

PUBLIC CONTRACTING COALITION

CM/GC WHITE PAPER

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PUBLIC CONTRACTING COALITION

CM/GC WHITE PAPER

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PUBLIC CONTRACTING COALITION

CM/GC WHITE PAPER

I. Introduction

The Public Contracting Coalition consists of diverse group of individuals representing Public Agencies, Contractors, Design Professionals, and Construction Managers. A list of the participating organizations is included in this paper as Attachment 1. The Coalition met over a period of several months to discuss: (1) when a Public Agency should be allowed to use negotiation instead of competitive bidding to select a Construction Contractor; and, (2) when appropriate, how should the process be conducted to ensure that it is fair and objective.

Under Based upon certain **findings circumstances**, Oregon law, through an exemption process, allows contracts for Public Improvements to be negotiated rather than competitively bid. One frequently used alternative contracting method is the Construction Manager/General Contractor (CM/GC), where a contract is established between the Public Agency and a private firm with expertise in design and construction methodologies. The purpose of this document is to provide guidelines to public agencies that elect to use this method of contracting. **It should be noted that, while this document provides the recommended guidelines, Oregon statutes currently allow agencies to develop their own procedures which are not inconsistent with ORS Chapter 279.**

The members of this Coalition did not intend to cover each and every aspect of negotiated CM/GC Public Improvement contracts. Instead, the Coalition has addressed the most significant factors that should be considered in the original decision to exempt a particular project from the requirement of competitive bidding, as well as the recommended means of conducting a selection.

A. What is CM/GC

As used within this document, CM/GC stands for the contracting method using a Construction Manager/General Contractor and results in a contract containing a Guaranteed Maximum Price (GMP). A single firm, referred to as a CM/GC, is **generally** selected during the design process by a competitive procurement (generally an RFP or RFQ/RFP, followed in both cases by a “short-list” and an interview), which is primarily qualifications-based. Ideally, the CM/GC works as part of a collaborative team with the Public Agency and Architect during the design process, providing value engineering, constructability review, scheduling, estimating, and other related services.

The following describes the “typical” result of the CM/GC process. Prior to completion of the contract documents, but as early as during the schematic design phase, the CM/GC provides the Public Agency with the GMP to perform the work as a “General Contractor.” The CM/GC also provides the Public Agency with a performance and payment bond for the full value of the GMP.

Compensation for the CM/GC’s services is paid on the basis of a fee, which is generally identified during, and is an element of the selection process. The actual construction work of the project is competitively bid by the CM/GC to various trade subcontractors. The CM/GC usually is required to contract with the responsible subcontractor, submitting the lowest responsive bids. The CM/GC may self-perform the "general conditions" and other minor “pick-up” work. The Public Agency often chooses to allow the CM/GC to bid against other subcontractors to perform portions of the trade work.

The Oregon Public Improvements Statute, ORS 279.015, requires all Public Improvement Projects to be procured by competitive bid, unless an exemption is granted by the State or the **Public Contracts Review Board** of a Public Agency other than the State. Consequently, all CM/GC projects (as described above) require an exemption under ORS 279.015(2). This provision requires the Public Agency to develop findings that the alternative procurement process (in this case, the CM/GC process) is unlikely to encourage favoritism or substantially diminish competition, and the project will result in substantial cost savings to the Public Agency. *Findings are further defined by Statute (ORS 279.011(5)) to mean the justification for an agency conclusion that includes, but is not limited to, information regarding: (a) Operational, budget and financial data, (b) Public benefits, (c) Value engineering, (d) Specialized expertise required, (e) Public safety, (f) Market conditions, (g) Technical complexity, and (h) Funding Sources.*

Some State of Oregon agencies (Higher Education, Corrections, and Administrative Services) have a class exemption granted under Oregon Administrative Rule 125-310-220. Whenever these agencies elect to use the CM/GC process, they must produce findings in support of the process, which are consistent with ORS 279.015(2), and maintain them in the project file. All other **public state** agencies must develop the required findings and be granted an exemption order. **Other public agencies must either obtain an exemption for CM/GC contracts as a class of contracts or obtain a specific exemption for each CM/GC contract.** Copies of the statute and **administrative** **the applicable Attorney General’s Model** rule are included as Attachment 4.

Most State agencies (except Higher Education, Oregon Health Sciences University, and the Lottery) must comply with State of Oregon, Department of Administrative Services rules set forth in OAR 125-310-220. Other Public Agencies may choose to adopt these rules or to develop their own procedures. However, most Public Agencies in Oregon must comply with the requirements of ORS 279.015.

