

ORDINANCE NO. NS-2145

AN ORDINANCE AMENDING THE BEND CODE BY DELETING SECTIONS 1.550 TO 1.557 AND ADDING NEW SECTIONS RELATING TO PUBLIC CONTRACTING

Findings:

- A. Bend Code Sections 1.550 through 1.557 regulate public contracting in Bend. The State of Oregon has significantly amended the state statutes relating to public contracting since BC 1.550 through 1.557 were adopted.
- B. The City Council functions as the Local Contract Review Board. Staff has recommended changes in the Code to allow the Council to more effectively exercise its functions as the Local Contract Review Board and to be more aware of City contracts and contracting processes.
- C. The changes being proposed for the Bend Code provisions relating to public contracting have been discussed by affected City departments and are intended to clarify the scope of authority of city officials and to provide processes to maximize competition and selection of contracts that offer the best combination of financial benefit and highest quality product.
- D. The City is in the process of reviewing and reorganizing the Bend Code. The proposed code amendments would not fit in the existing structure of the code, so the Council believes it is appropriate to leave it to the City Recorder to determine how the new code provisions should be added to the Bend Code.

Based on these findings, the City of Bend ordains as follows:

Section 1. Bend Code Sections 1.550 to 1.557 are deleted.

Section 2. The Bend Code is amended by adding the sections shown on the attached Exhibit A. The City Recorder is directed to incorporate those sections into the code in the manner that the City Recorder determines appropriate.

Section 3. All other provisions of the Bend Code remain unchanged and in effect.

Read for the first time the 2nd day of June, 2010.

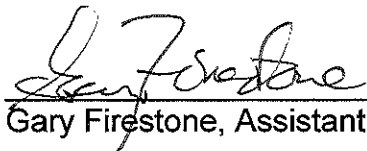
Read for the second time the 16<sup>th</sup> day of June, 2010.

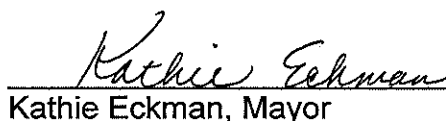
Approved by roll call vote the 16<sup>th</sup> day of June, 2010.

YES: 7                      NO: 0

Authenticated by the Mayor the 16<sup>th</sup> day of June, 2010.

Approved as to form:

  
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Gary Firestone, Assistant City Attorney

  
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Kathie Eckman, Mayor

ATTEST:  
  
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Patricia Stell, City of Bend Recorder

## EXHIBIT A – CODE LANGUAGE FOR PUBLIC CONTRACTING

### PUBLIC CONTRACTS

#### **.010 Local Contract Review Board and Delegation of Authority**

- A. The City Council shall act as the Local Contract Review Board and shall have all powers authorized by state law and the city charter.
- B. The Contract Review Board may delegate its powers and responsibilities consistent with the Oregon Public Contracting Code, applicable rules, and the Bend Code.
- C. The City Manager shall have all authority relating to public contracting except authority specifically reserved to the Contract Review Board by this Chapter.
- D. Except as specifically provided to the contrary in this chapter, the City Manager may further delegate authority granted by Sections 1.550 to 1.560.
- E. The Local Contract Review Board may adopt rules relating to public contracts and the public contracting process, including exemptions from formal competitive bidding or formal competitive proposal requirements.
- F. As used in this chapter, “public contract” means any purchase, lease, or sale by the City of personal property, public improvements or services, including personal services. “Public contract” does not include collective bargaining agreements or other employment agreements between the City and its employees.

