

Exhibit A

Changes to Chapter 5.33 Goods and Services

1. **Amend Subsection 5.33.010 A. Definitions as follows:**

A. The following definitions apply to the City of Portland's Purchasing Authority, Policies and Rules as contained in this Chapter.

1.-9. No changes.

10. **Chief Procurement Officer:** The individual, ~~or their designee~~, in charge of the Procurement Services Division of the Office of Management and Finance.

11.-14. No changes.

15. **Competitive Range:** The number of Proposers the City will conduct discussions or negotiate with if the City intends to conduct discussions or negotiations in accordance with Chapter 5.33 or Chapter 5.34.

16.-18. No Changes

19. **Contract Execution:** Contract Execution occurs when the Contract is signed by any mark, word, or symbol, in ink, or using Electronic means by an Authorized Representative of an Offeror and the City.

20. No changes.

21. **Cost Estimate:** The City's most recent ~~pre-Bid~~ pre-solicitation, 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, or confidential cost calculation documents, where available.~~

22.-28. No changes

29. **Equal Employment Opportunity (EEO):** An "Equal Employment Opportunity" Employer is one who does not engage in the discrimination prohibited by Federal law and who is registered as an EEO employer with the City of Portland. ~~certification program administered by the City. Certification by Contractors is required for in order to obtain most City Contracts as required by Chapter 3.100.~~

30. **Equal Benefits (EB):** means the provision of the same or equivalent benefits to employees with spouses and employees with domestic partners, to spouses of employees and domestic partners of employees, and to dependents and family members of spouses and dependents and family members of domestic partners.

30.-40. Renumbered to 31. – 41. No changes.

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41-42. **Personal Services:** as used in these rules, means services performed under a Professional, Technical or Expert Services Contract governed by Chapter 5.68 or pursuant to ORS 279A.055.

42-43. **Prequalification:** Depending on the context, either the process followed by the City to determine the qualifications of an Offeror or the process to determine the suitability of particular Goods.

43.-59. Renumbered 44. – 60. No changes.

60-61. **Signature:** Any Written or Electronic mark, word or symbol that is made or adopted by a Person with the intent to be bound to a Contract.

61.-68. Renumbered 62-69. No changes.

2. Amend Subsection 5.33.020 C. City Council as Local Contract Review Board as follows:

C. The Attorney General Model Public Contracting Rules do not apply to the City's Procurement of goods, services, and certain construction services. Instead, the rules contained in Chapter 5.33 apply to those Procurements. Similarly, the Attorney General Model Public Contracting rules for Construction do not apply, except with respect to CM/GC Procurements. ~~Instead—Notwithstanding CM/GC Procurements,~~ the Rules contained in Chapter 5.34 apply to the City's ~~these~~ Public Improvements and construction services. It is the intent of these rules to permit the City to act to the full extent permitted by State law. To the extent that the rules adopted in Chapters 5.33 and 5.34 appear to give the City less authority than State law, then State law shall prevail and the City may act to the full extent permitted by State law.

3. Amend Subsection 5.33.040 A. Authority of Chief Procurement Officer as follows:

A. For Contracts covered by Chapters 5.33 and 5.34, the Chief Procurement Officer is authorized to:

1. Advertise for Bids or Proposals for Goods and Services without specific authorization from City Council, when the anticipated amount ~~proposed purchase~~ is included within the current fiscal year budget and is \$500,000 or less.

2.-4. No changes.

5. Advertise for Bids or Proposals for Goods and Services when the proposed purchase is not included within the current fiscal year budget and the anticipated Contract Amount exceeds \$500,000 when City Council approves of the purchase by Ordinance. Thereafter, the Chief Procurement Officer may award and execute a Contract if the Contract Amount is \$500,000 or less. If the Contract Amount exceeds \$500,000 the Chief Procurement Officer shall recommend the Award of a Contract by report to City Council.

6.-13. No changes.

4. Delete Section 5.33.050 Authority for Golf Concession Contracts.

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5. **Delete Section 5.33.055 Authority of Appropriation Unit Managers.**

6. **Amend Section 5.33.060 Authority of Directors.**
Directors of Bureaus or Offices are authorized to:
 - A. Execute Contracts to the same extent as appropriation unit managers as provided in Section 5.33.055; obligating the City for purchases of Goods and Services for use by their bureau in an amount not to exceed \$5,000 for a single transaction as specified in Section 5.33.180. Procurements shall not be artificially divided or fragmented so as to constitute Procurements under \$5,000.
 - B.-C. No change.

7. **Amend Section 5.33.070 Purchasing Goods, Services and Public Improvements from City Employees.**
 - A. Purchasing From City Employees. The Chief Procurement Officer, City Official or City employee shall not make any purchase of Goods and Services from any City employee, or any business with which a City employee is associated, except as follows:
 1. When the purchase is expressly authorized by ordinance; or
 2. During a state of Emergency as provided by Chapters 15.04 and 15.08; and when approved in Writing by the Mayor, or the person performing the Mayor's duties, under those Chapters.
 - B. "Business with which a City employee is associated" means any business in which the City employee is a director, officer or owner.
 - C. In any situation in which the Chief Procurement Officer believes that a purchase would cause an appearance of impropriety, regardless of whether the purchase is authorized by this or any other code provision, the Chief Procurement Officer may condition the proposed purchase on approval by Council.

8. **Add Section 5.33.076 Equal Employment Opportunity**
 - A. It is unlawful to discriminate on the basis of race, religion, color, sex, marital status, familial status, national origin, age, mental or physical disability, sexual orientation or source of income in programs, activities, services, benefits, and employment whether carried out by the City of Portland, directly or through a contractor or any other entity with whom the City of Portland arranges to carry out its programs and activities except as allowed by federal law, rules and regulations.
 - B. Any person, vendor, contractor, or entity of any type must be registered with the City of Portland as an EEO Employer in order to be eligible to be awarded any Contract.
 - C. Procurement Services has the authority to adopt rules, establish standards and procedures it deems necessary to effectively carry out this program

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- D. Contractors and Subcontractors shall provide all information requested by the City to assist it in performing its duties.
- E. If the City receives a complaint filed by any person or entity that alleges prohibited discrimination by a Contractor or Subcontractor, or when information comes into its possession indicating that a Contractor or Subcontractor may have engaged in prohibited discrimination, the City may conduct an investigation to determine whether the complaint or the information is correct.

9. **Add Section 5.33.77 Equal Benefits**

- A. No contractor on a City Contract shall discriminate by policy or practice in the provision of employee benefits between an employee with a domestic partner and an employee with a spouse, subject to the following exceptions:
- B. Procurement Services has the authority to adopt rules, establish standards and procedures it deems necessary to effectively carry out this program in a manner, but not limited to the following:
 - 1. Examine contractor's benefit programs;
 - 2. Allow for remedial action after a finding of non-compliance;
 - 3. Determine and impose appropriate sanctions or remedies by contractors including, but are not limited to:
 - a. Disqualification of the contractor from bidding on or being awarded a City Contract for a period of up to 3 years; and
 - b. Contractual remedies, including, but not limited to, termination of the Contract.
 - c. Impose other appropriate contractual and civil remedies and sanctions for violations.
 - 4. Impose other appropriate contractual and civil remedies and sanctions for violations.
- C. The City shall not execute or award a Contract with a contractor unless such contractor has agreed not to discriminate in the provision of employee benefits as provided for in this chapter.

10. **Amend Section 5.33.080 Environmentally Preferable Procurement**

- A. Definitions:
 - 1.-18. No changes.
 - 19. ~~"Retreaded Tire" means any tire that uses an existing casing for the purpose of vulcanizing new tread to such casing that meets all performance and quality standards in the Federal Motor Vehicle Safety Standards determined by the United States Department of Transportation.~~

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20.-24. Renumbered 19. -23. No changes.

B. Environmentally Preferable Procurement General Policy. In developing plans, drawings, work statements, specifications, or other product descriptions, the City shall insure, to the maximum extent economically feasible, the purchase of environmentally preferable products or services that comply with the City's Sustainable City Principles. This includes, but is not limited to, products that are durable, recyclable, reusable, readily biodegradable, energy efficient, made from recycled materials, and nontoxic. In doing so, the City shall purchase products and services based on long-term environmental and operating costs, and find ways to include environmental and social costs in short-term prices. Furthermore, the City shall first seek to reuse, repair, or refurbish existing equipment and products prior to purchasing new, to the extent reuse is fiscally sound and complements other City safety and sustainability policies. ~~purchase products and services based on long-term environmental and operating costs, and find ways to include environmental and social costs in short-term prices.~~

C.-D. No changes.

