

ORDINANCE NO. 578

AN ORDINANCE OF THE CITY OF WILSONVILLE RELATING TO PROCEDURES FOR PUBLIC CONTRACTING, REPEALING AND ADOPTING CODE SECTIONS CONCERNING THE LOCAL CONTRACT REVIEW BOARD, AND DECLARING AN EMERGENCY.

WHEREAS, in 1976, the City Council created a Local Contract Review Board, designating itself as constituent members of the Board; and

WHEREAS, over the years, the State Public Contracting Code was amended in a patchwork fashion and became less adaptable to modern and innovative practices, technologies and public-private partnerships; and

WHEREAS, the 2003 Oregon Legislature adopted HB 2341 (2003 Oregon Laws, Chapter 794) ("The Public Contracting Code"), which has an operative date of March 1, 2005; and

WHEREAS, the Public Contracting Code requires the City of Wilsonville to designate a Local Contract Review Board, and to adopt contracting rules in areas not covered by the Public Contracting Code or "Model Rules" adopted by the Attorney General; and

WHEREAS, The Public Contracting Code divides powers and duties for contracting into two categories: those that must be performed by the local "Contract Review Board"; and those that must be performed by the City's "Contracting Agency"; and

WHEREAS, on February 7, 2005, the Council conducted a public hearing on proposed public contracting rules and supportive findings attached as Exhibit A; and being fully advised in the premises,

NOW THEREFORE, THE CITY OF WILSONVILLE ORDAINS AS FOLLOWS:

Section 1. Wilsonville Code Sections 2.310 through 2.314 are repealed, with new sections 2.310-2.319 adopted to read as follows:

PUBLIC CONTRACTS

2.310 Local Contract Review Board; Delegation of Authority. The Wilsonville City Council is designated as the Local Contract Review Board under the State of Oregon Public Contracting Code. The Contract Review Board shall have all the powers of the State and Local Public Contract Review Board relative to the contract concerns of the City or, if delegated, the Urban Renewal Agency of the City of Wilsonville. The Board may, from time to time, delegate its powers and responsibilities consistent with the Oregon Public Contracting Code, the Model Rules, or the Wilsonville Code. The City Manager, or his/her designated agent, is designated as the City's "Contracting Agency" for purposes of contracting powers and duties assigned to the City of Wilsonville as a "Contracting Agency" under the State of Oregon Public Contracting Code or the Model Rules.

2.311 Application of State Law. Except as specifically provided herein, public contracts shall be let by the City of Wilsonville according to the State of Oregon Public Contracting Code, including the Model Rules adopted by the Oregon Attorney General as they now exist and as they may be amended in the future, and the Wilsonville Code. Definitions provided by the State of Oregon Public Contracting Code or the Model Rules shall apply to City of Wilsonville procurements, except as may be specifically provided herein.

2.312 Exemptions from Competitive Procurement. The following classes of public contracts are hereby exempted from competitive procurement:

(1) Any contract the exemption of which is provided by the State of Oregon Public Contracting Code or Model Rules;

(2) Change orders or contract amendments reasonably related to the scope of work under the original contract, up to fifteen percent of the contract price may be approved by the Contracting Agency. Additional goods or services may be purchased through the amendment even though the original contract did not provide unit prices or allow for additional purchases. Change orders or other amendments that increase the initial price of the contract by more than above-mentioned amount must be separately approved by the Contract Review Board or Contracting Agency.

(3) Contracts for the purchase of computer equipment and software, which may be by requests for quotations, the solicitation of which may be by advertisement or oral requests for offers.

- (4) Purchases through federal programs, pursuant to ORS 279A.180.
- (5) An emergency contract, provided that the Contracting Agency adheres to the requirements of ORS 279B.080 or 279C.335(5) and the model rules.
- (6) Personal Service Contracts as defined in W.C. 2.315.
- (7) A Public Facility Improvement Agreement entered into between the City of Wilsonville and a person responsible for carrying out conditions of approval of a land use decision of the City of Wilsonville. The term "Land Use Decision" has the meaning provided by ORS 197.015.
- (8) Price Regulated Items, Library lending materials, used items, and periodicals, Advertising Contracts, Equipment Maintenance Repair and Overhaul, Purchases Under Established Price Agreements, Gasoline, Diesel Fuel, Heating Oil, Lubricants and Asphalt, Investment Contracts, Insurance contracts, Office Copier Purchases, Sole Source Contracts, and Oil or Hazardous Material Removal.
- (9) Procurement of goods or services less than or equal to \$5,000.