In addition, As a result of 1999 Oregon legislative action, all State agencies, and all other public agencies, except those that proactively choose to exempt themselves, must comply with the State of Oregon Attorney General's Model Public Contract Rules. OAR 137-40-0500 through -0580 address Alternative Contracting Methods, including the CM/GC Process. OAR 137-040-0570 contains specific requirements for the CM/GC process. Almost all public agencies in Oregon must adhere to these rules.

B. Where CM/GC has been used by public agencies

The CM/GC (with a GMP) process has been used by public sector agencies in the State of Oregon since the mid-1980's. Public Agencies with experience using the process include those listed in Attachment 2.

II. When CM/GC Should be Used

The Construction Manager/General Contractor (CM/GC) contracting method is one form of project delivery found by many private owners and Public Agencies to be an effective alternative to the traditional design-bid-build process. With proper application, it is characterized by an integrated team approach, where the CM/GC is hired early in the design process to participate in planning, constructability analysis, value engineering and other pre-construction services. When used in this way, key benefits which may accrue to the Public Agency are lower costs, faster schedules, higher quality, and fewer lawsuits.

The Coalition has studied CM/GC as it has been used in Oregon, and has observed that CM/GC is not appropriate for all projects. Additionally, **it is recommended that** Public Agencies ~~should~~ meet a clear set of criteria when seeking an exemption from the statutory public purchasing requirements. The Coalition recommends that public agencies ~~should~~ **demonstrate through the findings show** why a project is well suited for CM/GC.

~~Unless at least two of the~~ **The following criteria justify** ~~should be reviewed to determine if~~ an alternative contracting procedure ~~as being~~ **is justified and is** in the best interest of the public, taxpayers, and other stakeholders, and the Public Agency has the experience and expertise to administer the sophisticated CM/GC process as described in Section IV, public agencies should not use the CM/GC process.

A. Time Savings

The Public Agency finds that the project has significant schedule ramifications and concurrent design and construction is necessary to meet these critical deadlines and to shorten the overall duration of construction process. Potential time savings must be substantiated. In order to justify schedule concerns, the Public Agency may consider operational and financial data that shows significant savings and/or increased opportunities for generating revenue as a result of

early project completion. Other findings influencing these criteria include demonstrated public benefits as a result of less construction duration/disruption to the public facility.

B. Cost Savings

The Public Agency finds that early Contractor input during the design process will contribute to significant cost savings. Potential or expected cost savings must be substantiated. In order to justify cost concerns, the Public Agency may consider the following: value engineering, building systems analysis, life cycle analysis and construction planning that will lead to substantial savings to the public or other stakeholders. Factors which might influence these criteria include high rates of inflation, market uncertainty due to material and labor fluctuations/scarcities, and the compelling need for specialized construction expertise due to technical challenges.

C. Technical Complexity

The Public Agency finds that this project presents significant technical complexities which are best addressed by a “team approach”, with the General Contractor helping the Public Agency and Architect solve specific project challenges during pre-construction. The Public Agency should show that taxpayers or other stakeholders will benefit as a result of Contractor input on issues such as:

1. Operations (e.g., keeping the facility functioning during construction)
2. Tenant occupancy (e.g., maintaining tenant safety and efficiency throughout construction)
3. Public safety (e.g., developing early and comprehensive project safety plan in concert with Owner and Architect)
4. Delivery of an early budget and/or Guaranteed Maximum Price (GMP) enables the Public Agency to provide the public, taxpayers and other stakeholders with greater cost reliability and more effective management of budget process
5. Fundraising (e.g., Contractor’s involvement facilitates in-kind giving)
6. Historic preservation (e.g., seismic upgrades while maintaining historic facades)
7. Difficult remodel projects with many unknowns factors
8. Projects requiring complex phasing or highly coordinated scheduling

D. Not Diminishing Competition or Encouraging Favoritism

The Public Agency finds that it is unlikely that the process of selecting a CM/GC will encourage favoritism in the awarding of the public contract or substantially diminish competition for the public contract.

In extraordinary circumstances, a Public Agency needs to satisfy only one of the above-described criteria. Extraordinary circumstances would include the following:

1. A time emergency (i.e., fire destroyed structure where an immediate start of construction is required, where the public sector has an immediate contractual requirement for the private sector services) where the competitive method will not work effectively.
2. A project where the phasing and/or complexity are so extremely difficult that complete design and other pre-construction services cannot be completed effectively without the direct involvement of the CM/GC firm.

III. How CM/GC Should be Selected

A. ~~Develop Adequate Findings~~ Selection of CM/GC Method

As ~~At~~ a minimum, findings supporting the use of ~~it is recommended that each agency review it~~ justification for using the CM/GC method of contracting. ~~The~~ ~~should address the~~ following points ~~should be addressed~~.

