



**CITY COUNCIL MEETING
STAFF REPORT**

Meeting Date: February 22, 2024		Subject: Public Contracting Code Update	
		Staff Member: Stephanie Davidson, Assistant City Attorney	
		Department: Legal	
Action Required		Advisory Board/Commission Recommendation	
<input type="checkbox"/> Motion <input type="checkbox"/> Public Hearing Date: <input type="checkbox"/> Ordinance 1 st Reading Date: <input type="checkbox"/> Ordinance 2 nd Reading Date: <input type="checkbox"/> Resolution <input checked="" type="checkbox"/> Information or Direction <input type="checkbox"/> Information Only <input type="checkbox"/> Council Direction <input type="checkbox"/> Consent Agenda		<input type="checkbox"/> Approval <input type="checkbox"/> Denial <input type="checkbox"/> None Forwarded <input checked="" type="checkbox"/> Not Applicable Comments: Informational overview of the City’s current public contracting code, and request for direction from City Council regarding potential changes to the City’s public contracting code.	
Staff Recommendation: N/A			
Recommended Language for Motion: N/A			
Project / Issue Relates To:			
<input type="checkbox"/> Council Goals/Priorities:	<input type="checkbox"/> Adopted Master Plan(s):	<input checked="" type="checkbox"/> Not Applicable	

ISSUE BEFORE COUNCIL: An informational session to discuss potential updates to the City’s Public Contracting Code (WC 2.310 through 2.319).

EXECUTIVE SUMMARY:

Public contracting (also referred to as “public procurement”) refers to the City’s efforts to procure goods or services. The Legal Department is currently taking a holistic look at the City’s public contracting program and seeks guidance from City Council.

This project is important because financial reviewers (e.g., auditors, state and federal grant providers, etc...) often request more robust public contracting regulations and guidance than what is currently reflected in the Wilsonville Code (WC). City staff have also periodically expressed that some parts of our public contracting program are frustrating or confusing. The Legal Department’s goal is to facilitate City Council’s adoption of updates to the City’s Public Contracting Code effective as of July 1, 2023. The Legal Department is also developing a manual to assist City staff who engage in contracting activities.

I. Applicable Law: State Public Contracting Code

In 2004, the Oregon legislature overhauled the state’s public contracting statutes. These changes were effective in 2005. The State of Oregon’s Public Contracting Code now consist of the following statutes:

- ORS Chapter 279A – contains general provisions related to public contracting
- ORS Chapter 279B – governs the procurement of goods and services
- ORS Chapter 279C – governs the procurement of architectural, engineering, and other related services, as well as construction services

The following Oregon Administrative Rules (OAR), developed and maintained by the Oregon Department of Justice, also govern public contracting activities:

- OAR Chapter 137-046 – contains general public contracting provisions
- OAR Chapter 137-047 – governs goods and services procurements
- OAR Chapter 137-048 – states the architectural, engineering, and related services procurement requirements
- OAR Chapter 137-049 – contains the requirements for procuring construction (public improvement) services

These OARs, which I will refer to as the “Model Rules,” are a model code that local jurisdictions may adopt, or may “opt out” of. Many local jurisdictions, including Wilsonville, have not opted out of the Model Rules. Other local jurisdictions (e.g., Milwaukie and Lake Oswego) have opted out of the Model Rules and have adopted their own rules.

II. Applicable Law: Wilsonville Public Contracting Code

Wilsonville’s Public Contracting Code is WC 2.310-2.319. Wilsonville does not currently have a related administrative guide or manual. Other than a narrow revision to the Wilsonville Public Contracting Code in 2014, it has not been revised since its adoption in 2005.

III. Requests for Guidance from City Council

A. Verification of Approach

Policy Questions for City Council: Is City Council comfortable with the City’s current approach (following the Model Rules, and supplementing them as necessary with the City’s Public Procurement Code)? Or, is City Council interested in exploring the possibility of opting out of the Model Rules and having the City develop its own stand-alone Public Procurement Code?

B. City Council Approval

i. Initial Contract

Under the City’s Public Contracting Code, City staff must obtain City Council’s approval before entering into contracts with a value of more than \$100,000. Currently, a large number of contracts appear on City Council’s consent agenda.

Policy Questions for City Council: Considering factors such as inflation and the value of many City contracts, does City Council still want to see and approve all contracts of this value? Or, is City Council interested in increasing this approval threshold? If this approval threshold is increased, the City Manager and City staff will be empowered to enter into more contracts without first obtaining City Council’s approval (contracts with a value of more than \$100,000, and up to some higher level set by City Council).