E. ~~Purchasing Recycled Oils.~~

~~1. Preference for Oil Products with Greater Recycled Content: The City shall require that purchases of lubricating oil and industrial oil be made from the vendor whose oil product contains the greater percentage of recycled oil, unless a specific oil product containing recycled oil is:~~

~~a. Not available within a reasonable period of time or in quantities necessary to meet the City's needs;~~

~~b. Not able to meet the performance requirements or standard recommended by the equipment or vehicle manufacturer, including any warranty requirements; or~~

~~c. Available only at a cost that exceeds the price preference established in Subsection 5.33.080 C.~~

~~2. In accordance with ORS 279B.240 the City shall ensure that its procedures and specifications for the procurement of lubricating oil and industrial oil do not exclude recycled oils and do not require oils to be manufactured from virgin materials.~~

E. In accordance with ORS 279B.240 the City shall ensure that its procedures and specifications for the procurement of lubricating oil and industrial oil do not exclude recycled oils and do not require oils to be manufactured from virgin materials.

F. ~~Purchasing Retreaded Tires.~~

~~1. All tires for use on the non-steering wheels of City vehicles shall be equipped with retreaded tires unless one of the following exceptions applies:~~

~~a. The vehicles are emergency vehicles as defined in ORS 801.260;~~

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- ~~b. The vehicles are other fire suppression or emergency assistance vehicles;~~
- ~~e. The vehicles are passenger-carrying vehicles with a gross weight rating of one ton or more; or~~
- ~~d. The cost per mile differential of the retreaded tires exceeds the five percent preference set forth in Subsection 5.33.080 C.~~

F. Procurement practices regarding recyclable and reusable goods. The City shall ensure, to the maximum extent economically feasible, the procurement of goods that may be recycled or reused when discarded.

G. Purchasing Energy Efficient Products.

1. No changes.
2. No changes.
3. Price Differential and Payback Period: While many Energy Star® compliant products are currently available for no price premium, should a price differential exist, the City will apply a simple life cycle cost analysis. Purchases where the price premium payback period is within ~~five~~ 10 years or less shall be encouraged. Where the price premium payback period is longer than ~~five~~ 10 years, Energy Star® compliant products may still be used; however, the City shall not be obligated to purchase and use Energy Star® compliant products in those circumstances.

H. Purchasing Interior/Exterior Architectural Paint Products.

1. All paint must be low-VOC by complying with the current standards set forth by the California South Coast Air Quality Management District Rule 1113 for Architectural Coatings ~~or the VOC and chemical component limits of Green Seal's Standard GS-11, section 4.1.~~
- 2.-3. No changes.

11. Amend Section 5.33.090 Use of Price Agreements.

If the City Awards a Price Agreement or executes a requirements contract that will allow the City to purchase whatever quantity it needs from a Contractor, then City Bureaus shall make their purchases from that Contract unless the Chief Procurement Officer grants an exemption to that requirement. Price Agreements resulting from a participating agreement utilizing a cooperative agreement through another agency are exempt from this requirement.

12. Amend Section 5.33.160 Permissive Cooperative Procurements

- A. No change.
- B. The City may enter into a Permissive Cooperative Procurement if:

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1. No change.
2. The Administering Contracting Agency's Solicitation and Award process for the original Contract ~~is to allow the City~~ other governmental bodies to establish contracts or price agreements under the terms, conditions and prices of the original contract;
- 3.-4. No change.

C.-H. No changes.

13. Amend Subsection 5.33.220 D Special Procurements

D. The City Council declares the following as classes of Special Procurements:

- 1-11. No changes.
12. Software and Hardware Maintenance, Licenses, Subscriptions, and Upgrades. The City may directly enter into a Contract or renew existing Contracts for information technology hardware or software maintenance, licenses, subscriptions, and upgrades without Competitive Solicitation where the maintenance, upgrades, subscriptions, and licenses are either available from only one source or, if available from more than one provider, are obtained from the City's current provider in order to utilize the pre-existing knowledge of the vendor regarding the specifics of the City's hardware or software system. The City shall document in the Procurement File the facts that justify either that maintenance, license(s), subscriptions, and upgrades were available from only one source or, if from more than one source, from the current vendor.

13-21. No changes.

14. Amend Section 5.33.300 Public Notice of Solicitation for Contracts over \$150,000.

- A. No change.
- B. Advertising. The City shall advertise every notice of a Solicitation Document as follows:
 1. The City shall publish the advertisement for Offers in accordance with the requirements of ORS 29779B.055(4)(a) and (b) and 279B.060(5); or
 - 2.-3. No changes.

C.-E. No changes.

15. Amend Section 5.33.500 Responsibility of Offerors.

- A. Contracts shall be Awarded only to Responsible Offerors. Pursuant to ORS 279B.110, the City shall consider whether the Offeror has:
 - 1.-3. No changes.
 4. Qualified legally to Contract with the City. Procurement Services may determine that such an Offeror is not legally qualified if:

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- a. The Offeror does not have a business license tax account with the City;
or
- b. The Offeror failed to make payments required by Title 7 of the City Code and has failed to make appropriate payment arrangements with the Revenue ~~Bureau~~ Division of the Bureau of Revenue and Financial Services within seven (7) Days of the receipt of a Bid or Proposal, unless the City waives that requirement and decides to pursue collection through retention of Contract funds, or through other means; or
- c. The Offeror failed to submit a signed affidavit that attests, under penalty of perjury, that the Offeror has complied with the tax laws of the State of Oregon and the City of Portland.

5.-6. No changes.

B.-C. No changes.

16. Amend Section 5.33.720 Protests and Judicial Review of Multi-Tiered Solicitations.

A.-B. No changes.

C. Basis of Protest. An Affected Person may protest its exclusion from the Competitive Range or from subsequent stages of a Procurement only if:

1.-2. No changes.

3. In the case of a competitive request for proposal, the exercise of judgment used by the Evaluation Committee members in scoring written proposals and oral interviews, including the use of outside expertise, if that judgment was biased or not exercised in good faith. The unbiased, good faith judgment of Evaluation is not grounds for protest. The unbiased, good faith judgment of Evaluation Committee members will not be a basis for sustaining a protest.

D.-G. No changes.

17. Amend Subsection 5.33.750 B Protests of Other Violations.

B. Method of Protest.

1. Time: A Written protest of the Chief Procurement Officer's Award shall be provided to the Chief Procurement Officer no later than ten (10) Days after the date on which the alleged violation occurred and in no event ~~no~~ later than ten (10) Days after the date of the execution of the Contract. The Chief Procurement Officer shall not consider a protest submitted after the timeline established for submitting such protest under this rule and shall not consider a protest under this section if a right to protest is elsewhere provided by this Code.

2. No Changes.

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Changes to Chapter 5.34 Public Improvements and Construction Services

1. **Amend Subsection 5.34.010 A. Definitions as follows:**
 - A. The definitions contained in Sections 5.33.010 and 5.33.140 are applicable to Chapter 5.34.
 - 1.-5. No changes.
 6. **“Work”** means all services, material, labor, tools, equipment, and all appliances, machinery, systems, transportation, and appurtenances necessary to perform and complete the Contract, and such additional items not specifically indicated or described which can be reasonably inferred as belonging to the item described or indicated and as required by good practice to provide a complete, functioning, and satisfactory system or structure.

2. **Amend Subsection 5.34.020 B. Application and Authority as follows:**
 - B. Contracts for minor alteration, ordinary repair or maintenance of public improvements or Price Agreements, as well as other Contracts for construction services that are not defined as a public improvement under Section 5.33.010 shall be Awarded and executed pursuant to Chapter 5.33 and ORS 279B and not this Chapter. However, some portions of ORS 279C and this chapter may still be applicable to the resulting Contracts.

3. **Amend Subsection 5.34.100 F.**
 - F. Alternative Contracting Methods found in Section 5.34.800 *et seq.* Class exemptions are located in Subsection 5.34.830 ~~G-H~~, while individual Contracts must be authorized by the City Council by ordinance.

4. **Amend Subsection 5.34.300 D. Solicitation Documents; Required Provisions; Assignment or Transfer as follows:**
 - D. The City must include all applicable Contract provisions required by Oregon law as follows:
 - 1.-21. No changes.
 22. Contractor's certification that all Subcontractors performing Work described in ORS 701.005(25) (~~i.e., construction Work~~) will be registered with the Construction Contractors Board, or licensed by the State Landscape Contractors Board in accordance with ~~ORS 701.035 to 701.055~~ the Construction Contractor's Licensing Act before the Subcontractors commence Work under the Contract.