Background Justification

1. Demonstrate that the Public Agency has knowledgeable staff or consultants who have the capacity to manage the CM/GC process.
2. Provide a clear ~~indication~~ **description** of how the CM/GC selection process will be conducted.
3. Describe how sub-contractors will be selected and the process used if the general contractor wishes to perform some of the work.
4. Address any other administrative requirement for this process imposed by the Public Agency's public contract review authority.
5. List the minimum requirements the Public Agency intends to require of prospective CM/GC's.

Adequacy of Findings

1. Discuss how the process is unlikely to encourage favoritism in awarding the contract or substantially diminish competition, **or**
2. Provide evidence to demonstrate that the process should result in substantial cost savings to the Public Agency.
3. ***Provide narrative and/or quantitative information relevant to the findings required by ORS 279.011.***

B. Public Meeting on Findings

A statutory requirement of ORS 279.015 is that prior to final adoption of findings justifying the use of alternative methods of procuring Public Improvement contracts, Public Agencies ***must*** hold a public meeting. Notification of the public meeting ***must*** be published in at least one trade newspaper of general statewide circulation. The notice should state that the public meeting is for the purpose of taking comments on draft findings for an exemption from the public contracting requirement. As a part of the public meeting, the Public Agency should offer an opportunity for any interested party to present comment. Publication of the meeting notice ***must*** occur a minimum of ***fourteen*** days prior to the meeting. At the time of advertisement, copies of draft findings should be available to the public.

If a situation exists that requires prompt action by the agency, notification of the public meeting can be published simultaneously with the advertisement of the solicitation, as long as responses to the RFP/RFQ are due at least five days after the meeting and final approval of the findings.

C. Request for Proposals

The Public Agency's solicitation document should be designed to clearly communicate the needs of the project, the requirements for submission, and the evaluation criteria. It additionally should address the following issues:

1. Fair Competition

A critically important aspect of alternative contracting is a fair and open selection process that allows all qualified firms to compete on a level playing field. The Coalition feels that the selection process should include both a written and oral presentation **unless there is a wide disparity among the proposers in the final results of the scoring.** The basis for selecting a CM/GC firm should include, at a minimum, the firm's history, financial health, bonding capability, experience, proposed staff, project approach and fee. Public Agencies should have the latitude of developing additional criteria which reflect the specific project's goals, and that the weight of the scoring criteria should be

left to the Public Agency's discretion, reflecting the needs of the particular project. As a guideline, this group recommends that no one category dominate the scoring criteria.

2. Two-Step versus Three-Step Solicitation Process

The Coalition feels that, in many cases and especially when time is of the essence, the CM/GC competition can be fairly administered with a two-step (RFP/interview) process. In a two-step competition, the first question of the RFP can elicit qualifications (history, bonding capacity, special capabilities, etc.) with subsequent questions becoming more project specific. A short-list of the top-ranked firms would then be invited to an interview. The Public Agency, however, should have the leeway to use a three-step (RFQ/RFP/Interview) process, if they feel it is in the project's best interests.

3. Public Agency/Project Information to be Included in Solicitation Package

- a. An explanation of what the Public Agency is attempting to accomplish with the project.
- b. A thorough description of the project, background information, special requirements, etc..
- c. A clear description of preconstruction, construction and post-construction deliverables.
- d. Project Timeline/Milestones including critical dates, GMP due, estimated (or desired) time of completion, etc..
- e. Minimum requirements for the proposer to be considered as CM/GC for the project, such as: Bonding capacity, insurance requirements, demonstrated capabilities (e.g., three projects of \$xx; current state license, etc.).
- f. Public Agency's Project Team (A/E, special consultants, etc) members
- g. Single (Public Agency) point of contact for questions
- h. CM/GC exemption findings
- i. Scoring Criteria
- j. Public Agency's intended selection panel, identifying the anticipated number of persons, their background, and qualifications.

4. Suggested RFP Contents

(Note: Sample RFP's are available from many of the public agencies who have used the CM/GC process; see Attachment 2 [for a list of such agencies](#))

- a. Company overview
 - (1) Years of business
 - (2) Bankruptcy
 - (3) Contract defaults

- b. Personnel

For each of the following project team members, indicate their level of participation in the project phases of pre-construction, construction and commissioning (this may be expressed as a percentage of their work time):

 - (1) Project structure
 - (2) Principals (highest person with authority)
 - (3) Project manager
 - (4) Superintendent

- c. Plan for the project:
 - (1) Flow chart
 - (2) Methodology
 - (3) Unique management strategies
 - (4) Describe the value that you bring to the job

- d. Experience/references relative to the particular project under question related to the following:
 - (1) Size
 - (2) Type
 - (3) Complexity
 - (4) Schedule

- e. Safety plan as it applies to this project

- f. Fee
 - (1) The RFP should define what should be included in the fee proposed for the project. (Examples include AIA Form A111, Arts. 7 and 8.)
 - (2) Fee for change orders
 - (3) Scoring: Low proposer gets all points allocated for the fee. Other proposer are awarded points proportionally, based upon the ratio of the amount of their proposed fee to the low proposer's fee proposal.

