



# Staff Analysis and Report to the Board

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Board Meeting/Work Session Date: May 14, 2019 (Second Reading)

Senior Lead: Cynthia Le, Chief Financial Officer

Department and Staff Lead: Emily Courtnage, Director of Purchasing & Contracting

**SUBJECT: 2019 Revisions to Portland Public Schools Public Contracting Rules**

## **I. BACKGROUND**

Per the attached Executive Summary Memorandum, the District adopted revised Public Contracting Rules ("Rules") in 2010 and subsequent updates in October 2012 and March 2016. These Rules comprise the Contracting and Purchasing Manual referenced in Policy 8.50.090-P and govern the District's procurement activities. The rules closely follow state statute (ORS Chapter 279) and the related Attorney General Model Rules. The District is required to regularly update these Rules to reflect legislative changes to state statute.

These proposed 2019 Rules were presented to the Board Policy and Governance Committee on December 20, 2018 and January 10, 2019 and to the Board Audit Committee on March 13, 2019. After one revision, the Audit Committee recommended the presentation of these revised Rules, attached hereto, to the full Board.

The Board held a first reading of the revised Rules on April 15, 2019 and allowed the requisite 21 days for public comment before this second reading.

## **II. RELATED POLICIES/BEST PRACTICES**

Under Board Policy 8.50.090-P ("Public Contracting and Purchasing Rules"), the Board is designated the local contract review board under ORS 279.060 with authority to adopt rules for public contracts and purchasing and exempt certain public contract or classes of contracts from competitive bidding process. The Policy further provides: "The Superintendent shall develop Public Contracting Rules ("Rules") governing District contracts and purchasing practices and shall post them to the District website. . . . Any changes to the Rules shall be approved by Board Resolution."

In formulating the new or updated special class procurements in these proposed Rules, Purchasing & Contracting staff reviewed similar language in the public contracting rules of the City of Portland, the University of Oregon, and the North Clackamas School District.

## **III. FISCAL IMPACT**

This policy revision is budget neutral.

## **IV. COMMUNITY ENGAGEMENT (IF APPLICABLE)**

Purchasing & Contracting staff has been formulating this revision since mid-2018. Several of these changes are mandatory per state statute or new federal regulation; others correct minor errors or typos. When making decisions regarding optional changes, we worked in conjunction with impacted departments, including General Counsel, Special Education, Columbia Regional Program, Office of



School Modernization, and Facilities and Asset Management. Our external legal counsel at Miller Nash advised us regarding these changes and drafted the revised rules, the attached Findings, and the accompanying Executive Summary.

Notice of the new or revised class special procurements (for copyrighted materials and creative works; software and hardware maintenance, licenses, subscriptions, and upgrades; specialized assistive equipment for students; and services, repair, or maintenance services for products under warranty) was published in the Portland Business Tribune on April 5, 2019, as required by PPS 47-0287 ("Special Procurements; Request Procedures.").

#### **V. TIMELINE FOR IMPLEMENTATION/EVALUATION**

If adopted, these revised Rules will be posted on the District website, both on the Purchasing & Contracting site and the Board site.

These Rules will be reviewed, and when warranted revised, on a regular basis going forward. Such review and revision will occur at a minimum: 1) When there are changes to the Oregon Attorney General Model Rules; 2) when there are Oregon legislative changes to statutes impacting public contracting, and 3) when there are new PPS purchasing and contracting needs to be addressed in these rules.

#### **VI. BOARD OPTIONS WITH ANALYSIS**

If adopted, these Rules will replace the 2016 version of the Portland Public Schools Public Contracting Rules, bringing our Rules into compliance with current law, including the new federal procurement standards, and streamlining the purchasing process for certain essential services.

If the Board does not adopt the 2019 Rules, the District will continue to operate under the 2016 Public Contracting Rules and will continue to follow new state and federal law governing District procurement. However, some of the most recent state and federal law would not be reflected in the District's Rules.

#### **VII. STAFF RECOMMENDATION**

Staff recommends that the Board adopt the 2019 Public Contracting Rules as proposed in the redline attached hereto.

