

# **ORS 279B**

## **ACQUISITION OF GOODS AND SERVICES**

### **I. Overview**

ORS Chapter 279A, 279B and 279C are cited as the “Public Contracting Code.” ORS 279A.005.

A. Effective Date: March 1, 2005

B. Application: Applies to public contracts first advertised, but if not advertised then entered into, on or after March 1, 2005.

1. ORS 279B is subject to ORS 279A, but not 279C. ORS 279B.015
2. ORS 279A.010 (1) contains definitions applicable to ORS 279B.
3. ORS 279C.320 provides that contracts for minor alteration, ordinary repair or maintenance of public improvements, as well as any other construction contract not defined as a public improvement shall be governed by ORS 279B.
4. ORS 279A.025(2) sets forth transactions NOT covered by the Public Contracting Code. Examples include:  
  
“Sole source expenditures when rates are set by law or ordinance for purposes of source selection.” (2)(f).

C. Authority

1. Local Contract Review Boards: governing body is LCRB if no action taken. ORS 279A.060
2. Local contracting agencies may adopt rules of procedure. ORS 279A.065(5)(a). Rules must state that the Attorney General Model rules do NOT apply. EACH TIME the AG modifies the model rules a local contracting agency “shall review” the model rules to determine whether the local agency should modify its own rules “to ensure compliance with statutory changes.” ORS 279A.065(b)
3. Authority under the Code may be delegated and subdelegated in whole or part. ORS 279.075

D. Definitions

1. Goods and Services: ORS 279B.005(1)(c)(b) provides:

“Goods and services “ or “goods or services” means supplies, equipment, materials and services other than personal services designated under ors 279A.055 and any personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, that a contract agency is authorized by law to procure. “Goods and services” or “good or services” includes combinations of any of the items identified in this paragraph.

2. Local contracting agency: ORS 289A.010(1)(n)

“Local contracting agency” means a local government or special government body authorized by law to conduct procurement. “Local contracting agency: includes any person authorized by a local contracting agency to conduct procurement on behalf of the local contracting agency.

3. Public contract: ORS 29A.010(1)(x)

“Public contract” means a sale or other disposal, or a purchase, rental or other acquisition by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. “Public contract” does not include grants.

**II. Source Selection**

Methods of acquiring goods and services include the following:

- A. Competitive Sealed Bidding: ORS 279.055

- B. Competitive Sealed proposals: ORS 279.060

1. The RFP may state that the contract will be awarded by:

- a. Negotiation with highest ranked proposer
- b. Competitive negotiations
- c. Multiple-tiered competition designed to identify a class of proposers that fall within a competitive range; or
- d. Otherwise eliminate from consideration a class of lower ranked proposers or any combination of methods as authorized by rules. ORS 279B.060(2)(h)(D)

- i. Discussions leading to best and final offers. ORS 279B.060(6)(b)(B)
    - ii. Serial negotiations. Id., 6(b)(D)
    - iii. competitive simultaneous negotiations. Id., 6(b)(E)
  - 2. Proposals are not subject to the Public Records Act during the process of negotiation or until the Notice of Intent to Award is issued. ORS 279B.060(5)(a). Even after, portions of proposals that are exempt or conditionally exempt may be withheld. Id., 5(b)

C. Small Procurements: ORS 279.065  
\$5,000 or Less

D. Intermediate Procurements: ORS 279B.070  
>\$5,000 to \$150,000

3 competitive price quotations or competitive proposals; Fewer may suffice if a written records is made of the effort

E. Sole Source Procurements: ORS 279B.075

F. Emergency Procurements: ORS 279B.080

An emergency means circumstances that A) Could no have been reasonably foreseen, B) create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety and C) require prompt execution of a contract to remedy the condition. ORS 279A.010(1)(f)

G. Special Procurements ORS 279B.085

- 1. Class of contracts or individual contracts
- 2. Contracting procedures different than as otherwise set forth in the Code
- 3. Requires request to the LCRB for approval
- 4. Use of special procurement must be unlikely to encourage favoritism in the awarding of public contractors or to substantially diminish competition for public contracts; and

5. Use of special procurement must result in substantial cost savings to the agency OR to the public OR otherwise substantially promote the public interest in a manner that could not be practicably be realized by complying with other contracting procedures or rules adopted pursuant to the Code. (e.g., 217 interchange)

