

OFFICE OF THE SECRETARY OF STATE

LAVONNE GRIFFIN-VALADE
SECRETARY OF STATE

CHERYL MYERS
DEPUTY SECRETARY OF STATE
AND TRIBAL LIAISON



ARCHIVES DIVISION

STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 731
DEPARTMENT OF TRANSPORTATION

FILED

03/29/2024 2:26 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Updating rules to change veteran language to comply with HB2295 (2023)

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 04/21/2024 5:00 PM

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

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

CONTACT: Guy Britnell
503-930-5090
guy.a.britnell@odot.oregon.gov

ODOT Procurement Office
355 Capitol Street NE
Salem, OR 97301

Filed By:
Lauri Kunze
Rules Coordinator

NEED FOR THE RULE(S)

Amending language in rules that refer to "service-disabled veteran" to comply with HB 2295 (2023)

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

HB 2295 (2023)

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

No impact anticipated. The amendments proposed in this amendment do not impact race.

FISCAL AND ECONOMIC IMPACT:

See statements below.

COST OF COMPLIANCE:

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

No economic impact on state agencies or local governments. Certain members of the public (non-service-disabled veterans) may be positively impacted by these updates.

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

None required.

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

The amendments to this rule are required by law.

RULES PROPOSED:

731-148-0215, 731-148-0220

AMEND: 731-148-0215

RULE SUMMARY: Amending rule to comply with veteran language updates in HB 2295 (2023).

CHANGES TO RULE:

731-148-0215

Requests for Qualifications

(1) ODOT may use this Request for Qualifications ("RFQ") procedure to Evaluate potential Consultants and establish a short list of qualified Consultants for some or all of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ. This RFQ procedure will be used as the first step in a two-step Procurement process, with the second step in the process being a selection by ODOT under OAR 731-148-0200 (Direct Appointment), a selection under OAR 731-148-0205 (Small Purchase Procedure) or an RFP processed under OAR 731-148-0220 (Formal Selection Procedure).¶

(2)(a) ODOT shall publish each RFQ by one or more of the electronic methods identified in OAR 731-146-0150(1).¶

(b) ODOT shall publish the advertisement within a reasonable time before the deadline for the response to the RFQ, but in any event no fewer than seven calendar days before the closing date set forth in the RFQ.¶

(c) In the alternative to advertising using one or more electronic methods in subsection (2)(a) of this rule, ODOT may advertise the RFQ in at least one newspaper of general circulation in the area where the Project is located and in as many other issues and publications as may be necessary or desirable to achieve adequate competition. Other issues and publications may include, but are not limited to, local newspapers, trade journals, and publications targeted to reach disadvantaged business enterprise ("DBE"), ~~service-disabled~~ veteran business enterprise ("~~SDVB~~"), minority business enterprise ("MBE"), women business enterprise ("WBE") and emerging small business enterprise ("ESB") audiences.¶

(3) ODOT shall include the following, at a minimum, in each RFQ:¶

(a) A brief description of the services or Project(s), or both, for which ODOT is seeking one or more Consultants;¶

(b) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant(s) ability to provide additional services related to the services or Project(s) or both, including but not limited to construction services;¶

(c) The deadline for submitting a response to the RFQ;¶

(d) A description of required Consultant qualifications for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services ODOT seeks;¶

(e) The RFQ evaluation criteria, including weights, points or other classifications applicable to each criterion;¶

(f) A statement whether or not ODOT will hold a pre-qualification meeting for all interested Consultants to discuss the services or Project(s) described in the RFQ and if a pre-qualification meeting will be held, the location of the meeting and whether or not attendance is mandatory; and¶

(g) A statement that Consultants responding to the RFQ do so solely at their expense, and that ODOT is not responsible for any Consultant expenses associated with the RFQ.¶

(4) ODOT may include a request for any or all of the following in each RFQ:¶

(a) A statement describing Consultants' general qualifications and related performance information;¶

(b) A description of Consultants' specific qualifications to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ including Consultants' committed resources and recent, current and projected workloads;¶

(c) A list of similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services and references concerning past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control and contract administration;¶

(d) A copy of all records, if any, of Consultants' performance under Contracts with any other agency;¶