5. **Amend Subsection 5.34.410 A. Bid or Proposal Security**
 - A. **Security Amount.** If The City requires Bid or Proposal Security, it shall be not more than 10 percent of the Offeror's Bid or Proposal. The City shall not use Bid or Proposal Security to discourage competition. The City shall clearly state any Bid or Proposal Security requirements in its Solicitation Document. The Offeror shall forfeit Bid or

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Proposal Security after Award if the Offeror fails to execute the Contract and promptly return it with any required Performance Bond, Payment Bond and any required proof of insurance. See ORS 279C.365(455) and ORS 279C.385. See also, Section 5.34.915 and BOLI rules regarding the separate requirement for a Public Works Bond.

6. Amend Subsection 5.34.510 A. Prequalification of Offerors

- A. The City of Portland requires prequalification of all prime construction contractors on public improvement contracts with an estimated value of \$250,000 or greater, per ORS 279C.430(1) which allows public agencies the option to adopt their own rules for mandatory prequalification of contractors desiring to bid for public improvement contracts let by that agency. The Chief Procurement Officer has the authority to require Prequalification for public improvement contracts ~~under~~ \$250,000 or less. The City shall not consider a Bid from a Bidder that is not prequalified, if the City required Prequalification.

7. Amend Subsection 5.34.600 C. Bid or Proposal Evaluation Criteria

- C. Proposal Evaluation Criteria. If the City Council has exempted a Public Improvement from the Competitive Bidding requirements of ORS 279C.335(1), and has directed the use of an Alternative Contracting Method under ORS 279C.335(3) and ORS 279C.337, evaluation criteria shall be set forth in the Solicitation Documents.

8. Amend Subsection 5.34.610 B. Offer Evaluation and Award; Determination of Responsibility.

- B. No changes.

1. -2. No changes.

3. Has a satisfactory record of integrity. An Offeror may lack integrity if ~~the~~ the City determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to the City. The City may find an Offeror not Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Conduct Disqualification under Section 5.34.540 may be used to determine an Offeror's integrity. The City shall make its basis for determining that an Offeror is not Responsible under this paragraph part of the Solicitation file;

4. Is qualified legally to Contract with the City, including having a current City business license and EEO certification. The Procurement Services may determine that such a Person is not legally qualified if:

- a. The Person does not have a business license with the City; or
- b. The Person failed to make payments required by Title 7 of the City Code and has failed to make appropriate payment arrangements with the Revenue ~~Bureau~~ Division of the Bureau of Revenue and Financial

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Services within seven (7) Days of the receipt of a Bid or Proposal, unless the City waives that requirement and decides to pursue collection through retention of Contract funds, or through other means.

5. No changes.

9. Correct formatting in Subsection 5.34.630 B. Reciprocal Preferences

- B. The City shall use the list prepared and maintained by the Oregon Department of Administrative Services pursuant to ORS 279A.120(4) to determine both
- a~~1~~. whether the Nonresident Bidder's state gives preference to in-state Bidders, and
 - b~~2~~. the amount of such preference. Bidders or Proposers who believe that information is inaccurate shall notify the City prior to submitting their Bid to permit a reasonable investigation. Otherwise, the City shall rely on that information in making its determination.

10. Amend Section 5.34.810 Definitions for Alternative Contracting Methods

The following definitions shall apply to Sections 5.34.800 through 5.34.890, unless the context requires otherwise:

- A. **Alternative Contracting Methods.** Innovative ~~Procurement~~ techniques for ~~obtaining~~ procuring or performing Public Improvement Contracts, utilizing processes other than the traditional method involved in the ~~of~~ design-Bid-build with Award of a Public Improvement Contract based solely on price (in which a final design is issued with formal Bid documents, construction Work is obtained by sealed Bid Awarded to the lowest Responsive, Responsible Bidder, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design-Build contracting, CM/GC forms of contracting and ESPCs, which are specifically addressed in Section 5.34.880. These methods also include as well as ~~such as~~ other developing techniques ~~such as~~ including, but not limited to, general "performance contracting" and "cost plus time" contracting, for which procedural requirements are identified under Sections 5.34.800 through 5.34.890.
- B. **Construction Manager/General Contractor (or "CM/GC").** A CM/GC Contractor means a person who provides Construction Manager/General Contractor services to the City under a Public Improvement Contract. A form of Procurement that results in a Public Improvement Contract for a Construction Manager/General Contractor to undertake project team involvement with design development; constructability reviews; value engineering, scheduling, estimating and subcontracting services; establish a Guaranteed Maximum Price to complete the Contract Work; act as General Contractor; coordinate and manage the building process; provide general Contractor expertise; and act as a member of the project team along with the City, architect/engineers and other consultants. CM/GC also refers to a Contractor under this form of Contract.
- C. **Construction Manager/General Contractor Method (or "CM/GC Method")** means the Alternative Contracting Method which involves the City's section of a CM/GC to perform CM/GC Services for a project or projects.

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D. Construction Manager/General Contractor Services (or “CM/GC Services”) means construction-related services the City procures by means of an Alternative Contracting Method under ORS 279C.335 and the at:

1. Include a Construction Manager/General Contractor’s:
 - a. Functioning as a member of a project team that includes the City, the architect or engineer that designs the Public Improvement under a separate contract with the City and other contractors and consultants; and
 - b. Reviewing and analyzing a design for a Public Improvement in order to:
 - (1) Suggest changes in the design that minimize potential errors, delays, unexpected costs and other problems during construction;
 - (2) Recommend means by which the City may achieve the functions of the Public Improvement or a component of the Public Improvement safely, reliably, efficiently and at the lowest overall cost;
 - (3) Improve the value and quality of the Public Improvement; and
 - (4) Reduce the time necessary to complete the Public Improvement.
2. May include, depending on the specific terms of the Public Improvement Contract and on whether the City decides to proceed with construction, a Construction Manager/General Contractor’s:
 - a. Devising a schedule for constructing the Public improvement;
 - b. Estimating construction, materials, labor and other costs for the Public Improvement;
 - c. Establishing a fixed price, a Guaranteed Maximum Price or other maximum price;
 - d. Constructing portions of the Public improvement and subcontracting portions to other contractors;
 - e. Coordinating and overseeing the construction process; or
 - f. Performing other services related to constructing a Public Improvement in accordance with the terms of the Public Improvement Contract.

EE. **Design-Build.** A form of Procurement that results in a Public Improvement Contract in which the construction Contractor also provides or obtains specified design services, participates on the project team with the City, and manages both design and construction. In this form of Contract, a single ~~Person~~ Contractor provides the City with all of the ~~Personal~~ Professional, Technical and Expert Services and Work necessary to both design and construct the project.

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- ~~DE.~~ **Energy Conservation Measures (or "ECMs") (also known as "energy efficiency measures")**. As used in ESPC Procurement, any equipment, fixture or furnishing to be added or used in an existing building, structure or building/structure system, and any repair, alteration or improvement to an existing building, structure or building/structure system that is designed to reduce energy consumption and related costs, including those costs related to electrical energy, thermal energy, water consumption, waste disposal, and future contract labor costs and materials costs associated with maintenance of the building or structure. Maintenance services are not Energy Conservation Measures, for purposes of Section 5.34.880. **Early Work**. Early Work means construction services, construction materials and other Work authorized by the parties to be performed under the CM/GC Contract in advance of the establishment of the GMP, fixed price or other maximum, not-to-exceed price for the project. Permissible Early Work shall be limited to early procurement of materials and supplies, early release of Bid or Proposal packages for site development and related activities, and any other advance Work related to important components of the project for which performance prior to establishment of the GMP will materially and positively affect the development or completion of the project.
- E. **Energy Savings Guarantee**. The energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the City that certain energy savings and performance will be achieved for the project covered by the RFP, through the installation and implementation of the agreed upon ECMs for the project. The Energy Savings Guarantee shall include, but shall not be limited to, the specific energy savings and performance levels and amounts that will be guaranteed, provisions related to the financial remedies available to the City in the event the guaranteed savings and performance are not achieved, the specific conditions under which the ESCO will guarantee energy savings and performance (including the specific responsibilities of the City after final completion of the design and construction phase), and the term of the energy savings and performance guarantee.
- F. **Energy Savings Performance Contract (or "ESPC")**. A Public Improvement Contract between The City and a Qualified Energy Service Company for the identification, evaluation, recommendation, design and construction of Energy Conservation Measures, including a Design-Build Contract, that guarantee energy savings or performance.
- G. **Guaranteed Maximum Price (or "GMP")**. GMP means the total price at which the Construction Manager/General Contractor agrees to provide Construction Manager/General Contractor services to the City in accordance with the terms and conditions and scope of work for a specific Public Improvement Contract and within which are:
1. All costs the City agrees to reimburse and all fees the City agrees to pay for completing the Work; and
 2. Any contingent costs, fees, or other charges specifically identified in the Public Improvement Contract. For Alternative Contracting Methods other than the CM/GC method, "Guaranteed Maximum Price: ("GMP") means 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 and any particularly identified contingency amounts, as defined by the Public Improvement Contract, except for material changes in the Scope of Work. It may also include particularly identified contingency amounts.

