

¹125-247-0110

Feasibility Determination, Cost Analysis and Department Report

(1) The Table of Contents for this Rule is as follows:

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(2) **Generally.**

(a) Before conducting a Procurement for Services, an Authorized Agency must, in the absence of a Feasibility Determination under Section (3) of this Rule, conduct a Written Cost Analysis under Sections (4) through (6) of this Rule (Cost Analysis).

(b) The Procurement for Services must have an estimated contract value that exceeds \$250,000 for the estimated term of the Contract(s) (Value), including incidental costs related to the Services, and Anticipated Amendments, but not Unanticipated Amendments. Authorized Agencies must not fragment to avoid this threshold (see OAR 125-246-0630).

(c) If a Procurement is conducted in accordance with this Rule, an Award is made, and one or more Unanticipated Amendments then increase the estimated contract's value over \$250,000, a Cost Analysis is not required at that time.

(d) "Services" has the meaning as defined in OAR 125-246-0110, except that for purposes of this Rule only:

(A) "Services" does not include the services of an Architect, Engineer, Land Surveyor or Provider of Related Services as defined in ORS 279C.100; and

(B) "Services" does not include Client Services, defined as of August 4, 2009, in OAR 125-246-0110, as follows:

²(i) "Client" means any individual, family or Provider:

(I) For whom an Agency must provide Services and incidental or specialized Goods, in any combination thereof ("Services and Incidental Supplies"), according to state, federal law, rule, and policy. Those Services and Incidental Supplies include but are not limited to treatment, care, protection, and support without regard to the proximity of the services being provided;

(II) Who in fact receives and utilizes services provided by an Agency primarily for that individual's or family's benefit;

(III) Who is under the custody, care, or both of the Agency; or

(IV) Who provides direct care or Services and is a proxy or representative of the non-Provider Client.

¹ Updated Draft, 12/09/09; only new changes to the rule are shown, since the Public Draft, 11/03/09

² Renumbered

(ii) "Client Services" means any Services that directly or primarily support a Client, whether the Client is the recipient through the provision of voluntary or mandatory Services. Client Services also means any Goods that are incidental or specialized in relation to any Services defined in this Subsection. Client Services may include but are not limited to (where these terms are used in another statute, they must have that meaning):

(I) Housing, including utilities, rent or mortgage or assistance to pay rent, mortgage or utilities;

(II) Sustenance, including clothing;

(III) Employment training or Skills training to improve employability;

(IV) Services for people with disabilities;

(V) Foster care or foster care facilities;

(VI) Residential care or residential care facilities;

(VII) Community housing;

(VIII) In-home care including home delivered meals;

(IX) Medical care, services and treatment, including but not limited to:

(aa) Medical, Dental, Hospital, Psychological, Psychiatric, Therapy, Vision;

(bb) Alcohol and drug treatment;

(cc) Smoking cessation;

(dd) Drugs, prescriptions and non-prescription;

(ee) Nursing services and facilities;

(ff) Transportation or relocation;

(gg) Quality of life, living skills training; or

(hh) Personal care; or

(ii) Legal services and expert witnesses services;

(jj) Religious practices, traditions and services, separately or in any combination thereof; and

(kk) Educational services. The term "Client Services" does not include benefits or services provided as a condition of employment with an Agency.

(3) **Feasibility Determination.** An Authorized Agency may proceed with the Procurement of Services without conducting a Cost Analysis if the Authorized Agency makes Written findings that one or more of the Special Circumstances described in Subsection (3)(c) make the Authorized Agency's use of its own personnel and resources to provide the Services not feasible (Feasibility Determination).

(a) **Approval of Written Findings.** The Designated Procurement Officer (DPO), or the Chief Procurement Officer when appropriate for Procurements of the State Procurement Office (collectively, DPO) must approve the Written findings under Section (3) before conducting the Procurement.

(b) **Special Circumstances.** Special Circumstances include any circumstances, conditions or occurrences that would make the Services, if performed by the Authorized Agency's employees, incapable of being managed, utilized or dealt with successfully in terms of the quality, timeliness of completion, success in obtaining desired results, or other reasonable needs of the Authorized Agency. Examples of Special Circumstances include but are not limited to:

(A) **Expertise.** The DPO approves a determination that the Authorized Agency lacks the specialized capabilities, experience, or technical or other expertise necessary to perform the

Services. In making the finding, the Authorized Agency must compare the Authorized Agency's capability, experience or expertise in the field most closely involved in performing the Services with a potential contractor's capability, experience or expertise in the same or a similar field.