*Practice Note: An ordinance or other LCRB approval adopting a class special procurement or contract specific special procurement should set forth specific factual findings that show that the requirements of ORS 279B.085 have been met in regard to “favoritism”, “diminishing competition,” “substantial cost savings” and/or “promoting the public interest.”*

This is important because in the event of a challenge to the special procurement, the court will review it pursuant to a writ of review proceeding pursuant to ORS Chapter 34. Such a review is “on the record” and additional evidence to support the special procurement will not be allowed. Second, the court gives “due deference” to factual findings made by the LCRB and “may not substitute its judgment for that of the contracting agency \* \* \* .” ORS 279B.400(6)

6. Public notice required by publishing at least once in a least one newspaper of general circulation in the area where the contract is to be performed; ORS 279B.055(4)(b)
7. Examples: See Appendix B.

### **III. Notice of Intent to Award ORS 279B.135**

- A. Time: 7 days before the award, unless the contracting agency determines “that seven days is impractical under rules adopted under ORS 279.065”
- B. Not applicable to small procurements, intermediate procurements, sole-source procurements, emergency procurements or special procurements.
- C. The notice and manner of posting or issuance must conform to rules adopted by the agency.

### **IV. Specifications**

- A. Brand names or equals ORS 279B.215
- B. Mandatory contractual conditions
  1. Prompt payment, contributions to IAF, liens and Dept of Revenue. ORS 279B.220

2. Yard waste material for law and landscape maintenance contracts. ORS 279B.225
  3. Payment for medical care and workers' compensation. ORS 279B.230
  4. Hours of labor. ORS 279B.235
- C. Exclusion of recycled oils prohibited. ORS 249.240.

## **V. Legal Remedies**

- A. Protests/Judicial review of special procurements: 279B.400
1. Exhaustion of administrative remedies required
  2. Protests to be filed in accordance with rules
  3. Approval of a special procurement by writ of review ORS Chapter 34, but normal 60 day time period is shortened to 10 days.
  4. Venue in county where principal offices of the local agency are located, Priority to be given on docket.
  5. Request for judicial review prohibits contract execution UNLESS the contracting agency determines in writing there is a "compelling governmental interest in proceeding" OR "that the goods or services are urgently needed."
  6. If agency makes a written determination it must provide that "immediately" to the person who filed the challenge.
  7. Person who filed challenge may seek to stay contract execution.
  8. Court may stay proceeding if its finds the written determination was not supported by "substantial evidence" or constituted a "manifest abuse of discretion."
  9. Court may require bond
  10. Prospective contractor to be joined in litigation
  11. Court to give "due deference" to any factual contracting decision made and may not substitute its judgment.
  12. Remand if violation could have affected the award of the contract and then agency may determine whether to proceed with the procurement process in light of court's decision.

13. Reimbursement to contractor if contract had been executed before court's decision calculated similarly to that in ORS 279C.470.
  14. Costs and attorney fees available but not mandatory.
- B. Protests of solicitation documents. 279B.405
1. Protest based on grounds that solicitation document is “unnecessarily restrictive” “legally flawed” or improperly specifies a brand name. “legally flawed” means that the solicitation document contains terms and conditions contrary to law while “unnecessarily restrictive” means that it “limits competition arbitration without reasonably promoting the fulfillment of the procurement needs” of the contract agency.
  2. Solicitation documents cannot be challenged for a contract specific special procurement unless approval of the special procurement has been invalidated.
  3. Protests according to rules adopted
  4. Protests must contain certain specified information
  5. Agency to issue a decision in writing to the protest or notify that the protest was untimely, or failed to give required information
  6. Decision required no less than 3 business days before bids or proposals or offers are due
  7. Judicial review by writ of review
  8. Review conditions and possibility of contract execution notwithstanding protest similar to those for special procurements
- C. Protests of contract award: 279B.410
1. Bidder/proposer adversely affected because they would be eligible to be awarded the contract if protest successful; and
  2. Reason for the protest is:
    - a. all lower bids or higher ranked proposals are nonresponsive
    - b. Failure in evaluation process
    - c. Abuse of discretion in rejecting protestor's bid or proposal as nonresponsive
    - d. Award otherwise violates Chapters 279B or 279A.

