

## ADM-1.08 - Purchasing Board of Appeals Rules of Procedure

### PURCHASING BOARD OF APPEALS RULES OF PROCEDURE

*Administrative Rule Adopted by Bureau Pursuant to Rule-Making Authority*

ARB-ADM-1.08

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#### **Section 1.0 - Definitions**

- A. The following definitions apply to the City of Portland's Hearing Rules for appeals of adversely affected bidders or proposers in regard to City decisions about solicitation specifications or contract provisions as provided by PCC 5.33.200, bidder or proposer responsibility as provided by PCC 5.33.300, bidder or proposer responsiveness as provided by PCC 5.33.300, contract award, as provided by PCC 5.33.320, negotiation as provided by PCC 5.33.340, revisions, revocations and disqualification of bidders or proposers, as provided in PCC 5.33.330 and 5.33.470.
1. Addenda: Additions or deletions to, material changes in, or general interest explanations of the City's solicitation documents.
  2. Alternative Contracting Methods: Methods of public improvement contracting, commonly including variations of Design/Build and CM/GC forms of contracting, which are specifically addressed in this Chapter, as well as other developing techniques such as performance contracting and cost plus time contracting which are addressed as a group in this Chapter as forms of competitive negotiation.
  3. Authorized Representative: The owner of a sole proprietorship, a partner in a firm or partnership, or, a person authorized to bind by a corporation's board of directors.
  4. Award: The decision of the City to execute a contract with a particular bidder or proposer.
  5. Bid: A competitive offer binding on the bidder and submitted in response to an invitation to bid.
  6. Bid or Proposal Bond/Bid or Proposal Security: A means of securing execution of an awarded contract as further provided in PCC 5.33.180 and 5.33.460.
  7. Bidder: A person who submits a bid in response to the City's invitation to bid.
  8. Bidding Period: The span of time between the date of issuance of the solicitation document and closing of the solicitation.
  9. City: The City of Portland, Oregon or designee.
  10. Closing: The date and time announced in the City's solicitation document as the deadline for submitting bids or proposals.
  11. Competitive Bidding: A selection process that involves an advertised public notice, issuance of a written solicitation document inviting persons to submit written, signed, and sealed bids that are received in the Bureau of Purchases and publicly opened at a designated time and place.
  12. Competitive Negotiation: A method of contracting in which proposal evaluation and contract award result from an open and competitive procedure, typically through the request for proposal process, in which evaluation criteria in addition to price are considered in contractor selection.
  13. Competitive Range: The number of proposers the City will negotiate with if the City intends to negotiate with proposers in accordance with PCC 5.33.340.
  14. Construction Manager/General Contractor (CM/GC): An alternative contracting

- method, or a person selected pursuant to that method, to perform a public improvement project. The method typically requires a contractor to undertake design phase involvement, constructability reviews, value engineering, scheduling, estimating and acquiring subcontracting services, establishing a GMP to complete the contract work, acting as general contractor, coordinating and managing the building process, and providing general contractor expertise.
15. **Contract:** The written agreement between the City and the Contractor, that sets forth the rights and obligations of the parties, including the City's solicitation document and the accepted portions of a bid or proposal, describing the work to be done and the obligations of the parties. Depending upon the goods and services being procured, the contract may consist of a purchase order, price agreement, or other contract documents. The contract includes without limitation any addenda, the general and special conditions governing the work, the performance and payment bond (if required), plans, standard or special specifications, technical specifications and any contract amendments, including approved change orders.
  16. **Contract Execution:** Contract execution occurs when the contract is signed by any mark, work, or symbol, in ink, with the intent to be bound, by an authorized representative of a bidder or proposer and the City.
  17. **Contract Price:** The total of the awarded bid or proposal amount, including any approved alternates, and any fully executed change orders or amendments.
  18. **Contractor:** The person awarded the contract to furnish the goods, services or work required by the City's solicitation document.
  19. **Cost Estimate:** The City's most recent pre-bid, good faith assessment of anticipated contract costs, consisting of either the estimate of an architect, engineer or other qualified professional, or confidential cost calculation worksheets, where available, or formal planning or budgetary documents.
  20. **Days:** Calendar days, including weekdays, weekends and holidays, unless otherwise specified by these rules or the solicitation document.
  21. **Descriptive Literature:** Informational materials concerning available products submitted by bidders or proposers in response to the City's solicitation document.
  22. **Design/Build:** An alternative contracting method that results in a public improvement contract in which the construction contractor also provides or obtains specified design services, and manages both design and construction. In this form of contract, a single entity provides the City with all of the services necessary to both design and construct the project.
  23. **Disqualification:** Preclusion from bidding and contracting with the City for a period of time.
  24. **Electronic:** Any means of transmission of information by electronic device, including but not limited to electronic mail or facsimile. A facsimile or fax is a document that has been transmitted to the City over telephone lines and received by the City in a hard copy form by a device commonly known as a facsimile machine.
  25. **Exempt:** Contracts not subject to the competitive bidding requirements of state or local law.
  26. **Exemption:** A formal process under ORS 279.015 or ORS 279.017, and PCC 5.33.090 which permits the City to purchase goods or services without the use of competitive bidding. An exemption may be for a specific contract or solicitation, or it may be for a class or category of contracts.
  27. **Foreign Contractor:** A contractor not domiciled in or registered to do business in

