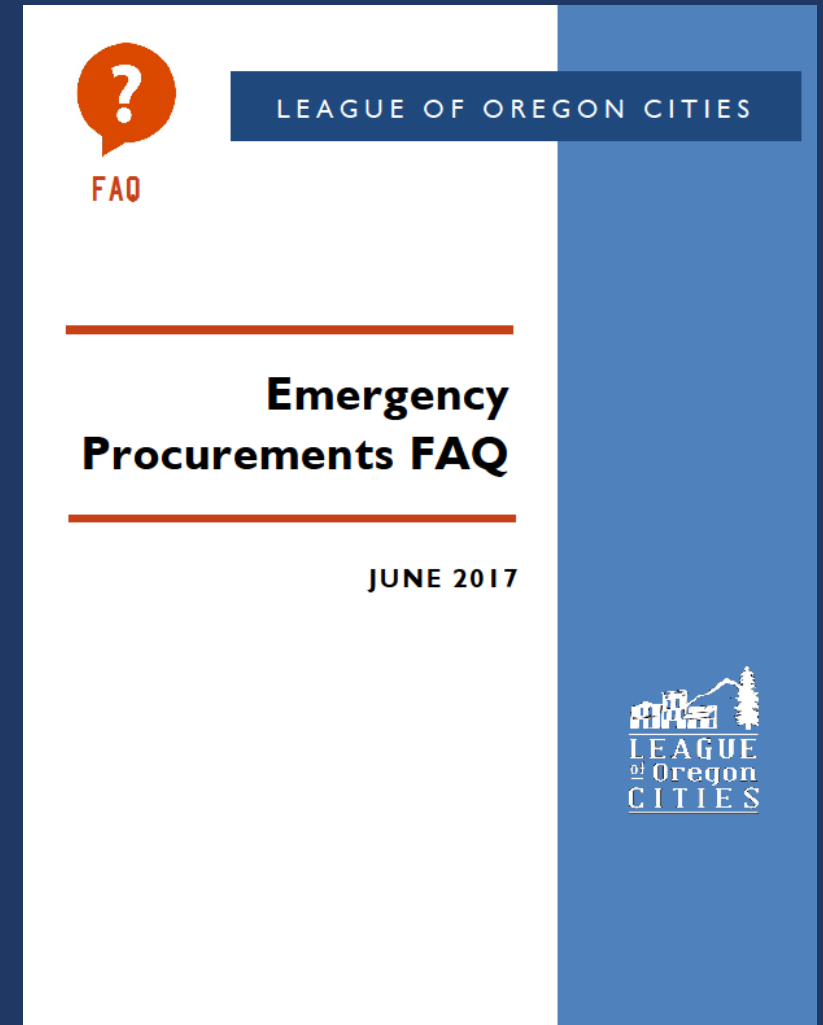


# No Formal Procurement Required

- Surplus Property
  - [www.oregonsurplus.com](http://www.oregonsurplus.com)
  - <http://gsaccess.gov>
- Qualified Rehabilitation Facility (QRF)
  - Must look to QRFs first.
  - <https://wrf.dasapp.Oregon.gov/>
  - QRF must meet city's needs – form, fit & function.
- Inmate Labor
  - Oregon Corrections Enterprises
  - [www.oce.Oregon.gov](http://www.oce.Oregon.gov)
  - Metal, furniture, upholstery, printing, mail fulfillment, call centers, garments, embroidery, sign shops, parks, laundries, document imaging
- Cooperative Purchasing
  - Contracts have already gone through RFP
  - [www.Oregon.gov/das/Procurement/Pages/Orcpp.aspx](http://www.Oregon.gov/das/Procurement/Pages/Orcpp.aspx)
  - <http://nppgov.com>
- Intergovernmental Agreements
  - Agreements with other state or local agencies.
- Sole Source
  - Only one source can meet the need.
  - Documented market research about competition is required.
  - Things to consider: compatibility, software or data exchange, pilot or experimental project, copyright, etc.
  - Public Notice of Determination of 7 days.

# Emergency Procurements

- Substantial risk of loss, damage, interruption of services or threat to public health or safety.
- Procurement shall be made with competition that is reasonable and appropriate under the circumstances.



