

## **Special Procurements and Exemptions from Competitive Bidding**

### ***SPECIAL PROCUREMENTS***

The ESD shall submit a written request to the Board, acting as the Local Contract Review Board (LCRB), that describes the contracting procedure, the goods and services or class of goods and services that are the subject of the special procurement and circumstances that justify the use of a special procurement under the standards as follows: the special procurement is unlikely to encourage favoritism in the awarding of public contract or to substantially diminish competition for public contracts and, (A) is reasonably expected to result in substantial cost savings to the ESD or to the public, or (B) otherwise substantially promote the public interest in a matter that could not practicably be realized by complying with requirements that are applicable under ORS 279B.055, 279B.060, 279B.065, 279B.070 or under any related rules. Public notice of the approval of a special procurement must be given in the same manner as provided in ORS 279B.055(4). If the ESD intends to award a contract through special procurements that calls for competition among prospective contractors, the ESD shall award the contract to the contractor it determines to be most advantageous to the ESD. When the LCRB approves a class special procurement the ESD may award contracts to acquire goods and services within the class of goods and services in accordance with the terms of the approval without making a subsequent request for a special procurement.

#### **1. Brand Names or Products, “Or Equal,” Single Seller and Sole Source**

- a. The ESD may purchase brand names or products from a single seller or sole source without competitive bidding subject to the limitations of this rule.
- b. Solicitation specifications for public contracts of the ESD shall not expressly or implicitly require any product of any particular manufacturer or seller except as expressly authorized in subsections c. and d. of this rule.
- c. The ESD may specify a particular brand name or equal specification when the use of a brand name or equal specification is advantages to the ESD, because the brand name describes the standard of quality, performance, functionality and other characteristics of the product needed by the ESD.
  - (1) The ESD is entitled to determine what constitutes a product that is equal or superior to the product specified, and any such determination is final.
  - (2) The ESD is not prohibited from specifying one or more comparable products as examples of the quality, performance, functionality or other characteristics of the product needed by the ESD.

- (3) A brand name specification may be prepared and used only if the ESD determines for a solicitation or class of solicitations that only the identified brand name specification will meet the needs of the ESD based on one or more of the following written determinations:
  - (a) The use of a brand name specification is unlikely to encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts; or
  - (b) Specification of the brand name, mark or product would result in cost savings to the ESD; or
  - (c) There is only one manufacturer or seller of the product of the quality, performance or functionality required; or
  - (d) The efficient utilization of existing goods requires the acquisition of compatible goods and services.
  
- d. The ESD may award a contract for goods or services without competition when the LCRB determines in writing that the goods or services, or the class of goods or services, are available from only one source. The determination of source must be based upon written findings that shall include:
  - (1) A brief description of the contract or contracts to be covered, including contemplated future purchases;
  - (2) Description of the product or service to be purchased; and
  - (3) The reasons the ESD is seeking this procurement method, which shall include any of the following:
    - (a) That the efficient utilization of existing goods requires the acquisition of compatible goods or services; or
    - (b) That the goods or services required for the exchange of software or data with other public or private agencies are available from only one source; or
    - (c) That the goods or services are for use in a pilot or an experimental project; or
    - (d) To the extent reasonably practical, the contracting agency shall negotiate with the sole source to obtain contract terms advantages to the contracting agency.
  
- e. The ESD may specify a product or service available from only one manufacturer but available through multiple sellers after complying with subsection 1.c. above documenting the procurement file with the following information:
  - (1) If the total purchase is over \$10,000 but does not exceed \$150,000, and a comparable product or service is not available under an existing Mandatory Use Contract, the ESD must obtain informal competitive quotes, bids; or proposals and document this process in the procurement file;
  - (2) If the purchase does not exceed \$150,000, and the supplies or services are not available under an existing price agreement for information technology with competing products or Mandatory Use Contract, the ESD must first request and obtain prior written authorization from the LCRB to proceed with the acquisition.

- f. If the ESD intends to make several purchases of brand name-specific supplies and services from a particular manufacturer or seller for a period not to exceed five years, the ESD must so state this in the procurement file and in the solicitation document, if any, or a public notice of a solicitation. If the total purchase amount is estimated to exceed \$150,000, this shall be stated in the advertisement for bids or proposals.

### **Findings of Fact/Conclusion of Compliance with Law (OAR 125-247-0275)**

The ESD shall submit a written request to the local contract review board that describes the contracting procedure, goods and services subject of the special procurement and the circumstances that justify the use of the special procurement.

- a. It is unlikely that this special procurement will encourage favoritism in the awarding of public contracts or substantially diminish competition for such contracts and is reasonably expected to result in substantial cost savings to the ESD which could not be realized under ORS 279B.055, 279B.060, 279B.065, or 279B.070 as required by ORS 279B.085(4).
- b. Public notice of the approval must be given in the same manner as provided in ORS 279B.055(4).
- c. This rule requires the ESD to make a good faith effort to determine that no other sources are available for the specified products.
- d. The ESD maintains open lists from which vendors are contacted for quotations and utilizes electronic means of determining new vendors on an ongoing basis.
- e. The awarding of a contract as described in this special procurement should result in substantial cost savings by virtue of the ability to reduce solicitation costs when it is known that comparable products are not available, or when specifying another product solely to meet a competition requirement might lead to lower initial cost but longer lifetime cost.
- f. When the local review board approves a class special procurement the ESD may award contracts to acquire goods and services within the class of goods and services in accordance with the terms of the approval without making a subsequent request for procurement.

## **2. Advertising Contracts, Purchase of**

- a. The ESD may purchase advertising in any media, regardless of dollar amount, without competitive bidding.
- b. The Board, acting as the LCRB of the ESD must use competitive methods whenever possible to achieve best value and must document in the procurement file the reasons why a competitive process was deemed impractical and the resulting contract must be in writing.
- c. If the anticipated purchase exceeds \$10,000 and a competitive method is used, the ESD must post notice on the Oregon Procurement Information Network (ORPIN).

## **Findings of Fact**

The ESD traditionally purchases advertising in newspapers. The following findings relate primarily to newspapers and written publications; however, the ESD may also purchase advertising for student activities or educational programs in other media, such as radio or television, where these findings apply:

- a. By their nature, media sources are generally unique. Advertisements are placed in a particular source because of the specific audience that source serves;
- b. Competition to furnish advertising space in daily newspapers of general, trade or business circulation in the vicinity of the ESD is limited;
- c. Cost savings are difficult to quantify where the sources are unique and not interchangeable;
- d. Advertisements may be placed to satisfy legal notice or Board policy requirements;
- e. Other published advertisements or notices, such as routine public notices, personnel recruitment information, etc., are placed in one or more of the publications of general circulation in the local area and other publications, as appropriate;
- f. The communities served by the ESD rely upon its use of the local daily newspaper as a central source of news and information regarding ESD activities;
- g. It is unknown whether contracts for advertisements placed with radio, television or other broadcast media are going to result in cost savings if not placed for competitive bid or request for proposal (RFP). If possible savings could be obtained through competitive means, the ESD would attempt to obtain competitive quotes or bids, as appropriate.