2.313 Administrative Authority. Administrative staff and departments have contracting authority and responsibilities as follows:

- (1) In addition to all other acts authorized by state law, the Contracting Agency is authorized to:
 - (a) Enter into city contracts not to exceed \$100,000 without additional authorization of the Contract Review Board or as otherwise may be allowed by these Code provisions.
 - (b) Consistent with the Wilsonville Code, adopt forms, computer software, procedures, and administrative policies and rules for all city purchases.
 - (c) Allow a contract to be extended or renewed for a single term not to exceed one year.
- (2) Purchases of goods from City employees shall require authorization of the Contracting Agency. Provision of services by City personnel shall be in accordance with the City Personnel Policies and other applicable law.
- (3) All contracting by departments shall be according to approved City purchasing procedures adopted by the Contracting Agency or the Contract Review Board.

(4) Each department shall operate within its budget, or seek supplemental budgetary authority from City Council with respect to any contract.

(5) Each Department shall plan purchase requirements sufficiently in advance so that orders can be placed in economical quantities.

(6) Each Department shall process requisition forms and negotiate purchases on the most favorable terms in accordance with adopted ordinances, state laws, policies and procedures.

(7) Departments may give notice of public improvement contracts by electronic publication where the Contracting Agency finds that such publication is likely to be cost effective, as provided in ORS 279C.360.

2.314 Public Improvement Contracts. Public improvement contracts estimated by the Contracting Agency not to exceed \$100,000 may be let by competitive quote under the following procedures:

(1) The Contracting Agency shall informally solicit at least three price quotes from prospective contractors. If three prospective contractors are not available, then fewer quotes may be solicited, and the Contracting Agency shall maintain records of the attempts to obtain quotes.

(2) The Contracting Agency shall award the contract to the prospective contractor whose quote will best serve the interests of the City of Wilsonville, taking into account price and other applicable factors, such as experience, specific expertise, availability, project understanding, contractor capacity, and contractor responsibility. If the contract is not awarded on the basis of the lowest price, the Contracting Agency shall make a written record of the basis for the award.

(3) A procurement may not be artificially divided or fragmented to qualify for the informal contract award procedures provided by this section.

(4) A public improvement contract let under this section may be amended by change order as provided in Wilsonville Code Section 2.312 (2).

(5) Public improvement contracts in excess of \$100,000 shall be let in accordance with the provisions of ORS 279C.

2.315 Personal Service Contracts. A personal service contract is a contract primarily for the provision of services that require specialized technical, creative, professional or communication skills or talents, unique and specialized knowledge, or the exercise of discretionary judgment skills, and for which the quality of the service depends on attributes that are

unique to the service provider. Such services include, but are not limited to, the services of architects, engineers, surveyors and related services, attorneys, auditors and other licensed professionals, artists, designers, computer programmers, performers, consultants and property managers.

The Contracting Agency shall have discretion to determine whether a particular type of contract or service falls within the foregoing definition. Nothing in this section shall apply to the employment of regular City employees.

Personal services contracts (other than personal services contracts for architectural or engineering services pursuant to ORS 279C.110(2) for certain public improvement projects that involve state and federal monies), are subject to the rules established by this section:

(1) Unless otherwise approved by the Contracting Agency, all personal service contracts shall require the contractor to defend, indemnify, and hold harmless the City, its officers, agents and employees against and from any and all claims or demands for damages of any kind arising out of or connected in any way with the contractor's performance thereunder and shall include a waiver of contractor's right to ORS 30.285 and ORS 30.287 indemnification and defense.

(2) Unless otherwise approved by the Contracting Agency, City personal service contracts shall contain a provision requiring the person or entity providing the service to obtain and maintain liability insurance coverage in at least the amount of the City's tort liability limits, naming the City as an additional named insured, during the life of the contract.

(3) All City personal services contracts shall contain all contract provisions mandated by State law. These provisions may be incorporated in the personal service contract by reference to State law, unless State law provides otherwise. The City Attorney's Office will prepare model contract provisions for use in City personal service contracts.

(4) The following procedure shall be observed in the selection of personal service contractors:

(a) For personal service contracts involving an anticipated fee of \$10,000 or less per annum, the Contracting Agency may negotiate a contract for such services with any qualified contractor of his or her selection.

(b) For personal service contracts involving an anticipated fee of more than \$10,000 but less than \$150,000 per annum, the Contracting Agency shall solicit at least three (3) prospective contractors who

shall appear to have at least minimum qualifications for the proposed assignment, notify each prospective contractor in reasonable detail of the proposed assignment, and determine the prospective contractor's interest and ability to perform the proposed assignment.