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- H. ~~Measurement and Verification (or "M & V"). As used in ESPC Procurement, the examination of installed ECMs using the International Performance Measurement and Verification Protocol ("IPMVP"), or any other comparable protocol or process, to monitor and verify the operation of energy using systems pre-installation and post-installation.~~
- HI. ~~Project Development Plan. A secondary phase of Personal Services and Work performed by an ESCO in an ESPC Procurement when the ESCO performs more extensive design of the agreed-upon ECMs for the project, provides the detailed provisions of the ESCO's Energy Savings Guarantee that the fully installed and commissioned ECMs will achieve a particular energy savings level for the building or structure, and prepares an overall report or plan summarizing the ESCO's Work during this secondary phase of the Work and otherwise explaining how the agreed-upon ECMs will be implemented during the design and construction phase of the Work; The term "Project Development Plan" can also refer to the report or plan provided by the ESCO at the conclusion of this phase of the Work.~~
- J. ~~Qualified Energy Service Company (or "ESCO"). As used in ESPC Procurement, a company, firm or other legal Person with the following characteristics: demonstrated technical, operational, financial and managerial capabilities to design, install, construct, commission, manage, measure and verify, and otherwise implement Energy Conservation Measures and other Work on building systems or building components that are directly related to the ECMs in existing buildings and structures; a prior record of successfully performing ESPCs on projects involving existing buildings and structures that are comparable to the project under consideration by the City; and the financial strength to effectively guarantee energy savings and performance under the ESPC for the project in question, or the ability to secure necessary financial measures to effectively guarantee energy savings under an ESPC for that project.~~
- KI. ~~Technical Energy Audit. As used in ESPC Procurement, the initial phase of Personal Services to be performed by an ESCO that includes a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to the City of the ESCO's Findings during this initial phase of the Work; the term "Technical Energy Audit" can also refer to the report provided by the ESCO at the conclusion of this phase of the Work. Savings Pertaining to CM/GC (or "Savings").—CM/GC Savings means a positive difference between a fixed price, Guaranteed Maximum Price, or other maximum price set forth in the Contract and the actual cost of the Work, including costs for which the City reimburses a Construction Manager/General Contractor and fees or profits the Construction Manager/General Contractor earns. For other Alternative Contracting Methods, "Savings" means a positive difference between a Guaranteed Maximum Price or other maximum not-to-exceed price set forth in a Public Improvement Contract and the actual costs of the Contractor's performance of the Work payable by the City under the terms of the Contract, including costs for which the City reimburses the Contractor and fees, profits, or other payments the Contractor earns.~~

11. Amend Section 5.34. 820 Use of Alternative Contracting Methods

- A. **Competitive Bidding Exemptions.** ORS Chapter 279C requires a competitive bidding process for Public Improvement Contracts unless a statutory exception applies, a class of

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Contracts has been exempted from Competitive Bidding, or an individual Contract has been exempted from Competitive Bidding, in accordance with ORS 279C.335 and Section 5.34.830. Use of Alternative Contracting Methods may be directed by the City's Chief Procurement Officer as an exception to the prescribed Public Contracting practices in Oregon, and their use must be justified in accordance with City Code.

~~B. **Energy Savings Performance Contracts.** Unlike other Alternative Contracting Methods covered by Section 5.34.800 *et seq.* ESPCs are exempt from the competitive bidding requirement for Public Improvement Contracts pursuant to ORS 279C.335(1)(f), if the City complies with the procedures set forth in Section 5.34.880 related to the Solicitation, negotiation and contracting for ESPC Work. If those procedures are not followed, an ESPC procurement may still be exempted from competitive bidding requirements by following the general exemption procedures within ORS 279C.335.~~

~~CB. **Post-Project Evaluation.** ORS 279C.355 requires that the City prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 for which the when the City does not use Competitive Bidding process was not used. The purpose of this evaluation is to determine whether it was actually in the City's best interest to use an Alternative Contracting Method instead of Competitive Bidding. The evaluation must be delivered to City Council on behalf of the City's Chief Procurement Officer within 30 Days after the date the City "accepts" the Public Improvement project, which event is typically defined in the Contract. ~~The Chief Procurement Officer shall forward such reports to the City Council in a timely manner.~~ In the absence of a definition of "acceptance", the later of the date of final payment or the date of final completion of the Work will govern. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:~~

1.-3. No changes.

12. Amend Section 5.34.830 Findings, Notice and Hearing

A. The City Council may by ordinance exempt a Contract from the requirements of an ITB process Competitive Bidding if it makes the following findings:

1. It is unlikely that the exemption will encourage favoritism in the Awarding of Public Improvement Contracts or substantially diminish competition for Public Improvement Contracts as further described in Subsection 5.34.830 F.; and
2. The exemption will likely result in substantial costs savings and other substantial benefits to the City in accordance with ORS 279C.335(2)(b). ~~The "substantial cost savings" criterion at ORS 279C.335(2)(b) requires consideration of the type, cost, amount of the Contract, number of Entities available to Bid, and "such other factors may be deemed appropriate" as further described in Subsection 5.34.830 E; As set forth in ORS 279C.335(2)(b)A-N and Subsection 5.34.830.D below, if a particular factor has no application whatsoever to the particular Public Improvement Contract or class of Public Improvement Contracts then it is not required to address the factor other than to state that the factor has no application;~~
or

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3. If the Public Improvement relates to the operation, maintenance or construction of highways, bridges and other transportation facilities, that the exemption will result in substantial cost savings to the City or to the public.
4. As an alternative to the findings regarding substantial cost savings, the City may make a finding that identifies the project as a pilot project for which the City intends to determine whether the use of the Alternate Contracting Process Method actually results in substantial cost savings to the City, or, if it is for a Public Improvement described in Subsection 5.34.830 A.3 above, to the public, provided the City has not previously used the proposed Alternate Contracting Method. Nevertheless, findings are still required in accordance with ORS 279C.335(2)(a).

B.-C. No changes.

D. The City Council shall require and approve additional findings in the following areas in order to declare the exemption:

1. ~~Operational, budget and financial data~~ How many persons are available to bid;
2. ~~Public benefits-~~ The construction budget and the projected operating costs for the completed Public Improvement;
3. ~~Value Engineering~~ Public benefits that may result from granting the exemption;
4. ~~Specialized expertise required~~ Whether value engineering techniques may decrease the cost of the Public Improvement;
5. ~~Public safety~~ The cost and availability of specialized expertise that is necessary for the Public Improvement;
6. ~~Market conditions~~ Any likely increases in public safety;
7. ~~Technical complexity; and~~ Whether granting the exemption may reduce risks to the City or the public that are related to the Public Improvement;
8. ~~Funding sources-~~ Whether granting the exemption will affect the sources of funding for the Public Improvement;
9. Whether granting the exemption will better enable the City to control the impact that market conditions may have on the cost of and time necessary to complete the Public Improvement;
10. Whether granting the exemption will better enable the City to address the size and technical complexity of the Public Improvement;
11. Whether the Public Improvement involves new construction or renovates or remodels an existing structure;
12. Whether the Public Improvement will be occupied or unoccupied during construction;

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13. Whether the Public Improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions; and
14. Whether the City has, or has retained under contract, and will use City personnel, consultants and legal counsel that have necessary expertise and substantial experience in Alternative Contracting Methods to assist in developing the Alternative Contracting Methods that the City will use to award the Public Improvement contract and to help negotiate, administer and enforce the terms of the Public Improvement Contract.

To the extent applicable, if a particular factor has no application whatsoever to the particular Public Improvement Contract or class of Public Improvement Contracts, the City does not need to consider that factor, and the City is not required to address the factor, other than to state why the factor has no application whatsoever to the particular Public Improvement Contract or class of Public Improvement Contracts.

E. No changes.

1. The Notice shall state that the public hearing is for the purpose of taking comments on the City's draft findings for an exemption from ~~the~~ Competitive Bidding ~~requirement of using an ITB~~. At the time of the notice, copies of the draft findings shall be made available to the public.
- 2.-3. No changes.

F. Addressing Cost Savings. Accordingly, when the Contract or class of Contracts under consideration for an exemption contemplates the use of Alternative Contracting Methods, the "substantial cost savings and other substantial benefits" requirement may be addressed by a combination of:

1. Specified Findings that address the factors and other information specifically identified by statute, including, but not limited to, an analysis or reasonable forecast of present and future cost savings and other substantial benefits; and
2. No changes.

