



STAFF REPORT

Date: October 5, 2023
To: School Board Policy Committee
From: Emily Courtnage, Director of Purchasing & Contracting
Subject: Update to Public Contracting Rules

In 2010, Portland Public Schools developed and adopted a substantial and comprehensive revision to its Public Contracting Rules. These rules were updated in 2012, 2016, and 2019 to reflect legislative changes to the state Public Contracting Code (ORS Chapter 279A, 279B, and 279C) and revisions to the Attorney General's Model Public Contracting Rules ("Model Rules"). An update and revision to the District's Public Contracting Rules is necessary to reflect legislative changes to the Public Contracting Code in 2023, as well as improve internal alignment, efficiency, and effectiveness, as further detailed below.

I. Updates to Public Contract Rules to Reflect Legislative Changes

a. Updates to Competitive Procurement Thresholds

In the spring of 2023, the Oregon legislature adopted the following changes to competitive procurement thresholds that had been in place for well over a decade:

1. Raised the small procurement threshold (*i.e.*, the dollar amount below which no competition is required) from \$10,000 to \$25,000 for Construction contracts
2. Raised the small procurement threshold for Goods and Services contracts from \$10,000 to \$25,000
3. Raised the formal procurement threshold (*i.e.*, the dollar amount above which the District must conduct a formally advertised, public Request for Proposals or Invitations to Bid solicitation process) for Goods and Services contracts from \$150,000 to \$250,000

Per Senate Bill 1047, these changes to the Oregon Public Contracting Code are effective January 1, 2024. Staff recommends updating the District's Public Contracting Rules to reflect these legislative changes on or as soon as possible after January 1, 2024. See PPS 47-0250(c) and (d).

Local Contract Review Boards (at Portland Public Schools, this is the School Board) have discretion to adopt their own thresholds for Personal Services contracts. (Personal Services are those services that "require specialized technical, creative, professional, or communication skills or talents, unique and specialized knowledge, or the expertise of discretionary judgment skills,

and for which the quality of Services depends on attributes that are unique to the service provider.” PPS 46-0500(2)). The District’s current formal procurement threshold for Personal Services contracts is \$150,000, which was made to align with the existing Goods and Services formal procurement threshold established by the legislature in 2003. Staff recommends increasing the District’s formal procurement threshold for Personal Services to \$250,000 to align with the new 2023 legislative update to the formal procurement threshold for Goods and Services.¹ See PPS 46-0505. These changes will also align with the formal procurement thresholds applicable to (1) procurements for contracts expending federal grant or pass-through funds, and (2) procurements for architecture, engineering, and related services contracts.

b. Other Minor Updates to Oregon Public Contracting Code and the Attorney General’s Model Public Contracting Rules

Staff recommends the following additional changes to bring the District’s Public Contracting Rules into alignment with new legislation and the Attorney General’s Model Rules. Staff recommends adhering to the Model Rules language throughout the District’s Public Contracting Rules, as the Model Rules promote consistency across Oregon public agencies, ease of administration and interpretation by staff, and common expectations among contractors who work with Oregon public agencies.

- (1) Adoption of the Model Rule regarding the informal selection procedures for Architecture, Engineering, and Related Services contracts not exceeding \$250,000 (PPS 48-0210)
- (2) Adoption of a new Model Rule in the Attorney General’s Model Rules regarding protests and judicial review of qualified products lists decisions (PPS 47-0745)
- (3) Change to the Public Hearing mandate for exemptions from competitive bidding for public improvement contracts (PPS 49-0630(7)). In 2021, the Oregon legislature amended ORS 279C.335(5) to require that interested parties must be given an opportunity to request a hearing. The District no longer needs to hold a public hearing unless one is requested. The Board will continue to vote on all requests for exemption from competitive bidding and use of alternative contracting methods for public improvement projects (such as Request for Proposals or Construction Manager/General Contractor).
- (4) Numerous minor language changes and additions throughout to ensure alignment with Model Rules.

II. Updates to Reflect Changes in Pricing/Buying Power and/or Align with New Procurement Thresholds

a. Raise Board Approval Threshold from \$150,000 to \$250,000 for Revenue and Expenditure Contracts (PPS 45-0200(4)(b)(A))

Staff recommends increasing the Board’s delegation of authority to the Superintendent or designee to approve and sign contracts from those that exceed \$150,000 to those that exceed \$250,000 for several reasons:

¹ \$150,000 in 2003 is equivalent to \$257,802 in 2024.