3. Rules shall establish reasonable time and manner for protests. Late protests “may not” be considered.
  4. Judicial review pursuant to ORS 29B.415
- D. Judicial review of protests of contract award ORS 279B.415
1. Venue: where principal offices of local contracting agency located
  2. Join as parties all bidders that would be in line for an award of the contract ahead of the complainant
  3. Bond may be required to be posted
  4. Execution of contract to the same extent as special procurements
  5. Court to review “only those grounds the complainant raised in the protest to the contracting agency.”
  6. Court review on the basis of “substantial evidence,” i.e., if the record viewed as a whole, would permit a reasonable person to make that finding.” Standards from APA review imported
  7. Court may remand to agency and give “ancillary” relief such as bid preparation costs but such relief does not include an award of the contract or an award of lost profits or other damages. ORS 279B.415(7)(a).
  8. Limited reimbursement to contractor if contract executed
  9. Costs and attorney fees may be awarded
- E. Judicial review of “other violations” ORS 279B.420.
- F. Review of Debarment and prequalification decisions: ORS 279B.425

## APPENDIX A

### DRAFT RULES: LEGAL REMEDIES<sup>1</sup>

#### VI. PCC 5.33.XXX Protests and Judicial Review of Special Procurements

- A. Protest prior to approval: An Affected Person must protest the Purchasing Agent's request for approval of a Special Procurement, or a class Special Procurement before approval by the City Council.
- B. Method of Protest
  - 1. Time: A written protest of the Purchasing Agent's request shall be provided to the Purchasing Agent seven (7) days after the Notice of the Request for Approval of the Special Procurement is advertised unless a different time period is provided in the Notice. The Purchasing Agent shall not consider a protest submitted after the timeline established for submitting such protest under this rule or such different time period as may be provided in the Public Notice of the request for approval of a proposed Special Procurement.
  - 2. Contents: The written protest must include:
    - a. Sufficient information to identify the Request that is the subject of the protest;
    - b. A detailed statement of all the legal and factual grounds for the protest;
    - c. Evidence or supporting documentation that supports the grounds on which the protest is based;
    - d. A description of the resulting harm to the Affected Person; and
    - e. The relief requested.
- C. City Response. After receipt of the protest, the Purchasing Agent may do any or all of the following:
  - 1. Agree with the Protest and withdraw the Request;
  - 2. Agree with the Protest, in whole or in part, and submit a revised Request to the City Council as part of the same Special Procurement process;

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<sup>1</sup> These draft rules are still under revision by the City of Portland's Bureau of Purchases and City Attorney's office. They have not yet been presented to City Council and do not represent official policy of the City of Portland.

3. Issue a written response to the protest and provide that response to the Affected Person;
4. Refer the protest to the Contract Board of Appeals for decision, as provided in PCC 5.33.XXX;
5. Refer the protest, together with any written response by the Purchasing Agent; to the City Council for decision;
6. Any other action that is in the best interest of the City that gives full consideration to the merits of the protest and notice to the protestor of the action taken;

D. Judicial Review.

1. An affected person may not seek judicial review of the City Council's approval of a Special procurement or Class Special Procurement unless it has complied with the Protest requirements of this section and exhausted its administrative remedies.
2. Judicial review is not available if the Request is denied by the City Council, Contract Board of Appeals or is withdrawn by the Purchasing Agent.

**VII. PCC 5.33.XXX Protests and Judicial Review of Sole-Source Procurements**

- A. An Affected Person may protest the determination that the Goods or Services or class of Goods or Services are available from only one source.
- B. Method of Protest
  1. Time: A written protest of the Purchasing Agent's request shall be provided to the Purchasing Agent within seven (7) whenever the City posts a notice that it will make a sole source purchase. The Purchasing Agent shall not consider a protest submitted after the timeline established for submitting such protest under this rule or such different time period as may be provided in the Public Notice of the request for approval of a proposed Special Procurement.
  2. Contents:
    - a. Sufficient information to identify the Request that is the subject of the protest;
    - b. A detailed statement of all the legal and factual grounds for the protest;