# Competitive Procurement



# Goods and Services



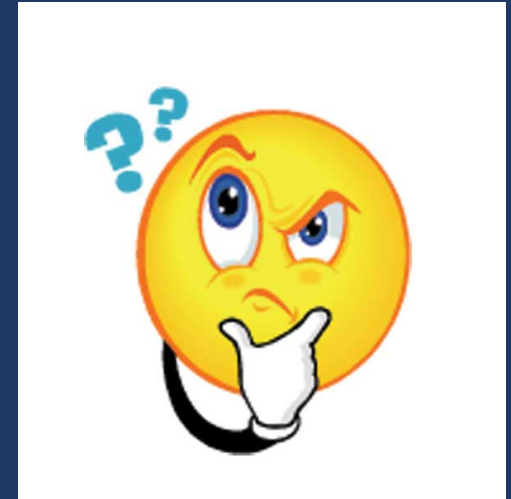
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# First Things First - Determine Contract Size

- Small Procurement
  - Contracts up to \$10,000
  - Award by direct appointment or any manner deemed practicable or convenient
- Intermediate Procurement
  - Contracts not to exceed \$150,000
  - Seek at least 3 informally solicited competitive price quotes or competitive proposals
- All Other Contract Sizes
  - Generally requires formal bid process



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# ITB versus RFP

Procurement document	Invitation to Bid	Request for Proposals
Characteristic	Competitive Sealed Bidding	Competitive Sealed Proposals
Advertising requirements	A minimum period specified by law.	A minimum period specified by law.
Goal	Lowest price.	Best value.
Responses evaluated by	Procurement professional, with assistance from the requester, as needed.	Formal evaluation committee with numerous participants.
Cost evaluation process	Costs for responsive bids are compared to each other to identify lowest cost.	Costs for responsive proposals are scored as part of the total score.
Best and Final Offer allowed?	No.	Yes.
Negotiation Allowed?	No.	Yes.
Award basis	Lowest responsive and responsible supplier.	Supplier with highest overall evaluation score based on solicitation criteria.

# Invitation to Bid

ITB



# Step 1 – Develop the ITB Document

- Must Include

- Description of the procurement;
  - Scope of work, anticipated duties
  - Expectations for performance
- All requirements on which the bid award will be based; and
- All applicable contractual terms and conditions.

Detailed Checklists in  
ORS 279B.055 and  
OAR 137-047-0255.

- May Include

- Criteria to determine minimum acceptability (inspection, testing, quality, suitability for intended purposes, etc.); and
- Bid security “if reasonably necessary or prudent to protect the interests of the contracting agency.”

# Step 2 – Notice

- You must give notice of the ITB
  - On website or in your local newspaper;
  - To contractors who have expressed an interest; and
  - “Principle business office” of the city.
- Notice must be given at least 14 days before the bid closes.
- AG’s Model Rules set out the contents of the notice.

OAR 137-047-0300

# Step 3 – Manage the Solicitation

## Permissible actions between notice and closing

- Pre-submittal conference
- Withdrawal of bids
  - Permitted only if the bidder acted in good faith and without gross negligence
- Waiver or allow correction of mistakes in bids
  - Errors in judgment cannot be corrected
  - Minor informalities and clerical errors can be corrected or waived
  - Code requires decisions regarding mistakes be made in writing
- Modifications of the ITB via addenda
- Withdrawal of the ITB – cancelling the contract

# Steps 4 & 5 – Receipt & Evaluation of Bids

- Bid Evaluation

- State law requires the city to review all bids received prior to closing
- Cannot consider any bids received after closing date
- Contract must be awarded to the lowest “responsible” bidder who’s bid “substantially complies” with the requirements and criteria of the ITB.

- Bid Rejection

- May reject any bid not in compliance with all prescribed public bidding procedures and requirements
- May reject all bids if it is in the public interest to do so

# Steps 6 & 7 – Notice of Intent to Award, Post Award & Execute Contract

- Notice of Intent to Award
  - Given to all bidders at least 7 days prior to contract award.
  - Contract award is not final until 7 days protest period has expired.
  - Bids subject to disclosure after Notice of Intent to Award issued.
    - Except for confidential and trade secret information.
- Contract Award
  - Code requires the city to award contract to lowest “responsible” bidder whose bid “substantially complies.”
  - Applicable preferences may be applied.

Negotiations are not generally permitted,  
but clarification may be sought.

# Request for Proposal

**RFP**

# Step 1 – Develop the RFP Document

- Must Include

- Description of the procurement;
  - Scope of work, anticipated duties
  - Expectations for performance
- All requirements on which the award will be based; and
- All applicable contractual terms and conditions.

- May Include

- Proposal security “if reasonably necessary or prudent to protect the interests of the contracting agency.”

Detailed Checklists in  
ORS 279B.060 and  
OAR 137-047-0260.

# Step 2 – Notice

- You must give notice of the RFP
  - On website or in your local newspaper;
  - To contractors who have expressed an interest; and
  - “Principle business office” of the city.
- Notice must be given at least 30 days before the bid closes.
- AG’s Model Rules set out the contents of the notice.