G. No changes.

H. Class Exemptions.

1. In making the findings supporting a class exemption the City shall clearly identify the "class" with respect to its defining characteristics pursuant to the requirements of ORS 279C.335(3) as indicated below: Those characteristics shall include some combination of Project descriptions or locations, time periods, Contract values or method of Procurement or other factors that distinguish the limited and related class of Projects from the City's overall construction program. Classes shall not be defined solely by funding sources, such as a particular bond

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fund, or by method of Procurement, but must be defined by characteristics that reasonably relate to the exemption criteria set forth in ORS 279C.335(2).

- a. The class cannot be based on a single characteristic or factor, so that the City directly or indirectly creates a class (e.g., using the CM/GC Method for all City construction projects, unidentified future construction projects of a particular work category, or all construction projects from a particular funding source such as the sale of bonds); and
- b. The class must include a combination of factors to be defined by the City through characteristics that reasonably relate to the exemption criteria, and must reflect a detailed evaluation of those characteristics so that the class is defined in a limited way that effectively meets the City's objectives while allowing for impartial and open competition and protecting the integrity of the exemption process (i.e., a series of renovation projects that involve renovations for a common purpose, require completion on a related schedule to avoid unnecessary disruption of operations, share common characteristics such as historic building considerations, presence of asbestos or other hazardous substances, or the presence of staff during construction, or otherwise possess characteristics that meet the requirements).

2. The following classes of Contracts are hereby exempt from the Competitive low Bidding requirements of this Chapter:

- 1-a. Contract Amendments. Contract amendments, pursuant to the authority granted by Subsection 5.34.020 C., and provided that the original Contract was executed in accordance with this chapter;
- 2-b. Tenant improvements. Tenant Improvements on City owned property are exempt from the requirements of Competitive low Bidding, but may be subject to other provisions of this Chapter or ORS 279C. Tenant improvements are exempt when:
 - a-(1) The improvements are paid for in part, or in whole, by the tenant;
 - b-(2) The improvements are primarily for the tenant's benefit; and
 - e-(3) The tenant hires the Contractor to perform the Work, whether or not a competitive process is used by the tenant.
- 3-c. Deficiency Corrections/Contractor on site. The City may hire a private Contractor to perform Work if:
 - a-(1) The City finds that a Contractor hired by a private developer or Person is at or near the site where City Work needs to be performed and the cost proposed by the private Contractor is reasonable and the cost of the Work will be less than \$25,000; or

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- b.(2) The City finds that a Contractor hired by the City is at or near the site where City Work needs to be performed; and
 - (1)(a) The new Work is not within the Scope the original Contract and was not anticipated at the time that the original Contract was Awarded; and
 - (2)(b) If the original Contract was less than \$25,000 the new work does not cause the total payment to the Contractor to exceed \$25,000; or
 - (3)(c) If the original Contract was more than \$25,000, the new Work does increase the total amount paid to the Contractor by more than \$50,000.

13. Amend Section 5.34.840 Competitive Proposals; General Procedures

- A. General Application: The City may utilize the RFP outlined in Subsections 5.34.840 C. through ~~ED~~. below for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS 279C.330 to ORS 279C.337, ORS 279C.400 to 279C.410 and Sections 5.34.800 to 5.34.890, unless other applicable statutes control the City's use of competitive Proposals for Public Improvement Contracts. Nothing in this rule shall limit the use of evaluation factors or other matters expressly permitted by those additional rules or authorized by ordinance.
- ~~B. ESPCs: For ESPCs, the RFP outlined in Subsections 5.34.840 C. through E. below shall be utilized if the City desires the Procurement process to be exempt from the competitive bidding requirements of ORS 279C.335. The RFP process for the Alternative Contracting Methods identified in Subsections 5.34.800 to 5.34.890 includes the following steps:~~
- ~~EB. No changes~~
- ~~EC. Evaluation Factors.~~
 - 1. In basic negotiated construction contracting, where the only reason for an RFP is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, the status of its Equal Employment Opportunity (EEO) certification, its efforts to diversify its workforce in order to reach all of the City's citizens and other related matters that could affect the cost or quality of the Work.
 - 2. In CM/GC contracting, in addition to Subsection 5.33.840 D.1., those factors may also include the ability to respond to the technical complexity or unique character of the project, ~~coordination of~~ analyze and propose value engineering options, analyze energy efficiency measure or alternative energy options, coordinate multiple disciplines on the project, effectively utilize the time required available to commence and complete the improvement, and related matters that could affect the cost or quality of the Work.

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3. No changes.
4. ~~In Energy Savings Performance Contracting (ESPC), in addition to the factors set forth in Subsections 5.33.840 D.1., 2. and 3., those factors may also include sample Technical Energy Audits from similar projects, sample M & V reports, financial statements and related information of the ESCO for a time period established in the RFP, financial statements and related information of joint ventures comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline consultant), past performance of the ESCO in meeting energy guarantee Contract levels, the specific Person that will provide the Energy Savings Guarantee to be offered by the ESCO, the ESCO's management plan for the project, information on the specific methods, techniques and equipment that the ESCO will use in the performance of the Work under the ESPC, the ESCO's team members and consultants to be assigned to the project, the ESCO's experience in the Energy Savings Performance Contracting field, the ESCO's experience acting as the prime Contractor on previous ESPC projects (as opposed to a sub-contractor or consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular project between the City and the ESCO, the ESCO's equipment performance guarantee policies and procedures, the ESCO's energy savings and cost savings guarantee policies and procedures, the ESCO's project cost guarantee policies and procedures, the ESCO's pricing methodologies, the price that the ESCO will charge for the Technical Energy Audit phase of the Work and the ESCO's fee structure for all phases of the ESPC.~~

ED. Contract Negotiations. Contract terms may be negotiated to the extent allowed by the RFP and Sections 5.34.800 to 5.34.890, provided that the general Work Scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See Section 5.34.850. Terms that may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that affect cost or quality. For the CM/GC Method, terms that may be negotiated also include the specific scope of pre-construction services, the work to be performed by the CM/GC, and any other term that the City has identified as being subject to negotiation. ~~In ESPC contracting, terms that may be negotiated also include the Scope of preliminary design of ECMs to be evaluated by the parties during the Technical Energy Audit phase of the Work, the Scope of Personal Services and Work to be performed by the ESCO during the Project Development Plan phase of the Work, the detailed provisions of the Energy Savings Guarantee to be provided by the ESCO and Scope of Work, methodologies and compensation terms and conditions during the design and construction phase and M & V phase of the Work, consistent with the requirements of Section 5.34.880 below.~~

14. Amend Section 5.34.850 Requests for Proposals (RFP)

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- A. Generally. The use of competitive Proposals must be specifically authorized for a Public Improvement Contract under the Competitive Bidding ~~requirement~~ exception and exemption requirements of ORS 279C.335(4), Section 5.34.150 and Sections 5.34.800 to 5.34.890. Also see ORS 279C.337, ORS 279C.400 to 279C.410 for statutory requirements regarding competitive Proposals, and Section 5.34.840 regarding competitive Proposal procedures.
- B. No changes.
- C. Evaluation of Proposals.
1. No changes.
 2. No changes.
 - a. No changes.
 - b. If the City proceeds with discussions or negotiations, the City shall establish a negotiation team tailored for the acquisition. The City's team may include legal, technical, auditing and negotiating personnel.
 3. No changes.
- D. Competitive Range; Protest; Award.
1. Determining Competitive Range.
 - a. If the City does not cancel the Solicitation, after the Opening the City will evaluate all Proposals in accordance with the evaluation criteria set forth in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria set forth in the Request for Proposals, the City will ~~determine and~~ rank the Proposers based on the City's scoring and determine in the Competitive Range.
 - b. No changes.
 - 2.-3. No changes.
- E.-F. No changes.
- 15. Amend Section 5.34.860 RFP Pricing Mechanisms**
- A. A Request for Proposals may result in a Contract with a lump sum Contract Price or a fixed Contract Price, as in the case of Ceompetitive Bidding. Alternatively, a Request for Proposals may result in a cost reimbursement Contract with a GMP or some other maximum price specified in the Contract ~~may be negotiated~~.
- B. Economic incentives or disincentives may be included to reflect stated City purposes related to time of completion, safety or other Public Contracting objectives, including but not limited to, total least cost mechanisms such as Life Cycle Costing.

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C. A Guaranteed Maximum Price (GMP) ~~is~~ may be used as the pricing mechanism for Contracts for CM/GC Services where a total Contract Price is provided in the design phase in order to assist the City in determining whether the project Scope is within the City's budget, and allowing for design changes during preliminary design rather than after final design ~~Work has~~ services have been completed.

1. -2. No changes.