## **Conclusion of Compliance with Law**

Due to limited competition and unique nature of sources, it is unlikely that this class special procurement will encourage favoritism in the awarding of public contracts or substantially diminish competition for such contracts. Further, any contracts awarded under this class special procurement would result in a cost savings available to the ESD where the ESD can achieve volume savings through contracts for advertising with a particular media source, or otherwise substantially promote the public interest.

### **3. Advertising Contracts, Sale of**

The ESD may sell advertising for ESD publications and activities, regardless of dollar amount, without competitive bidding, including school newspapers, yearbooks, athletic programs, drama or music programs and the like.

## **Findings of Fact**

Sales of advertising for student activities are generally other fund revenues, where student groups solicit advertisements from local businesses to help with the cost of the activity itself. A common example is the sale of advertising in school newspapers and yearbooks. The circulation of the newspaper and yearbook is limited to the students, teachers, parents and interested members of the community associated with the activities of that particular school. Due to the limited circulation and audience, the businesses that participate by purchasing advertising do so partly in the spirit of good will. Any business is welcome to place an advertisement in the school newspaper or yearbook; all it needs to do is to contact any ESD school which publishes one. The ESD itself would not achieve

any increased revenue to the General Fund by seeking competitive bids or proposals for such advertising. This holds true for other student activities, such as athletics, drama or music events and the like.

### **Conclusion of Compliance with Law**

These findings indicate that it is unlikely that this special procurement will encourage favoritism in the awarding of public contracts or substantially diminish competition for such contracts. Any business or individual who wishes to advertise in this manner may do so by simply contacting the student group responsible for the activity.

The sale of advertising for student activities such as school newspapers, yearbooks, athletic, drama or music programs would not benefit from competitive procurement. Such a requirement would place an unnecessary burden on the student group's activity and there is no financial advantage to the ESD in doing so. Consequently, the cost savings test is not an issue.

## **4. Equipment Repair and Overhaul**

- a. The ESD may enter into a public contract for equipment repair or overhaul without competitive bidding, subject to the following conditions:
  - (1) Service or parts required are unknown and the cost cannot be determined without extensive preliminary dismantling or testing; or
  - (2) Service or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source; and
  - (3) The purchase is made within the limits and pursuant to the methods in subsection b, of this rule.
  
- b. The following limitations apply to this rule:
  - (1) If the contract is less than or equal to \$150,000, the school or department shall submit in writing to the superintendent or designee the reasons why competitive bids or quotes are deemed to be impractical. The superintendent or designee will accordingly document in its procurement file and may enter directly into the contract;
  - (2) If the school or department official thinks the contract may exceed \$150,000, he/she shall submit in writing to the superintendent or designee the reasons why competitive bidding is deemed to be impractical and a description of the cost savings to be obtained by a special procurement. The superintendent or designee may prepare a specific request for the anticipated contract to be obtained through special procurement procedures to submit to the LCRB for approval.

### **Findings of Fact**

The need for equipment repair or overhaul cannot be anticipated by ESD staff. If a piece of equipment is broken or not working properly, the ESD incurs cost of downtime, possible replacement equipment rental fees, staff time and other inconveniences or liabilities to its programs. Generally, there are a limited number of vendors who are able to perform repair or overhaul on a particular piece of equipment because of its make or manufacture. Sophisticated equipment may

require specially trained personnel available from only one source. Often, a piece of equipment will have a partial warranty in place which will guarantee some savings to the ESD in the parts and/or labor needed to do the repair or overhaul. This warranty savings may only be achieved if the original manufacturer or provider of the equipment performs the necessary repair or overhaul.

The dollar limits on the use of this special procurement procedure ensure that when the cost of the equipment repair or overhaul is expected to exceed \$150,000, the ESD will either seek formal competitive bids or, if that is not practical or cost effective, obtain a specific special procurement procedure from the LCRB to proceed with the purchase of the needed repair or overhaul.

### **Conclusion of Compliance with Law**

It is unlikely that this special procurement procedure will encourage favoritism in the awarding of public contracts or substantially diminish competition for such contracts because the dollar limits incorporated into this special procurement when the anticipated costs exceed \$150,000, insure the ESD will seek formal competitive bids and proposals. If the formal process is not practical, the ESD will obtain a specific exemption from the LCRB to proceed with the purchase of the needed repair or overhaul.

The awarding of public contracts under this special procurement will result in a cost savings to the ESD, as required by ORS 279B.085, because the ESD incurs direct and indirect costs from the moment equipment breaks down or becomes unusable. This special procurement only applies to equipment already owned by the ESD and does not provide for the purchase of new equipment. The ESD must be able to purchase necessary services and parts as quickly as possible in order to minimize equipment downtime and potential costs during that downtime.

## **5. Copyrighted Materials**

The ESD may, without competitive bidding and regardless of dollar amount, purchase copyrighted materials where there is only one known supplier available for such goods. Examples of copyrighted materials covered by this special procurement procedure may include, but are not necessarily limited to, newly adopted textbooks/instructional materials, workbooks, curriculum kits, reference materials, audio and visual media and non-mass-marketed software from a particular publisher or their designated distributor.

### **Findings of Fact**

By their nature, copyrighted materials are protected for the use of a single owner. Copyrighted materials may not be duplicated by others without the copyright owner's permission or license. Copyrights are established and regulated under federal law.

Often, copyrighted materials are produced by only one supplier who may be the owner of the copyright or his/her licensee. Textbooks/Instructional materials are examples of copyrighted materials that the ESD purchases through a sole source. Textbooks/Instructional materials are adopted through a statewide process under the authority of the Oregon Department of Education. A textbook/instructional material adoption defines the various materials which the ESD will purchase for use in its educational programs.

The ESD purchases its textbooks/instructional materials through the Northwest Textbook Depository. This practice enables the regional textbook depository to purchase and warehouse textbooks/instructional materials in conformance with adoptions made in the states of their region. The result is that savings are achieved through the depository's combined purchases on behalf of member ESDs. Freight costs for individual ESDs are reduced by the bulk purchases of the depository and the depository takes on the cost of stocking and warehousing enough to meet each member ESD's needs.

The system of textbook/instructional materials distribution enables the ESD to participate in the largest possible bulk purchasing activity of adopted textbooks/instructional materials in the region. This ensures a cost savings to the ESD, a savings that would be jeopardized if the ESD was to act as an individual purchaser.

### **Conclusion of Compliance with Law**

This special procurement will not encourage favoritism or substantially diminish competition in the awarding of public contracts. The production and distribution of copyrighted materials is controlled by the owner of the copyright and may only be permitted through a sole source. The ESD has no control over this.