**VIII. I have reviewed this staff report and concur with the recommendation to the Board.**



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Guadalupe Guerrero  
Superintendent  
Portland Public Schools

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Date 5/9/19

#### **ATTACHMENTS**


- A. Executive Summary
- B. Resolution
- C. 2019 Revised Purchasing and Contracting Rules (redlined to show proposed changes)
- D. 2019 Revised Purchasing and Contracting Rules (clean copy)
- E. Findings in Support of Designation of Special Class Procurements





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## Memorandum

**To:** Board of Education  
**From:** Jeffrey G. Condit   
**Client:** Portland Public Schools  
**Subject:** 2018 Revisions to Public Contracting Rules—Executive Summary  
**Date:** March 27, 2019

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### INTRODUCTION

In 2010, Portland Public Schools developed and adopted a substantial and comprehensive revision to its Public Contracting Rules. These rules were updated in 2012 and 2016. The 2019 revisions update the District's rules 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") that have been adopted since the last update. The revisions also address new federal contracting requirements, and include elective amendments to address implementation issues that have arisen since the last update. The revised rules are attached as Exhibit A to the Board's resolution adopting the revisions.

### LEGAL FRAMEWORK

The Board of Education serves as the Local Public Contract Review Board ("Board") for the District pursuant to ORS 279A.060. ORS 279A.065 empowers the Board to adopt local public contracting rules. The District's rules are based upon the Attorney-General's Model Public Contracting Rules ("Model Rules"), but include District-specific provisions and statutory requirements omitted from the Model Rules. This eliminates potential conflicts and allows the District staff to work from a single document rather than three different documents.

ORS 279A.065 requires the Attorney General to update the Model Rules after each legislative session to reflect amendments to the Public Contracting Code. The statute also requires a local contracting agency such as the District to review the Attorney General's revisions to determine whether its own rules need to be revised.

## SUMMARY OF AMENDMENTS

Some of the 2019 revisions to the District's rules reflect changes to the Model Rules. There have not been many statutory or model rules changes since the District's last update. The biggest changes have been to statutes relating to non-discrimination in the award of contracts to minority-owned and women-owned businesses, emerging small businesses, and businesses owned by service-disabled veterans. These have not changed significantly from a district operations perspective, but there have been definitional changes and additional contractual and oversight requirements for such certifications. The legislature has also revised the tax certification requirements for goods and services contracts. Finally, the Attorney General has proposed new rules with regard to joint contracting by state and local contracting authorities. The 2018 District Rules reflect these changes, as well as a number of editorial changes that the Attorney General has made to the rules. Collectively, the proposed amendments bring the District's rules into alignment with the state rules.

Another significant amendment is the addition of rules to comply with the United States Office of Management and Budget ("OMB") Uniform Guidance (2 CFR 200). The District receives substantial federal funding directly or through the State of Oregon. The Uniform Guidance is OMB's attempt to adopt and apply a uniform set of requirements applicable to contracts funded in whole or in part with federal funds. The Uniform Guidance went into full effect as to "subrecipients" (agencies such as the District that receive pass-through federal funding) on July 1, 2018. The Rule changes reflect the new procurement requirements in 2 CFR Sections 200.317 to 200.326. These new rules and contract requirements are primarily located at PPS 46.600 to 46.675. Prior to implementation of the Uniform Guidance, public body subrecipient procurements were generally considered compliant if they complied with state public contracting requirements. This is still true for the states, but local government procurements must now comply with the Uniform Guidance. These rules control over any other state or local rules.

Staff is also proposing a few elective amendments as follows:

Staff proposes adding three classes of contracts to PPS 46-0535, which allows selection of certain professional services contracts by negotiation. Added are:

- Contracts for interim staff and temporary staffing services. The rationale for this change is that the District has to move quickly to fill interim positions to avoid work slowdowns, the appointments are temporary, and when the interim position is management or professional, the District is often looking for very specific experience and expertise.

- Contracts for therapeutic placement to meet needs identified in a student's IEP. The rationale for this change is that these needs are highly specialized and generally need to be met immediately in order for the District to comply with its special education obligations.