D. No changes.

16. Amend Section 5.34.880 Energy Savings Performance Contracts (ESPC)

A. Generally. Sections 5.34.800 to 5.34.890 include a limited, efficient method for the City to enter into ESPCs outside the competitive bidding requirements of ORS 279C.335 for existing buildings or structures, but not for new construction. If the City chooses not to utilize these rules, the City may still enter into an ESPC by complying with the competitive bidding exemption process set forth in ORS 279C.335, or by otherwise complying with the Procurement requirements applicable to any City not subject to all the requirements of ORS 279C.335. The following definitions shall apply specifically to Energy Savings Performance Contracts (or "ESPC"), unless the context requires otherwise.

1. Energy Conservation Measures (or "ECMs") (also known as "energy efficiency measures"). As used in ESPC Procurement, any equipment, fixture or furnishing to be added or used in an existing building, structure or building/structure system, and any repair, alteration or improvement to an existing building, structure or building/structure system that is designed to reduce energy consumption and related costs, including those costs related to electrical energy, thermal energy, water consumption, waste disposal, and future contract-labor costs and materials costs associated with maintenance of the building or structure. Maintenance services are not Energy Conservation Measures, for purposes of this Section.

2. Energy Savings Guarantee. The energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the City that certain energy savings and performance will be achieved for the project covered by the RFP, through the installation and implementation of the agreed-upon ECMs for the project. The Energy Savings Guarantee shall include, but shall not be limited to, the specific energy savings and performance levels and amounts that will be guaranteed, provisions related to the financial remedies available to the City in the event the guaranteed savings and performance are not achieved, the specific conditions under which the ESCO will guarantee energy savings and performance (including the specific responsibilities of the City after final completion of the design and construction phase), and the term of the energy savings and performance guarantee.

3. Energy Savings Performance Contract (or "ESPC"). A Public Improvement Contract between The City and a Qualified Energy Service Company for the identification, evaluation, recommendation, design and construction of Energy Conservation Measures, including a Design-Build Contract, that guarantee energy savings or performance.

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- a. Measurement and Verification (or "M & V"). As used in ESPC Procurement, the examination of installed ECMs using the International Performance Measurement and Verification Protocol ("IPMVP"), or any other comparable protocol or process, to monitor and verify the operation of energy-using systems pre-installation and post-installation.
 - b. Technical Energy Audit. As used in ESPC Procurement, the initial phase of Personal Services to be performed by an ESCO that includes a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to the City of the ESCO's Findings during this initial phase of the Work; the term "Technical Energy Audit" can also refer to the report provided by the ESCO at the conclusion of this phase of the Work.
- B. Energy Savings Performance Contracts. Unlike other Alternative Contracting Methods covered by Section 5.34.800 et seq. ESPCs are exempt from the competitive bidding requirement for Public Improvement Contracts pursuant to ORS 279C.335(1)(f), if the City complies with the procedures set forth in Section 5.34.880 related to the Solicitation, negotiation and contracting for ESPC Work. If those procedures are not followed, an ESPC procurement may still be exempt from competitive bidding requirements by following the general exemption procedures within ORS 279C.335.
- BC. ESPC Contracting Method. The ESPC form of contracting, as defined in Subsection 5.34.810-F. herein, has unique technical complexities associated with the determination of what ECMs are feasible for the City, as well as the additional technical complexities associated with a Design-Build Contract. For ESPC's the RFP outlined in Subsections 5.34.840 B through D shall be utilized if the City desires the Procurement process to be exempt from the competitive bidding requirements of ORS 279C.335. The City shall only utilize the ESPC contracting method with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the ESPC contracting process, the City must be able to reasonably anticipate one or more of the following types of benefits:
1. -8. No changes.
- D. In ESPC contracting, terms that may be negotiated also include the Scope of preliminary design of DCMs to be evaluated by the parties during the Technical Energy Audit phase of the Work, the Scope of Personal Services and Work to be performed by the ESCO during the Project Development Plan phase of the Work, the detailed provisions of the Energy Savings Guarantee to be provided by the ESCO and Scope of Work, methodologies and compensation terms and conditions during the design and construction phase and M & V phase of the Work, consistent with the requirements of this Section.
- E. In Energy Savings Performance Contracting (ESPC), in addition to the factors set forth in Subsections 5.33.840 C.1., 2. and 3., those factors may also include sample Technical Energy Audits from similar projects, sample M & V reports, financial statements and related information of the ESCO for a time period established in the RFP, financial statements and related information of joint ventures comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities

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(independently or in cooperation with an independent third-party energy baseline consultant), past performance of the ESCO in meeting energy guarantee Contract levels, the specific Person that will provide the Energy Savings Guarantee to be offered by the ESCO, the ESCO's management plan for the project, information on the specific methods, techniques and equipment that the ESCO will use in the performance of the Work under the ESPC, the ESCO's team members and consultants to be assigned to the project, the ESCO's experience in the Energy Savings Performance Contracting field, the ESCO's experience acting as the prime Contractor on previous ESPC projects (as opposed to a sub-contractor or consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular project between the City and the ESCO, the ESCO's equipment performance guarantee policies and procedures, the ESCO's energy savings and cost savings guarantee policies and procedures, the ESCO's project cost guarantee policies and procedures, the ESCO's pricing methodologies, the price that the ESCO will charge for the Technical Energy Audit phase of the Work and the ESCO's fee structure for all phases of the ESPC.

CF. No changes.

DG. No changes.

EH. Selection. ESPC selection criteria may include those factors set forth above in Subsections 5.34.840 ~~BC.1., 2., and 3., and 4.~~ Since the Energy Savings Guarantee is such a fundamental component in the ESPC contracting process, Proposers must disclose in their Proposals the identity of any Person providing (directly or indirectly) any Energy Savings Guarantee that may be offered by the successful ESCO during the course of the performance of the ESPC, along with any financial statements and related information pertaining to any such Person.

F-I. Relettered to I. -L. No changes

17. **Amend Section 5.34.890 Construction Manager/General Contractor Services (CM/GC Services).**

A. **General.** ~~The CM/GC form of contracting, as defined in Subsection 5.34.810 B., Method is a technically complex project delivery system. City bureaus shall use this contracting method only with the assistance of legal counsel, as well as knowledgeable staff, consultants or both staff and consultants who have a demonstrated capability of managing the CM/GC Method, in the necessary disciplines of engineering, construction scheduling and cost control, accounting, legal, Public Contracting and project management. Unlike the Design-Build form of contracting Method, the CM/GC form of contracting Method does not contemplate a "single point of responsibility" under which the Contractor CM/GC is responsible for successful completion of all Work related to a performance Specification. The CM/GC has defined Contract obligations, including responsibilities as part of the project team along with the City and design professional, although in with the CM/GC Method, there is a separate Contract between the City and~~

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the design professional(s). In order to utilize the CM/GC ~~M~~method, the City must be able to reasonably anticipate the following types of benefits:

1. Time Savings. ~~With the CM/GC Method, t~~The Public Improvement has significant schedule ramifications, such that concurrent design and construction are necessary in order to meet critical deadlines and shorten the overall duration of construction. The City may consider operational and financial data that show significant savings or increased opportunities for generating revenue as a result of early completion, as well as less disruption to public facilities as a result of shortened construction periods;
2. Cost Savings. ~~Early Contractor~~ With the CM/GC Method, early CM/GC input during the design process is expected to contribute to significant cost savings. The City may consider value engineering, building systems analysis, Life Cycle Costing analysis and construction planning that lead to cost savings. The City shall specify any special factors influencing this analysis, including high rates of inflation, market uncertainty due to material and labor fluctuations or scarcities, and the need for specialized construction expertise due to technical challenges; and
3. Technical Complexity. ~~With the CM/GC Method, t~~The Public Improvement presents significant technical complexities that are best addressed by a collaborative or team effort between the City, design professionals ~~and Contractor, City project management or technical consultants and the CM/GC,~~ in which the ~~Contractor~~ CM/GC will assist in addressing specific project challenges through pre-construction services. The City may consider the need for ~~Contractor~~ CM/GC input on issues such as operations of the facility during construction, tenant occupancy, public safety, delivery of an early budget or GMP, financing, historic preservation, difficult remodeling projects and projects requiring complex phasing or highly coordinated scheduling.

B. **Authority.** The City shall use the CM/GC ~~form of contracting~~ Method only in accordance with the requirements of ~~these rules~~ ORS 279C.337, when an exemption from Competitive Bidding is approved by Council. See particularly, Section 5.34.820 on "Use of Alternative Contracting Methods".

C. **Selection.** CM/GC selection criteria may include those factors set forth above in Subsection 5.34.840 ~~BC-2.~~ The City shall, in documents the City uses to procure CM/GC Services.