The awarding of contracts pursuant to this special procurement will result in a cost savings to the ESD when it needs to purchase copyrighted materials and there is only one known supplier for such goods, or otherwise substantially promote the public interest.

## **6. Product Prequalification**

- a. When specific design or performance specifications must be met or such specifications are impractical to create or reproduce for a type of product to be purchased, the ESD may specify a list of approved or qualified products by reference to the prequalified product(s) of particular manufacturers or vendors in accordance with the following product prequalification procedure:
  - (1) The ESD will make reasonable efforts to notify all known manufacturers and vendors of competing products of the ESD's intent to compile a list of prequalified products. The notice will explain the opportunity manufacturers and vendors of competing products will have to apply to have their product(s) included on the ESD's list of prequalified products. At its discretion, the ESD may provide notice by advertisement in a trade paper of general statewide circulation or other appropriate trade publication; or instead of advertising, the ESD may provide written notice to those manufacturers and vendors appearing on the appropriate list maintained by the ESD; and
  - (2) The ESD will accept manufacturer and vendor applications to include products in the ESD's list of prequalified products up to 15 calendar days prior to the initial advertisement for bids or proposals for the type of product to be purchased, unless otherwise specified in the advertisement or in the ESD's written notice.
- b. If the ESD denies an application for including a product on a list of prequalified products, the ESD shall promptly provide the applicant with a written notice of the denial and include the reason for denial. The applicant may submit a written appeal within 7 calendar days to the ESD business manager to request review and reconsideration of the denial.

## Findings of Fact

- a. There are occasions when the ESD needs to establish a list of prequalified products before it invites bids or proposals to furnish the products. The ESD may have a specific performance or design need, but it is impractical for the ESD to create a specification for the type of products to be purchased. An example is audiovisual equipment. There is a tremendous variety of audiovisual products offered in the market. The equipment technology is complex and constantly changing. It would be very burdensome and time consuming for the ESD to generate non brand name, generic performance specifications for such equipment every time it wants to make a purchase.

Also, competition would be poorly served because bidders and proposers would not know in advance whether their offered product would meet the general specification substantially enough to be considered a responsive offer. The decision to make an award would be slow, because each product offered would have to be analyzed against the ESD's specification. Slowdown in the award process affects both bidders, who are asked to hold their bids open until award is made, and ESD programs, because staff are not able to order the equipment they need until the contract is awarded.

In this case, it might be more cost effective and efficient for the ESD to prequalify products and establish a list of approved products before invitations to bid are sent out. The prequalification process can be done some time before the need for a new contract. Once the prequalified product list is established, the bidding and contract award process can go quickly and smoothly.

- b. A second occasion when prequalification of products will be useful is when the specific design or performance specifications for a product are so exacting that the ESD must have time to carefully consider what is offered in the market that may or may not meet the specifications and, if necessary, reconsider its options before issuing an invitation to bid.
- c. This rule sets out a process of prequalification which requires the use of advertisement or other appropriate means to notify vendors of competing products of their opportunity to submit items for prequalification. The ESD maintains vendor mailing lists which are open to all interested vendors. The ESD uses these lists routinely to notify vendors of its intentions to prequalify products or to invite bids on products.
- d. This includes a 15-day time limit between the closure of a prequalification list and a related invitation to bid. This time factor ensures that vendors have a reasonable time to apply to include their products on a prequalified product list.
- e. Subsection b. of this rule provides vendors with an appeal process to follow if their application for prequalification is denied.



## **Conclusion of Compliance with Law**

Where prequalification of products is appropriate, it is unlikely that this special procurement will encourage favoritism in the awarding of public contracts or diminish competition for such contracts. There are several safeguards in the rule to prevent this, including notice, advertising, time and appeal process requirements to ensure that vendors are given a fair and open opportunity to participate in the prequalification process.

The prequalification of products process is a time-consuming effort for the ESD. It is not a shortcut procurement method. The ESD would use this method only after balancing cost-saving considerations, such as the ability of the ESD to create or generate nonbrand name generic specifications for types of products or the need for lengthy product evaluation prior to contract award. If the prequalification method is chosen, it will result in a cost savings to the ESD because the normal method of product selection is too cumbersome and costly to pursue, or otherwise substantially promote the public interest.

### **7. Requirements Contracts (Blanket Purchase Orders, Price Agreements)<sup>1</sup>**

- a. The business manager, on behalf of the ESD, may establish requirements contracts for the purposes of minimizing paperwork, achieving continuity of product, securing a source of supply, reducing inventory, combining ESD requirements for volume discounts, standardization among schools and departments and reducing lead time for ordering.
- b. The ESD may enter into a requirements contract (also known as a blanket purchase order or price agreement) whereby it is agreed to purchase goods or services for an anticipated need at a predetermined price or price discount from a price list, provided the contract is let by a competitive procurement process pursuant to the requirements of the public contracting code and these rules.
- c. Once a requirements contract is established, schools and departments may purchase the goods and services from the awarded contractor without first undertaking additional competitive solicitation.
- d. Schools and departments shall use requirements contracts established by the ESD, unless otherwise specified in the contract, allowed by law or these rules or specifically authorized by the superintendent or designee.
- e. Under the authority of ORS 279A.025 and 279B.085, the ESD may use the requirements contract entered into by another Oregon public agency when:
  - (1) The original contract met the requirements of public contracting code; and
  - (2) The original contract allows other public agency usage of the contract; and
  - (3) The original public contracting agency concurs and this is documented by a written interagency agreement between the ESD and the agency.

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<sup>1</sup>The Oregon Procurement Information Network (ORPIN) allows authorized members to utilize the state's price agreement/contracts to purchase goods and services. Authorized ORCPP members can legally attach to a state price agreement and forego the competitive bid process. Access to hundreds of competitive price contracts for a wide variety of goods and services: vehicles, computers, furniture, copiers, fax machines, travel, pharmaceuticals, office products, etc. is available. Counties, cities, schools, municipalities or their public corporate entities having local governing authority, a United States governmental agency or American Indian tribe or agency are eligible to participate.

- f. The term of any ESD requirements contract, including renewals, shall not exceed five years unless otherwise permitted under the public contracting code.

### **Findings of Fact**

This rule permits the ESD to enter into requirements contracts, in which the vendor agrees to provide specified goods and services over the term of the contract at the bid price or discount rate. A requirements contract is useful when the purchase of the goods or services are routine and repetitive. For example, school, office, custodial and facilities maintenance supplies are customarily purchased through requirements contracts.

Requirements contracts are a common method of minimizing paperwork, achieving continuity of product, securing a source of supply, reducing inventory, obtaining volume discounts, standardizing usage among schools and departments and reducing lead time for ordering.

The ESD establishes requirements contracts as a result of open competitive bidding or RFP processes, unless otherwise permitted under the public contracting code.