- c. Evidence or supporting documentation that supports the grounds on which the protest is based;
  - d. A description of the resulting harm to the Affected Person; and
  - e. The relief requested
- C. City Response. After receipt of the protest, the Purchasing Agent may do any or all of the following:
  - 1. Agree with the Protest and withdraw the Notice of intent to make a sole source purchase;
  - 2. Agree with the Protest ,in whole or in part ,and submit a revised Intent to make a sole source purchase;
  - 3. Issue a written response to the protest and provide that determination to the Affected Person;
  - 4. Refer the protest to the Contract Board of Appeals. If so referred the Affected Person is required to participate in that process or its protest will be considered abandoned and all rights to judicial review will be lost;
  - 5. Refer the protest to the City Council for consideration along with the Purchasing Agent’s Request; or
  - 6. Any other action that is in the best interest of the City while giving full consideration to the merits of the protest.
- D. Judicial Review. An affected person may not seek judicial review of the City Council’s approval of a Sole Source procurement unless it has complied with the Protest requirements of this section. Judicial review is not available if the City elects not to make a sole source procurement.

**VIII. PCC 5.33.XXX Protests and Judicial Review of Multi-Tiered Solicitations**

- A. Interested offerors may file a written protest of the specifications, Contract terms and conditions, pursuant to PCC 5.33.XXX. [protest of solicitation documents.]
- B. Offerors may protest in one of two ways:
  - 1. If no other protest remedies are provided in the Solicitation Document, aggrieved offerors can file a written protest to the award within seven (7) calendar days after the issuance of the Notice of Intent to Award if the meet the requirements of Section C below, pursuant to PCC 5.33.XXX [protests of contract award]; or

2. If expressly required or permitted by the Solicitation Document, aggrieved offerors can file a written protest after being excluded from the Competitive Range or after being excluded from any subsequent stages of procurement.
- C. Basis of Protest. An aggrieved Offeror may protest its exclusion from the competitive range or from subsequent stages of a procurement only if:
1. The Offeror is Responsible and submitted a Responsive Offer;
  2. The City made a mistake that, if corrected, would have made the protesting Offeror eligible to participate in the next stage of the procurement.
- D. If the Solicitation document permits or requires protests prior to the City's issuance of a Notice of Intent to Award, an affected Offeror must submit a written protest specifying its basis within seven (7) days after the offeror was excluded from participating further in the procurement.
- E. After receipt of protest objecting to the exclusion of an Offeror from further participation in the procurement, the Purchasing Agent may do any or all of the following:
1. Agree with the Protest, in whole or in part, and permit the Offeror to participate in the next stage of the procurement;
  2. Issue a written response to the protest and provide that determination to the Affected Person;
  3. Refer the protest to the Contract Board of Appeals. If so referred the Affected Person is required to participate in that process or its protest will be considered abandoned and all rights to judicial review will be lost;
  4. Refer the protest to the City Council for consideration along with the Purchasing Agent's Request; or
  5. Take any other action that is in the best interest of the City while giving full consideration to the merits of the protest.
- F. Judicial Review. An affected person may not seek judicial review of the City's decision to reject an offeror from a preliminary stage of a multi-tiered solicitation unless it has complied with the Protest requirements of this section. Judicial review is not available if the City elects not to make a procurement.

**IX. PCC 5.33.XXX Protests and Judicial Review of Solicitation Documents and the Procurement Process**

- A. A prospective Offeror may protest the procurement process or the Solicitation Document for offers solicited pursuant to competitive sealed bidding, competitive sealed proposals, a special procurement, or a class special procurement. Prior to submitting a protest, a prospective Offeror may seek clarification of any provision of the Solicitation Document. The City's clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on the City unless the City amends the Solicitation Document by Addendum
- B. Method of Protest
1. Time: A written protest of the Purchasing Agent's request shall be provided to the Purchasing Agent seven (7) after the City posts a notice that it will make a sole source purchase. The Purchasing Agent shall not consider a protest submitted after the timeline established for submitting such protest under this rule or such different time period as may be provided in the Public Notice of the request for approval of a proposed Special Procurement.
  2. Contents: The protest must include the following information:
    - a. Sufficient information to identify the Request that is the subject of the protest;
    - b. A detailed statement of all the legal and factual grounds for the protest;
    - c. Evidence or supporting documentation that supports the grounds on which the protest is based;
    - d. A description of the resulting harm to the Affected Person; and
    - e. The relief requested.
- C. Required City Response.
1. The City shall inform the offeror in writing if the protest was not timely filed;
  2. The City shall inform the offeror if it failed to meet the requirements of Section B( 2) and the reasons for that failure;
  3. If the protest was timely filed and provides the information required by Section B(2) above, the Purchasing Agent City shall issue a decision in writing and provide that decision to the protestor no less than three (3)

business days before offers are due, unless a written determination is made by the City that circumstances exist that require a shorter time limit.