1. Describe the selection criteria and the weight of each criterion in the evaluation process;
2. Describe how interviews will be used and evaluated, if interviews are to be used in the selection;
3. Describe any other criteria that may be considered in selecting a CM/GC;
4. Describe how scoring from the evaluation of the written proposals and interviews will be combined to arrive at a Proposer's final score and ranking;

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5. State that any Savings the CM/GC realizes in performing the Contract will accrue to the City, unless the Contract provides otherwise;
 6. Specify terms and conditions that govern how the fixed price, GMP or other maximum price set forth in the Contract will be determined and whether the price includes or is based on unit pricing or allows for Work that is constructed in phases;
 7. State that the City will not pay any amount that exceeds a fixed price, GMP or other maximum price specified in the Contract unless the amount results from material changes to the scope of work set forth in the Contract and the parties to the Contract agree in writing to the material changes;
 8. State that the City will conduct the procurement in accordance with model rules the Attorney General adopts under ORS 279A.065 (3); and
 9. Specify deadlines and time periods for the selection that allow prospective Proposers a reasonable opportunity to submit proposals, including but not limited to:
 - a. The date and time by which the City must receive proposals;
 - b. The time periods during which the City will conduct interviews, if the City will conduct interviews;
 - c. The date by which the City plans to indicate an intent to award the Contract; and
 - d. The time period during which the City will meet with Proposers that the City did not select for the Contract, if a Proposer requests a meeting to discuss the procurement.
- D. **Basis for Payment.** The CM/GC process adds specified Construction Manager ~~Personal~~ Professional, Technical and Expert Services to traditional ~~General Contractor~~ design-bid-build general contractor Work, requiring full Contract performance within a negotiated ~~Guaranteed Maximum Price (GMP)~~. The GMP, fixed Contract Price or other maximum Contract Price. For a GMP pricing method, the basis for payment is reimbursable direct costs as defined under the Contract, plus a fee constituting full payment for Work and ~~Personal~~ Professional, Technical and Expert Services rendered, which together shall not exceed the GMP. See GMP definition at Subsection 5.34.810 ~~GE~~. and Pricing Mechanisms in Section 5.34.860.
- E. **Contract Requirements.** The City ~~Contracting Agencies~~ shall conform ~~their~~ its CM/GC Services contracting practices to the following requirements:
1. Nature of the Contracts for CM/GC Services. Since the scope of CM/GC Services includes a pre-construction phase of Professional, Technical and Expert Services and a construction phase Work to be performed by the CM/GC, the City may award one or more Contracts for CM/GC Services. In general, Contracts for CM/GC Services will include contract provisions that will not only govern the relationship between the City and the CM/GC for the pre-construction

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Professional, Technical and Expert Services, but will also include provisions that will govern the CM/GC's providing of the Work necessary to complete the Public Improvement. The City will only authorize the construction phase or phases of a portion of the project or the entire project upon successful negotiation of the GMP. For purposes of paying BOLI prevailing wages, a CM/GC Services Contract becomes a public works Contract at the time covered Work activities commence, through authorized Early Work during the pre-construction phase or construction phase Work.

12. Setting the GMP, Fixed Contract Price or Other Maximum Contract Price. The GMP, fixed Contract price or other maximum Contract Price shall be set at an identified time consistent with industry practice, and project conditions and after supporting information reasonably considered necessary to its use has been developed, and the. The supporting information shall for the GMP must define with particularity both what Professional, Technical and Expert Services and Work is included and/or excluded from the GMP, fixed Contract price or other maximum Contract Price. A set of project drawings and Specifications shall be produced establishing the GMP sScope of Work contemplated by the GMP, fixed Contract price or other maximum Contract Price.
23. Adjustments to the GMP, Fixed Contract Price or Other Maximum Contract Price. The Contract shall clearly identify the standards or factors under which changes or additional Work will be considered outside of the Work Scope that warrants an increase in the GMP, fixed Contract price or other maximum Contract Price as well as criteria for decreasing the GMP, fixed Contract price or other maximum Contract Price. The GMP, fixed Contract price or other maximum Contract Price shall not be increased without a concomitant increase to the sScope of Work defined at the establishment of the GMP, fixed Contract price or other maximum Contract Price or most recent GMP amendment to the GMP, fixed Contract price or other maximum Contract Price.
34. Cost Savings. The Contract shall clearly identify the disposition of any Cost Savings resulting from completion of the Work below the GMP, fixed Contract price or other maximum Contract Price; that is, under what circumstances, if any, the CM/GC might share in those Cost Savings, or whether they the Cost Savings accrue only to the City's benefit. (Note that Unless there is a clearly articulated reason for sharing such cost savings, they should the Cost Savings set forth in the Contract, the cost Savings must accrue to the City.)
45. Cost Reimbursement. The Contract shall clearly identify what items or categories of items are eligible for cost reimbursement within the GMP or other maximum Contract Price, including any category of "General Conditions" (a general grouping of direct costs that are not separately invoiced, subcontracted or included within either overhead or fee), and may also incorporate a mutually-agreeable cost reimbursement standard.
56. Audit. Cost reimbursements shall be made subject to final audit adjustment, and the Contract shall establish an audit process to ensure that Contract costs are allowable, properly allocated and reasonable.

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67. Fee. Compensation for the CM/GC's Personal Services and construction Work, where the Contract uses a GMP, shall be paid on the basis of a fee that is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee ~~should~~ shall be expressly defined ~~wherever possible.~~ The fee, first in the Contract terms and conditions at the time the City selects the CM/GC. The fee, which may be expressed as either a fixed dollar amount or as a proposed percentage of all reimbursable costs, shall be identified during and become an element of the selection process. It shall subsequently be expressed as a fixed amount for particular construction Work authorized to be performed, when Early Work is added to the Contract through an amendment and when the GMP is established. The CM/GC fee does not include any fee paid to the CM/GC for performing preconstruction services during a separate preconstruction phase.
78. Incentives. The Contract shall clearly identify any economic incentives, the specific criteria that apply and their relationship to other financial elements of the Contract (including the GMP, fixed Contract price or other maximum Contract Price).
89. Controlled Insurance Programs. For projects ~~anticipated to exceed \$75 Million where an owner-controlled or contractor-controlled insurance program is permitted,~~ the Contract shall clearly identify whether an Owner Controlled or Contractor Controlled Insurance Program is anticipated or allowable. If so, the Contract shall clearly identify:
- a. anticipated cost savings from reduced premiums, claims reductions and other factors;
 - b. the allocation of cost savings; and
 - c. safety responsibilities, incentives or both safety responsibilities and/or incentives.
910. Early Work. The RFP shall clearly identify, whenever feasible, the circumstances under which any of the ~~following activities~~ Early Work may be authorized and undertaken for compensation prior to establishing the GMP, fixed Contract price or other maximum Contract price:
- a. ~~Early Procurement of materials and supplies;~~
 - b. ~~Early release of Bid packages for such things as site development; and~~
 - e. ~~Other advance Work related to critical components of the Contract.~~
1011. Subcontractor Selection. ~~The Contract shall clearly describe the methods by which the CM/GC shall publicly receive, open and record Bids or price quotations, and competitively select Subcontractors to perform the Contract Work based upon price, as well as the mechanisms by which the City may waive those requirements. The documents shall also describe completely the methods by which the CM/GC and its affiliated or subsidiary entities may compete to perform the Work, including, at a minimum, advance notice to the public of the~~

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CM/GC's intent to compete and a public Opening of Bids or quotations by an independent party. Subcontracts under the Contract are not Public Contracts within the meaning of the Code. However, the Contract must include provisions that clearly meet the requirements of ORS 279C.337(3) and other City requirements. Within the scope of ORS 279C.337(3), the CM/GC's subcontractor selection process must meet the following parameters:

- a. Absent a written justification prepared by the CM/GC and approved by the City as more particularly provided for in this section, the CM/GC's Subcontractor selection process must be "competitive", meaning that the process should include publicly advertised subcontractor solicitations and be based on a low-bid competitive method, a low-quote competitive method for contracts in a specified dollar range agreeable to the City, or a method whereby both price and qualifications of the subcontractors are evaluated in a competitive environment, consistent with the RFP and Contract requirements;
- b. When the Subcontractor selection process for a particular Work package will not be "competitive" as provided for in this section, the process must meet the following requirements:
 - (1) The CM/GC must prepare and submit a written justification to the City, explaining the project circumstances that support a non-competitive Subcontractor selection process for a particular Work package, including, but not limited to, Emergency circumstances, the CM/GC's need to utilize a key Subcontractor member of the CM/GC's project team consistent with the CM/GC's project proposal, the need to meet other specified Contract requirements, the continuation or expansion of an existing Subcontractor agreement that was awarded through a "competitive process" along with facts supporting the continuation or expansion of the Subcontractor agreement, or a "sole source" justification;
 - (2) For a "sole source" selection of a subcontractor to proceed, the City must evaluate the written justification provided by the CM/GC and must find that critical project efficiencies require utilization of labor, services or materials from one subcontractor; that technical compatibility issues on the project require labor, services or materials from one subcontractor; that particular labor, services or materials are needed as part of an experimental or pilot project or as part of an experimental or pilot aspect of the project; or that other project circumstances exist to support the conclusion that the labor, services or materials are available from only one subcontractor;
 - (3) The CM/GC must provide an independent cost estimate for the Work package that will be subject to the non-competitive process, if required by the City;