The ESD limits the term of requirements contracts, including all renewal options, to a maximum of five years before competitive rebidding must be done, unless otherwise permitted under the public contracting code.

The ESD may use the requirements contracts established by other public agencies, subject to certain conditions of state law, Board policy and administrative regulation.

### **Conclusion of Compliance with Law**

It is unlikely that this special procurement will result in favoritism in the awarding of public contracts or diminish competition for such contracts. The ESD will only enter into requirements contracts which result from open competitive bidding processes. This condition applies also to the use of requirements contracts established by other public contracting agencies.

The awarding of ESD requirements contracts will result in a cost savings to the ESD, or otherwise substantially promote the public interest. It would be costly and inefficient to make routine, repetitive purchases of goods and services through individual transactions. Also, the guaranteed volume of a requirements contract allows the ESD to get better prices from bidders.

## 8. Used Personal Property or Equipment, Purchase<sup>1</sup>

- a. Subject to the provisions of this rule, the ESD may purchase used property or equipment without obtaining competitive bids or quotes, if the ESD has determined that the purchase will result in cost savings to the ESD and will not diminish competition or encourage favoritism. “Used personal property or equipment” is property or equipment which has been placed in its intended use by a previous owner or user for a period of time recognized in the relevant trade or industry as qualifying the personal property or equipment as “used” at the time of ESD purchase. Used personal property or equipment generally does not include property or equipment if the ESD was the previous user, whether under a lease, as part of a demonstration, trial or pilot project or similar arrangement.
- b. For purchases of used personal property or equipment costing less than or equal to \$150,000, the ESD shall, where feasible, obtain three competitive quotes unless the ESD has determined and documented that a purchase without obtaining competitive quotes will result in cost savings to the ESD and will not diminish competition or encourage favoritism.
- c. For purchases of used personal property or equipment totaling \$150,000 or more, the ESD shall attempt to obtain three competitive quotes. The ESD will keep a written record of the source and amount of quotes received. If three quotes are not available, a written record must be made of the attempt to obtain quotes.

### Findings of Fact

The ESD is responsible to manage expenditures in the best interests of the public. Cost savings can be achieved through the procurement of used property and equipment. The ESD purchases used property and equipment when it meets the ESD’s needs and is cost effective. Considerations include type, quality, quantity and estimated useful life of the used item.

Used equipment and property becomes available sporadically and without notice. Used equipment and property is generally sold on a first-come, first-served basis. When used property or equipment does be-come available, the ESD must be able to respond immediately in order to obtain the property or equipment.

Some types of property or equipment may not be readily available in the new goods market. The ESD may have to look for used items to fill the need.

Competition to provide used property and equipment may be very limited and inconsistent, depending on the type of product.

The ESD maintains vendor lists which include information on whether a vendor provides used property or equipment. These lists are open to all vendors.

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<sup>1</sup>When contracting with another governmental entity, a district has a statutory exception under ORS 279A.025. The district may purchase state/federal surplus property through the Department of Administrative Services, State Services Division for Surplus Property. For more information on this program, contact DAS at 503-378-4714.

## **Conclusion of Compliance with Law**

It is unlikely that this special procurement will encourage favoritism in the award of public contracts or substantially diminish competition for such contracts. The purchase of used property or equipment depends on an inconsistent, sporadic market. When a used item is available, there is often little competition available. Sources for used items of the type, quality and quantity required by the ESD are inconsistent. This rule requires the ESD to attempt to obtain and document quotes as appropriate to the dollar amount of the purchase. If the anticipated purchase is over \$150,000, the ESD will advertise its need.

The use of this special procurement will result in a cost savings to the ESD, or otherwise substantially promote the public interest. The cost of used equipment or property is generally substantially less than that of new. Savings of 20 percent to 50 percent are not uncommon. Used equipment can provide good value to the ESD and help ensure the continuation of ESD services and programs.

## **9. Information Technology Contracts**

The ESD may enter into a contract to acquire information technology hardware and software without competitive bidding subject to the following conditions:

- a. If the contract amount does not exceed \$150,000, the ESD shall attempt to obtain three competitive quotes pursuant to the rules governing Intermediate Procurements. The ESD shall keep a written record of the sources of the quotes or proposals received. If three quotes or proposals are not reasonably available, fewer will suffice, but the ESD shall make a written record of the effort made to obtain the quotes or proposals.
- b. If the contract amount exceeds \$150,000, the ESD shall determine and use the best procurement method, pursuant to the public contracting code and these rules, and shall solicit written proposals in accordance with the requirements of the *Attorney General's Model Public Contract and LCRB Rules*. The ESD shall document the evaluation and award process, which will be part of the public record justifying the award;
- c. If the amount of the contract is estimated to exceed \$150,000, the ESD shall provide proposers an opportunity to review the evaluation of their proposals before final selection is made.

## **Findings of Fact**

- a. Rapid changes in technology make it necessary for the ESD to be able to purchase needed computer equipment quickly.
- b. Pricing for high-technology equipment also changes rapidly. It is frequently possible to take advantage of frequent price changes in the marketplace in the purchase of computer equipment.
- c. There is generally sufficient competition among vendors of information technology hardware and software for ESD business.
- d. The ESD will follow rules governing special procurements and obtain at least three informally solicited quotes for purchases less than or equal to \$150,000.
- e. If the ESD requires a brand name or sole source product, the ESD will follow its rule governing Brand Names or Products, "Or Equal," Single Seller and Sole Source, Section 1. under Special Procurements to procure it.

## **Conclusion of Compliance with Law**

It is unlikely that this special procurement will encourage favoritism in the award of ESD contracts or substantially diminish competition for ESD contracts. The purchase of information technology hardware and software will be made in accordance with other competitive bidding rules contained in this administrative regulation. If the anticipated purchase is over \$150,000, the ESD will advertise its need.

The use of this special procurement will result in a cost savings to the ESD, or otherwise substantially promote the public interest. Competition will be encouraged at all dollar levels of purchase of information technology hardware and software. This rule gives the ESD some flexibility in selecting the method of competitive procurement but requires adherence to the rule on brand name or sole source acquisitions if those situations occur.