(e) The number of Consultants' experienced staff committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ, including such personnel's specific qualifications and experience and an estimate of the proportion of time that such personnel would spend on those services;¶

- (f) Consultants' approaches to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ and design philosophy, if applicable; ¶
- (g) Consultants' geographic proximity to and familiarity with the physical location of the Project, if applicable; ¶
- (h) Consultants' ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses; ¶
- (i) If ODOT is selecting a Consultant to provide Related Services, Consultants' pricing policies and pricing Proposals or other pricing information, including the number of hours estimated for the services required, expenses, hourly rates and overhead; ¶
- (j) Consultants' ability to assist ODOT in complying with art acquisition requirements, pursuant to ORS 276.073 through 276.090; ¶
- (k) Consultants' ability to assist ODOT in complying with State of Oregon energy efficient design requirements, pursuant to ORS 276.900 through 276.915; ¶
- (L) Consultants' ability to assist ODOT in complying with the energy technology requirements of ORS 279C.527 and 279C.528; and ¶
- (m) Any other information ODOT deems reasonably necessary to Evaluate Consultants' qualifications.¶
- (5) ODOT shall Evaluate all responses received according to the criteria set forth in the RFQ.¶
- (6) ODOT may use any reasonable screening or evaluation method to establish a short list of qualified Consultants, including but not limited to, the following: ¶
- (a) Requiring Consultants responding to an RFQ to achieve a threshold score before qualifying for placement on the short list; ¶
- (b) Placing a pre-determined number of the highest scoring Consultants on a short list; ¶
- (c) Placing on a short list only those Consultants with certain essential qualifications or experience, whose practice is limited to a particular subject area, or who practice in a particular geographic locale or region, provided that such factors are material, would not unduly restrict competition, and were announced as dispositive in the RFQ. ¶
- (7) After the evaluation committee Evaluates the responding Consultants, ODOT shall establish a short list of at least three qualified Consultants, if feasible; provided however, if four or fewer Consultants responded to the RFQ or if fewer than three Consultants fail to meet ODOT's minimum requirements, then ODOT may establish a short list of fewer than three qualified Consultants. ¶
- (8) ODOT shall provide copies of the selection notices that ODOT sent to the highest ranked Proposers to all Consultants submitting a response to the RFQ.¶
- (9) ODOT may establish more than one short list from an RFQ, with each short list applicable to a particular service, dollar threshold, geographic location, or combination of the preceding.¶
- (10) No Consultant will be eligible for placement on an ODOT short list established under this rule if Consultant or any of Consultant's principals, partners or associates are members of ODOT's RFQ evaluation committee.¶
- (11) ODOT may limit participation under OAR 731-148-0205 (Small Purchase Procedure) and OAR 731-148-0220 (Formal Selection Procedure) to firms on ODOT's short list applicable to the services.¶
- (12)(a) RFQ Protest and Request for Change. If allowed by the RFQ, Consultants may submit a written protest of anything contained in the RFQ and may request a change to any provision contained in the RFQ, no later than seven calendar days prior to the date responses are due, unless a different deadline is indicated in the RFQ. Each protest and request for change must include the reasons for the protest or request, and the proposed changes to the RFQ. ODOT may not consider any protest or requests for change that is submitted after the submission deadline.¶
- (b) Protest of Exclusion from Short List. If allowed by the RFQ, a Consultant who claims to have been adversely affected or aggrieved by the selection of the highest ranked Consultants may submit a written protest of the selection to ODOT no later than seven calendar days after the date of the selection notices, unless a different deadline is indicated in the RFQ. A Consultant submitting a protest must claim that the protesting Consultant is one of the highest ranked Consultants because the responses of all higher ranked Consultants failed to meet the requirements of the RFQ, or because a sufficient number of responses of higher ranked Consultants failed to meet the requirements of the RFQ. In the alternative, a Consultant Proposer submitting a protest must claim that the responses of all higher ranked Consultants, or a sufficient number of higher ranked Consultants, are not qualified to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ. ODOT may not consider any protest that is submitted after the submission deadline.¶
- (c) Resolution of Protests. ODOT shall resolve all timely submitted protests and requests for change within a reasonable time following ODOT's receipt of the protest or request for change. Once resolved, ODOT shall promptly issue a written decision on the protest or request for change to the Consultant who submitted the protest or request for change. If the protest results in a change to the RFQ, ODOT shall revise the RFQ accordingly and may re-advertise the RFQ in accordance with these rules or post an addenda, as applicable. ¶
- (13) ODOT may cancel an RFQ per OAR 731-148-0250.