- the State of Oregon.
28. Formal Bid Threshold: The amount as provided by City Charter Section 8-104.
  29. Guaranteed Maximum Price (GMP): The total maximum price provided to the City by the contractor, and accepted by the City, that includes all reimbursable costs of and fees for completion of the contract work, as defined by the solicitation document and the contract documents, except for material changes in the scope of work. It may also include particularly identified contingency amounts.
  30. Informal Price Quotations: The competitive solicitation by the City of informal offers from competing bidders.
  31. Invitation to bid (ITB): A solicitation document calling for bids.
  32. Life Cycle Costing: A determination of the cost of a product for its estimated useful life, including without limitation acquisition costs, operation and maintenance costs, and disposal.
  33. Local Contract Review Board: The Portland City Council as authorized by ORS 279.055 and PCC 5.33.020.
  34. Non-Competitive Negotiation: A method of contracting in which contract award results from contract discussions with only one individual or firm.
  35. Offer: A bid or proposal.
  36. Opening: The date, time and place announced in the City's solicitation document for the public opening of written, sealed bids or proposals.
  37. ORS: Oregon Revised Statutes as applicable and as amended.
  38. Other Options: Those items generally considered appropriate for negotiation in the competitive proposal process, relating to the details of contract performance, but excluding any material requirements previously announced in the solicitation process which would likely affect the competition.
  39. PCC: The Code of the City of Portland, Oregon.
  40. Person: A natural person capable of being legally bound, sole proprietorship, limited liability company, corporation, foreign corporation, non-profit corporation, profit and non-profit unincorporated association, business trust, partnership, two or more persons having a joint or common economic interest, a government or government subdivision or other entity whether bidder or proposer or prospective bidder or proposer, contractor, vendor, or sub-contractor.
  41. Prequalification: A process followed by the City to determine the qualifications of products or prospective bidders or proposers to perform contracts.
  42. Product Sample: A representative specimen of the item offered by the bidder or proposer in response to the City's solicitation document. Unless otherwise provided in the solicitation document, the product sample shall be the exact product or a representative portion of that product offered in the bid or proposal.
  43. Project: A contract for public improvement as defined by ORS 279.011(8).
  44. Proposal: A competitive offer binding on the proposer and submitted in response to a request for proposals.
  45. Proposer: A person who submits a proposal in response to the City's request for proposals.
  46. Public Contract: The term public contract as used herein shall have the same meaning as provided in ORS 279.011(6).
  47. Public Improvement: The term public improvement as used herein shall have the same meaning as provided in ORS 279.011(8).
  48. Public Works: The term public works as used herein shall have the same meaning as provided in ORS 279.348(3).
  49. Purchasing Agent: That person designated by the Portland City Council to act as