- (c) The Contracting Agency may arrange for any or all interested prospective contractors to be interviewed for the assignment by an appropriate City employee or by an interview committee.
 - (d) Following a review of the qualifications and interview, where conducted, of the interested prospective contractors, the Contracting Agency shall select the prospective contractor, and shall prepare a personal service contract.
- (5) The above provisions regarding selection procedures do not apply to amendments, modifications or supplements to executed personal service contracts.
- (6) The following criteria may be considered in the evaluation and selection of a personal service contractor:
- (a) Specialized experience in the type of work to be performed.
 - (b) Capacity and capability to perform the work, including any specialized services within the time limitations for the work.
 - (c) Educational and professional record, including past record of performance on contracts with governmental agencies and private parties with respect to cost control, quality of work, the exercise of discretion, ability to meet schedules, and contract administration, where applicable.
 - (d) Availability to perform the assignment and familiarity with the area in which the specific work is located, including knowledge of design or techniques peculiar to it, where applicable.
 - (e) Any other factors relevant to the particular contract. The procedures and criteria for the screening and selection of a personal services contractor is within the sole discretion of the Contracting Agency and may be adjusted to accommodate the Contracting Agency's scope, schedule, and budget objectives for a particular project.
- (7) The selection procedures described in this section may be waived by the Contracting Agency where 1) an emergency exists that could not have

been reasonably foreseen and requires such prompt execution of a contract to remedy the situation that there is not sufficient time to permit utilization of the selection procedures, 2) selection is from a list of providers with similar qualifications in which selection is determined based upon an annual qualification process, or 3) a change in contractor to do follow-up work would clearly result in increased costs or increased time.

(8) The Contracting Agency is delegated the authority to sign all personal service contracts.

(9) Unless otherwise provided herein, all personal service contracts shall be awarded on a competitive selection process. Nothing contained in this section shall preclude the City from complying with provisions of Federal or State law that require or allow the City to utilize a different selection or contracting procedure.

2.316 Surplus Personal Property Disposition. Disposition of surplus personal property may be made, at the discretion of the Contracting Agency, under provisions of the State of Oregon Public Contracting Code, or the Model Rules, or under the provisions of this section:

(1) From time to time and after personal property owned by the City of Wilsonville is determined by the Contracting Agency to be surplus to the needs of the City, the City may sell the property at public auction. The City may utilize a contracting firm, approved by the Contract Review Board, for disposition of the property on terms and conditions contained in a contract approved by the Contract Review Board. The City shall give notice of the public auction by posting notice of the means by which the property will be disposed of on the City of Wilsonville Internet Website, or by advertisement in a newspaper of general circulation.

(2) Auction sales may be conducted entirely on the internet. Sale shall be for cash to the highest bidder. All proceeds of the sale shall be paid to the City's general fund, subject to the terms and conditions of the contract (if any) approved by the Contract Review Board between the City of Wilsonville and a firm selected to conduct the auction.

(3) All personal property sold pursuant to this section shall be sold as-is without any warranty, either express or implied, of any kind, including but not limited to warranties of title or fitness for any purpose. Upon receiving payment for the personal property from the successful bidder, the person or company conducting the auction shall execute an appropriate bill of sale, which shall recite that the sale is without warranty, as provided in this sub-section.

(4) The Contracting Agency may sell surplus personal property by a negotiated sale if the value of the property is estimated to be less than the cost of the action sale and expected proceeds. Surplus property which has a value of less than \$500, or for which the costs of a negotiated sale are likely to exceed sale proceeds, may be disposed of by any means determined to be cost effective, including by disposal as waste. Alternatively the Contracting Agency may transfer personal property without remuneration or only nominal remuneration to another public agency or any recognized non-profit organization.

2.317 Bids Exceeding Budget. If bids are solicited for a public improvement contract, and all bids exceed the budget for the project, the Contracting Agency may, prior to contract award, negotiate for a price within the project budget under the following procedures:

(1) Negotiations will begin with the lowest, responsive and responsible bidder. If negotiations are not successful, then the Contracting Agency may begin negotiations with the second lowest responsive, responsible bidder, and so on.

(2) Negotiations may include the inclusion of value engineering and other options to attempt to bring the project cost within the budgeted amount.

(3) A contract may not be awarded under this section if the scope of the project is significantly changed from the description in the original bid documents.

(4) The Contracting Agency will adhere to the provisions of ORS 279C.340 in applying this section.

2.318 Bid Rejection, Disqualification, Appeal. (1) The Contracting Agency may reject any bid not in compliance with all prescribed public bidding procedures and requirements and may reject all bids if it is in the public interest to do so.

(a) The person does not have sufficient financial ability to perform the contract. Evidence that the person can acquire a surety bond in the amount and type required shall be sufficient to establish financial ability;

(b) The person does not have equipment available to perform the contract;

(c) The person does not have personnel or sufficient experience to perform the contract; or

(d) The person has breached contractual obligations to public and/or private contracting agencies.

(2) A person who has been disqualified as a bidder may appeal such disqualification to the Board as follows:

(a) The person shall, within three business days after receipt of notice of disqualification, in writing notify the City Recorder that the person wishes to appeal the disqualification;

(b) Immediately upon receipt of such written notice of appeal, the Recorder shall inform the Board;

(c) Upon receipt of notice of appeal, the Board shall notify the person appealing the time and place of the hearing;

(d) The Board shall consider de novo the notice of disqualification, the record of the investigation made by the City Manager and/or the Community Development Director or City Engineer, and any evidence provided by the parties. The hearing shall be public and the appeal decided scheduling permits. The Board's decision and reasons therefor shall be in writing.