It may be relevant to City Council to note a recent change to the Oregon Public Procurement Code, effective as of January 1, 2024: For the purchase of goods and services, the category “intermediate” procurements, which may be conducted by obtaining three quotes rather than using a competitive procurement procedure, has been expanded. Previously, this category included purchases of up to \$100,000, but now includes purchases of up to \$250,000. The impact of this change is that purchases of goods and services with a value of between \$100,000 and \$250,000 may now be done by obtaining three quotes – rather than through a competitive procurement procedure. In other words, this change makes these purchases easier.

ii. Contract Amendments and Change Orders

Under the City’s Public Contracting Code, City staff must obtain City Council’s approval before entering into change orders or contract amendments of up to 15% of the “contract price.” This language is arguably ambiguous – does “contract price” refer to the value of the initial contract, or in a situation in which there is more than one contract amendment or change order, does this term refer to each contract iteration? This should be clarified.

Policy Questions for City Council: Does City Council still feel that this threshold is appropriate? At what point and under what circumstances does City Council want to approve contract amendments and change orders?

C. Exemptions to Competitive Procurement

The Oregon Public Procurement Code allows the City to exempt specific types of goods and services from competitive procurement. The City's Code currently documents such exemptions in WC 2.312 and 2.313. These exemptions have not been updated since 2005 and should be reviewed.

When a certain type of procurement is exempted from competitive procurement, City staff may use whatever procurement method they feel is appropriate – for example, direct procurement. City Council may prescribe a specific procurement method.

i. Legal Standard for Exemptions from Competitive Procurement

To create a new exemption, or to expand an exemption, City Council must find that the alternative procedure (other than competitive procurement):

- Is either unlikely to encourage favoritism, or substantially diminish competition for public contracts; and
- Is either reasonably expected to result in substantial cost savings to the City or to the public, or otherwise substantially promotes the public interest in a manner that could not practicably be realized by competitive procurement.

ii. Expand Exemption for Computer Equipment and Software

WC 2.312(3) currently exempts the “purchase of computer equipment and software” from competitive procurement requirements (the “Computer Technology Exemption”). Technology evolves quickly, and computer equipment and software is now an integral part of equipment that is not traditionally seen as “computer equipment and software.” Therefore, there is a disconnect between the scope of this exemption and our current needs.

Staff have identified two major procurement types that would benefit from expanding this exemption:

- HVAC system and security system. Our HVAC system and security system have software components, and procurement of additional infrastructure within these systems must be compatible with the existing system; in other words, it is most efficient to procure these additional infrastructure components from the same vendor that the City worked with to build the existing system, rather than engaging in competitive procurement.

Using multiple vendors for these systems increases the City's exposure to risk that these systems could be corrupted or accessed by unauthorized third parties. We can limit our preventative maintenance and the number of points of failure (i.e., access points) within these systems by limiting the number of vendors who have access to these systems.

- SaaS Contracts. The way that software is delivered by vendors to their customers has changed significantly in the past twenty years. It is more common now for software to be

delivered through the “software-as-a-service” (SaaS) model. SaaS software is licensed to a user or customer on a subscription basis, is centrally hosted, and is accessed via the internet. SaaS software is sometimes referred to as “cloud computing.” SaaS software could be more explicitly referenced in the Computer Technology Exemption.

Policy Question for City Council: Staff recommend expanding the Computer Technology Exemption and believe doing so would satisfy the applicable legal standard. Does City Council agree with this direction?

iii. Potential New Exemption: National Citizen Survey

The City has used the biennial survey “National Citizen Survey” since 2012. The National Citizen Survey benchmarks the City against several hundred other cities around the country, and helps the City gather feedback from its citizens. The City uses this particular survey consistently over time because the same questions are asked each time it is administered, allowing the City to track its progress over time.

The City currently obtains the National Citizen Survey through a sole source procurement process; the last time this was done was in 2023, under the authority granted in Resolution No. 2778. The National Citizen Survey is arguably a unique survey tool, and the only survey tool the City has historically used. To City staff’s knowledge, there are no other survey tools that allow the City to benchmark its progress with respect to so many other cities, and with respect to its past data.

Currently there is no exemption from competitive procurement requirements for this survey.