4. The Purchasing Agent's response shall inform the protestor that it may seek a writ of review provided it seeks the writ before the opening of bids, proposals or offers.
5. If the City receives protest from a prospective Offeror in accordance with this rule, the City may extend Closing if the City determines an extension is necessary to consider the protest and to issue an Addendum to the Solicitation Document.

D. **Optional City Response:** In addition to the requirements of Section C above, the Purchasing Agent may take any or all of the following:

1. Agree with the Protest and make any necessary corrections to the solicitation document or procurement process;
2. Issue a written response to the protest and provide that decision to the Affected Person;
3. Refer the protest any response to the Contract Board of Appeals. If so referred the Affected Person is required to participate in that process or its protest will be considered abandoned and all rights to judicial review will be lost;
4. Refer the protest and any response to the City Council for decision; or
5. Any other action that is in the best interest of the City while giving full consideration to the merits of the protest.

E. **Judicial Review.** An affected person may not seek judicial review of the City's solicitation document or procurement process unless it has complied with the Protest requirements of this section.

**X. PCC 5.33.XXX Protests and Judicial Review of Contract Award**

A. An Offeror may protest the award of a Contract, or the intent to award of a Contract, whichever occurs first, if:

1. The bidder or proposer is adversely affected because the bidder or proposer would be eligible to be awarded the public contract in the event that the protest were successful; and
2. The reason for the protest is that:
  - a. All lower bids or higher ranked proposals are nonresponsive;

- b. The City failed to conduct the evaluation of proposals in accordance with the criteria or processes described in the solicitation document;
- c. The City abused its discretion in rejecting the protestor's bid or proposal as nonresponsive; or
- d. The City's evaluation of bids or proposals or the City's subsequent determination of award is otherwise in violation of these rules, ORS Chapter 279B or ORS Chapter 279A.

B. Method of Protest.

- 1. Time: A written protest of the Purchasing Agent's request shall be provided to the Purchasing Agent within seven (7) days after the City posts a notice that it will make a contract award. The Purchasing Agent shall not consider a protest submitted after the timeline established for submitting such protest under this rule or such different time period as may be provided in the Public Notice of the request for approval of a proposed Special Procurement.
- 2. Contents: The protest must include the following information:
  - a. Sufficient information to identify the Request that is the subject of the protest;
  - b. A detailed statement of all the legal and factual grounds for the protest as described in Section A(2)(a)-(d) above;
  - c. Evidence or supporting documentation that supports the grounds on which the protest is based;
  - d. A description of the resulting harm to the Affected Person; and
  - e. The relief requested

C. Required City Response. The City shall take the following actions, as appropriate:

- 1. The City shall inform the offeror in writing if the protest was not timely filed;
- 2. The City shall inform the offeror if it failed to meet the requirements of Section B( 2) and the reasons for that failure;

3. If the protest was timely filed and provides the information required by Section B(2) above, the City shall issue a decision in writing and provide that decision to the protestor within seven (7) business days unless a written determination is made by the City that circumstances exist that require a shorter time limit.
  4. If the City denies the protest, it shall inform the protestor that it has the right to seek review of the decision by the Contract Board of Appeals, or City Council, as the Purchasing Agent may determine.
- D. **Optional City Response:** In addition to the requirements of Section C above, the City may take any or all of the following:
1. Agree with the Protest and issue a revised Notice of Intent to Award or take any other corrective action that may be necessary to ensure that the contract is awarded to the appropriate Offeror;
  2. Issue a written response to the protest and provide that decision to the Affected Person;
  3. Refer the protest and any response to the Contract Board of Appeals for decision. If so referred the Affected Person is required to participate in that process or its protest will be considered abandoned and all rights to judicial review will be lost;
  4. Refer the protest and any response to the City Council for decision; or
  5. Take any other action that is in the best interest of the City while giving full consideration to the merits of the protest.
- E. **Judicial Review.** An affected person may not seek judicial review of the City's decision to award a contract unless it has complied with the Protest requirements of this section. Judicial review is not available if the City elects not to make a sole source procurement