- Contracts for legal services. The rationale for this change is the legal service needs are frequently specialized and generally need to be met promptly.

Staff is also proposing repealing the rules on contract amendments that currently require single or cumulative amendments that would increase the cost of the contract by more than 125% over the original contract price to be approved by the Board. See 47-0800 (goods and services contracts), 48-0320 (architecture, engineering, and related contracts), and 49-0910 (public improvement contracts). These rules have proven difficult in practice because the age and condition of the District's facilities and equipment mean frequent discovery of unforeseen conditions, requiring contract adjustments. The District does not have a real choice but to approve a contract adjustment when such conditions arise, and the delay of having to take such changes to the Board can increase costs. (Staff is proposing to retain this requirement for personal services contracts that do not present these same challenges. See PPS-46-0535(4).) To provide for transparency and board oversight, approval of amendments over 125% of the original contract price for larger contracts must be reported to the Board at its next regular business meeting.

Next, staff is recommending some minor modifications to the District's list of class special procurements. A "class special procurement" exempts certain goods and/or services from compliance with the standard solicitation processes of bids or quotes where such process are not relevant to or the best method for procuring the particular good and/or service. In order to approve a class special procurement, the Board must find that approving the special procurement will not diminish competition, and is reasonably expected to result in substantial costs or otherwise promotes the public interest in a manner that could not practicably be realized by complying with the standard procurement processes.

An existing class special procurement exempts copyrighted materials and creative works. See PPS-47-0288(4). Examples include textbooks for which there is no competitive market, and artworks, which are not practicable to purchase by low bid or request for proposals, and certain instructional materials. Staff is proposing to update this list to add instructional software applications and other digital resources, and to remove the specific reference to the District's Instructional Resource Intake Survey ("IRIS") process, which would fall under the new broader language.

Staff is also recommending updating the current special procurement for software and hardware maintenance and upgrades (PPS 47-0288 (11)) where such services are only available from a single source, or when available from multiple providers, are best procured from the incumbent provider who has knowledge of the District's systems. The superintendent must document the reasons for exercising this exemption in the procurement file.

Staff is proposing to add two new class special procurements:

PPS-47-0288(27) adds specialized assistive equipment for students. This equipment has to be procured on short notice, is very specialized, and frequently has to be customized for the specific student.

PPS-47-0288(28) adds service, repair, or maintenance for products under warranty where the warranty requires use of a particular provider or where the manufacturer or provider must diagnose the problem because the system or part is proprietary.

Staff is proposing to delete two rules relating to contracts involving federal funds, because those are now subject to the Uniform Guidance rules.

The findings in support of these class special procurement amendments are set forth in Exhibit B to the resolution.

Finally, Staff is proposing deletion of PPS 48-0220, the informal section procedure for architects, engineers, and other construction-related professional services that applies to contracts between \$100,000 and \$250,000. The procedure is so similar to the formal request for proposals ("RFP") selection process that Staff is proposing to use the formal process for all of these types of contracts when estimated to be over \$100,000.

The proposed 2018 revisions to the District's Rules make several other minor editorial or clarification changes.



**FINDINGS IN SUPPORT OF THE DESIGNATION OF CERTAIN CLASSES OF  
CONTRACTS FOR GOODS AND SERVICES AS SPECIAL CLASS  
PROCUREMENTS UNDER ORS 279B.085**

The Board of Directors of School District No. 1J, Multnomah County, Oregon, acting as the Local Public Contract Review Board (the "Board"), makes the following findings in support of amendments and additions to the District's class special procurements for goods and services incorporated in the District's 2019 amendments to its Public Contracting Rules ("2019 Amendments").

**I. Class Special Procurements.**

**A. Applicable Criteria.** ORS 279B.085(4) empowers the Board to designate classes of contracts for goods or services for special procurement outside of the competitive procurement processes otherwise required under ORS Chapter 279B and the District's Public Contracting Rules. In order to approve a class special procurement, the Board must find that the designation of a class of contracts for special procurement:

1. Is unlikely to encourage favoritism in the award of public contracts or to substantially diminish competition for public contracts; and
2. Either:
  - a. Is reasonably expected to result in substantial cost savings to the contracting agency or to the public; or
  - b. Otherwise substantially promotes the public interest in a manner that could not practicably be realized by complying with the requirements that are otherwise applicable under ORS Chapter 279B or the District's rules adopted to implement those rules.