Statutory/Other Authority: ORS 184.619, 279A.065(6)(a), 279A.070

Statutes/Other Implemented: ORS 279A.050(3), 279C.110

AMEND: 731-148-0220

RULE SUMMARY: Amending rule to comply with veteran language updates in HB 2295 (2023).

CHANGES TO RULE:

731-148-0220

Formal Selection Procedure

(1) ODOT may use the formal selection procedure described in this rule to obtain a Contract regardless of Estimated Fee of the Contract, but ODOT must use this rule to obtain a Contract if the Estimated Fee of the Contract exceeds \$250,000 and the services cannot be obtained under OAR 731-148-0200 (Direct Appointment Procedure) or OAR 731-148-0205 (Small Purchase Procedure). ¶

(2) ODOT shall obtain Contracts using the formal selection procedure through public advertisement of RFPs. ¶

(a) ODOT shall publish each RFP by one or more of the electronic methods identified in OAR 731-146-0150(1). ¶

(A) ODOT shall publish the advertisement within a reasonable time before the deadline for the Proposal submission or response to the RFP. ¶

(B) ODOT shall include a brief description of the following items in the advertisement: ¶

(i) The Project(s) or the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services ODOT seeks; ¶

(ii) How and where Consultants may obtain a copy of the RFP; and ¶

(iii) The deadline for submitting a Proposal or response to the RFP. ¶

(b) In the alternative to advertising using one or more electronic methods in subsection (2)(a) of this rule, ODOT may advertise the RFP in at least one newspaper of general circulation in the area where the Project is located and in as many other issues and publications as may be necessary or desirable to achieve adequate competition. Other issues and publications may include, but are not limited to, local newspapers, trade journals, and publications targeted to reach DBE, SDV, Veteran, MBE, WBE and ESB audiences. ¶

(c) ODOT may send notice of the RFP directly to Consultants on ODOT's list of Consultants that is created and maintained under OAR 731-148-0215 (Request for Qualifications). ¶

(3) Formal Selection of Consultants through Request for Proposals. ODOT shall use the procedure described in section (3) of this rule when issuing an RFP for a Contract described in section (1) of this rule. ¶

(a) RFP Required Contents. An RFP processed under this rule must include: ¶

(A) General background information, including a description of the Project and the specific Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services sought for the Project, the estimated Project cost, the estimated time period during which the Project is to be completed, and the estimated time period in which the specific Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services sought will be performed; ¶

(B) The RFP evaluation process and the criteria which will be used to select the most qualified Proposer, including the weights, points or other classifications applicable to each criterion. If ODOT does not indicate the applicable number of points, weights or other classifications, then each criterion is of equal value. Evaluation criteria may include, but are not limited to, the following: ¶

(i) Proposers' availability and capability to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP; ¶

(ii) Experience of Proposers' key staff persons in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, or Related Services on comparable projects; ¶

(iii) The amount and type of resources, and number of experienced staff persons Proposers have committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP; ¶

(iv) The recent, current and projected workloads of the staff and resources referenced in section (3)(a)(B)(iii), above; ¶

(v) The proportion of time Proposers estimate that the staff referenced in section (3)(a)(B)(iii), above, would spend on the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP; ¶

(vi) Proposers' demonstrated ability to complete successfully similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services on time and within budget, including whether or not there is a record of satisfactory performance; ¶

(vii) References and recommendations from past clients; ¶

(viii) Proposers' performance history in meeting deadlines, submitting accurate estimates, producing high quality work, meeting financial obligations, price and cost data from previous projects, cost controls and contract administration; ¶