**XI. PCC 5.33.XXX Protests of Other Violations**

- A. Any violation of Chapter 279A or 279B, except ORS 279B.270, 279B.275, ORS 279B.280 and 279B.400 to 279B.425, by the City, for which no administrative remedy is otherwise provided by this Code is subject to this rule.
- B. A protest may be made under this section only if a public contract is about to be awarded or has been awarded and:
  1. An alleged violation of 279A or 279B, except ORS 279B.270, 279B.275, ORS 279B.280 and 279B.400 to 279B.425, has occurred in the procurement process and violation has resulted or will result in the unlawful award of a contract or the unlawful failure to award the contract;

2. The alleged violation deprived the person protesting of the award of the contract or the opportunity to compete for the award of the contract;
3. The protestor would have been a responsible bidder, proposer or offeror qualified to receive the award of the contract;
4. The protestor gave written notice to the City describing the alleged violation no later than 10 days after the date on which the alleged violation occurred and in no event more than 10 days after the date of the execution of the contract;
5. If the alleged violation is of ORS 279A, then it is one for which no judicial review is provided by another section of ORS Chapter 279A or 279B. If the alleged violation is of 279B, except ORS 279B.270, ORS 279B.275, 279B.280 and 279B.400 to 279B.425, then it is one for which no judicial review is provided by another section of ORS Chapter 279B.

C. Method of Protest.

1. Time: A written protest of the Purchasing Agent's request shall be provided to the Purchasing Agent seven (7) days after the date on which the alleged violation occurred and in no event no later than seven (7) days after the date of the execution of the contract. The Purchasing Agent shall not consider a protest submitted after the timeline established for submitting such protest under this rule and shall not consider a protest under this section if a right to protest is elsewhere provided by this Code..
2. Contents: The protest must include the following information:
  - a. Sufficient information to identify the procurement that is the subject of the protest;
  - b. A detailed statement of the alleged violation and all the legal and factual grounds for the protest;
  - c. Evidence or supporting documentation that supports the grounds on which the protest is based;
  - d. A description of the resulting harm to the Affected Person; and
  - e. The relief requested.

D. Required City Response. The City shall take the following actions, as appropriate:

1. The City shall inform the offeror in writing if the protest was not timely filed;

2. The City shall inform the offeror if it failed to meet the requirements of Section B( 2) and the reasons for that failure;
  3. If the protest was timely filed and provides the information required by Section B(2) above, the City shall issue a decision in writing and provide that decision to the protestor within seven (7) business days unless a written determination is made by the City that circumstances exist that require a shorter time limit;
  4. If the City denies the protest, it shall inform the protestor that it has the right to seek review of the decision by the Contract Board of Appeals, or City Council, as the Purchasing Agent may determine.
- E. Optional City Response: In addition to the requirements of Section C above, the City may take any or all of the following:
1. Agree with the Protest and take any corrective action necessary;
  2. Issue a written response to the protest and provide that decision to the Affected Person;
  3. Refer the protest and any response to the Contract Board of Appeals for decision. If so referred the Affected Person is required to participate in that process or its protest will be considered abandoned and all rights to judicial review will be lost;
  4. Refer the protest and any response to the City Council for decision; or
  5. Take any other action that is in the best interest of the City while giving full consideration to the merits of the protest.
- F. Judicial Review. An affected person may not seek judicial review of an alleged violation for which no administrative remedy is otherwise provided unless it has complied with the Protest requirements of this section.

**XII. PCC 5.33.XXX Review of Prequalification and Debarment Decisions**

- A. The denial, revocation or revision of a prequalification decision or a decision to debar a prospective offer must submit written appeal to the City within three business days after receipt of the City’s notice.
- B. The City Council delegates its authority to the Purchasing Agent for the purposes of receiving notice of any city contracting agency that a person has appealed. Upon receipt the notice the Purchasing Agent shall notify the person appealing of a time and place of a hearing designed to consider the appeal within 30 days.

- C. The City Council delegates its authority to conduct a hearing to the Purchasing Agent. The Purchasing Agent may sub-delegate the authority to conduct a hearing to any person the Purchasing Agent deems appropriate.