## **10. Telecommunications Systems - Hardware and Software Contracts**

- a. The ESD may enter into a contract to acquire telecommunications system hardware and software, without competitive bidding, subject to the following conditions:
  - (1) If the contract amount does not exceed \$150,000, the ESD shall attempt to obtain three competitive quotes pursuant to the rules governing Intermediate Procurements. The ESD shall keep a written record of the sources of the quotes or proposals received. If three quotes or proposals are not reasonably available, fewer will suffice, but the ESD shall make a written record of the effort made to obtain the quotes or proposals.
  - (2) If the contract amount exceeds \$150,000, the ESD shall determine and use the best procurement method, pursuant to the public contracting code and these rules and shall solicit written proposals in accordance with the requirements of Chapter 137, Divisions 047 and 049 of the *Attorney General's Model Public Contract and LCRB Rules*. The ESD shall document the evaluation and award process, which will be part of the public record justifying the award.
- b. The telecommunications solicitation authorized in subsection 10.a.(1) of these rules shall:
  - (1) State the contractual requirements in the solicitation document;
  - (2) State the evaluation criteria to be applied in awarding the contract and the role of any evaluation committee. Criteria that would be used to identify the proposal that best meets the ESD's needs may include, but are not limited to, cost, quality, service and support, compatibility, product or system reliability, vendor viability and financial stability, operating efficiency and expansion potential;
  - (3) State the provisions made for bidders or proposers to comment on any specifications which they feel limit competition; and

## **Findings of Fact**

- a. Rapid changes in technology make it necessary for the ESD to be able to purchase needed telecommunications hardware and software quickly.

- b. Since deregulation, there is generally adequate competition among vendors of telecommunication hardware and software to allow the ESD to make competitive purchases.
- c. Pricing for telecommunications hardware and software also changes frequently. It is important for the ESD to take advantage of price competition in the marketplace.
- d. The ESD will follow procedures governing special procurements and document reasonable efforts to obtain at least three informally solicited quotes for purchases over \$10,000 but less than or equal to \$150,000.
- e. If a purchase of telecommunications hardware or software is expected to cost more than \$150,000, the ESD will use a formal competitive bidding or proposal process in accordance with these rules and the *Attorney General's Model Public Contract and LCRB Rules*.
- f. There are also times when the ESD needs to purchase specific items that are compatible with current equipment. On these occasions, the ESD will follow its rule governing Brand Names or Products, "Or Equal," Single Seller and Sole Source, Section 1. under Special Procurements to make the purchase.

### **Conclusion of Compliance with Law**

It is unlikely that this special procurement will encourage favoritism in the awarding of public contracts or substantially diminish competition for such contracts. The purchase of telecommunications hardware and software will be made in accordance with other competitive bidding rules herein. If the anticipated purchase is over \$150,000, the ESD will advertise its need.

The use of this special procurement will result in a cost savings to the ESD, or otherwise substantially promote the public interest. Competition will be encouraged at all dollar levels of purchase of telecommunications hardware and software. This rule gives the ESD some flexibility in selecting the method of competitive procurement but requires adherence to the rule on brand name or sole source acquisitions if those situations occur.

## **11. Telecommunications Services**

- a. The ESD shall secure the most competitive, cost-effective telecommunications services of the quality needed to meet all service performance requirements while minimizing administrative and service delivery costs. The ESD will use routine purchasing procedures whenever possible, but if necessary, the ESD can consider alternative procurement methods in accordance with this rule.

The ESD will generally follow the normal competitive procurement processes in obtaining telecommunications services. This process will only be used if necessary where there is a lack of sufficient competition to furnish needed services.

- b. In determining the appropriate procurement method for telecommunications services, the ESD shall comply with the requirements of ORS 291.038 and determine whether competition exists. In determining whether competition exists, the ESD may consider the following factors:
  - (1) The extent to which alternative providers exist in the relevant geographic and service market; the greater area of Linn, Benton and Lincoln Counties;
  - (2) The extent to which alternative services offered are comparable or substitutable in technology, service provided and performance. For example, if the ESD requires digital

services, analog services are not comparable or substitutable. If the ESD requires fiber optic technology, then copper, microwave or satellite transmission technology may not be comparable or substitutable;

- (3) The extent to which alternative providers can respond to the ESD's interest in consistency and continuity of services throughout its service area, volume discounts, equitable service for all users, centralized management and limiting ESD liability. For example, to be considered as the ESD's long-distance service provider, any long-distance service vendor must be able to meet, support and interface with the ESD's centralized automated billing requirements. The ESD must document for the record its findings on these factors or any other factors used in determining whether competition exists. In developing its findings, the ESD may solicit the information either through informal telephone or written contacts or through a formal solicitation such as an RFP.
- c. If the ESD determines that competition does not exist in the area for the relevant service, the ESD may proceed to secure the service on a sole source basis, as described in the ESD's rule governing Brand Names or Products, "Or Equal," Single Seller and Sole Source, Section 1, under Special Procurements.

### **Findings of Fact**

- a. Since deregulation, there is generally adequate competition among vendors of telecommunication services to allow the ESD to make competitive procurements.
- b. Since there is competition, price competition exists in the marketplace. It is important for the ESD to take advantage of existing competition.
- c. The ESD will follow its rules governing special procurements and document reasonable efforts to obtain at least three informally solicited quotes for purchases less than or equal to \$150,000. The ESD shall keep a written record of the sources of the quotes or proposals received. If three quotes or proposals are not reasonably available, fewer will suffice, but the ESD shall make a written record of the effort made to obtain the quotes or proposals.
- d. If a purchase of service is expected to cost more than \$150,000, the ESD will use a formal competitive bidding or proposal process in accordance with these rules and the *Attorney General's Model Public Contract and LCRB Rules*.
- e. There may be occasions where there is limited competition that can furnish telecommunications services of the quality and extent required by ESD operations. In such instances, the ESD will follow this rule and also its rule governing Brand Names or Products, "Or Equal," Single Seller and Sole Source, Section 1, under Special Procurements to procure needed services from the sole source.

### **Conclusion of Compliance with Law**

It is unlikely that this special procurement will encourage favoritism in the awarding of public contracts or substantially diminish competition for such contracts. Routinely, the purchase of telecommunications services will be made in accordance with other competitive bidding rules contained in this administrative regulation. If the anticipated purchase is over \$150,000, the ESD will advertise its need, issue a written solicitation document and invite written bids or proposals to be furnished in response.

There may be circumstances, however, where sufficient competition does not exist in the relevant geographic and service market area. In such cases, the ESD will follow this rule in determining whether sufficient competition exists to make a competitive procurement.

The use of this special procurement will result in a cost savings to the ESD, or otherwise substantially promote the public interest. Competition will be encouraged at all dollar levels of purchase of telecommunications hardware and software. This rule gives the ESD some flexibility in selecting the method of competitive procurement but requires adherence to the rule on brand name or sole source acquisitions if those situations occur. The rule also states the steps to be taken to document situations where sufficient competition may not exist and a sole source purchase needs to be made.

