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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 123
OREGON BUSINESS DEVELOPMENT DEPARTMENT

FILED
08/15/2019 9:35 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: These rules relate to the contracting procedures of the Business Development Department.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 09/23/2019 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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NEED FOR THE RULE(S):

These rules are needed to better clarify statute which allows the department to enter into contracts as necessary to carry out its authorized mission.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

ORS 285A.075 and 279A.070

FISCAL AND ECONOMIC IMPACT:

These rule amendments do not have a fiscal impact.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

There is no cost of compliance or effect on small businesses as a result of these amendments.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Small business were not involved in the development of these minor amendments.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

There is no fiscal impact as a result of these amendments.

RULES PROPOSED:

123-006-0035, 123-006-0045

AMEND: 123-006-0035

RULE SUMMARY: This rule is being amended to better clarify "Limited Amounts" under the definition of "Unanticipated Amendments".

CHANGES TO RULE:

123-006-0035

Contract Amendments ¶¶

(1) General Rule. The Department may amend any contract without additional competition, including reinstatements and cost overruns, but only when the Department has determined:¶¶

(a) The amended Contract is within the Scope of the Solicitation Document, or if no Solicitation Document, the Contract; or in the instance of a Special Procurement, the approval of Special Procurement;¶¶

(b) The amended Contract does not adversely affect the competitive conditions for the original contract; and¶¶

(c) If the Contract was selected according to the Small Procurement method, the total compensation does not exceed \$10,000, or, if selected according to the Intermediate Procurement method, the total compensation does not exceed \$150,000.¶¶

(2) Anticipated Amendments.¶¶

(a) "Anticipated Amendment" means the Department has text in any Solicitation Document and the Contract that explains:¶¶

(A) The possibility of one or more Amendments;¶¶

(B) A general description of circumstances that might require an Amendment to be issued under the Contract and any changes to the requirements of the Contract that may be anticipated or even planned for, but not necessarily quantified at the time of Contract execution. These changes may be described in any Solicitation and Contract as, for example: Extra Work or Goods; Additional Work; Work to be done if certain situations are encountered; or Changes in terms, conditions, price, or type of Work; etc.; and¶¶

(C) The provisions of the Contract that are subject to negotiation in order to finalize the details and costs of such an Amendment.¶¶

(b) Anticipated Amendments do not include cost overruns or reinstatements.¶¶

(c) The Department may make one or more Anticipated Amendments to a Contract without any additional competitive process and for an unlimited amount, subject to section (1) of this rule.¶¶

(3) Unanticipated Amendments.¶¶

(a) "Unanticipated Amendment" means any Amendment that does not meet the requirements of an Anticipated Amendment. Unanticipated Amendments do not include cost overruns or reinstatements.¶¶

(b) Limited Amount. The Department may make one or more Unanticipated Amendments to a Contract without any additional competitive process, provided the cumulative amounts of all Unanticipated Amendments do not exceed ~~\$12,500 for a Contract award as a small procurement under 137-047-0265~~ or ~~25% of the Original Contract amount of a Contract awarded as an intermediate procurement under 137-047-0270~~ 100% of the Original Contract amount and subject to section (1) of this rule.¶¶

(c) Unlimited Amount. The Department may make one or more Unanticipated Amendments to a Contract without any additional competitive process and for an unlimited amount, subject to section (1) of this rule, and provided the Department's Designated Procurement Officer gives written approval of the Unanticipated Amendment as meeting the following requirements:¶¶

(A) The Unanticipated Amendment is due to circumstances that were unforeseen at the time the original Contract was established;¶¶

(B) The Unanticipated Amendment does not represent any important general change that alters the essential identity or main purpose of the original Contract, nor is of such importance that it should be a new undertaking;

and¶¶

(C) The Unanticipated Amendment serves the public interest, including specific reasoning to support that conclusion. Reasons may include, but are not limited to: To address emergencies arising in the course of the Contract that require prompt action to protect the Work already completed or Goods delivered; to comply with official or judicial commands or directives issued during contract performance; or to ensure that the purpose of the Contract will be realized.¶¶