(B) **Funding Requirement.** The terms under which the Authorized Agency receives a grant or other funds for use in a Procurement require the Authorized Agency to obtain Services through an independent contractor;

(C) **Law Requirement.** Other state or federal law requires the Authorized Agency to procure Services through an independent contractor;

(D) **Real or Personal Property.** The Procurement is for Services that are incidental to a contract for purchasing or leasing real or personal property, including service and maintenance agreements for equipment that is leased or rented;

(E) **Conflict of Interest; Unbiased Review.** The Authorized Agency cannot accomplish policy, administrative or legal goals, including but not limited to avoiding conflicts of interest or ensuring independent or unbiased findings in cases when using the Authorized Agency's existing personnel or persons the Authorized Agency could hire through a regular or ordinary process would not be suitable;

(F) **Emergency Procurement.** The Procurement is for Services to which the provisions of ORS 279B.080 apply;

(G) **Delay.** The Procurement is for Services, the need for which is so urgent, temporary or occasional that attempting to perform the Services with the Authorized Agency's own personnel or resources would cause a delay that would frustrate the purpose for obtaining the Services; and

(H) **Services Completed within Six Months.** The Services that the Authorized Agency intends to procure will be completed within six months after the date on which the contract for the Services is executed.

(d) **Procurement File.** All written determinations required in this section (1)(f) must be made a part of the Procurement File in accordance with OAR 125-246-0556

(4) Cost Analysis: Estimation of Agency and Contractor Data.

(a) **Costs of Using Authorized Agency's Own Personnel and Resources.** The Authorized Agency must estimate the Authorized Agency's cost of performing the Services and consider cost factors that include:

(A) **Salaries or Wages and Benefits.** The salary or wage and benefit costs for the employees of the Authorized Agency who would be directly involved in performing the Services, to the extent those costs reflect the proportion of the activity of those employees in the direct provision of the Services. These costs include those salary or wage and benefit costs of the employees who inspect, supervise or monitor the performance of the Services, to the extent those costs reflect the

the proportion of the activity of those employees in the direct inspection, supervision or monitoring of the performance of the Services.

(B) Material Costs. The material costs necessary to the performance of the Services, including the costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies used or consumed in the provision of the Services.

(C) Related Costs.

(i) Costs incurred in planning for, training for, starting up, implementing, transporting and delivering the Services.

(ii) Any costs related to stopping and dismantling a project or operation because the Authorized Agency intends to procure a limited quantity of Services or to procure the Services within a defined or limited period of time.

(iii) The miscellaneous costs related to performing the Services, including but not limited to reasonably foreseeable fluctuations in the costs for the items identified in this Subsection (4)(a) over the expected duration of the Procurement. These costs exclude the Authorized Agency's indirect overhead costs for existing salaries or wages and benefits for administrators and exclude costs for rent, equipment, utilities and materials, except to the extent the cost items identified in this sentence are attributed solely to performing the Services and would not be incurred unless the Authorized Agency performed the Services.

(D) Other Information. The Authorized Agency's costs described in this Subsection (4)(a)(A) do not constitute an exclusive list of cost information. An Authorized Agency may consider other reliable information that bears on the cost to the Authorized Agency of performing the Services. For example, if the Authorized Agency has accounted for its actual costs of performing the Services under consideration, or reasonably comparable Services, in a relatively recent Services project, the Authorized Agency may consider those actual costs in making its estimate.

(b) Costs a Potential Contractor Would Incur. The Authorized Agency must estimate the cost a potential Contractor would incur in performing the Services and consider cost factors that include:

(A) Salaries or Wages and Benefits. The estimated salary or wage and benefit costs for a potential Contractor and potential Contractor's employees who work in the business or industry most closely involved in performing the Services; and who would be necessary and directly involved in performing the Services or who would inspect, supervise, or monitor the performance of the Services.

(i) The Authorized Agency may, but is not required to, communicate with any actual Contractor for information related to this estimate (see OAR 125-246-0635).

(ii) The Authorized Agency may consider in making this estimate any public source of information, including but not limited to:

(I) Other Contracts of the Authorized Agency or another Agency for reasonably comparable services;

(II) Trade or other marketplace websites;

(III) Industry or professional associations and publications;

(IV) The Oregon Bureau of Labor and Industries or an agency of another jurisdiction that performs comparable functions; and

(V) A survey of Persons who provide reasonably comparable services by means including but not limited to Internet or telephone searches.

(B) **Material Costs.** The material costs necessary to the performance of the Services, including the costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies used or consumed in the provision of the Services.

(C) **Related Costs.** The miscellaneous costs related to performing the Services. These miscellaneous costs include but are not limited to reasonably foreseeable fluctuations in the costs listed in Subsections (4)(b)(A) and (B) over the expected duration of the Procurement.

(D) **Other Information.** The potential Contractor's costs described in Subsections (4)(b)(A) and (B) do not constitute an exclusive list of cost information. An Authorized Agency may consider other reliable information that bears on the costs a potential Contractor would incur. For example, if in the recent past, the Authorized Agency conducted a Solicitation that required cost information or permitted negotiation of price based on a cost analysis for Services reasonably comparable to the current Services, the Authorized Agency may use that cost information in estimating the costs of current Services.