## **12. Hazardous Material Removal; Oil Cleanup**

- a. The ESD may enter into public contracts without competitive bidding, regardless of dollar amount, when ordered to clean up oil or hazardous waste pursuant to the authority granted to the Oregon Department of Environmental Quality (DEQ) under ORS Chapter 466, especially ORS 466.605 through 466.680. In exercising its authority under this exemption, the ESD shall:
  - (1) To the extent reasonable under the circumstances, encourage competition by attempting to make informal solicitations or to obtain informal quotes from potential suppliers of goods and services;
  - (2) Make written findings describing the circumstances that require the cleanup or maintain a copy of the DEQ order for the cleanup;
  - (3) Record the measures taken under 12.a.(1) of this rule to encourage competition, the amount of the quotes or proposals obtained, if any, and the reason for selecting the contractor to whom award is made.
- b. The ESD shall not contract pursuant to this special procurement in the absence of an order from the DEQ to clean up a site which includes a time limit that would not allow the ESD to hire a contractor under normal competitive bidding procedures. Goods and services to perform other hazardous material removal or cleanup will be purchased in accordance with normal competitive bidding procedures as described in Board policy with this administrative regulation.

### **Findings of Fact**

- a. When the DEQ orders a public agency to remove or clean up hazardous material or oil, the public agency must respond within a very short time, which is stated in the DEQ order. This time period does not generally allow the agency to take the time necessary to solicit written bids or proposals for the work to be performed. The ESD would be liable for any delay in responding to DEQ orders to perform hazardous material removal or cleanup.
- b. This exemption will not be used in those situations where there is no DEQ order to remedy the situation. Routine competitive procurement methods will be used where there is no DEQ order to act immediately. The ESD maintains open lists of vendors who are interested in providing hazardous material removal and cleanup services. Whenever it needs hazardous



material removal or disposal, the ESD makes use of these lists to solicit quotes, bids or proposals as needed, in addition to advertising the procurement as required.

- c. Cost savings are achieved through this exemption because the ESD can be liable for DEQ penalties and fines if it does not timely remove hazardous materials or oil as ordered. There is also serious risk in these situations that property damage or personal injury could result if the ESD is slow to act.

### **Conclusions of Compliance with Law**

It is unlikely that this special procurement will encourage favoritism in the awarding of public contracts or substantially diminish competition for such contracts as required by ORS 279B.085 (3)(a). If it is under DEQ order to act immediately, the ESD will still attempt to obtain competitive quotes for the work to be performed as it has the ability and time to do so. Unless the ESD is faced with the quasi-emergency situation of a DEQ order to remove or clean up hazardous waste or oil, it will follow normal competitive procedures to obtain these services.

The award of public contracts pursuant to this special procurement will result in a cost savings to the ESD in these situation, as required by ORS 279B.085 (3)(b), because the ESD must comply with the law and avoid and minimize risk to persons and property. Where possible, it will seek competitive quotes for the work to be performed and will award the contract to the lowest, responsive and responsible bidder.

### **13. Renegotiation of Existing Contracts with Incumbent Contractors**

- a. The ESD may amend or renegotiate contracts with existing vendors, service providers or other parties subject to the limitations of this rule.
- b. The ESD has determined that value engineering generally does not apply to this special procurement procedure.
- c. The renegotiated contract falls within a current special procurement procedure, but if not the LCRB must approve a separate special procurement.
- d. The ESD may renegotiate certain terms, but they must not unreasonably alter the scope of the original contract.

### **Findings of Fact**

- a. The LCRB may amend contracts when it is in the best interest of the ESD. The superintendent and/or other designee, acting on behalf of the LCRB, may renegotiate certain provisions, including:
  - (1) Price;
  - (2) Term;
  - (3) Delivery and shipping;
  - (4) Order size;
  - (5) Substitution;
  - (6) Warranties;
  - (7) On-line ordering systems;
  - (8) Price adjustments;

- (9) Produce availability;
- (10) Product quality;
- (11) Reporting requirements; or
- (12) Discounts.

Any contract amendment will be supported by legal consideration when necessary to validate the amended provision.

- b. The amended terms must be within a reasonable scope of the original contract, but not fundamentally alter the agreement or nature of goods or services. ESDs may, however, request functionally equivalent substitutes for goods or services in the original contract.
- c. The contract as a whole must be more favorable to the individual needs of the ESD to justify renegotiation. Cost may be a factor in determining what is a favorable change to the original contract, but the ESD may use factors other than cost that demonstrate that the amended contract is more favorable to the unique needs of the ESD.

### **Conclusion of Compliance with Law**

This special procurement will not encourage favoritism or substantially diminish competition in awarding public contracts because it already exists as a contract awarded in compliance with the ESD's special procurement and public contracting code.

The awarding of contracts under this special procurement will result in cost savings to the ESD when it need to renew its original contract with vendors, service providers or other parties, or otherwise substantially promote the public interest.

### ***EXEMPTIONS FROM COMPETITIVE BIDDING***

All public contracts shall be based upon competitive bids or proposals, except the following:

- 1. Contracts which have been specifically exempted under ORS 279A.025 and 279C.335; and
- 2. Contracts covered by the class exemptions in the following set of rules developed pursuant to ORS 279C.335 (2) and (5) and based on Oregon Administrative Rules, Chapter 125, Divisions 246 through 249.

The Board, acting as the Local Contract Review Board (LCRB) for the ESD, has made the findings required by ORS 279C.330, ORS 279C.335 and ORS 279C.345, and determined that awarding a contract under this exemption is unlikely to encourage favoritism or substantially diminish competition and will likely result in a substantial cost savings to the ESD. The findings required to justify each exemption include information regarding: (1) operational, budget and financial data; (2) public benefits; (3) value engineering; (4) specialized expertise required; (5) public safety; (6) market conditions; (7) technical complexity; and (8) funding sources. Only these findings are required for each class or individual contract exemption, unless the LCRB specifically excludes a finding or includes an additional finding.

Promulgation of these exemptions can only occur after public notification and a public hearing to receive testimony pertaining to draft exemptions and findings, pursuant to ORS 279C.335.

## 1. Brand Names or Products, “or Equal,” Single Seller and Sole Source

- a. The ESD may purchase brand names or products from a single seller or sole source without competitive bidding subject to the limitations of this rule.
- b. The ESD has determined that value engineering generally does not apply to this exemption.
- c. Solicitation specifications for public contracts of the ESD shall not expressly or implicitly require any product of any particular manufacturer or seller except as expressly authorized in subsections 1.d. and 1.e. of this rule.
- d. The ESD may specify a particular brand name, make or product suffixed by “or equal,” “or approved equal,” “or equivalent,” “or approved equivalent” or similar language if there is no other practical method of specification after documenting the procurement file with the following:
  - (1) A brief description of the solicitation(s) to be covered, including contemplated future purchases;
  - (2) Description of the brand name, mark or product to be specified; and
  - (3) A brand name specification may be prepared and used only if the ESD determines for a solicitation or class of solicitations that only the identified brand name specification will meet the needs of the ESD based on one or more of the following written determinations:
    - (a) The use of the brand name specification is unlikely to encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts; or
    - (b) Specification of the brand name, mark or product would result in substantial cost savings to the ESD; or
    - (c) There is only one manufacturer or seller of the product of the quality, performance or functionality required; or
    - (d) The efficient utilization of existing goods requires the acquisition of compatible goods and services.
  - (4) The ESD shall make reasonable effort to notify all known suppliers of the specified product and invite such vendors to submit competitive bids or proposals.
- e. The ESD may purchase a particular product or service available from only one source, after documenting the procurement file with the ESD’s findings of current market research to support the determination that the product is available from only one seller or source. The ESD’s findings shall include:
  - (1) A brief description of the contract or contracts to be covered, including contemplated future purchases;
  - (2) Description of the product or service to be purchased; and
  - (3) The reasons the ESD is seeking this procurement method, which shall include any of the following:
    - (a) That the efficient utilization of existing equipment, supplies or services requires the acquisition of compatible equipment, supplies or services; or