(3) In addition to the powers and duties established by this Code, the Board and Contracting Agency shall have such additional powers as authorized by State law and may also:

(a) Require notice publication in addition to that required by State law;

(b) Require pre-qualification for persons desiring to bid for public improvement contracts;

(c) Grant exemptions from the bid security and performance bond required on contracts for public improvements;

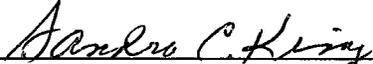
(d) Make alternate arrangements for retainage pursuant to the Oregon Contracting Code.

2.319 Conflict of Law. In the event of a conflict between any provision of the State of Oregon Public Contracting Code or the Model Rules and this chapter of the Wilsonville Code, the provisions of this chapter shall control.

Section 2. In support of this Ordinance, the Council hereby adopts "Findings In Support of Exemptions to Competitive Bidding or Proposals", attached hereto and incorporated herein as Exhibit A.

Section 3. Emergency Clause. Because the revised State Public Contracting Code takes effect on March 1, 2005, and supersedes Local Contract Review Board Rules not adopted by that date, the public fiscal welfare requires that this ordinance take effect immediately upon its passage.

SUBMITTED to the Wilsonville City Council and read for the first time at a regular meeting thereof on the 7th day of February, 2005, commencing at the hour of 7:00 p.m. at the Wilsonville Community Center, 7965 SW Wilsonville Road, Wilsonville, OR; and scheduled for a second reading at a special meeting of the Council on the 22nd day of February, 2005, commencing at the hour of 7:00 p.m.. at the Wilsonville Community Development Annex, 8445 SW Elligsen Road, Wilsonville, OR.



SANDRA C. KING, CMC, City Recorder

Enacted by the City Council on the 22nd day of February, 2005, by the following votes:

YEAS: -4- NAYS: -0- ABSTAIN: -0-



SANDRA C. KING, CMC, City Recorder

DATED and signed by the Mayor this 25th day of February, 2005.



CHARLOTTE LEHAN, Mayor

SUMMARY OF VOTES:

Mayor Lehan	<u>Yes</u>
Councilor Kirk	<u>Yes</u>
Councilor Holt	<u>Yes</u>
Councilor Scott-Tabb	<u>Excused</u>
Councilor Knapp	<u>Yes</u>

FINDINGS IN SUPPORT OF EXEMPTIONS TO COMPETITIVE BIDDING OR PROPOSALS

The Local Contract Review Board of the City of Wilsonville adopts the following findings in support of exemptions to competitive bidding/proposal requirements.

Contracts Under Certain Dollar Amounts

1. The City incurs costs in awarding contracts under a formal competitive bidding or formal competitive proposal process.
2. While competitive bidding or competitive proposals can result in cost savings for large projects, the cost of the process can exceed the cost savings for smaller contracts.
3. State law creates exemptions for contracts under specified dollar amounts, and the City's exemption implements state law rather than creating a new or special exemption.
4. The rules require an informal competitive process (solicitation of quotes) in most situations, assuring competition. Even when a direct appointment is possible, the City cannot use a higher priced source if a lower priced source is known to be available. The rule against fragmentation of contracts prevents misuse of this exemption.
5. The requirement to obtain at least three quotes for intermediate contracts discourages favoritism by requiring the City to check with several sources.
6. It is unlikely that this exemption will encourage favoritism or diminish competition because it still provides for competition in most circumstances and requires the City to consider alternate sources.
7. The exemption will lead to cost savings by avoiding the cost of a formal process when that cost would outweigh any likely cost savings.
8. The exemption is in the public interest because it allows the City to reduce internal costs while controlling contract expenditures. This could not be achieved otherwise.

Price Regulated Items

9. If prices are regulated, a competitive process would not result in a lower-cost contract and the costs of the process would increase the City's overall costs.
10. Price-regulated items are typically available only from a single or limited number of sources, so exempting price-regulated items is unlikely to encourage favoritism.

11. The exemption is in the public interest because it results in cost savings for the City that could not be achieved without the exemption.

Library Periodicals

12. The purchase of most library periodicals is within the small contract dollar amount.
13. A substantial amount of market competition exists for periodicals, which results in competitive prices in the market.
14. The costs of a formal competitive process are greater than the amount of any likely savings from a competitive process.
15. The prohibition on use of higher priced sources when lower priced sources are known to be available discourages favoritism.

Advertising Contracts

16. Most entities that provide a forum for advertisers have set prices that cannot be negotiated.
17. The City has legal requirements for advertising public notices that can only be met by a small number of sources and all possible sources can be contacted without the need for an invitation to bid or request for proposals.
18. The correct advertising medium is important for the success of any advertising, so the specific medium needs to be selected based on considerations that are difficult to quantify. Therefore, selecting advertising media by bid is inappropriate and selecting by proposals may also result in a proliferation of proposals that do not meet the City's needs.
19. Advertising often must be placed on a short time schedule that does not permit the use of a formal competitive process.
20. The costs of a formal competitive process would likely be greater than the savings resulting from using that type of process to place advertising.
21. This exemption will not encourage favoritism because the City is still able to use informal processes to compare media and choose the best outcome for the City.
22. The exemption is in the public interest because it will result in cost savings to the City without encouraging favoritism and those purposes could not be met with existing rules.