D. Interview D. Interview

Owners should consider requiring proposers to have individuals who will be doing the work as presenters at the interview.

E. Scoring

1. Scoring Guidelines

The Public Agency should give scorers of the RFQ/RFP guidelines to assist in review of the proposals. These guidelines are intended to educate scorers as to what is important to the owner and what constitutes a superior, appropriate, and inferior answer to questions. The Public Agency should give scorers of the RFQ/RFP guidelines to assist in review of the proposals. These guidelines are intended to educate scorers as to what is important to the owner and what constitutes a superior, appropriate, and inferior answer to questions.

2. Scoring Process

Each rater provides a **numerical** score for each proposal, based on the scoring criteria published in the RFP, and the guidelines provided by the Public Agency. Scorers should fill out their evaluation sheets individually, and the scores should be totaled to determine final scores and ranking.

3. Scoring Cross-check

In addition to being evaluated based on the aggregate total for each firm, final ranking should be verified through “cross-checking”. This process involves looking at each scorer's ranking of the proposals in addition to the total points, using the following process:

In addition to being evaluated based on the aggregate total for each firm, final ranking should be verified through cross-checking. This process involves looking at each scorer's ranking of the proposals in addition to the total points, using the following process:

- a) Each rater’s top-scoring proposal receives one point, second highest proposal receives two points, and so forth.
- b) The rankings for each proposer are totaled. (The best score a proposer can receive is equal to one multiplied by the number of raters, and the poorest is equal to the number of proposers multiplied by the number of raters.)
- c) The proposer with the best ranking should be the same as the proposer with the highest numerical score total. If these

methods do not agree, then the points assigned by one or more of the raters may be skewed and the selection committee should discuss and resolve the apparent discrepancy.

F. Post-Selection Debriefing.F. Post-Selection Debriefing.

Scoring documentation should be provided to participants at the conclusion of the process and be available to anyone else who requests it. Scoring documentation should be provided to participants at the conclusion of the process and be available to anyone else who requests it. Public Agencies should offer post-selection debriefings to all participants. This benefits not only the participants, but also the Public Agency in learning what worked well and what did not for future solicitation processes.

IV. CM/GC Administration

A. Subcontracting Requirements/Public Purchasing

A CM/GC should use a competitive process to select its trade subcontractors. Subcontractors should be solicited in appropriate trade publications, and unless specifically approved by the Public Agency, should be awarded to the subcontractor submitting the lowest responsive and responsible bid.

B. CM/GC Performance of Subcontract Work

A Public Agency may allow the CM/GC to perform some of the trade work if the CM/GC competes competitively with trade subcontractors for that work. In such cases, bids will need to be submitted to the Public Agency or an independent third party.

C. Public Agency Administration of the CM/GC Process

In many, if not most cases, experience has shown that successful management of the CM/GC process by the Public Agency requires a level of project management activity equal to or greater than that of a comparable design-bid-build project. This demand is especially true for first-time users and projects developed on a phased construction basis. The process is very "owner-intensive" at all stages. Time demands on the Public Agency are particularly intense during the design process, when value-engineering options and the final Guaranteed Maximum price are being developed. During construction, the active Public Agency involvement and decision-making remains essential.

The Coalition is aware that a common misunderstanding exists that the CM/GC, through its CM (construction management) function, can carry the majority of the project management load for the Public Agency. A responsible CM/GC takes on active management of its subcontractors and the overall guidance of the work to ensure the project is on schedule, within budget, and of

acceptable quality. This role of the CM/GC does not replace the Public Agency's responsibility for monitoring the progress of the work, processing payment applications (which is far more complex than the traditional design-bid-build process), and active participation in evaluating and prioritizing alternates, overall decision-making, and total project budget management.

One of the potential benefits of CM/GC is reduced construction time by overlapping construction with the completion of later design phases. When used for this benefit, continuous and active participation by staff of the Public Agency is particularly critical to the success of the project.