- (b) That the goods or services required for the exchange of software or data with other public or private agencies are available for only one source; or
  - (c) That the goods or services are for use in a pilot or an experimental project; or
  - (d) Other findings that support the conclusion that the goods or services are available from only one source.
- (4) To the extent reasonably practical, the contracting agency shall negotiate with the sole source to obtain contract terms advantageous to the contracting agency.
- f. The ESD may specify a product or service available from only one manufacturer but available through multiple sellers, after documenting the procurement file with the following information:
  - (1) If the total purchase is over \$10,000 but does not exceed \$100,000, and a comparable product or service is not available under an existing state cooperative purchasing contract, competitive quotes shall be obtained by the ESD and retained in the procurement file; or
  - (2) If the amount of the purchase exceeds \$100,000, the product or service shall be obtained through competitive bidding unless a specific exemption is granted by the LCRB.
- g. If the ESD intends to make several purchases of the product of a particular manufacturer or seller for a period not to exceed five years, the ESD will so state in the solicitation file and in the solicitation document, if any. Such documentation shall be sufficient notice as to subsequent purchases. If the total purchase amount is estimated to exceed \$100,000, this shall be stated in the advertisement for bids or proposals.

### **Findings of Fact/Conclusion of Compliance with Law**

It is unlikely that this process will encourage favoritism in the award of public contracts or substantially diminish competition for such contracts, as required by ORS 279C.335 (2)(a).

This class exemption applies only to contracts under a limited dollar amount, and then, only after efforts to obtain competitive quotes are made, or other methods have been employed to ensure that competitive means are used if available. The ESD maintains open lists from which vendors are contracted for quotations. In addition, as required by ORS 279C.335 (2)(b) award of a public contract subject to the above described exemption should likely result in substantial cost savings by virtue of the ability to reduce solicitation costs when it is known that comparable products are not available, or when specifying another product solely to meet a competition requirement might lead to lower initial cost but longer lifetime cost.

## 2. Product Prequalification

- a. When specific design or performance specifications must be met or such specifications are impractical to create or reproduce for a type of product to be purchased, the ESD may specify a list of approved or qualified products by reference to the prequalified product(s) of particular manufacturers or vendors in accordance with the following product prequalification procedure:
  - (1) The ESD will make reasonable efforts to notify all known manufacturers and vendors of competing products of the ESD's intent to compile a list of prequalified products. The notice will explain the opportunity manufacturers and vendors of competing products will have to apply to have their product(s) included on the ESD's list of prequalified products. At its discretion, the ESD may provide notice by advertisement in a trade paper of general statewide circulation or other appropriate trade publication; or instead of advertising, the ESD may provide written notice to those manufacturers and vendors appearing on the appropriate list maintained by the ESD; and
  - (2) The ESD will accept manufacturer and vendor applications to include products in the ESD's list of prequalified products up to 15 calendar days prior to the initial advertisement for bids or proposals for the type of product to be purchased, unless otherwise specified in the advertisement or in the ESD's written notice.
- b. The ESD has determined that special expertise required, generally, does not apply to this rule.
- c. If the ESD denies an application for inclusion of a product on its list of prequalified products, the ESD shall promptly provide the applicant with a written notice of the denial and include the reason for denial. The applicant may submit a written appeal within [7] calendar days to the ESD business manager to request review and reconsideration of the denial.

### Findings of Fact

- a. There are occasions when the ESD needs to establish a list of prequalified products before it invites bids or proposals to furnish the products. The ESD may have a specific performance or design need, but it is impractical for the ESD to create a specification for the type of products to be purchased. An example is audiovisual equipment. There is a tremendous variety of audiovisual products offered in the market. The equipment technology is complex and constantly changing. It would be very burdensome and time consuming for the ESD to generate non brand name, generic performance specifications for such equipment every time it wants to make a purchase.

Also, competition would be poorly served because bidders and proposers would not know in advance whether their offered product would meet the general specification substantially enough to be considered a responsive offer. The decision to make an award would be slow, because each product offered would have to be analyzed against the ESD's specification. Slowdown in the award process affects both bidders, who are asked to hold their bids open until award is made, and ESD programs, because staff are not able to order the equipment they need until the contract is awarded.

In this case, it might be more cost effective and efficient for the ESD to prequalify products and establish a list of approved products before invitations to bid are sent out. The prequalification process can be done some time before the need for a new contract. Once the

prequalified product list is established, the bidding and contract award process can go quickly and smoothly.

- b. A second occasion when prequalification of products will be useful is when the specific design or performance specifications for a product are so exacting that the ESD must have time to carefully consider what is offered in the market that may or may not meet the specifications and, if necessary, reconsider its options before issuing an invitation to bid.
- c. This rule sets out a process of prequalification which requires the use of advertisement or other appropriate means to notify vendors of competing products of their opportunity to submit items for prequalification. The ESD maintains vendor mailing lists which are open to all interested vendors. The ESD uses these lists routinely to notify vendors of its intentions to prequalify products or to invite bids on products.
- d. This includes a 15-day time limit between the closure of a prequalification list and a related invitation to bid. This time factor ensures that vendors have a reasonable time to apply to include their products on a prequalified product list.
- e. Subsection c. of this rule provides vendors with an appeal process to follow if their application for prequalification is denied.

### **Conclusion of Compliance with Law**

Where prequalification of products is appropriate, it is unlikely that this exemption will encourage favoritism in the awarding of public contracts or diminish competition for such contracts as required by ORS 279C.335 (2)(a). There are several safeguards in the rule to prevent this, including notice, advertising, time and appeal process requirements to ensure that vendors are given a fair and open opportunity to participate in the prequalification process.

The prequalification of products process is a time-consuming effort for the ESD. It is not a shortcut procurement method. The ESD would use this method only after balancing cost-saving considerations, such as the ability of the ESD to create or generate non brand name generic specifications for types of products or the need for lengthy product evaluation prior to contract award. If the prequalification method is chosen, it will likely result in a substantial cost savings to the ESD as required by ORS 279C.335 (2)(b) because the normal method of product selection is too cumbersome and costly to pursue.