OAR 137-047-0300



# Step 3 – Manage the Solicitation

## Permissible actions between notice and closing

- Pre- and post-submittal conferences, site tours, meetings, etc.
- Withdrawal of proposals
  - Permitted only if the bidder acted in good faith and without gross negligence
- Modification of proposals
  - Permitted after closing to get best and final offers
- Modification of RFP – addenda before and after closing
- Withdrawal of RFP – cancelling contract award.

# Steps 4 & 5 – Evaluations & Negotiations

- Proposal Evaluation

- Code does not require the city to evaluate all proposals received before the closing date because competition following closing may eliminate some proposals
- May permit proposal modification before award to obtain best offers
- May modify criteria for any tier of competition before starting the tier

- Negotiations are Permitted if Specified in RFP

- Proposals may be revised after opening and before award “for the purpose of obtaining best offers or best and final offers[.]”
- The city may issue addenda to the RFP “that modifies the criteria, rating process and procedure for any tier of competition before the start of the tier to which the addendum applies.”

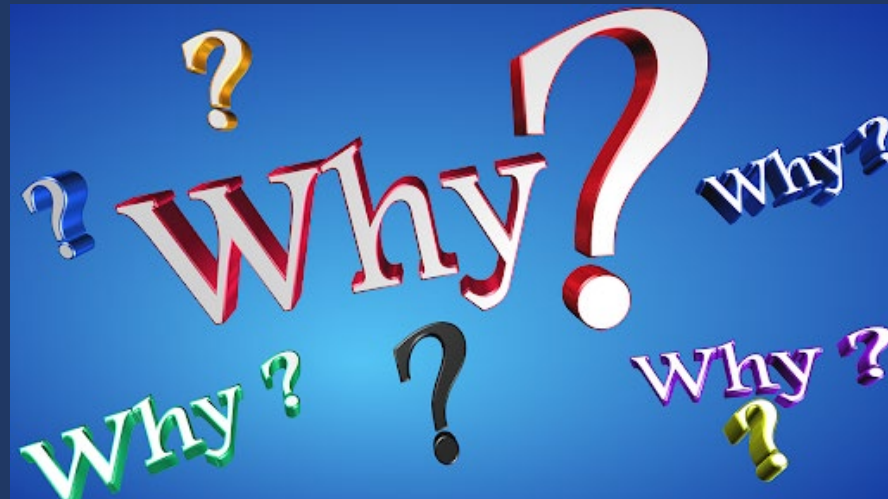
# Steps 6 & 7 – Notice of Intent to Award & Contract Execution

- Notice of Intent to Award
  - Must be given to all proposers at least 7 days prior to contract award
  - Contract award is not final until protest period specified in notice of intent to award has expired
  - Proposals subject to public record disclosure after notice of intent to award is issued
    - Except confidential and trade secret information
- Contract Execution
  - The city awards contract to the “responsible” proposer whose proposal “is most advantageous”
  - Any applicable preferences must be applied

# Document, Document, Document !

Throughout the **ENTIRE** process, remember:

1. To document **WHAT** decisions were made; and
1. To document **WHY** the decisions were made.



# Procurement of Public Improvements



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# Public Improvements - Overview

- Commonly known as construction contracts
- Generally requires formal and competitive bidding
  - Contracts with value of \$5,000 or less don't have to use ITB
  - Contracts with value of \$1000,000 or less can seek competitive quotes
    - Evaluation based on price alone, or on price and other factors such as contractor experience
    - Award to “prospective contractor whose quote will best serve the interest of the city”
- Least cost policies
- Governed by ORS 279C and OAR Division 49

# What is a Public Improvement?

- What is a Public Improvement
  - Contracts for the “construction, reconstruction or major renovation on real property by or for a city.”
- What is NOT a Public Improvement
  - No funds of the city are directly or indirectly used, except for participation incidental or related primarily to project design and installation; or
  - The work is emergency work; or
  - The work is minor alteration, or ordinary repair or maintenance necessary to preserve the public improvement (unless the contract is to resurface with 2” or more of asphalt at a cost of more than \$125,000)

# Specific Advertising Requirements

- Required by ORS 279C.360
- Publish at least in the local newspaper in the area where the contract is to be performed not less than 5 days before the bids are opened
- If the contract will be  $\geq$  \$125,000, the advertisement must also be published in at least one trade newspaper of statewide circulation
- Electronic publication is permitted, but only if your local rules allow





# Specific Bid Security Requirements

- Required by ORS 279C.365
- The city must require bid security for construction contracts with an estimated value of more than \$100,000 or in the case of contracts for highways, bridges, and other transportation projects of more than \$50,000
  - Cannot exceed 10% or be less than 5% of bid or proposal
  - Required form of security: surety bond; irrevocable letter of credit; or cashier's/certified check