Equipment Maintenance Repair and Overhaul

23. It is often impossible to determine the cost of equipment repair or overhaul without testing the equipment. It is not cost effective to have one contractor test the equipment and another perform the repairs.
24. Equipment repair often is needed to be performed without delay and in less time than a competitive process would take.
25. The only way to have a competitive process for equipment repair or overhaul, other than by creating price agreements, would be to have a separate entity test the equipment to determine what is wrong with the equipment.
26. Without knowing the extent of repairs needed, competition is not possible because different entities could quote only their hourly rates, with no prediction as to the amount of time the repairs would take.
27. The exemption is unlikely to encourage favoritism because it is to be used only in rare occasions where the City does not have established price agreements, reached by a competitive process without favoritism.
28. This exemption serves the public interest by providing a simple process for obtaining equipment repair when needed.
29. The exemption for maintenance does not apply to routine or scheduled maintenance, unless there is only one entity capable of providing the service.

Purchases Under Established Price Agreements

30. Purchases under existing price agreements are unlikely to encourage favoritism or diminish competition because they are based on price agreements entered into after an open competitive process.
31. This exemption furthers the public interest by ensuring that price agreements will function properly and the same results would not be achievable if this exemption were not granted.

Gasoline, Diesel Fuel, Heating Oil, Lubricants and Asphalt

32. The exemption encourages competition and discourages favoritism by requiring an informal competitive process and requiring the City to use the least expensive source of those providing quotes.
33. The purchases under this exemption are likely to be at levels that qualify as small or intermediate contracts and the process is similar to the process required for intermediate contracts. The exemption is provided because over a period of time the total dollar amount of goods purchased from a single source may exceed the dollar maximum for intermediate contracts. The

exemption is justified because each individual contract will be entered into on a competitive basis.

34. This exception is in the public interest because it allows the City to reduce costs while maintaining competition. The same result could not be achieved within existing rules because a costly formal process might otherwise be required.

Investment Contracts

35. Investment of City funds is closely regulated by state statutes.
36. Protecting the City's financial resources is in the public interest and awarding investment contracts to low bidders creates a risk of the security of the City's funds. The City needs to have a relationship of trust with those
37. The exemption for investment contracts or contracts to borrow funds is not likely to restrict competition or encourage favoritism because the City will investigate a range of potential contractors to assure the security of the City's funds.
38. The exception is in the public interest because it protects the City's financial resources in a way that could not be achieved without the exception.

Insurance Contracts

39. This exception provides for a competitive process for appointing agents of record or obtaining specific insurance, although the process does not necessarily conform to the standard RFP or ITB process. The competitive nature of the process promotes competition and does not encourage favoritism. The public interest would not be served by reliance on other regulations because of the specific nature of insurance contracts.

Office Copier Purchases

40. This exemption requires a comparison of products and prices and so is a competitive process.
41. The exception is not likely to discourage competition or encourage favoritism because it does require the City to compare and choose the best combination of goods and price. It also results in a cost savings by being a less costly process than a formal competitive bidding or proposal process.
42. The exemption is in the public interest because it allows the City to reduce procedural costs while maintaining competition, and other regulations do not provide the same combination of cost savings and competitive process.

Single Seller of Product or Service

43. In some cases, there is only one possible supplier of the goods or services needed by the City. If there is only one supplied, a competitive process would be both unnecessary and costly.
44. This exception does not discourage competition; it simply recognizes that in some situations competition does not exist and that having a competitive process would not result in competition. It also does not encourage favoritism because no one would be disfavored by choosing the only possible source. The regulation contains sufficient safeguards to assure that it will be used only when other sources are not available.
45. The exception is in the public interest because it results in cost savings that would not be possible if the exception did not exist.

Contract Amendments

46. At times the City's needs change during the course of a contract and more goods, services, or work is needed to meet the City's needs. It would not be cost-effective to require a new contracting process for additional work closely related to an existing contract.
47. This exemption contains limitations to prevent abuse and to limit the extent of contract amendments. These limitations discourage favoritism by requiring a new competitive process for major amendments.
48. The exemption does not discourage competition because it applies only when the existing contract was awarded by a competitive process.
49. The exemption is in the public interest because it saves the cost of a competitive process to make minor amendments to an existing contract.

Oil or Hazardous Material Removal

50. This exemption is limited to situations in which the City must comply with a DEQ order. The exemption is needed to ensure compliance with environmental laws and protection of the environment in a timely manner and applies only if a competitive process cannot be completed in time to comply with the DEQ order.
51. The exception promotes competition by requiring the City to use an informal competitive process by obtaining informal solicitations or quotes from potential suppliers.
52. This exemption is in the public interest and the public interest in environmental cleanup would not be served if this exemption were not adopted.