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- (4) The CM/GC must fully respond to any questions or comments submitted to the CM/GC by the City; and
- (5) The City must approve the CM/GC's use of the non-competitive Subcontractor selection process prior to the CM/GC's pursuit of the non-competitive process.
- c. A competitive selection process may be preceded by a publicly advertised subcontractor pre-qualification process, with only those subcontractors meeting the pre-qualification requirements being invited to participate in the later competitive process through which the CM/GC will select the subcontractor to perform the construction Work described in the selection process;
- d. If the CM/GC or an Affiliate or subsidiary of the CM/GC will be included in the subcontractor selection process to perform particular construction Work on the project, the CM/GC must disclose that fact in the selection process documents and announcements. The Contract must also identify the conditions, processes and procedures the CM/GC will utilize in that competitive process in order to make the process impartial, competitive and fair, including but not limited to objective, independent review and opening of bids or proposals for the elements of Work involved, by a representative of the City or another independent third party.
- ~~11.2.~~ Subcontractor Approvals and Protests. The Contract shall clearly establish whether the City must approve subcontract Awards, and to what extent, if any, the City will resolve Procurement or be involved in the resolution of protests of the CM/GC's selection of Subcontractors and suppliers. The related procedures and reporting mechanisms related to the resolution of Subcontractor and supplier protests shall be established in the Contract with certainty, including whether the CM/GC's acts as the City's representative roles and responsibilities in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, the City shall must retain the right to monitor the subcontracting process in order to protect City's interests and to confirm the CM/GC's compliance with the contract and with applicable statutes, administrative rules and other legal requirements.
- ~~12.13.~~ CM/GC Self-Performance. ~~Whenever feasible, the Contract shall or Performance by CM/GC Affiliates or Subsidiaries Without Competition. Consistent with the requirements of ORS 279C.3337(3)(c), the Contract must establish the elements of Work conditions under which the CM/GC or an Affiliate or subsidiary of the CM/GC may self-perform elements of the Work without competition from subcontractors, including, for example, the Work of the job-site general conditions. In the alternative, the Contract shall include a process for City approval of CM/GC self-performance. In order for the CM/GC or an Affiliate or subsidiary of the CM/GC to perform elements of the construction Work without competition from subcontractors, the CM/GC must provide, or must have included in the CM/GC's RFP proposal to perform CM/GC Services for the project, a detailed proposal for performance of the Work by the CM/GC or an Affiliate or subsidiary of the CM/GC. If required by the City, the CM/GC's~~

proposal to perform the construction Work must be supported by at least one independent cost estimate prior to the Work being included in the Contract.

14. Unsuccessful Subcontractor Briefing. ORS 279C.337(3)(e) is designed to allow a subcontractor who was not selected by the CM/GC to perform a particular element of the construction Work to obtain specific information from the CM/GC, and meet with the CM/GC to discuss the subcontractor qualification and selection process involved and the CM/GC's subcontractor selection decisions, in order to better understand why the subcontractor was not successful in being selected to perform the particular element of the Work and to improve the subcontractor's substantive qualifications or the subcontractor's methods in competing for elements of the Work for the particular project involved, or for future projects. The briefing meetings may be held with individual subcontractors or, if the subcontractors agree, in groups of subcontractors, with those groups established by bid package or other designation agreed to by the City and the CM/GC. Nevertheless, the CM/GC is not obligated to provide this briefing opportunity unless the CM/GC receives a written request from a subcontractor to discuss the subcontractor qualification and selection process involved. Unless the City and the CM/GC agree on a different schedule, the CM/GC Contract should include provisions:
 - a. Allowing a Subcontractor 60 days from the CM/GC's notice of award of a subcontract for a particular Work package to request, in writing, a post-selection meeting with the CM/GC under this section; and
 - b. Requiring the CM/GC to set a meeting with the subcontractor under this section within 45 days of the Subcontractor's written request.

15. Performance and Payment Bonds. Provided no construction Work is included with the preconstruction services to be performed under the initial form of the CM/GC Contract, no performance bond or payment bond is required to be provided by the CM/GC at the time of Contract signing, consistent with ORS 279C.380. Once construction Work is included in the Contract and authorized by the City to be performed by the CM/GC, however, the CM/GC must provide a performance bond and payment bond in the full amount of any Early Work to be performed by the CM/GC, or the full amount of the amount of the GMP, fixed price or other maximum Contract Amount, as applicable. Furthermore, in the event additional Early Work is added to the CM/GC Contract after the initial Early Work or in the event an amendment to the CM/GC Contract is made so that the GMP, fixed price or other maximum Contract Amount must be increased, the performance bond and the payment bond must be increased in an amount equal to the additional Early Work or the increased GMP, fixed price or other maximum Contract Amount.

16. Independent Review of CM/GC Performance: Conflicts of Interest. If the City requires independent review, monitoring, inspection or other oversight of a CM/GC's performance of pre-construction Professional, Technical and Expert Services, construction Work or both pre-construction and construction Work, the City must obtain those independent review services from a Contractor independent of the CM/GC, the CM/GC's Affiliates and the CM/GC's

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Subcontractors, pursuant to the requirements of ORS 279C.307. However, ORS 279C.307 does not prohibit the following:

- a. The CM/GC's performance of both pre-construction Professional, Technical and Expert Services and construction Work that are included within the definition of CM/GC Services, consistent with ORS 279C.307(2); or
- b. The CM/GC's performance of internal quality control services, quality assurance services or other internal peer review of CM/GC work product that is intended to confirm the CM/GC's performance of the CM/GC Contract according to its terms.

~~13~~17. Socio-Economic Programs. The Contract shall clearly identify conditions relating to any required socio-economic programs (~~such as Good Faith Efforts and Workforce Training and Hiring~~), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and City.

18. Amend Subsection 5.34.920 C. Retainage

- C. Deposit in Interest-bearing Aaccounts. Upon request of the Contractor, the City shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the City. Earnings on such account shall accrue to the Contractor. The City may determine the account into which the retainage is placed.

Changes to Chapter 5.68 Professional, Technical and Expert Services

1. Amend Subsection 5.68.010.A Definitions as follows:

A. For the purposes of this Chapter, "professional, technical and expert" refers to any individual or group, excluding regular City employees, who, for a fee, provides services or gives professional advice regarding matters in the field of their special knowledge or training. This includes but is not limited to: planners, architects, engineers, lawyers, accountants, doctors, dentists, ministers, and counselors in investments, insurance, advertising, graphics, training, public relations, communications, software, data processing and management systems. Such contracts may include incidental materials such as written reports, architecture or engineering renderings, and similar supplemental materials. The Chief Procurement Officer has authority to classify services not specifically addressed in this provision as professional services if those services require professional advice in a field of special knowledge or training similar to those listed above.

B.-G. No changes.

2. Amend Section 5.68.020 Application. Personal Services Contracts as follows:

A. No change.

B. The following services, designated as Personal Services Contracts, are exempt from the selection process outlined in the City's Professional, Technical and Expert Services Manual and can be made by direct appointment under this Chapter:

1. No changes

2. Physician or medical personnel to determine any prospective or current City employee's ability to work or return to work;

3. No changes.

4. Veterinary physician, specialist, or medical personnel required to determine any prospective or current City-owned service animal's ability to work or return to work, or providing general medical upkeep to a City-owned service animal;

5. Performing artists, whether vocal, instrumental, or visual required by the City to provide a paid performance of their work for an audience determined by the City;

6. A one-time payment or gratuity granted in recognition of a special service in which propriety or competitive selection process is not feasible and made without the giver recognizing themselves as having any liability or legal obligation for services;

7. Golf Course Management Agreements (including concessions and club house operations) of a duration not to exceed five years for the parks under the jurisdiction of the City of Portland Bureau of Parks and Recreation.

8. Modification by the licensor of intellectual property licensed to the City.

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4.9. The City Attorney's retention of expert witnesses, consultants to assist the City Attorney's Office in providing legal advice to the City, and outside legal counsel.

C.-F. No changes.

3. Amend Section 5.68.050 Review by City Attorney and Chief Procurement Officer.

A. The ~~City Attorney and the~~ Chief Procurement Officer shall review and approve the form of all Requests for Proposals, Requests for Qualifications and other similar solicitation documents for all PTE contracts estimated to exceed \$100,000, prior to issuance. Further review by the City Attorney will be at the Chief Procurement Officer's discretion.

B. No change.