V. Review Procedures

A. Post-Contract Report by *the Public Agency*

ORS 279.103 requires that upon completion of and final payment for any public improvement contract in excess of \$100,000, for which the public agency did not use the competitive bidding process, the public agency shall prepare and deliver to the Director of the Director of the (State of Oregon) Department of Administrative Services or the local contract review board (which is typically the governing board of the public agency) an evaluation of the public improvement project. The evaluation shall include but not be limited to the following matters: (a) The actual project cost as compared with original project estimates; (b) The amount of any guaranteed maximum price; (c) The number and project change orders issued by the public agency; (d) A narrative description of successes and failures during the design, engineering and construction of the project; and (e) An objective assessment of the use of the alternative contracting process as compared to the findings required by ORS 279.015.

The Public Contracting Coalition recommends that it is also valuable for the project team to perform a “post-project” review. A copy of a suggested form of a report card is Attachment 3 to the White Paper.

B. Education

The Coalition believes that this CM/GC White Paper should be an educational tool for Public Agencies and Contractors as to when the use of a CM/GC contracting procedure fits the requirements of a construction project, and how the agency should conduct the Contractor selection to ensure that the agency selects the best Contractor in a fair selection process.

This CM/GC White Paper will also be used as a tool to educate Contractors as to how the CM/GC market is different from the competitive bidding market, and what skills a Contractor needs to compete in the CM/GC market.

The Coalition intends to monitor how public agencies use the CM/GC Contractor selection process over the next 18 months. If this CM/GC White Paper does not serve this purpose, and

Public Agencies do not follow the guidelines included in this paper **or that otherwise provide a fair and open process in compliance with applicable laws and rules**, then the group will reconvene and consider alternative measures. Such measures may include proposing legislation for the 2001 legislature to ensure that Public Agencies follow procedures that protect the interests of the public, taxpayers, and other stakeholders in deciding when and how to use the CM/GC Contractor selection process.

C. Complaints

A committee of Coalition members has agreed to serve as an educational resource to public agencies. That committee will include representatives from small and large public agencies, Contractors and design professionals.

This educational function will have two aspects:

First, the Coalition committee will be willing to meet with Public Agencies to assist them in understanding generally the advantages and disadvantages of the CM/GC Contractor selection process, and to provide counsel to the agencies as the agencies make decisions about whether to use that process.

Second, the committee will be available to hear complaints from Contractors and other persons that believe that an agency is proposing to use the CM/GC Contractor selection process either when it is not consistent with the guidelines in the CM/GC White Paper **or not in compliance with applicable law**, or in a manner that is inconsistent with the Contractor selection processes as outlined in it. If the committee agrees that the complaint appears to have some merit, the committee will meet with the Public Agency to review the basis for its decision.

If a Public Agency, Contractor or other person wishes to avail itself of these educational services, please contact **Government Relations Department**, Associated General Contractors, 9450 S.W. Commerce Circle, Suite 200, Wilsonville, Oregon 97070, telephone (503) 682-3363, fax (503) 682-1696.

D. Regular Meetings

The Coalition will meet approximately every six months to review generally the use of the CM/GC Contractor selection process by public agencies in Oregon, and to review the anticipated need for the CM/GC Contractor selection process by Public Agencies in the next twelve months.

ATTACHMENT 1

PUBLIC CONTRACTING COALITION

Participating Organizations

American Institute of Architects
Associated General Contractors
Associated Builders & Contractors
Association of Oregon Counties
Benge Construction
Blumenstein-Dean Construction
City of Portland
Colamette Construction
Eugene School District
Hoffman Construction
League of Oregon Cities
Milstead & Associates
NECA
Oregon School Boards Association
Oregon Building Trades Council
Oregon Department of Transportation
Oregon Department of Corrections
Oregon Department of Administrative Services
Port of Portland
Responsible Public Contracting Council, Inc.
Special Districts Association of Oregon

ATTACHMENT 2

PUBLIC AGENCIES THAT HAVE USED CM/GC

<u>Agency</u>	<u>Contact</u>	<u>Telephone</u>
City of Portland	Steve Sivage	(503) 823-6987
Clackamas County	Jerry Justice	(503) 655-8751
Deschutes Sheriff's Department	Greg Brown	(541) 383-4393
Lane County Housing Authority	Dan Paddock	(541) 687-3755
Metro	Berit Stevenson	(503) 797-1722
Multnomah County	Bob Nilson	(503) 248-3322
Oak Lodge Fire District	Jim Cannici	(503) 653-2432
Port of Portland		
Portland Community College	Betty Kay	
Portland Development Commission		
School districts:		
Portland	Reg Martinson	
Beaverton	Steve Ladd	
Hillsboro		
Parkrose	Jim Fenstermaker	(503) 408-2103
Grants Pass	Kerm Bennett	(541) 474-5700
Woodburn		
Salem/Keizer	Tom McMullen	