**B. Findings.** The District's class special procurements are set forth in District Public Contracting Rules at PPS-47-0288 (Exhibit A). The District's 2019 Amendments amend two existing class special procurements and adopt two new class special procurements as follows:

1. Copyrighted Materials and Creative Works (PPS-47-0288(4)).
  - a. Findings of Fact. The 2019 Rules amend this section to add instructional software applications, other digital resources, and assessments and related assessment materials and reports available from only one source, and to remove the specific reference to the District's Instructional Resource Intake Survey ("IRIS") process, which would be covered by the new language.
  - b. Conclusions of Law. This amendment will not discourage competition because instructional materials (including digital resources) and assessments are so specialized or unique that they cannot be effectively competed. In addition, many instructional materials must be reviewed prior to approval for use at the



District, and this allows for creation of a list of vetted and approved materials, including digital resources, from which programs and teachers can select. This promotes the public interest in high quality and relevant instructional materials in a way that cannot practicably be realized through the standard ORS 279B procurement process.

**2. Software and Hardware Maintenance, Licenses, Subscriptions, and Upgrades (PPS-47-0288(11)).**

**a. Findings of Fact.** The 2019 Rules modify this special procurement to allow direct procurement of software and hardware maintenance, licenses, subscriptions, and upgrades where they are only available from a single source or, when available from multiple providers, are best procured from the incumbent provider who has knowledge of the District's systems. The superintendent must document the reasons for exercising this exemption in the procurement file.

**b. Conclusions of Law.** This amendment is unlikely to diminish competition because it can only be employed where no competition exists, or where the contract has previously been completed and the product is already fully integrated with the District's systems or the incumbent provider has specialized knowledge of the District's systems. It promotes the public interest in a way that cannot practicably be realized through the standard ORS 279B procurement process because it makes efficient use of the District's existing systems and does not require the District to conduct a competitive process where no competition exists.

**3. Specialized Assistive Equipment for Students (PPS-47-0288(27)).**

**a. Findings of Fact.** The 2019 Rules add a new special procurement that allows direct procurement of specialized assistive equipment for students, including without limitation positioning equipment for orthopedically impaired students and assistive technology for blind/vision impaired, deaf/hard of hearing, and deaf/blind students and augmentative and alternative communication equipment for students who require such assistance. This equipment has to be procured on short notice, is very specialized, is usually available from only one source, and frequently has to be customized for the specific student.

**b. Conclusions of Law.** This amendment is unlikely to diminish competition because this equipment is so specialized and customized it cannot be effectively competed. It promotes the public interest in a way that cannot practicably be realized through the standard ORS 279B procurement process because it allows the District to quickly and efficiently acquire the specialized equipment needed for such students.

**4. Service, Repair, or Maintenance Services for Products Under Warranty.**

**a. Findings of Fact.** The 2019 Rules add a new special procurement that allows direct procurement of service, repair, or maintenance services from a manufacturer, dealer, or authorized service provider for a product or a system



subject to a warranty when the terms of the warranty require use of a particular maintenance service provider or providers, or when the manufacturer or approved provider must diagnose a problem because the system or part is proprietary.

**b. Conclusions of Law.** This amendment is unlikely to diminish competition because the original acquisition of the product or system will have been competitively procured, and this exemption will only apply where the warranty or proprietary nature of the product or service requires that the District use a particular vendor for repair or maintenance. It promotes the public interest in a way that cannot practicably be realized through the standard ORS 279B procurement process because it allows the District to comply with the product warranty or recognize the proprietary nature of certain products or equipment.

**II. Existing Special Procurement and Exemptions Continued.** No other substantive amendments to existing special procurements or exemptions, or new special procurements or exemptions, are being proposed as part of the 2019 Amendments to the District's Public Contracting Rules.