(ix) Status and quality of any required license or certification; ¶

- (x) Proposers' knowledge and understanding of the Project and Architectural, Engineering and Land Surveying Services or Related Services described in the RFP as shown in Proposers' approaches to staffing and scheduling needs for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services and proposed solutions to any perceived design and constructability issues;¶
- (xi) Results from interviews, if conducted;¶
- (xii) Design philosophy, if applicable, and approach to the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;¶
- (xiii) If ODOT is selecting a Consultant to provide Related Services, pricing policies and pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead; and¶
- (xiv) Any other criteria that ODOT deems relevant to the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP, including, where the nature and budget of the Project so warrant, a design competition between competing Proposers. Provided, however, these additional criteria cannot include pricing policies, pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, when the sole purpose or predominant purpose of the RFP is to obtain Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services.¶
- (C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including but not limited to construction services;¶
- (D) Whether interviews are possible and if so, the weight, points or other classifications applicable to the potential interview;¶
- (E) The date and time Proposals are due, and the delivery location for Proposals;¶
- (F) Reservation of the right to seek clarifications of each Proposal;¶
- (G) Reservation of the right to negotiate a final Contract that is in the best interest of ODOT;¶
- (H) Reservation of the right to reject any or all Proposals and reservation of the right to cancel the RFP at any time if doing either would be in the public interest as determined by ODOT;¶
- (I) A Statement that Proposers responding to the RFP do so solely at their expense, and ODOT is not responsible for any Proposer expenses associated with the RFP;¶
- (J) A statement directing Proposers to the protest procedures set forth in these Division 148 rules;¶
- (K) Special Contract requirements, including but not limited to DBE, MBE, WBE, ESB and ~~SDVB~~Veteran participation goals or good faith efforts with respect to DBE, MBE, WBE, ESB and ~~SDVB~~Veteran participation, and federal requirements when federal funds are involved;¶
- (L) A statement whether or not ODOT will hold a pre-Proposal meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP and if a pre-Proposal meeting will be held, the location of the meeting and whether or not attendance is mandatory;¶
- (M) A request for any information ODOT deems reasonably necessary to permit ODOT to evaluate, rank and select the most qualified Proposer to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP; and¶
- (N) A sample form of the Contract.¶
- (b) RFP Contents for Related Services Selections Based on Price Only. ODOT shall include at least the following in each RFP, whether or not the RFP is preceded by an RFQ, when the formal selection procedure is for Related Services selected on the basis of price Proposals and other pricing information only:¶
 - (A) General background information, including a description of the Project and the specific Related Services sought for the Project, the estimated Project cost, the estimated time period during which the Project is to be completed, and the estimated time period in which the specific Related Services sought will be performed;¶
 - (B) The RFP evaluation process and the price criteria which will be used to select the highest ranked Proposer, including the weights, points or other classifications applicable to each criterion. If ODOT does not indicate the applicable number of points, weights or other classifications, then each criterion is of equal value. Evaluation price criteria may include, but are not limited to, the total price for the Related Services described in the RFP, Consultant pricing policies, and other pricing information such as the Consultant's estimated number of staff hours needed to perform the Related Services described in the RFP, expenses, hourly rates and overhead;¶
 - (C) Any minimum or pass-fail qualifications that the Proposers must meet, including but not limited to any such qualifications in the subject matter areas described in section (3)(a)(B)(i) through section (3)(a)(B)(xii) of this rule; and¶
 - (D) The information listed in section (3)(a)(C) through section (3)(a)(N) of this rule pertaining to the Related Services described in the RFP.¶
- (c) ODOT shall Evaluate all Proposals received according to the criteria set forth in the RFP.¶
- (d) If ODOT does not cancel the RFP after Evaluating the Proposals, ODOT will begin negotiating a Contract with

the highest ranked Proposer. ODOT shall direct negotiations towards obtaining a written agreement on:

(A) The Consultant's performance obligations and performance schedule;

(B) Payment methodology, Consultant's rates and number of hours, and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to ODOT as determined solely by ODOT, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services; and;

(C) Any other conditions or provisions ODOT believes to be in the ODOT's best interest to negotiate.

(e) ODOT shall, either orally or in writing, formally terminate negotiations with the highest ranked Proposer if ODOT and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. ODOT may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, and so on, until negotiations result in a Contract. If negotiations with any Proposer do not result in a Contract within a reasonable amount of time, ODOT may end the particular formal solicitation. Nothing in this rule precludes ODOT from proceeding with a new formal solicitation for the same Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP that failed to result in a Contract.

Statutory/Other Authority: 279A.065(6)(a), 279A.070, ORS 184.619

Statutes/Other Implemented: ORS 279A.050(3), 279C.110