David Douglas	Gary Haase	(503) 252-2900
West Linn		
Pendleton	Terry Carty	(541) 276-6711
Riverdale	Jim Mabbott	(503) 635-6342
Pleasant Hills	Janet Luke	(541) 746-9646
State of Oregon:		
Administrative Services	Bill Foster	(503) 378-2865/X252
Corrections		
Higher Education	Linda Swanson	
	Kathleen Mulligan (OSU)	(541) 737-7705
Oregon Youth Authority	Dwayne McNanny	(503) 373-7280
Oregon Health Sciences Univ.	Gordon Ranta	(503) 494-5644
Tri-Met	Don Irwin	(503) 962-2260
Washington County	Larry Eisenberg	(503) 648-8829
Lane County	Bill VanVactor	

ATTACHMENT 3

REPORT CARD

Project description (one paragraph, including cost, scope of work, major challenges and other salient features):

		<u>Does Not</u> <u>Apply</u>	<u>Failed to</u> <u>Meet Goals</u>	<u>Met</u> <u>Goals</u>	<u>Exceeded</u> <u>Goals</u>
1.	Schedule Notes:	_____	_____	_____	_____
2.	Cost: Notes:	_____	_____	_____	_____
3.	Quality Notes:	_____	_____	_____	_____
4.	Public disruption Notes:	_____	_____	_____	_____
5.	MBE/WBE Notes:	_____	_____	_____	_____
6.	Teamwork Notes:	_____	_____	_____	_____

7. Safety _____
Notes: _____
8. Other: _____
Notes: _____
9. Other: _____
Notes: _____
10. Other: _____
Notes: _____

Please summarize how this project met the findings outlined in the CM/GC exemption, and quantify if possible.

Submitted by: _____

Title: _____

Date: _____

ATTACHMENT 4

Excerpt from Chapter 279 Oregon Revised Statutes

279.015 Competitive bidding; exceptions; exemptions.

(1) Subject to the policies and provisions of ORS 279.005 and 279.007, all public contracts shall be based upon competitive bids or proposals except:

- (a) Contracts made with other public agencies or the Federal Government;
- (b) Contracts made with qualified non-profit agencies providing employment opportunities for disabled individuals;
- (c) A public contract exempt under subsection (2) of this section;
- (d) A contract for supplies, at the option of the contracting agency, may be excluded from the competitive bidding requirement if the value of the contract is less than \$2,500;
- (e) Insurance and service contracts as provided for under ORS 414.115, 414.125, 414.135 and 414.145;
- (f) Contracts for repair, maintenance, improvement or protection of property obtained by the Director of Veterans' Affairs under ORS 407.135 and 407.145(1); and
- (g)(A) Contracts between public agencies utilizing an existing solicitation or current requirement contract of one of the public agencies that is party to the contract for which:
 - (i) The original contract met the requirements of this chapter;
 - (ii) The contract allows other public agency usage of the contract; and
 - (iii) The original contracting public agency concurs.
- (B) No written agreement under ORS chapter 190 is necessary under this paragraph if the arrangement is between or among units of local government.

(2) Subject to subsection (5)(b) of this section, the director or board may exempt certain public contracts or classes of public contracts from the competitive bidding requirements of subsection (1) of this section upon approval of the following findings submitted by the public contracting agency seeking the exemption:

- (a) It is unlikely that such exemption will encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts; and
- (b) The awarding of public contracts pursuant to the exemption will result in substantial cost savings to the public contracting agency. In making such finding, the director or board may consider the type, cost, amount of the contract, number of persons available to bid and such other factors as may be deemed appropriate.

**Department of Administrative Services
Administrative Rules**

Request for Proposal

125-310-200 An agency having independent statutory authority or that has been granted delegated purchasing authority from the Department to conduct its own procurements may, at its discretion, use request-for-proposal competitive procurement methods subject to the following conditions:

- (1) The procurement is advertised and a written solicitation document is issued that invites the submission of sealed, written offers to be opened publicly at a designated time and place; and
- (2) Contractual requirements are stated clearly in the solicitation document; and
- (3) Evaluation criteria to be applied in awarding the contract and the role of an evaluation committee are stated clearly in the solicitation document. Criteria used to identify the proposal that best meets the agency's needs may include but are not limited to cost, quality, service, compatibility, product reliability, operating efficiency and expansion potential; and
- (4) The solicitation document clearly states all complaint processes and remedies available; and
- (5) The solicitation document states the provisions for proposers to comment on any specifications that they feel limit competition.