Public Improvement Contracts Involving Design or Construction Management

53. This exemption allows a competitive proposal process to be used rather than a competitive bid process for public improvements under some circumstances.
54. The exemption promotes competition and discourages favoritism by requiring a competitive process.
55. The exemption recognizes that under some circumstances, the public interest is served by considering quality as well as cost in contracting for public improvements.
56. The use of the design/build and construction manager/general contractor types of contracts should result in cost savings to the City by allowing various means of controlling costs and coordinating design and construction to reduce costs.
57. The public interest is served by this exemption. The public interest would not be served by requiring competitive bidding on all public improvement contracts because doing so would limit the City's ability to use cost-saving techniques and would prevent the City from considering differences in quality among potential contractors when quality is a legitimate issue. Under the competitive bidding process, the City is required to award the contract to the lowest bidder, even if there is only a one cent difference in cost and a substantial difference in quality, providing that the low bidder meets minimum specifications.

Emergencies

58. In emergencies, the City is often required to take action in less time than it would take to complete a formal competitive process.
59. The exemption promotes competition and discourages favoritism by requiring the City to use an informal competitive process and by limiting the exemption to those contracts needed to avoid a substantial risk of loss, damage or interruption of services.
60. The exemption promotes the public interest by allowing the City to respond quickly to emergencies that threaten loss, damage or interruption of services. The public interest would not be served by requiring a formal competitive process to respond to an emergency.

Public Facility Improvement Agreements ("Development Agreements")

61. These agreements are entered into between the City of Wilsonville and a person responsible for carrying out conditions of approval of a land use decision of the City. The term "Land Use Decision" has the meaning provided by ORS 197.015.

62. Such contracts are unlikely to encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts, and result in substantial cost savings to the City.
63. Development Agreements commonly provide for the construction, by a developer, of streets, water lines, sewer lines, storm drainage and other improvements that are roughly proportional to the impacts of the development permitted. A lesser portion of the improvements, which the City would otherwise have to construct, are not proportional to the impacts of development. The provision of public improvements through a Development Agreement that includes both infrastructure required as a condition of development approval and infrastructure that is not a requirement of development is reasonable from a fiscal point of view in that it allows the City to take advantage of the cost-saving of a single improvement contract, as opposed to the developer and the City pursuing separate contracting processes.
64. The off-site public improvements that are the subject of development agreements will be constructed sooner than through a competitive process, and substantial savings accrue because of the shared economy of scale, given that the Developer will be constructing related public improvements on its property at the same time and to the same standards.
65. Because 1) the agreement entered into between the Developer and Developer's contractor will provide for the payment of prevailing wages for the public improvement work and 2) City Development Agreements rarely involve the same developer (or the same developer-chosen contractor), favoritism and suppression of competition is unlikely in an exempted Development Agreement process.

CONCLUSION

As to each of the exemptions provided in the City's public contracting rules:

66. It is unlikely that any of the exemptions will encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts. It is unlikely that the rules as a whole, including all exemptions, will encourage favoritism in the awarding of public contracting or substantially diminish competition for public contracts.
67. The awarding of public contracts pursuant to any of the exemptions will result in substantial cost savings to the City. The exemptions have been prepared to allow less expensive selection processes to be used when a more expensive process would not result in sufficient contract cost reduction to justify a more expensive process.

68. Each exemption supports the public interest and each exemption is needed to provide a comprehensive approach to public contracting that would not be achieved if any of the exemptions were not provided.

MEMORANDUM

To: Honorable Mayor and City Council

From: Paul A. Lee, Assistant City Attorney

Date: February 1, 2005

Re: Ordinance 578 Adopting a New Public Contracting Code

I. Introduction.

State law regulates many aspects of local government purchasing and contracting. The Public Contracts and Purchasing Laws in ORS Ch 279 are nearly 3 decades old. The statutes reflect an archaic structure of public improvement contracting, and constitute a patchwork of amendments that have precluded the use of developments in information technology and innovative public-private "partnerships." In recognition of this, the 2003 Legislature passed a comprehensive re-write of public contracting law to apply to public contracts first advertised or entered into after March 1, 2005. ORS Chapter 279 will be repealed and replaced with three new chapters that constitute Oregon's new Public Contracting Code ("Code").

The new chapters are ORS Ch 279A, which relate general provisions affecting the entire Code; ORS Ch 279B, which concerns public procurements of general goods and services; and ORS Ch 279C, which concerns public improvements and related contracts (for construction, architectural, engineering and related services). The Code directs the State Attorney General to promulgate public contracting rules that can be used by state agencies and local governments. ("Model rules"). Under the new law, the model rules will control the contracting of a local government unless the local government affirmatively adopts alternative local rules. Nevertheless, a city cannot rely solely on the model rules for its contracting needs -- the Code requires that every local government adopt some rules.