#### **.020 Purpose and Policies**

- A. The purposes of public contracting law and this chapter are:
  - 1. To obtain public improvements, goods and services that result in the best combination of high quality and low cost to the City.
  - 2. To avoid favoritism in the award of contracts.
  - 3. To use a process appropriate to the type and amount of the contract.
  - 4. To encourage competitiveness among contractors.
  - 5. To use a fair process for the sale of surplus personal property to maximize net proceeds to the City.
- B. The following policies apply to public contracting:
  - 1. The City shall comply and shall require all contractors to comply with Americans with Disabilities (“ADA”) rules, regulations, & procedures, and will not discriminate on the basis of disability in its purchasing and contracting policies, practices, and procedures. Prospective contractors shall comply with the ADA in employment practices, and perform contractual obligations consistently with ADA federal requirements/regulations, state disability law, and applicable regulations.
  - 2. Sustainability. The City recognizes that the actions it takes in its operations, maintenance, policies and planning efforts will have impacts on sustainability in our community. It is the City's policy to encourage implementation of sustainable purchasing. Sustainable practices incorporate three broad factors: environmental stewardship, life cycle costing and equal opportunities for every person impacted by a purchase. By including sustainability in purchasing decisions, The City can promote

practices that improve public and worker health, use economic resources responsibly, conserve natural resources, and reward environmentally conscious manufacturers while maintaining cost excellence and value standards. The City shall consider sustainability in soliciting and awarding contracts.

### **.030 Competitive Procurement**

- A. The City shall use a competitive procurement process in the award of all public contracts, except as exempted by state law or this subchapter. Personal service contracts may be awarded as provided in this section or in Section .040.
- B. Competitive procurement includes:
1. Invitations to bid and requests for proposals in compliance with state law and applicable rules. A process that involves a prequalification stage followed by an invitation to bid or request for proposals is a competitive process, provided the prequalification stage includes public notice equivalent to that required for invitations to bid and requests for proposals.
  2. For contracts of \$100,000 or less in value, obtaining bids or proposals from at least three potential contractors (limited solicitation).
  3. Awarding contracts under a federal or state master contract or purchase arrangement or program.
  4. Awarding contracts on the same terms as an existing contract award by another governmental entity after a competitive procurement.
  5. Awarding contracts for computer equipment, software and services based on obtaining bids or proposals from at least three potential contractors unless the City finds that fewer than three potential contractors provide the needed equipment, software or services.
- C. The following contracts are exempt from competitive procurement;
1. Contracts exempted from competitive procurement by the Oregon Contracting Code.
  2. Contracts under \$5,000, which may be entered into by direct award.
  3. Emergency contracts awarded in compliance with applicable statutes and rules. In the event the emergency is of a nature that requires immediate action to prevent damage to property or health (e.g., a major water line break or sewage overflow) the City Manager, or in the City Manager's absence, the Chief of Police, Fire Chief and/or Public Works Director may use all the means necessary to meet the emergency. Any emergency contract in excess of \$100,000 shall be brought before the Contract Review Board for ratification at the next scheduled Council meeting.
  4. Public Facility Improvement Agreements entered into between the City and a person responsible for carrying out conditions of approval of a City land use decision.
  5. Purchases of used goods when the cost of the used goods is substantially below the cost of new goods, and the City has made a reasonable effort to obtain the best quality goods at the lowest price. The City shall maintain a written record of its efforts to obtain the best quality goods at the lowest price, including a list of quotes obtained from other vendors.
  6. Any other contracts where the public interest would be promoted by exempting the contract from the competitive bidding process, provided that the Contract Review Board adheres to the Public Contracting Code

and the Model Rules in making the exemption.

- D. The City may use competitive procurement even if a contract is exempt from competitive procurement requirements. An exemption from competitive procurement does not relieve the City of the obligation to take reasonable measures to ensure that procurements are consistent with the policy of obtaining the best combination of quality and price.
- E. Contracts awarded by competitive bids shall be awarded based on the lowest "life cycle" costs to the City. Life cycle costs include both initial cost and cost of operating, repair, maintenance and replacement. Contracts awarded by competitive proposals shall be awarded to the responsible proposer that provides the best combination of price and quality, and shall consider cost on a "life cycle" basis.
- F. A procurement may not be artificially divided or fragmented to qualify for direct award or limited solicitation. A series of contracts with the same contractor for substantially similar work without a significant time between the contracts will normally be considered a single contract for purposes of determining whether an appropriate competitive selection process was used.