Request for Proposal - Construction Manager/General Contractor

125-310-220 An agency having independent statutory authority or that has been granted delegated purchasing authority from the Department to conduct its own procurements may seek individual or class exemptions from the Director of the Department of Administrative Services to use request-for-proposal procedures, in accordance with the requirements of OAR 125-310-200, for the selection of construction manager/general contractor firms (CM/GC) who will be required to establish guaranteed maximum prices for construction public improvements, subject to the following conditions:

- (1) Contractual requirements are stated clearly in the solicitation document. The contract shall describe the methods by which the CM/GC shall competitively select other contractors and subcontractors to perform the work of the improvement. Further, the contract shall describe completely the methods by which the CM/GC shall competitively select other contractors and subcontractors to perform the work of the improvement. Further, the contract shall describe completely the methods by which the CM/GC and its affiliated or subsidiary entities, if any, may compete to perform the work of the improvement; such methods shall include, at a minimum, public opening of sealed bids at a pre-announced time and place.
- (2) Evaluation criteria to be applied in selecting the CM/GC firm are stated clearly in the solicitation document. Criteria used to identify the CM/GC firm which best meets the public contracting needs may include but are not limited to cost, quality, experience relevant to the improvement to be constructed, and time required to commence and complete the improvement.

(3) The agency shall prepare written findings to support the use of the CM/GC contracting method and submit them to the Director of the Department of Administrative Services for approval. The findings must show compliance with ORS 279.015(2)(a) and (b). The agency shall retain the findings and make them available upon request. These findings shall address as many of the following items as are applicable:

(a) The agency has competitively bid a public improvement project and failed to receive a responsive, responsible bid within the cost estimate established by the agency or its consultant. There are de facto cost savings from not redesigning and/or rebidding the project;

(b) There are expected substantial savings on direct construction costs;

(c) The owner needs to have use of the project within the state project schedule and there will be program and cost consequences if the required use is delayed;

(d) The technical complexity or unique character of the project requires the coordination of multiple disciplines;

(e) The use of value engineering through cooperation among the architect/engineer, contractor and owner is important to the project's delivery on time and within budget;

(f) There are other factors which demonstrably affect cost.

(4) Notwithstanding the requirement to have the findings described in section (3) of this rule, approved by the Director of the Department of Administrative Services, the Director hereby finds that the Department of Administrative Services, the Department of Corrections and the Oregon State System of Higher Education possess the organizational capability to employ the Request for Proposal - Construction Manager/General Contractor method in their discretion. This discretion is subject to the following conditions: The above agencies shall prepare written findings to support the use of the CM/GC contracting method. The findings must show compliance with ORS 279.015(2)(a) and (b) and address section (3) of this rule. The agency shall retain the findings and make them available upon request. In all other respects, the Department of Administrative Services, the Department of Corrections and the Oregon State System of Higher Education shall follow the requirements of this rule as set forth above.

Construction Manager/General Contractor (CM/GC)

137-040-0570 (1) General. The CM/GC form of contracting, as defined at OAR 137-040-0510(2), is a technically complex project delivery system. Agencies shall only utilize this contracting method with the assistance of knowledgeable staff or consultants who have a demonstrated capability of managing the CM/GC process in the necessary disciplines of engineering, construction scheduling and cost control, accounting, legal, public contracting and project management. Unlike the Design/Build form of contracting, the CM/GC form of contracting does not contemplate a "single point of responsibility" under which the Contractor is responsible for successful completion of all work related to a performance specification. The CM/GC has defined contract obligations, including responsibilities as part of the project team along with the Agency and design professional, although in CM/GC there is a separate contract between the Agency and design professional. In order to utilize the CM/GC method, the Agency must be able to reasonably anticipate the following types of benefits:

(a) Time Savings. The Public Improvement has significant schedule ramifications,

such that concurrent design and construction are necessary in order to meet critical deadlines and shorten the overall duration of construction. The Agency may consider operational and financial data that shows significant savings or increased opportunities for generating revenue as a result of early completion, as well as less disruption to public facilities as a result of shortened construction periods;

(b) Cost Savings. Early Contractor input during the design process is expected to contribute to significant cost savings. The Agency may consider value engineering, building systems analysis, life cycle analysis and construction planning that lead to cost savings. The Agency shall specify any special factors influencing this analysis, including high rates of inflation, market uncertainty due to material and labor fluctuations or scarcities, and the need for specialized construction expertise due to technical challenges; and

(c) Technical Complexity. The Public Improvement presents significant technical complexities that are best addressed by a collaborative or team effort between the Agency, design professionals and Contractor, in which the Contractor will assist in addressing specific project challenges through pre-construction services. The Agency may consider the need for Contractor input on issues such as operations of the facility during construction, tenant occupancy, public safety, delivery of an early budget or GMP, financing, historic preservation, difficult remodeling projects and projects requiring complex phasing or highly coordinated scheduling.