The current city code contains rules and procedures that are tailored to Wilsonville, but these provisions are repealed under the new law. Staff has endeavored to draft an ordinance that maximizes the options the city has in procurement, while preserving local preferences adopted in the past. Proposed Ordinance 578 embodies staff's recommended set of required and alternative local rules.

II. Background and Features of Current Code

Public contracting law generally requires competitive bidding on all public contracts, with some statutory exemptions (such as personal service contracts). In 1976, the Wilsonville City Council elected to designate itself the Local Contract Review Board ("Board"), as an alternative to local procurement through the State Contract Review Board. Since that

time, the City has also entered into a contract with the Wilsonville Urban Renewal Agency to act as its Board and to apply the city procurement rules and procedures.

The current city code (W.C. 2.310- 2.314) prescribes how the Board exercises its powers, grants exemptions from public bidding, conducts hearings and hears appeals from disqualified bidders. The City Manager or the Manager's delegee is the "Contracting Officer" responsible for day-to-day administration of public contracts. Contracts exempt from competitive bidding are those that are less than \$5,000; involve other governments, concern items available through a single source, and "emergency" contracts. Contract-by-contract exemptions may be made by the Board based upon certain findings (the familiar "exemption will result in substantial cost savings" and "will not result in favoritism or substantially diminished competition"). Personal services contracts not exceeding \$50,000 may be entered into without a competitive selection process. In addition, the code provides a detailed procedure for disqualification of contract bidders and appeal from such disqualification. It authorizes the Contracting Officer to enter into contracts up to \$75,000 without first obtaining City Council approval, and the City Engineer, Building Official and the Finance Director are recognized as the City's Contracting Officer for public improvement contracts, improvements to city buildings, and purchase contracts, respectively.

III. Features of the State Code

ORS Ch 279A. This Chapter sets forth the overarching provisions for the entire Public Contracting Code, including definitions and general policy statements. The organization and applicability of various parts of the Code are identified, including types of contracting, acquisitions and organizations that are not made subject to the Code.

Provisions are centralized for the treatment of minority, women and emerging small businesses, including subcontracting requirements and remedies for discrimination. A three-year statute of limitations is established for a contracting agency to allege discrimination in subcontracting. Current statutes on contract preferences (including Oregon goods and services, nonresident bidders and recycled materials) have also been centralized.

Statutes applicable only to state agencies and state surplus property are grouped within ORS Ch 279A, as are provisions relating to personal services, intergovernmental agreements and a new comprehensive framework for various cooperative procurements.

ORS Ch 279B. Greater procurement flexibility is allowed in this chapter than under current law for the general procurement of "goods and services" (other than public improvements and related services addressed in ORS Ch 279C). Special treatment is provided for personal service contracts as they are identified by local agencies. Contracting agencies may select from two primary methods of procurement; competitive sealed bids or competitive sealed proposals. ORS Ch 279B then provides procedural requirements for each of those source selection methods. Additionally, five other contracting methods are identified:

(1) *Small Procurement.* ORS 279B.065 procedures are highly informal for procurements with a value of under \$5,000. ORS 279B.065

(2) *Intermediate Procurements.* Under ORS 279B.070, three competitive quotes are required for these informal procurements, up to \$150,000 in value.

(3) *Sole Source Procurements.* Under ORS 279B.075, written findings are required that the goods or services are available from only one source.

(4) *Emergency Procurements.* In ORS 279B.080, the head of a contracting agency, or designee, may authorize a defined "emergency" procurement after documentation.

(5) *Special Procurements.* ORS 279B.085 provisions are similar to the formal contract-by-contract exemption requirements under the current ORS 279.015(2).

ORS Ch 279B contains its own administrative provisions, including cancellation, offer responsibility, pre-qualification and debarment, notice of intent to award, use of price agreements and matters pertaining to specifications.

New legal remedies provisions are set forth in ORS Ch 279B for procurement of goods and services, in which a protest procedure is established at the contracting agency level. Exhaustion of administration remedies is required prior to litigation, and courts are directed to give deference to contracting agency determinations of fact. Questions of law continue to be determined by the courts. These new provisions do not apply to public improvement contracting under ORS Ch 279C, in which the current legal remedies under ORS 279.067 remain in place (litigation without exhaustion of administrative remedies or a required protest procedure).

ORS Ch 279C. Of the three new chapters within the Public Contracting Code, this chapter most closely resembles existing ORS Ch 279. Competitive bidding was retained as the norm for public improvements, and no substantive changes were made to statutes on hours of labor, prevailing wage rates, payment and interest, retainage, actions against payment bonds, first-tier subcontractor disclosure, pre-qualification, disqualification or legal remedies. However, there were six areas of substantive change:

(1) *Architects, Engineering ("A&E"), Land Surveying and Related Services.* Definitions and procedural requirements were reorganized and centralized within a new subdivision, ORS 279C.100 to 279C.125. Related services were defined and procedural provisions identified. Qualifications based selection is required for state agencies for A&E and Land Surveying contracts, or where state funding is utilized, and otherwise that process is merely allowed for local agencies.