- the City's Purchasing Agent or the Purchasing Agent's designee.
50. Qualified Rehabilitation Facility (QRF): A nonprofit community rehabilitation program or a vocational service provider whose purpose is to assist and encourage disabled individuals and which:
    - a. During the fiscal year employs disabled individuals for not less than 75 percent of the hours of direct labor required for the manufacture or provision of its products or services.
    - b. Shall be either a community rehabilitation program certified through the Oregon Vocational Rehabilitation Division or a vocational service provider certified through the Oregon Mental Health Division of the Department of Human Resources;
    - c. Meets the definition given in ORS 279.835(4); and
    - d. Shall be currently certified by the Oregon Department of Administrative Services (ODAS) as a QRF; i.e., is listed as a current certificate holder in the annual QRF Directory, published by ODAS.
  51. Request for proposals (RFP): A solicitation document calling for proposals.
  52. Responsible Bidder or Proposer: A person that has submitted a bid or proposal and that meets the standards set forth in PCC 5.33.300.B.4 and has not been disqualified under ORS 200.075, 279.037 or PCC 5.33.330.
  53. Responsive Bid or Proposal: A bid or proposal that substantially complies with applicable solicitation procedures and requirements and the solicitation document.
  54. Retainage: Unless the contract otherwise requires, retainage means the difference between the amount earned by the contractor on a public contract and the amount paid on the contract by the City.
  55. Service Contract: A contract for labor, labor and materials, or trade related services that is neither a professional, technical and expert services contract nor a public improvement contract.
  56. Solicitation Document: Any document that requests submission of a bid or proposal or other offer to the City to enter into a contract. All documents referenced by the solicitation document are included in the solicitation document.
  57. Specification: A portion of a contract that specifies how the work is to be performed or that sets conditions for performance of the work. The specifications may be expressly stated in the contract documents, or may be incorporated by reference to some other source. Examples of specifications include, but are not limited to: a description of the physical or functional characteristics of an item of work; the nature of a supply, service or construction item; a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery; or the quantities or qualities of materials to be furnished under the contract. Specifications may either state the result to be obtained or describe the method and manner of performing the work.
  58. Value Engineering: Those proposed changes to the plans, specifications, or other contract requirements which may be made, consistent with industry practice, under the original contract by mutual agreement in order to take advantage of potential cost savings without impairing the essential functions or characteristics of the public improvement. Cost savings include those resulting from life cycle costing, which may either increase or decrease absolute costs over varying time periods.
  59. Work: The furnishing of all materials, equipment, labor, and incidentals necessary to successfully complete any individual item or the entire contract and the timely successful completion of all duties and obligations imposed by the contract.

### ***Section 1.1 - Notice of Hearing***

- A. Following a request for a hearing before the Board of Appeals the City shall issue a notice informing the person appealing of the following matters:
1. A short and plain statement of the subject matter of the hearing;
  2. A statement of the party's right to be represented by counsel;
  3. A statement of the time and place of the hearing; and
  4. A statement that the hearing shall be recorded and that the person requesting the appeal has a right to acquire court reporting services at his or her own expense if so desired.
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### ***Section 1.2 - Representation of Parties***

Persons appealing may be represented at the hearing by an attorney, an officer of the corporation, or other person authorized to act on the person's behalf.

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### ***Section 1.3 - Discovery***

- A. Discovery by any party is permitted provided that the parties shall not delay the date of the hearing set by the Purchasing Agent.
- B. Discovery may include but is not limited to one or more of the following methods:
1. 1. Deposition of a material witness;
  2. Disclosure of names and addresses of witnesses expected to testify at the hearing; and
  3. Production of documents that are reasonably calculated to lead to admissible evidence at the hearing.
- C. The Purchasing Agent shall control the methods, timing and extent of discovery if the parties cannot reach agreement. The Purchasing Agent may limit discovery to a list of witnesses and the principal documents upon which the parties will rely.
- D. The parties may each issue subpoenas in support of discovery and to require witnesses to appear. The parties may apply to the circuit court to compel obedience to a subpoena.
- E. The Board may refuse to admit evidence that was not disclosed in response to a discovery order, unless the party that failed to provide discovery offers a satisfactory reason for having failed to do so.
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### ***Section 1.4 - Prehearing Conference***

- A. Prior to hearing, the Purchasing Agent may, in his or her discretion, conduct one or more prehearing conferences to facilitate the conduct and resolution of the appeal. The

Purchasing Agent may convene the conference on its own initiative or at a party's request.

- B. The purposes of a prehearing conference may include, but are not limited to the following:
1. To facilitate discovery and to resolve disagreements about discovery;
  2. To identify, simplify and clarify issues;
  3. To eliminate irrelevant issues;
  4. To obtain stipulations of fact;
  5. To provide to the Presiding Officer or Board, in advance of the hearing, copies of all documents intended to be offered as evidence at the hearing and the names of all witnesses expected to testify;
  6. To authenticate documents;
  7. To decide the order of proof and other procedural matters pertaining to the conduct of the hearing;
  8. To discuss the use of a collaborative dispute resolution process in lieu of or preliminary to holding the hearing on the appeal; and
  9. To discuss settlement or other resolution or partial resolution of the case.
- C. The prehearing conference may be conducted in person or by telephone.
- D. The Purchasing Agent must make a record of any stipulations, rulings and agreements. The City may make an audio or stenographic record of the pertinent portions of the conference or may place the substance of stipulations, rulings and agreements in the record by written summary. Stipulations to facts and to the authenticity of documents and agreements to narrow issues shall be binding upon the parties to the stipulation unless good cause is shown for rescinding a stipulation or agreement.
- E. After the hearing begins, the Presiding Officer may at any time recess the hearing to discuss any of the matters listed in this rule.
- F. The Purchasing Agent may delegate to the Presiding Officer the discretion to conduct prehearing conferences.