(2) Authority. Agencies may utilize the CM/GC form of contracting only in accordance with the requirements of these rules. See particularly OAR 137-040-0520 on "Use of Alternative Contracting Methods."

(3) Selection. CM/GC selection criteria may include those factors set forth above in OAR 137-040-0550(2)(b).

(4) Basis for Payment. The CM/GC process adds specified Construction Manager services to traditional General Contractor services, requiring full Contract performance within a negotiated Guaranteed Maximum Price (GMP). The basis for payment is reimbursable direct costs as defined under the Contract, plus a fee constituting full payment for Work and services rendered, which together shall not exceed the GMP. See GMP definition at OAR 137-040-0510(4), and Pricing Mechanisms at OAR 137-040-0540(3).

(5) Contract Requirements. Agencies shall conform their CM/GC contracting practices to the following requirements:

(a) Setting the GMP. The GMP shall be set at an identified time consistent with industry practice, after supporting information reasonably considered necessary to its use has been developed, and shall define with particularity both what is included and excluded from the GMP. A set of drawings and specifications shall be produced establishing the GMP scope.

(b) Adjustments to the GMP. The Contract shall clearly identify the standards or factors under which changes or additional Work will be considered outside of the Work scope and warrant an increase in the GMP, as well as criteria for decreasing the GMP. The GMP shall not be increased without a concomitant increase to the scope defined at the establishment of the GMP.

(c) Cost Savings. The Contract shall clearly identify the disposition of any cost savings resulting from completion of the Work below the GMP; that is, under

what circumstances, if any, the CM/GC might share in those cost savings, or whether they accrue only to the Agency's benefit. (Note that unless there is a clearly articulated reason for sharing such cost savings, they should accrue to the Agency.)

(d) Cost Reimbursement. The Contract shall clearly identify what items or categories of items are eligible for cost reimbursement within the GMP, including any category of "General Conditions" (a general grouping of direct costs that are not separately invoiced, subcontracted or included within either overhead or fee), and may also incorporate a mutually-agreeable cost-reimbursement standard.

(e) Audit. Cost reimbursements shall be made subject to final audit adjustment, and the Contract shall establish an audit process to ensure that Contract costs are allowable, properly allocated and reasonable.

(f) Fee. Compensation for the CM/GC's services shall be paid on the basis of a fee that is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee should be expressly defined wherever possible. The fee, first expressed as a proposed percentage of all reimbursable costs, shall be identified during and become an element of the selection process. It shall subsequently be expressed as a fixed amount when reimbursable costs are established within the GMP.

(g) Incentives. The Contract shall clearly identify any economic incentives, the specific criteria that apply and their relationship to other financial elements of the Contract (including the GMP).

(h) Controlled Insurance Programs. For projects anticipated to exceed \$75 Million, the Contract shall clearly identify whether an Owner Controlled or Contractor Controlled Insurance Program is anticipated or allowable. If so, the Contract shall clearly identify

(A) anticipated cost savings from reduced premiums, claims reductions and other factors,

(B) the allocation of cost savings, and

(C) safety responsibilities and/or incentives.

(i) Early Work. The RFP shall clearly identify the circumstances under which any of the following activities may be authorized and undertaken for compensation prior to establishing the GMP:

(A) early procurement of materials and supplies;

(B) early release of bid packages for such things as site development; and

(C) other advance work related to critical components of the Contract.

(j) Subcontractor Selection. The Contract shall clearly describe the methods by which the CM/GC shall publicly receive, open and record Bids or price quotations, and competitively select subcontractors to perform the Contract Work based upon price, as well as the mechanisms by which the Agency may waive those requirements. The documents shall also describe completely the methods by which the CM/GC and its affiliated or subsidiary entities may compete to perform the Work, including, at a minimum, advance notice to the public of the CM/GC's intent to compete and a public Opening of Bids or quotations by an independent party.

(k) Subcontractor Approvals and Protests. The Contract shall clearly establish whether the Agency must approve subcontract awards, and to what extent, if any, the Agency will resolve procurement protests of subcontractors and suppliers. The related procedures and

reporting mechanisms shall be established with certainty, including whether the CM/GC acts as the Agency's representative in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, the Agency shall retain the right to monitor the subcontracting process in order to protect Agency interests.

(1) Socio-Economic Programs. The Contract shall clearly identify conditions relating to any required socio-economic programs (such as Affirmative Action or Prison Inmate Labor Programs), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and Agency.