(2) *Bidding Exceptions and Exemptions.* While competitive bidding is retained as the norm for public improvement contracts under ORS 279C.335, an exception is allowed for intermediate level procurements (see below), emergency contracting procedures are clarified, and class exemptions are specifically authorized.

(3) *Performance and Payment Bonds.* ORS 279C.375 and 279C.380 specifically require a 100 percent performance bond as well as a 100 percent payment bond, rather than one combined bond, and clarifies the purpose of each. The bonds are required from a surety company with a state certificate of authority, and these statutes clarify that the right of action on the payment bond also applies in the case of competitive proposals.

(4) *Competitive Proposals.* The new provisions set out a procedural framework for how competitive proposals for public improvement contracts are authorized. Bidding statutes applicable to competitive proposals are identified, as well as inapplicable statutes. Requirements for Requests for Proposals and the selection process are also set forth.

(5) *Competitive Quotes.* The new provisions set out a procedural framework for intermediate level procurements. Three informal quotes are required, with award made to the lowest priced or a written record of the alternative basis of award. The thresholds are \$100,000 generally or \$50,000 for a contract for a highway, bridge or other transportation project.

(6) *Construction Contracts that are not Public Improvements.* Under these new provisions at ORS 279C.320, such contracts (including minor alterations, ordinary repair or maintenance of a public improvement) are to be procured as ordinary goods and services under ORS Ch 279B. Other requirements of ORS Ch 279C, such as prevailing wage rates, may apply. Provisions are also made for projects in which no funds of the agency are utilized.

IV. Features of the Proposed Ordinance

As indicated, the draft ordinance recognizes that the State Public Contracting Code and Model Rules apply in the absence of an ordinance provision to the contrary. What follows is 1) a description of local rules that must be adopted under state law, and those which are adopted discretionarily and 2) a citation to provisions in the ordinance addressing these matters.

ORS 279A.060 establishes the governing body of every local government is the local contract review board of that entity, but the Model Rules do not address issues of delegation of authority for decision-making activities that the statutes assign to "contracting agencies." If actions assigned to contracting agencies are not to be performed by the governing body, the duties must be delegated (most commonly to an executive or administrative official). In W. C. 2.310, the ordinance provides that the City Manager, or designated agent, is designated the City's "Contracting Agency" under state law.

The model rules do not create special classes of contracts that are exempt from the general requirements for competitive bids and proposals. W. C. 2.312 provides an array of special exemptions comprised of things the City has preferred in the past, (i.e., Personal Service and "sole source" contracts), and other contracts, the competitive procurement of which would be inefficient, impractical and otherwise supported by a

substantial savings and insubstantial impact on competition (e.g., purchase of price regulated items, library periodicals, gasoline, etc.). As part of the adoption of this ordinance, staff has proposed findings supporting these classes of exempt contracts. See Exhibit A to the proposed ordinance.

The local government must provide procedures for entry into personal service contracts by defining "personal services" and establishing a method for the award of such contracts. W.C. 2.315 provides the definition of personal service contract and details the procedure by which these contracts are let.

The model rules do not provide procedures for the disposal of surplus personal property. Under the terms of W.C. 2.316 the City Manager/or delegate, as the "Contracting Agency," determines whether property is surplus and the manner in which the property to sold at a public auction. The code specifies minimum notice and allows for auction sales conducted entirely on the internet.

It is discretionary with the Board to define and exempt personal service contracts from the competitive selection process. W.C. 2.315(5) provides the procedures for the screening and selection of persons to perform personal services.

Local governments may provide that procurements contracts can be amended in a manner beyond that provided in the Model Rules. W.C. 2.312(2) allows that as part of contract amendment, (exempted from competitive bidding generally under that same subsection), additional goods or services can be purchased by amendment, even though the original contract did not provide for additional purchases. In this same connection, the Contracting Agency is authorized to extend or renew contracts for a specified term under W. C. 2.313 (c). This is a helpful authorization, as it is not uncommon for the city to discover that a service contract has expired or is about to expire, when the services are needed than insufficient time is available for a new solicitation.

Oregon law allows improvement contracts for up to \$100,000 to be awarded using informal quotes. W. C. 2.314 authorizes that approach and fleshes out the manner in which at least three price quotes are solicited.

V. Recommendation.

Experience with the new state law and application of local code will likely invite amendments to Ordinance 578. However, the city is well served in adopting the ordinance prior to March 1, 2005, the effective date of the state law. Accordingly, staff recommends the council conduct a public hearing on the proposed ordinance, direct staff to incorporate any amendments, and pass the ordinance with an emergency clause at the council meeting of February 22, 2005.

pal