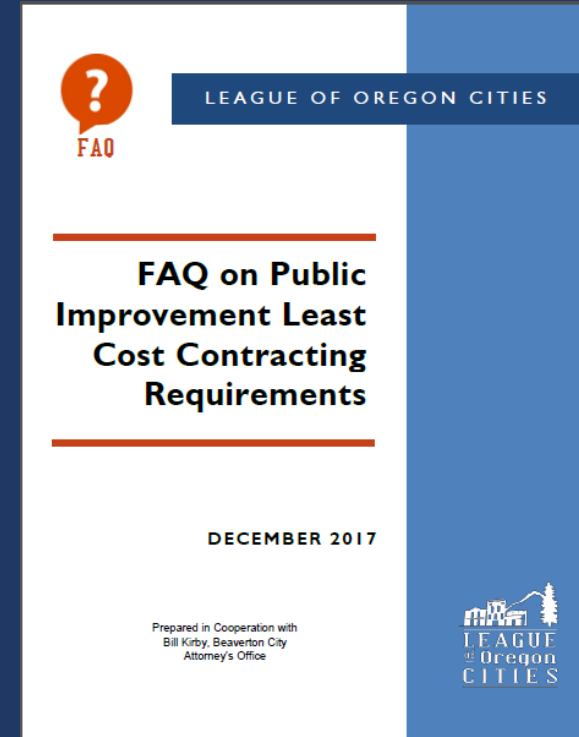
# Specific Cancellation Requirements

- Required by ORS 279C.395
- Cancellation permitted if it is in the public interest
- Prior to Closing
  - Notice Required
- After Closing, Prior to Opening
  - Offers returned
  - No notice required
- After Closing, After Opening
  - Offers retained
  - No notice required



# Least Cost Policy

- Requires cities to file with BOLI 30 days prior to adopting a budget
  - List **EVERY** public improvement for the budget period
  - By name and estimated total on-site construction costs
  - Identify projects the contracting agency will perform in-house
- Cities are allowed to use own personnel and equipment but there are restriction
- Required to conduct a least cost analysis 180 days prior to starting construction



# Least Cost Policy Continued

Least cost analysis not required if:

- The estimate cost of a paving project (resurfacing  $\geq 2''$ ) is less than \$125,000
- The estimated value of construction for all other projects is \$200,000 or less
- Public improvement is for distributing or transmitting electric power
- Public improvement is for placing maintenance patching, chip seals or other seals as maintenance
- City did not receive responsible bid or proposal for constructing the public improvement provided the solicitation occurred within one year before the day which construction began and allowed a commercially reasonable time to perform the construction

# Public Works Contract



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# Public Works Contract

- A type of construction contract valued at over \$50,000 to which prevailing wages will apply
  - Sometimes 279B contracts are also applicable – if the contract is for the maintenance, repair, or emergency work on a public improvement
  - \$50,000 threshold applies to the original contract **PLUS** any change orders or amendments
- Does not include
  - The reconstruction or renovation of privately owned property that is leased by the city; or
  - The renovation of a publicly owned real property that is more than 75 years old by a private nonprofit entity if:
    - The real property is leased to the private nonprofit entity for more than 25 years;
    - Funds of the city used in the renovation do not exceed 15% of the total cost of renovation; and
    - Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation was not completed on or before July 13, 2007

# Prevailing Wage Rates

- Minimum hourly rates a contractor must pay its employees
- The city must provide information regarding the payment of prevailing wages in contract specifications
- The applicable prevailing wage rates are those that are in effect at the time the solicitation for the contract was first advertised

# BOLI Notice of Award & Fee

- The city is required to notify BOLI when it has awarded a public works contract
- Notice must be submitted on the appropriate BOLI form no later than 30 days after the date of the award
- A fee of 0.1% of the contract price must be submitted (the fee cannot exceed \$7,5000 or be less than \$250) with the notice



# Additional Resources

- Oregon Department of Administrative Services Procurement Manual
  - <http://www.Oregon.gov/das/OPM/Pages/sitemap.aspx>
  - <http://www.Oregon.gov/das/Procurement/Pages/library.aspx>
  - Remember: Designed for state agencies so it may be more restrictive than your local procurement policies
- Oregon Attorney General Public Contracts Manual
  - [doj.state.or.us/wp-content/uploads/2019/02/publications\\_orderform.pdf](http://doj.state.or.us/wp-content/uploads/2019/02/publications_orderform.pdf)

# League of Oregon Cities

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