### **3. Requirements Contracts (Blanket Purchase Orders, Price)<sup>1</sup>**

- a. The business manager, on behalf of the ESD, may establish requirements contracts for the purposes of minimizing paperwork, achieving continuity of product, securing a source of supply, reducing inventory, combining ESD requirements for volume discounts, standardization among schools and departments and reducing lead time for ordering.
- b. The ESD has determined that value engineering generally does not apply to this rule.
- c. The ESD may enter into a requirements contract (also known as a blanket purchase order or price agreement) whereby it is agreed to purchase goods or services for an anticipated need at a predetermined price or price discount from a price list, provided the contract is let by a

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<sup>1</sup>The Oregon Procurement Information Network (ORPIN) allows authorized members to utilize the state's price agreement/contracts to purchase goods and services. Authorized ORCPP members can legally attach to a state price agreement and forego the competitive bid process. Access to hundreds of competitive price contracts for a wide variety of goods and services: vehicles, computers, furniture, copiers, fax machines, travel, pharmaceuticals, office products, etc. is available.

- competitive procurement process pursuant to the requirements of the public contracting code and these rules.
- d. Once a requirements contract is established, schools and departments may purchase the goods and services from the awarded contractor without first undertaking additional competitive solicitation.
  - e. Schools and departments shall use requirements contracts established by the ESD, unless otherwise specified in the contract, allowed by law or these rules or specifically authorized by the superintendent or designee.
  - f. Under the authority of ORS 279A.025 and 279C.335, the ESD may use the requirements contract entered into by another Oregon public agency when:
    - (1) The original contract met the requirements of the public contracting code; and
    - (2) The original contract allows other public agency usage of the contract; and
    - (3) The original public contracting agency concurs and this is documented by a written interagency agreement between the ESD and the agency.
  - g. The term of any ESD requirements contract, including renewals, shall not exceed five years unless otherwise exempted pursuant to ORS 279C.335.

### **Findings of Fact**

- a. This rule permits the ESD to enter into requirements contracts, in which the vendor agrees to provide specified goods and services over the term of the contract at the bid price or discount rate. A requirements contract is useful when the purchase of the goods or services are routine and repetitive. For example, school, office, custodial and facilities maintenance supplies are customarily purchased through requirements contracts.
- b. Requirements contracts are a common method of minimizing paperwork, achieving continuity of product, securing a source of supply, reducing inventory, obtaining volume discounts, standardizing usage among schools and departments and reducing lead time for ordering.
- c. The ESD establishes requirements contracts as a result of open competitive bidding or RFP processes, unless otherwise exempted.
- d. The ESD limits the term of requirements contracts, including all renewal options, to a maximum of five years before competitive rebidding must be done, unless otherwise exempted.
- e. The ESD may use the requirements contracts established by other public agencies, subject to certain conditions of state law, Board policy and administrative regulation.

### **Conclusion of Compliance with Law**

It is unlikely that this exemption will result in favoritism in the awarding of public contracts or diminish competition for such contracts, as required by ORS 279C.335 (2)(a). The ESD will only enter into requirements contracts which result from open competitive bidding processes. This condition applies also to the use of requirements contracts established by other public contracting agencies.

The awarding of ESD requirements contracts will likely result in a substantial cost savings to the ESD, as required by ORS 279C.335 (2)(b). It would be costly and inefficient to make routine,

repetitive purchases of goods and services through individual transactions. Also, the guaranteed volume of a requirements contract allows the ESD to get better prices from bidders.

#### **4. Waiver of Bid Security Requirements (Public Improvement Contracts under \$100,000)**

The LCRB may, at its discretion, waive the bid security requirements of ORS 279C.390, if the amount of the contract for the public improvement is less than \$100,000. Although the bid security requirements of ORS 279C.390 are waived for public improvement contracts under \$100,000, the ESD may impose a bid or quote security requirements for projects under \$100,000, when deemed to be in the best interest of the ESD.

#### **Findings of Fact/Conclusion of Compliance with Law**

This rule allows the LCRB to waive bid security requirements for certain public improvement contracts. Waiver of the bid security is provided for by statute without a requirement for findings.

#### **5. Waiver of Performance and Payment Security Requirements (Public Improvement Contracts under \$100,000)**

The LCRB may, at its discretion, waive the performance/payment security requirements of ORS 279C.390 if the amount of the contract for the public improvement is less than \$100,000. Although the performance/payment security requirements of ORS 279C.390 are waived for public improvement contracts less than \$100,000, the ESD may impose a performance/payment security requirement for projects less than \$100,000 when deemed to be in the best interest of the ESD.

#### **Findings of Fact/Conclusion of Compliance with Law**

This rule allows the LCRB to waive performance/payment security requirements for certain public improvement contracts. Waiver of the performance/payment security is provided for by statute without a requirement for findings.

#### **6. Projects with Complex Systems or Components**

- a. For contracts for public improvements with significant components that are inherently complex and are also complex to procure through competitive bid, the ESD may, at its discretion, use RFP competitive procurement methods subject to the conditions described in ORS 279C.400 and conditions enumerated in this exemption.
- b. Definitions. For purposes of this exemption only: “Complex Systems” are defined as those systems which incorporate the procurement of materials or other components which are difficult, if not impossible, to create in an “equal” specifications basis for competitive bid. Examples of such systems include but are not limited to, contracts for supplying and installing computerized controls for building heating, venting, air conditioning systems; and contracts for artificial surface outdoor multipurpose athletic fields. “Significant” is intended to mean something more than de minimus, but not necessarily the majority of the project as determined by cost.

#### **Finding of Fact/Conclusion of Compliance with the Law**



It is unlikely that this exemption will encourage favoritism in the awarding of the public contracts or substantially diminish competition for such contracts as required by ORS 279C.335 (2)(a). Contracts for public improvements occasionally incorporate the procurement of systems, materials, or other components (complex systems) for which it is extremely difficult to design bid specifications. In these situations, utilization of an RFP process where each of the systems can be evaluated utilizing a number of factors, in addition to price, will likely result in substantial cost savings to the ESD as required by ORS 279C.335 (2)(b).

ORS 279C.400 enumerates how RFP's are to be used if authorized by the LCRB. This criteria, ensures that competitive means will be used and selection will be fair and impartial. As a result, it is unlikely that this process will encourage favoritism in the awarding of public contracts or substantially diminish competition for such contracts as required by ORS 279C.335 (2)(a). The awarding of contracts pursuant to this process will result in optimal value to the ESD based on selection by the ESD of the best competitive proposal that meets the stated evaluative criteria.

This class exemption is intended to be used for the types of procurements describe in the findings, where the specific system, materials or components represent a significant portion of the project. This class exemption **is not** intended to be used for CM/GC projects or other methods of alternative procurement unless these projects meet the requirements of this class exemption. The CM/GC and others, not meeting the requirements of this class exemption, may still be procured by RFP, provided that a project or contract specific exemption is promulgated by the LCRB.