### ***Section 1.5 - Hearing***

- A. The board shall designate one of its members as the Presiding Officer. The hearing shall be conducted by and under the control of the presiding officer.
- B. If any member of the Board has an actual or potential conflict of interest as defined in ORS 244.020(1) or (7), that member shall comply with the requirements of ORS Chapter 244 (e.g., ORS 244.120 and 244.130). If a Board member should withdraw from the hearing, the Purchasing Agent shall appoint a replacement for the hearing. The replacement member shall be from the same group as the original member appointed, as provided in PCC 5.22.350C(2).
- C. The Board shall control the conduct of the hearing, including the order of witnesses and other matters, and may make such rulings as are necessary for its orderly conduct. The hearing shall be conducted, subject to the discretion of the Presiding Officer, so as to include the following:
1. The statement and evidence of the person requesting the appeal; and

2. The statement and evidence of the City in support of its action
  3. Any closing arguments.
- D. The Presiding Officer and parties shall have the right to question witnesses. The Presiding Officer may permit other Board members to ask questions in his or her discretion.
- E. The hearing may be continued with recesses as determined by the Presiding Officer, however, no such continuance shall have the effect of causing the decision to exceed any time period required by Oregon law.
- F. The Presiding Officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious, or immaterial matter.
- G. Exhibits shall be marked and maintained by the City as part of the record of the proceedings.
- H. If either party requests a continuance or delay in the hearing, the Board shall determine whether the continuance is warranted. The following procedural steps shall then be taken if the matter before the Board concerns a revocation or revision to a person's prequalification status or concerns a person's disqualification:
1. If the person appealing has sought a continuance that is warranted, but not caused by any action of the City, the Board shall permit the continuance only if the person appealing agrees not to bid on any City work during the time of the continuance. The City shall then re-issue its decision regarding rejection, revision, revocation or disqualification and the 30-day time period mandated by statute shall begin again.
  2. If the person appealing has sought a continuance that is warranted and caused by the actions of the City, the Board shall permit the continuance, the City shall re-issue its decision and the person appealing shall be entitled to bid on City work during the time of the continuance until a final order is entered.
  3. If the City has sought a continuance that is warranted by the actions of the person appealing, then the continuance shall be granted, the City shall re-issue its decision and the 30 day time period mandated by statute shall begin again. The re-issuance of the decision shall preclude the person appealing from bidding on City work until a final order is entered.
  4. If the City has sought a continuance that is warranted but has not been caused by the actions of the person appealing, the City shall reissue its decision and the person appealing shall be entitled to bid on City work until a final order is entered.
- I. In other matters, the Board shall determine whether the continuance is warranted. If a party other than the City seeks a delay through no fault of the City, then that party must post a bond in order to obtain a continuance. The amount of the bond shall be in the amount of the anticipated costs of delay that the City would suffer if the continuance were granted.
- J. The hearing shall be approximately four hours in length with no more than two hours provided to either party. The Presiding Officer may, but is not required, to grant additional time, if required, but only if it appears that the parties could not reasonably have shortened the time period for their presentation.

## ***Section 1.6 - Telephone Hearings***

- A. Unless precluded by law, the Purchasing Agent or Board may determine that a hearing or portion of a hearing may be heard by telephone. Nothing in this rule precludes the Purchasing Agent or Board from allowing some parties or witnesses to attend by telephone while others attend in person.
  - B. The Purchasing Agent may direct that a hearing be held by telephone upon request or on its own motion.
  - C. The City shall make an audio or stenographic record of any telephone hearing.
  - D. If a hearing is to be held by telephone, each party shall provide, the day before the commencement of the hearing, to all other parties and the Board, copies of the exhibits it intends to offer into evidence at the hearing. If a witness is to testify by telephone, the party that intends to call the witness shall provide, before commencement of the hearing, to the witness, to the other party, and to the Board, a copy of each document about which the witness will be questioned.
  - E. Nothing in this rule precludes any party from seeking to introduce documentary evidence in addition to evidence described in section (D) of this rule during the telephone hearing and the Presiding Officer shall receive such evidence, subject to the applicable rules of evidence set forth in Section 1.7 below, if inclusion of the evidence in the record is necessary to conduct a full and fair hearing and if it appears that the party seeking to introduce the evidence did not have a reasonable opportunity to provide the documentary evidence in advance.
  - F. As used in this rule, "telephone" means any two-way electronic communication device, including video conferencing.
  - G. The Board may make any rulings necessary to ensure that the hearing is fair to all parties and may reject otherwise admissible evidence under Section 1.7 if it appears that a party has not complied with these rules.
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## ***Section 1.7 - Evidentiary Rules***