First, this change will keep the Board contract approval threshold in alignment with the new formal procurement thresholds noted above. The Board approval threshold is at the Board's sole discretion, but was chosen over ten years ago to align with the formal procurement threshold for Goods, Services, and Personal Services, for ease of administration.

Second, the Board contract approval threshold for expenditure contracts has not changed since 2010.²

Finally, staff conducted an informal survey of eleven other local public agencies and school districts and found that nearly all (1) align their Board approval thresholds to the Goods and Services formal procurement threshold and are looking to raise their current \$150,000 threshold in light of the 2023 legislative changes, (2) already have a higher Board approval threshold (\$300,000 or above), or (3) delegate unlimited contracting authority to executive leaders.

b. Raise Small Procurement Threshold for Personal Services Contracts from \$50,000 to \$75,000 (PPS 46-0525(1))

Staff recommends increasing the threshold at which a three-quote or informal competition process is required for Personal Services contracts. The \$50,000 threshold has been in place for over a decade, during which time the buying power of \$50,000 has significantly decreased. Further, if the Board raises the formal procurement threshold for Personal Services from \$150,000 to \$250,000, as described above, it makes sense to also shift the small procurement threshold. With these changes, Personal Services contracts could be negotiated without competition if \$75,000 or less, with a three-quote or informal Request for Proposals process if between \$75,001 and \$250,000, and with a formal, publicly advertised Request for Proposals process if above \$250,000.

III. Removal of Administratively Burdensome Mandates That Do Not Align with the Oregon Public Contracting Code or Attorney General's Model Rules

a. Removal of the Amendment Cap for Personal Services contracts (PPS 46-0535(4))

In 2016, the Board adopted an amendment cap for Personal Services contracts that prohibits contract amendment to add scope or funds that would cause the total contract price to exceed 125% of the original contract price except in limited circumstances. See PPS 46-0535(4). This arbitrary amendment cap is not required by or included in the Oregon Public Contracting Code or the Model Rules. In the years since this cap has been in place, staff has observed significant, unintended adverse consequences of this amendment cap:

(1) In many cases, a small contract (*e.g.*, for a few sessions of professional development or a few hours of artist-in-residence time with students) cannot be amended to add additional days or sessions when it is determined that such addition is in the District's and/or students' interests. This forces the requesting school or department to draw up a new contract to add, for example, one new session at \$300 to a \$1000 contract. This strict rule serves no purpose but does add paperwork, time delay, and administrative burden.

² The buying power of \$150,000 in 2010 is equivalent to \$214,391 in 2024.

(2) The rule encourages a series of contracts with the same contractor rather than a single amended contract with additional scope. As such, it can inadvertently promote skirting of procurement thresholds and/or Board approval processes that would apply to any single contract with an amendment that caused it to cross a competitive procurement or Board approval threshold. For example, a \$120,000 personal services contract amended to add an additional \$35,000 would cross the current \$150,000 Board approval threshold, as well as the formal procurement threshold. Purchasing & Contracting staff would review the proposed amendment for procurement compliance and put the amendment on the next Board contracts agenda. With the amendment cap in place preventing such amendment, the originating contract manager is likely to simply submit a new contract with the same contractor for \$35,000, and such a low-dollar contract will likely not be funneled through the Board approval process or reviewed for formal procurement threshold compliance.

Staff has been unable to identify any countervailing positive results of the amendment cap and therefore recommends removing it.

b. Removal of the Amendment Reporting Requirement for Goods and Services, Architectural, Engineering, and Related Services, and Construction contracts (PPS 47-0800(4), 48-0320(5)), 49-0910(5)

In 2016, the Board also adopted amendment caps for Goods and Services, Architectural, Engineering, and Related Services, and Construction contracts that prohibited amendment to add scope or funds that would cause the total contract price to exceed 125% of the original contract price except in limited circumstances. In 2019, based on staff reports of numerous adverse and unintended results, such as delay of important construction or maintenance projects, the Board removed these amendment caps but substituted in a reporting requirement. This more limited reporting requirement applied only to contracts for which (a) the original contract price exceeded \$500,000, (b) amendments caused the new contract price to exceed 125% of the original contract price, and (c) the amendments were not explicitly contemplated and allowed for in a formal solicitation process and resulting contract (as in the case, for example, of a Request for Proposals for a contract for one year with options to renew for up to five additional years). The Rule directs staff to report any such amendments to the Board after the fact.