**.040 Personal Service Contracts**

- A. A personal service contract is appropriate for contracts for services where the individual qualifications and skills of the person providing the service are essential to the service. A personal service contract is awarded primarily on the basis of the contractor's qualifications including but not limited to criteria such as experience, training, knowledge, and expertise, technical skill, creativity, artistic ability, performance history, and demonstrated ability to exercise sound professional judgment. A personal service contract is not appropriate where price is the major factor and quality of service is only a minor factor and can be satisfied by compliance with minimum standards.
- B. In addition to the selection procedures authorized by Section .030, personal service contract may be awarded by either of the following procedures:
  - 1. Direct appointment of the contractor believed to be able to provide the best services, taking into consideration expertise, ability, experience and cost if:
    - a. The fee for the contract will not exceed \$10,000 in any 12-month period;
    - b. The contract is for legal services or for an expert witness; or
    - c. The City Manager has determined in writing that it is in the public interest to award the personal services contract without a competitive process and that the direct award will not promote favoritism or discourage competition and is otherwise consistent with the policies of this chapter;

OR

  - 2. By soliciting project specific scopes of work and costs from a list of potential contractors established by a request for proposal process. Lists of qualified contractors for certain types of professional services may be established for up to five years by a competitive request for proposal process. The City will annually review the performance of contractors on the list and may delist contractors for poor performance. The City will also provide an annual opportunity for contractors to be added to the list by an additional request for proposal process. A list of rates and costs will be required as part of the request for proposals process.

- C. The following rules apply to solicitation of personal service contracts by competitive proposals. A request for qualifications may be used as the first step in a request for proposal process.
1. The City may arrange for any or all proposers to be interviewed for the assignment by an appropriate City employee or by an interview committee.
  2. Following a review of the proposals and interview (if used), the City shall select the contractor based on the criteria stated in the solicitation document, which may include the following factors:
    - a. Specialized experience in the type of work to be performed.
    - b. Capacity and capability to perform the work, including any specialized services within the time limitations for the work.
    - c. Educational and professional record, including past record of performance on contracts with governmental agencies and private parties with respect to cost control, quality of work, ability to meet schedules, and contract administration, where applicable.
    - d. Availability to perform the assignment and familiarity with the area in which the specific work is located, including knowledge of design or techniques peculiar to it, where applicable.
    - e. Cost. Except when state or federal law or grant restrictions prohibit consideration of cost in selecting a contractor, the City shall consider cost as a factor in all contract awards, but cost shall not be the prime consideration in the selection of providers of professional services.
    - f. Any other factors relevant to the particular contract.

#### **.050 Authority to Obligate the City**

- A. The City Manager may enter into a public contract that does not exceed \$100,000 without specific Council approval, provided the obligation is part of an adopted budget and a record is made of the transaction that shows compliance with applicable law and regulations. The City Manager may not delegate more than \$25,000 in contracting authority to any other position or department, but the authority of the City Manager under this section may be authorized by any person designated to act as City Manager in the City Manager's absence.
- B. The City Manager may adopt forms, computer software, procedures, purchasing limits, change order standards and administrative policies for all City purchases. The City Manager may adopt purchasing policies dealing with ethics, sustainability, ADA compliance, conflicts of interest and other administrative matters consistent with this Chapter and applicable law.
- C. All public contracts in excess of \$100,000, and amendments in excess of \$100,000, require approval of the Contract Review Board. The amount of the amendment is the total amount of cumulative amendments, but excluding subsequent phase costs authorized by subsection E. Contract approvals shall normally be placed on the consent agenda. Any contract approval removed from the consent agenda shall normally be reset for consideration at the next council meeting, with direction to staff to provide additional information or analysis. If the matter is reset to a later meeting, two Contract Review Board members shall be designated to work with staff to address the issues, and staff shall prepare a supplemental report to address the issues.
- D. All public contracts shall include a maximum contract price, which may not be increased by more than 25% or \$25,000, whichever is greater, for any single

change, or 50% or \$50,000, whichever is greater, cumulatively, without approval of the City Manager. The City Manager's authority to approve increases may not be delegated except when the City Manager is absent from the City or otherwise unavailable for a week or longer. Changes in a contract will be permitted only when authorized by a written change order or amendment. Change orders that will increase the cost of a contract will be permitted only if there are unexpected conditions that could not have been discovered with normal diligence prior to execution of the contract, if a project cannot be completed as designed, or if the need for the change order is the result of an action or decision by the City.