- A. Evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible.
- B. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, and privileges afforded by Oregon law shall be recognized by the Board.
- C. All offered evidence, not objected to, shall be received by the Board subject to its power to exclude irrelevant, immaterial, or unduly repetitious matter.
- D. The Presiding Officer may receive evidence that was objected to by a party over that party's objection. Rulings on the admissibility of evidence, if not made at the hearing, shall be made on the record by the Presiding Officer at or before the time a final order is issued.
- E. The Presiding Officer shall accept an offer of proof made for excluded evidence. The offer of proof shall contain sufficient detail to allow the Board or a court to determine whether the evidence was properly excluded. The Presiding Officer shall have discretion to decide whether the offer of proof is to be oral or written and at what stage in the proceeding it will be made. The Presiding Officer may place reasonable limits on the offer of proof, including the time to be devoted to an oral offer or the number of pages in a written



offer.

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### **Section 1.8 - Withdrawals & Default Orders**

- A. The Purchasing Agent may cancel the hearing if the person appealing the City's decision withdraws a request for a hearing. If that occurs, the City's previous decision shall be final and in effect, retroactive to the date when the decision was first mailed to the bidder.
  - B. The Board may issue an order upholding the City's decision if the person appealing the City's decision fails to appear at the scheduled time and place for hearing. The Board may issue a final order of default only after the City makes a prima facie case on the record that supports the City's decision. The record may consist of oral (transcribed, recorded or reported) or written evidence or a combination of oral and written evidence. In all cases, the record shall contain evidence that persuades the Board of the existence of facts necessary to support the order. The default order shall be effect retroactive to the date when the City's decision was first mailed to the person appealing the City's decision.
  - C. The Purchasing Agent shall send a copy of the default order to the bidder at the bidder's last known address following the hearing at which the default order was entered.
  - D. Failure to appeal at the Hearing constitutes a waiver of the party's appeal and precludes the party from seeking review of the Board's decision or City's decision before the City Council.
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### **Section 1.9 - Ex Parte Communications**

- A. An ex parte communication is an oral or written communication to the Board from any party not made in the presence of all parties to the hearing, concerning a fact in issue or a question of law at issue in the proceeding. Ex Parte communications do not include any communication or advice to the Purchasing Agent or Board regarding procedural matters, including communications regarding the operation of these rules.
- B. If the Board receives an ex parte communication during the pendency of the appeal, the Presiding Officer shall:
  - 1. Give all parties notice of the substance of the communication, if oral, or a copy of the communication, if written; and
  - 2. Provide any party who did not present the ex parte communication an opportunity to rebut the substance of the ex parte communication at the hearing, or at a separate hearing for the limited purpose of receiving evidence relating to the ex parte communication only if the separate hearing will not delay issuance of the order, or in writing.
- C. The Board's record shall include:
  - 1. The ex parte communication, if in writing;
  - 2. A statement of the substance of the ex parte communication, if oral;

3. The notice to the parties of the ex parte communication; and
4. Rebuttal evidence, if any.

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### **Section 1.10 - Final Orders**

- A. After a hearing attended by the parties the Board shall set forth in writing the reasons for the decision it reached. The order may be signed by the Board or the Presiding Officer.
- B. The Board may allocate the cost for the hearing between the person appealing and the City. The allocation shall be based upon facts found by the Board and stated in the final order which, in the Board's opinion, warrant such allocation of the costs. In no event shall attorney fees be awarded to either party as costs.
- C. The order shall be prepared by the City and include a citation to the statutes under which the order may be appealed.
- D. If at the hearing the City and the person appealing reach an agreement on the action to be taken by the City, the Purchasing Agent or Board may enter a final order incorporating that agreement. In that event, the order shall be put into writing, signed by both parties and then signed by the Board or the Presiding Officer. If agreement is reached, the matters referenced by Paragraphs A, B or C of this rule need not be placed in the final order.
- E. The final order shall be mailed to the person appealing at that person's last known address.

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### **HISTORY**

Submitted for inclusion in PPD April 18, 2003.

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