(4) Cost Overruns.¶¶

(a) Unless the Contract provides that the maximum total compensation is based on an estimate and is subject to amendment, if Contractor expends all authorized compensation but the required Goods, Work or Services are not complete or are not satisfactory, Contractor is responsible to complete the Goods, Work or Services to Department's satisfaction without further compensation.¶¶

(b) Notwithstanding the general rule in subsection (4)(a) above, Department may, by Amendment to the Contract, agree to increases in the maximum total compensation, subject to section (1) of this rule, and provided the Department's Designated Procurement Officer gives written approval of the Cost Overrun Amendment as meeting the following requirements:¶¶

(A) The cost overrun arose out of circumstances or conditions encountered in the course of contract performance that were unavoidable and not reasonably anticipated at the time of the original Contract, or the most recent Amendment, if any;¶¶

(B) The cost overrun was incurred in good faith, results from the good faith performance by the Contractor, and is no greater than the prescribed hourly rate or the reasonable value of the additional Goods, Work or Services rendered; and¶¶

(C) The Cost Overrun Amendment serves the public interest, including specific reasoning to support that conclusion. Reasons may include, but are not limited to: To address emergencies arising in the course of the Contract that require prompt action to protect the Work already completed; to comply with official or judicial commands or directives issued during contract performance; or to ensure that the purpose of the Contract will be realized.¶¶

(5) Reinstatements.¶¶

(a) "Reinstatement" of an expired Contract means an amendment to restore the full action of the Contract as though the expiration had not occurred, and extend the Contract to a new expiration. A reinstatement may be combined with any other amendment allowed by this rule.¶¶

(b) The Department's Designated Procurement Officer may give written approval to reinstate an expired Contract if the following requirements are met:¶¶

(A) The failure to extend or renew the Contract in a timely manner was due to unforeseen or unavoidable conditions, or if due to administrative mistake, the reason for the mistake and the steps taken to prevent similar mistakes;¶¶

(B) The expiration occurred in good faith on the part of both the Department and the Contractor;¶¶

(C) The reinstatement furthers the public interest, compared to a separate procurement process, including specific reasoning to support that conclusion; and¶¶

(c) When a Contract is reinstated pursuant to this section, the Department may compensate the Contractor only at the rate or terms of compensation established in the original Contract, for Goods, Work or Services performed in the interim between the expiration of the original Contract and the execution of the Reinstatement Amendment.¶¶

(6) Amendments of Contracts for Architectural, Engineering and Land Surveying Services. This rule does not apply to amendments of Contracts for Architectural, Engineering and Land Surveying Services. The Department will comply with the Oregon Department of Justice Model Public Contract Rules, OAR chapter 137, division 048 for amendments to such contracts.

Statutory/Other Authority: ORS 285A.075

Statutes/Other Implemented: ORS 285A.075, 279.070

AMEND: 123-006-0045

RULE SUMMARY: This rule is being amended include three additional types of goods or services.

CHANGES TO RULE:

123-006-0045

Sole Source Procurements, by Rule. ¶

The Department may procure goods or services for the following subjects without competition:¶

(1) Advertising and Promotion. This covers all types of advertising placement, including booth space at trade shows and exhibitions. This does not include development of advertising or trade show services.¶

(2) Bond Counsel. The Department will follow the procedures and requirements of ORS 286A.130 and any applicable Oregon Administrative Rules.¶

(3) Event Speakers. This covers those contracts for event speakers such as a keynote address. This does not cover those contracts for services such as training instructors or facilitators of meetings.¶

(4) Conferences, Meetings, Events. This covers facilities for housing or conducting meetings or events, as well as hotels or other lodging accommodations for those attending such meetings or events.¶

(5) Organizational Memberships. This covers dues, registrations, and membership fees in organizations the Department chooses to associate with. This does not cover memberships for individuals.¶

(6) Foreign Trade Missions. This covers procurement expenditures necessary during the duration of a foreign trade mission. This does not include foreign trade shows. This does not include employee travel reimbursements.

Statutory/Other Authority: ORS 285A.075

Statutes/Other Implemented: ORS 285A.075, 279A.070, 279B.075