- E. It is expected that the City will anticipate future needs when soliciting contracts and will scope work broadly enough to avoid the need for contract revisions to add work that could have been anticipated prior to entering into the original contract. The City may contract for work in phases, with a contract amendment for each phase. If work is to be performed in phases, the maximum contract price need only be established for the first phase, with estimates for future phases included in the contract. The maximum contract price shall be established by contract amendment prior to the start of each subsequent phase. If the maximum contract price for a subsequent phase is more than 25% greater than the estimated cost for that phase or if no estimate for future phases was included in the original contract, a new competitive procedure is required, except for personal service contracts for professional services that include a provision for establishing the cost of subsequent phases based on a review by a neutral third party. Any contract with phases shall contain provisions allowing the City to terminate at the end of any phase. The City Manager may waive the requirement for a new competitive procedure based on a determination that the waiver is in the public interest, will result in cost savings to the City, and will not discourage competition.

#### **.060 Purchasing from City Employees**

- A. The purchase of any supplies, materials, equipment, labor or services, including personal, professional, technical and expert services from any City employee, or any business with which a City employee is associated is discouraged but may be allowed subject to prior written approval by the City Manager and approval shall be based upon findings that:
1. The purchase will be at the least cost to the City;
  2. The purchase will result in the most efficient method to accomplish the City's purpose;
  3. The purchase could not lead to any alleged violations of the personnel rules;
  4. The approval of the purchase could not lead to an adverse employer-employee relationship should the contract be unsatisfactorily performed; and
  5. The purchase is in compliance with all applicable laws, regulations and City policies.
- B. For purposes of this section "any business with which a City employee is associated" means any business of which the employee is a director, officer, owner or employee, or any business association in which the employee owns or has owned more than ten percent of the business within the preceding calendar year.

#### **.070 Negotiation with Bidders**

- A. If all bids exceed the budget for the project or an engineer's cost estimate, the City may, prior to contract award, negotiate for a price within the project budget, including an amended project budget. Negotiations will begin with the lowest,

responsive and responsible bidder. If negotiations are not successful, the City may begin negotiations with the next lowest responsive, responsible bidder. Negotiations may include the inclusion of value engineering and other options to attempt to bring the project cost within the budgeted amount. A contract may not be awarded under this section if the responsibilities of the contractor are significantly changed from the description in the solicitation documents, as determined by the City Manager.

- B. If the low bid is substantially below the budget for the project and the engineer's cost estimate, if any, the City may negotiate for additional work on the same project on the same terms as the bid.

#### **.080 Model Contract Forms**

- A. City model contract forms will be used unless the City Manager or City Attorney authorizes use of an alternate form. Terms may be amended to take into account specific circumstances. Contracts shall include the following provisions:
  - 1. A requirement that the contractor defend, indemnify, and hold harmless the City, its officers, agents and employees against and from any and all claims or demands for damages of any kind arising out of the contractor's performance under the contract.
  - 2. A provision requiring the person or entity providing the service to obtain and maintain liability insurance coverage in at least the amount of the City's tort liability limits, naming the City as an additional named insured, during the life of the contract.
  - 3. Contract provisions mandated by State and Federal law. These provisions may be incorporated by reference unless the law requiring the provision requires the provision to be set forth in full.
  - 4. A maximum contract price. The City Manager may authorize contracts without a maximum contract price if the City Manager determines that there is no reasonable way to establish a maximum contract price and that it is in the best interest of the City to proceed with the contract. The authority granted by this section may not be delegated.
- B. Public improvement contracts shall include provisions requiring compliance with any standards and specifications adopted by the City Council, the City Manager, the City Engineer and/or the Public Works Director. Compliance with adopted standards and specifications is required for all public improvements even if the standards and specifications are not referenced in the contract.