Policy Question for City Council: Staff recommend adding this exemption and believe doing so would satisfy the applicable legal standard. Does City Council agree with this direction?

iv. Potential New Exemption: Environmental Stewardship Programs

The City currently promotes environmental stewardship in partnership with a couple of non-profit organizations: (1) Backyard Habitat (a non-profit organization that engages the public to promote stewardship of and improve habitat in our community, for the benefit of humans and wildlife), and (2) Friends of Trees (a non-profit organization that partners with various local jurisdictions to organize volunteers and implement tree-planting initiatives).

The City currently obtains the authority to enter into contracts with these non-profit organizations through a sole source procurement process; the last time this was done was in 2023, through Resolution No. 3094.

Currently there is no exemption from competitive procurement requirements for these types of partnerships.

Policy Question for City Council: Staff recommend adding this exemption and believe doing so would satisfy the applicable legal standard. Does City Council agree with this direction?

D. Equity and Inclusion

Studies in other communities in Oregon and in the United States have found that public contracting regulations and requirements are often a barrier to small businesses, and women-owned and minority-owned businesses. The City currently does not have any equity and inclusion policies in its code, or in related administrative materials (e.g., manuals or administrative rules).

ORS 279A.100 allows the City to “engag[e] in public contracting practices designed to promote affirmative action goals, policies or programs for disadvantaged or minority groups or to give a preference in awarding public contracts to disabled veterans.” This statute defines “affirmative action” to mean “a program designed to ensure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age or physical or mental disability or a policy to give a preference in awarding public contracts to disabled veterans.”

The City must be cautious in implementing such an affirmative action program; it could violate the equal protection clause of the federal constitution if it is not appropriately tailored. The equal protection clause prohibits a government body (i.e., the City) from denying a person equal protection under its laws; generally speaking, it requires that a government body (i.e., the City) treat all individuals in similar situations the same. If the City implements a program that treats businesses or individuals differently based on certain classifications it will increase the chance that a member of the public will challenge the program in court, based on the argument that the City has violated its rights under the equal protection clause.

City staff are scheduled to present to the Diversity, Equity and Inclusion (“DEI”) Committee on this issue on February 13, 2024. This presentation will include certain recommendations that the Legal Department believe would not unreasonably expose the City to risk of legal challenge. The Legal Department will present these recommendations, and the DEI Committee’s recommendation, to City Council.

E. Professional Services

Oregon’s Public Procurement Code treats different types of professional services in distinctly different ways. In particular, architectural, engineering, photogrammetric mapping, transportation planning, land surveying, and related services (“A&E Services”) may be directly procured if the estimated cost is \$100,000 or less. All other professional services are subject to the procurement procedure thresholds for standard goods and services, meaning that the cap for all other professional services that can be directly procured is \$25,000. Many jurisdictions have adopted local regulations that treat all professional services the same, and are subject to the procurement regulations that apply to A&E Services.

Policy Question for City Council: Does City Council want to consider designating other professional services contracts as being subject to the same rules as A&E Services?

EXPECTED RESULTS:

The end result of this project is City Council’s adoption of revisions to the City’s Public Contracting Code (WC 2.310 through 2.319).

TIMELINE:

These are the deadlines applicable to this project:

- February 22, 2024: First work session.
- March 18, 2024: Second work session (the Legal Department will present proposed revisions to the City’s Public Contracting Code to City Council)
- May 6, 2024: Public hearing and first reading of an updated Public Contracting Code.
- May 20, 2024: Second reading of an updated Public Contracting Code.

CURRENT YEAR BUDGET IMPACTS:

N/A

COMMUNITY INVOLVEMENT PROCESS:

The Legal Department has sought feedback regarding the City’s public contracting program from all City departments that engage in contracting activities. Most recently, a meeting was convened to gather feedback in fall of 2023.

The Legal Department is currently working with the DEI Committee to gather feedback regarding equity and inclusion in the City’s public contracting program. We are scheduled to attend the DEI Committee’s February 13, 2024 meeting.

The Legal Department also plans to seek feedback from the City’s risk management and insurer regarding any updates to insurance and risk management provisions.

POTENTIAL IMPACTS OR BENEFIT TO THE COMMUNITY:

Updating and revising the City’s Public Contracting Code (WC 2.310 through 2.319), and adopting a manual to assist staff who engage in public contracting activities, will give staff and members of the public greater clarity, promote the City’s compliance with all applicable public contracting laws and rules.

ALTERNATIVES:

Retain existing code language.

CITY MANAGER COMMENT:

N/A

ATTACHMENTS:

1. WC 2.310-2.319