## APPENDIX B: DRAFT RULES RE SPECIAL PROCUREMENTS<sup>2</sup>

### XIII. PCC. 5.33.XXX Special Procurements

- A. The City may award a Public Contract as a Special Procurement pursuant to the requirements of ORS 279B.085, which permits class special procurements. Such procurements allow the City to enter into a series of contracts over time without using competitive sealed bidding or competitive sealed proposals.
- B. The City Council declares the following as classes of special procurements for which contracts may be awarded:<sup>3</sup>
  - 1. **Manufacturer Direct Supplies:** The City may purchase goods directly from a manufacturer without competitive bidding if a large volume purchase is required and the cost from the manufacturer is the same or less than the cost the manufacturer charges to its distributor(s). Procurements of this type are made on a contract-by-contract basis and are not requirements contracts.
  - 2. **Advertisements:** Except as provided by City Charter Section 8-101, the City may purchase advertising in newspapers and written publications.
  - 3. **Copyrighted Materials:** The City may purchase copyrighted materials where there is only one known supplier available for such goods. This includes, but is not limited to, new books, periodicals, curriculum materials, reference materials, audio and visual media, and non-mass marketed software from a particular publisher or its designated distributor.
  - 4. **Financial Products???** The City may purchase financial products such as bond insurance, surety bonds for City bond reserves and liquidity facilities such as letters of lines of credit.

*Practice note: ORS 279A.025(2)(q) provides that agreements entered into “in connection with” the following agreements are not covered by the Code:*

- a. “The incurring of debt by a public body, including but not limited to the issuance of bonds, certificates of participation other debt repayment obligations, and any associated contracts \* \* \*.”

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<sup>2</sup> These draft rules are still under revision by the City of Portland’s Bureau of Purchases and City Attorney’s office. They have not yet been presented to City Council and do not represent official policy of the City of Portland.

<sup>3</sup> At this time, these classes are placeholders. In order to have a valid class, LCRB’s must make the requisite findings to have special procurements and may have to adopt competitive procedures in order to make those findings.

- b. “The making of program loans and similar extensions or advances of funds, aid or assistance by a public body to a public or private body for the purpose of carrying out, promoting or sustaining activities or programs authorized by law; or
- c. “The investment of funds by a public body as authorized by law, and other financial transactions of a public body that by their character cannot practically be established under the competitive contractor selection procedures of 279B.050 [methods of source selection] or ORS 279B.085 [special procurements] .”

Question: Is a special procurement for financial products necessary?

- 5. Insurance Contracts:<sup>4</sup> Except for Employee Benefit Insurance as provided in PCC 5.33.xxx, contracts for insurance shall be let by one of the following alternative procedures:
  - a. Insurance Consultant: The City may solicit proposals from insurance agents to perform insurance services as the City’s insurance consultant in connection with more than one insurance contract. Among the services to be provided is the securing of competitive proposals from insurance carriers for all coverages for which the insurance consultant is given responsibility:
    - i. As part of the RFP process for selection of an insurance consultant, the City shall make reasonable efforts to inform known insurance agents in the competitive market area that it is considering such selection. These efforts shall include a public advertisement in at least one newspaper of general circulation in the Portland area and in at least one insurance trade publication of general circulation in the state. The advertisement shall generally describe the nature of the insurance that the City will require.
    - ii. Any contract period shall not exceed five years. An insurance consultant may serve more than one contract period. An insurance consultant of record shall qualify for a contract prior to each period as if each contract period were the first.
    - iii. In selecting an insurance consultant, the City shall select the consultant or consultants most likely to perform the most effective services.

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<sup>4</sup> ORS 279A.025(2)(b) provides that the Code is not applicable to insurance and service contracts as provided under ORS 414.115 through 414.145. As I read these statutes, they apply only to insurance obtained by the State Department of Human Resources.