#### **.090 Disposition of surplus personal property**

- A. Personal property owned by the City and under the dollar value of \$5,000 may be declared surplus and disposed of with the approval of any department head or the City Manager. Personal property with a value of less than \$25,000 may be disposed of only after being declared surplus by the City Manager. Personal property with a value greater than \$25,000 may be declared surplus and disposed of only with the approval of the City Council or if beyond an adopted replacement schedule. No personal property shall be declared surplus if the property is usable and needed by any City department. The method of disposal will be determined based on condition, value, demand, and/or use. Personal property may be declared surplus if it is scheduled for replacement in an adopted budget or it is no longer necessary to provide City services.
- B. When the current market value of an item is estimated to be more than \$25,000, the personal property must be disposed of in a competitive process. The City at its discretion may choose between sealed written bids, a public auction, an

internet auction, or some other process that allows competitive bidding. If no bids are received or if a determination is made that the market value of the property exceeds the offer of the highest responsible bidder, all bids may be rejected, and the City may negotiate a sale subject to the following conditions:

1. An appraisal of the market value of the property is obtained and documented, and the negotiated sale price meets or exceeds the market value; or
  2. The sale amount exceeds the highest bid received through the bidding or auction process.
- C. The City may sell personal property whose value is estimated to be less than \$25,000 by any means calculated to achieve the best net result to the City.
- D. City employees who have participated in the process of declaring goods to be surplus may not purchase or otherwise acquire surplus goods from the City. Other City employees may not purchase or otherwise acquire surplus goods until the general public has a reasonable opportunity to bid on, purchase or otherwise acquire the goods. Departments may adopt additional rules relating to the acquisition of surplus goods by City employees.
- E. The City may retain one or more agents to sell surplus personal property if the selection of the agent was conducted by a competitive request for proposal process.
- F. The City may, with the approval of the City Manager and without a competitive process, transfer surplus personal property with or without remuneration to the following entities:
1. Another public agency;
  2. Any sheltered workshop, work activity center or group care home which operates under contract or agreement with, or grant from, any state agency and which is certified to receive federal surplus property;
  3. Any private, non-profit social or health service activity or entity; or
  4. Any other recognized non-profit activity that is certified to receive federal surplus property.
- G. The City may give away surplus personal property to the public at no charge on a first-come, first-served basis for property that it would otherwise pay to dispose of. A City employee may take property under this provision only after it has been available to the public for a reasonable period of time (15 minutes if widely publicized in advance, one working day if not publicized in advance).
- H. The City may trade personal property owned by the City to other government agencies or to other entities provided the following conditions apply:
1. Trades to other government agencies must be approved in writing by the City Manager.
  2. Trades of personal property with parties other than government agencies must proceed as follows:
    - a. The market value of both the item to be given and the item to be received must be documented.
    - b. The proposal to trade an item for another item must be made available to an adequate number of other potential traders to encourage competition.



- c. The trade must be approved by the City Manager.
- I. If the City is purchasing new goods or equipment to replace existing goods or equipment and the seller accepts trade-ins, the City may trade in the old equipment in order to get a reduction in the price of the new goods without going through any process for the sale of the used goods.
- J. The City may dispose of surplus property that has no monetary value or that has a monetary value insufficient to cover the costs of a sale by disposing of the property as waste. Property that would otherwise be disposed of as waste may be made available to the public at no charge or at a minimal charge.
- K. All personal property sold or otherwise disposed of by the City shall be sold as-is without any warranty of any kind. Goods sold through an auction or other third-party seller shall be provided along with a bill of sale or receipt disclaiming all warranties.