Staff recommends removing the reporting requirement for several reasons: (1) The rule is not required by or included in the Oregon Public Contracting Code or the Model Rules; (2) in the several years since the rule has been in place, staff has reported only one or two applicable amendments that fit the criteria; (3) the Bond Accountability Committee already closely monitors increases to our bond-funded contracts; and (4) the reporting requirement is informational only, after the amendment is signed, and thus has no effect on the contract scope or the District's contracting practices.

IV. New or Revised Rules Delegating Authority to the Superintendent

a. Delegate Contracts Paid from Fee-Based Revenues (PPS 46-0200(4)(b)(G))

Staff recommends that the Board delegate contracting authority to the Superintendent or designee for any contracts paid entirely from fee-based revenues, such as student fees,

assessed and collected for specific purposes. The Board has a lesser oversight responsibility over non-District funds that still require a District contract to administer.

b. Bring Offer of Judgment Rule (PPS 46-0200(6)) into Alignment with Board Policy on Liability Claims

In an existing rule (PPS 46-0200(4)(b)(F)), the Board has delegated authority to the Superintendent or designee to make an offer of judgment in the course of litigation when the Superintendent and general counsel determine that such offer is in the best interests of the District. However, PPS 46-0200(6) requires that the general counsel draft a privileged memo to the Board explaining the legal basis for the offer of judgment if such offer exceeds \$25,000. Staff recommends raising the dollar threshold at which a privileged memo is required from \$25,000 to \$75,000. This revision will bring the rule in alignment with the revised Board Policy on Liability Claims, 8.60.021-P, which requires that settlement agreements of \$75,000 or above be submitted to the Board for approval.

V. New or Revised Direct Negotiation and Special Class Procurement Rules

a. New Rule to Allow Direct Negotiation of Medical Services (46-0525(14))

Staff recommends that the Board adopt a new rule allowing direct negotiation of contracts “for services provided by those in the medical community including, but not limited to, doctors, physicians, psychologists, nurses, laboratory technicians and those with specific license or unique skill to administer treatments for the health and well-being of people.” In practice, the District always exempts medical services from competition under PPS 46-0525(3) (allowing direct negotiation where “the work is not project-driven but requires an ongoing, long term relationship of knowledge or trust”) or PPS 46-0525(4) (allowing direct negotiation where “the contractor possesses unique knowledge and/or expertise in a specialized service area, making competition impractical”). However, both of these more general exceptions require direct negotiation justification paperwork to explain the applicability of one or more of these provisions. To cut down on unnecessary paperwork, staff recommends adopting a clear direct negotiation rule for medical services. The language of the rule is taken from a similar direct negotiation rule adopted by Metro.

b. Revised Special Class Procurement Rules for Copyrighted Materials and Creative Works (PPS 47-0288(4)) and Software and Hardware Maintenance, License, Subscriptions, and Upgrades (PPS 47-0288(11))

Staff recommends updating the District’s special class procurement rule allowing direct purchase without competition of copyrighted materials and creative works to more clearly cover curriculum materials in all modern electronic forms. Contracts for the procurement and distribution of textbooks have long been exempted from the public contracting code per statute (ORS 279A.025) and public contracting rule (PPS 46-0130). However, over time the use of traditional textbooks has diminished as the use of digital and online curriculum resources has increased, and this special class procurement was adopted to reflect that modern reality. The revision to this special class procurement clarifies the language to ensure it covers all curriculum materials that are available from only one source.

For similar reasons, staff recommends updating the District's special class procurement rule allowing direct purchase without competition of software and hardware licenses and subscriptions available from only one source. The revision clarifies the language to ensure it covers all digital resources, including cloud-based programs and applications.

ATTACHMENTS

- A. Redline of 2019 Public Contracting Rules