- b. Specific Proposals for Insurance Contracts: As an alternative to the process provided in PCC 5.33.xxx [above], the City may solicit proposals from insurance agents for the purpose of acquiring specific insurance contracts subject to the following conditions:
  - i. The City shall make reasonable efforts to inform known insurance agents in the competitive market area of the subject matter of the contract, and to solicit proposals for providing the services required in connection with the contract. These efforts shall include public advertisements in at least one newspaper of general circulation in the Portland area and at least one insurance trade publication of general circulation in the state. The advertisement shall state the specific nature of the insurance acquired.
  - ii. The City shall select an insurance agent on the basis of the most advantageous offer considering coverage, premium cost, and service to be provided.
- 6. Employee Benefit contracts
- 7. Purchase of Used Personal Property or Equipment: The City may procure used personal property or equipment. Used property or equipment is property or equipment that has been placed in 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”. Used personal property or equipment generally does not include property or equipment if the City was the previous user, whether under a lease, as part of a demonstration, trial or pilot project or similar arrangement.
- 8. Hazardous Material Removal and Oil Clean-up. The City may acquire services to remove or clean up hazardous material or oil from any vendor when ordered to do so by the Oregon Department of Environmental Quality pursuant to its authority under ORS Chapter 466. In doing so, the following conditions apply:
  - a. To the extent reasonable under the circumstances encourage competition by attempting to obtain informal price quotations or proposals from potential suppliers of goods and services;
  - b. The Bureau responsible for managing or coordinating the clean-up shall submit a written description of the circumstances that require it and a copy of the DEQ order for the cleanup to the Bureau of Purchases together with a requisition authorizing the contract;

- c. The Bureau of Purchases shall record the measures taken to encourage competition, the amount of the price quotations obtained, if any, and the reason for selecting the contractor to whom award is made; and
  - d. The timeline for cleanup does not permit use of intermediate procurement procedures.
9. Amendments to Contracts and Price Agreements. The City may execute contract amendments, as follows:

Contract amendments are conditioned upon:

- a. An original valid contract exists between the parties;
  - b. Unit prices or “add alternates” were provided in the solicitation document that established the cost basis for the additional work or product or in a lump sum contract the contractor has provided an estimate of the additional cost which has been verified by the Bureau seeking the amendment; and
  - c. The solicitation document provided for such amendments; or
  - d. Emergency: The original contract was let pursuant to a declaration of emergency, in accordance with ORS 279.015(4) and PCC 5.33.090 D.1.; or
  - e. Unplanned Environmental Cleanup: The additional work is required by reason of existing regulations or ordinances of federal, state or local agencies, dealing with the prevention of environmental pollution and the preservation of natural resources, that affect performance of the original contract and such regulations or ordinances either were not cited in the original contract, as provided in ORS 279.318, or were enacted or amended after submission of the successful bid or proposal.
- C. Notice. The City shall give Public Notice of (1) its request for approval and (2) of the City’s approval of a Special Procurement in a similar manner as provide for Public Notice of Competitive Sealed Bids under ORS 279B.055(4). The Public Notices shall describe the Goods or Services or class of Goods or Services to be acquired through the Special Procurement. The City shall give such Public Notice of its request for approval of a Special Procurement at least fourteen (14) Days prior to the approval of the Special Procurement by the City Council.
- D. If the City plans to conduct a competitive special procurement, it shall give notice of intent to award to all prequalified offerors who sought the award of a contract in the manner provided for competitive sealed bids.

## APPENDIX C: ORS 279B BY THE NUMBERS

<b>Type of Procurement</b>	<b>Magic Number</b>	<b>Rules</b>	<b>Authority</b>
<b>Permissive Cooperative Agreements</b>	\$250,000 or more	City must publish notice of intent to acquire more than \$250,000 on goods and services under the contract or price agreement through a permissive cooperative agreement.	ORS 279A.215(2)(a).
<b>Small Procurements</b>	\$5,000 or less	May be awarded in any manner, including direct selection, pursuant to rules adopted.	ORS 279B.065.
<b>Intermediate Procurements</b>	\$150,000 or less	1. Verbal quotations: \$50,000 or less; 2. Written quotations: \$50,000 to \$150,000	ORS 279B.070; City Code to distinguish Verbal and written
<b>Sole Source</b>	\$50,000 or more	Public Notice required for sole source purchases greater than \$50,000	ORS 279B.075A.
<b>Emergency</b>	\$150,000 or less	Purchasing Agent may declare, bureau direction in Agent's absence	ORS 279B.080;/City Code regarding authority
	\$500,000 or less	Commissioner in Charge may declare	City Code
	\$500,000 or more	Commissioner in Charge followed by Council authorization	City Code
<b>Facsimile Offers</b>	\$150,000 or Less if authorized		City Code
<b>Sign Contracts</b>	\$500,000 or less	Purchasing Agent may sign	City Code
	\$500,000 or more	Council must authorize	City Code