(5) **Decision: Comparison of Compensation and Other Costs**

(a) The Authorized Agency must compare:

(A) The Authorized Agency's estimated costs under Subsection (4)(a) and

(B) The Contractor's estimated costs under Subsection (4)(b).

(b) **Decision.** If the Authorized Agency's costs exceed the Contractor's costs under Subsection (5)(a) for the sole reason that the Contractor's costs for salaries or wages and benefits under Subsection (4)(b)(A) are lower than the Authorized Agency's costs for salaries or wages and benefits under Subsection (4)(a)(A), then the Authorized Agency may not conduct the Procurement.

(6) **Decision: Comparison of Agency and Contracting Costs**

(a) If Subsection (5)(b) does not apply, the Authorized Agency must compare:

(A) The Authorized Agency's estimated costs under Subsection (4)(a) and

(B) The total estimated costs that the Authorized Agency would incur in procuring the Services from a Contractor (Contracting Costs).

(b) **Profit Included.** Contracting Costs include the Authorized Agency's estimate of Contractor's profit in addition to the estimate of Contractor's costs under Subsection (4)(b). If

the Authorized Agency, in the reasonably near past, received Bids or Proposals for the performance of the Services under consideration, or reasonably comparable services, the Authorized Agency may consider the pricing offered in those Bids or Proposals in making its estimate. Similarly, the Authorized Agency may consider what it actually paid under a Contract for the same or similar services. For the purposes of these examples, the reasonably near past is limited to Contracts, Bids or Proposals entered into or received within the five (5) years preceding the date of the cost estimate. The Authorized Agency must take into account, when considering the pricing offered in previous Bids, Proposals, or Contracts, adjustments to the pricing in light of measures of market price adjustments that apply to the Services, such as the Consumer Price Indexes.

(c) **Decision.** If the Authorized Agency's Contracting Cost under this Section is lower than the Authorized Agency's cost under Subsection (4)(a), the Authorized Agency may conduct the Procurement. If the Authorized Agency's Contracting Cost is higher than the Authorized Agency's cost under Subsection (4)(a), the Authorized Agency may not conduct the Procurement, unless the Exception of Subsection (6)(d) applies

(d) **Exception Based on Lack of Agency Personnel and Resources; Reporting.** If the Authorized Agency determines that it would incur less cost in providing the Services with its own personnel and resources, the Authorized Agency may still conduct the Procurement if, at the time the Authorized Agency intends to conduct the Procurement, the Authorized Agency determines that it lacks personnel and resources to perform the Services within the time the Authorized Agency requires the Services (Exception). When an Authorized Agency conducts a Procurement under this Exception, the Authorized Agency must:

(A) Make and keep a Written determination that it lacks personnel and resources to perform the Services within the time the Authorized Agency requires the Services and the basis for the Authorized Agency's decision to conduct the Procurement;

(B) Obtain the Written approval by the DPO of the Exception before conducting the Procurement;

(C) Provide to the Emergency Board, each calendar quarter, copies of each Cost Analysis, Exception, and any other records described in this Subsection (6)(d);

(D) Prepare a request to the Governor for an appropriation and authority necessary for the Authorized Agency to hire personnel and obtain resources necessary to perform the Services that the Authorized Agency procured under this Subsection (6)(d). The request must include a copy of the records that the Authorized Agency provided to the Emergency Board under Subsection (6)(d)(C).

(7) **Department Evaluation and Report**

(a) **Application.** This Section applies to all public bodies authorized by law to conduct a Procurement, except for the Judicial Department and the Legislative Department (Public Bodies,

for this Rule only). Public Bodies include state and local agencies with contracting authority under ORS 279A.140, 279A.050, and related rules.

(b) Evaluation.

(A) The State Procurement Office, in consultation with other Public Bodies, must evaluate the extent to which Oregon Laws 2009, Chapter 880 and this Rule (Law), aided the Public Bodies in making their determinations as to whether to procure Services or to perform Services with the Public Bodies' own personnel and resources (Determinations).

(B) For the purpose of this Evaluation, Public Bodies must keep and make available to the State Procurement Office, only at its discretion and upon its request, all records and internal evaluations related to whether the Law aided them in making their Determinations.

(c) Report. The State Procurement Office must report the results of the consultation and Evaluation to the Legislative Assembly on January 10, 2011.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070

Stats. Implemented: Oregon Laws 2009, Chapter 880

COMMENTARY ON OAR 125-247-0110: New January 1, 2010

(1) **Special Circumstances.** Special circumstances are not limited to the eight (8) examples provided in the Statute and this Rule.

(2) **Section (4)(b)(A).** Considerations in making this estimate are not limited to the examples provided in this Rule.

(3) **Standards of Contractor Performance.** Prior to making estimations of potential contractor costs, the Authorized Agency may need to consider its decision regarding highest standards or good cause under OAR 125-247-0255 or 125-247-0260.