



**ARTS, CULTURE, AND HERITAGE COMMITTEE MEETING  
STAFF REPORT**

<b>Meeting Date: March 6, 2024</b>		<b>Subject: Procurement Rules Applicable to Public Art</b>	
		<b>Staff Member:</b> Stephanie Davidson, Assistant City Attorney	
		<b>Department:</b> Legal	
<b>Action Required</b>		<b>Advisory Board/Commission Recommendation</b>	
<input type="checkbox"/> Motion <input type="checkbox"/> Public Hearing Date: <input type="checkbox"/> Ordinance 1 <sup>st</sup> Reading Date: <input type="checkbox"/> Ordinance 2 <sup>nd</sup> 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	
		<b>Comments:</b> N/A	
<b>Staff Recommendation:</b> N/A			
<b>Recommended Language for Motion:</b> N/A			
<b>Project / Issue Relates To:</b>			
<input type="checkbox"/> Council Goals/Priorities:	<input type="checkbox"/> Adopted Master Plan(s):	<input checked="" type="checkbox"/> Not Applicable	

**ISSUE BEFORE THE ACHC COMMITTEE:** An informational session to discuss City staff’s recommendation to City Council that “public art” be exempted from competitive procurement requirements in state law.

**EXECUTIVE SUMMARY:**

Public contracting (i.e., public procurement) refers to the City’s efforts to procure goods or services, and enter into contracts with vendors or contractors. These public contracting activities are governed by the Oregon Public Procurement Code (Oregon Revised Statutes chapters 279A,

279B, and 279C, and related Oregon Administrative Rules) and the City's Public Contracting Code (WCC 2.310 through 2.319). In most cases, the City's procurement of art or "public art" is subject to the portions of the Oregon Public Procurement Code regarding procurement of goods.

Since November of last year, the City's Legal Department has been taking a holistic look at the City's public contracting program. The Legal Department's goal is to facilitate City Council's adoption of an updated City public contracting code effective as of July 1, 2023. The Legal Department is also developing a manual to assist City staff who engage in public contracting activities.

## **I. Background**

### **i. Summary of Oregon Public Procurement Code and Competitive Procurement Requirements**

Generally speaking, with respect to a public body's procurement of goods (e.g., artwork), the public body must:

- engage in competitive procurement processes when the procurement will have a value (i.e., total consideration paid) of \$250,000 or more;
- engage in a relatively easier process (i.e., obtain only three quotes) when the procurement will have a value of between \$25,000 and \$250,000; and,
- may engage in "direct appointment" (i.e., select a vendor or contractor without even obtaining additional quotes) when the procurement will have a value of less than \$25,000.

Competitive procurement includes "requests for proposals" (RFPs), "requests for qualification" (RFQs), and "invitations to bid" (ITBs). In very general terms, competitive procurement processes require a public body to make a procurement opportunity available to the public, and then evaluate all responses in a fair manner. When a competitive procurement process is required, the public body must comply with procedural requirements and timelines stated in state law, and interested parties have some right to protest the public body's award of the contract. Some might characterize these competitive procurement requirements as burdensome, complex, and time consuming.

### **ii. Current Approach**

Right now there is no exemption from competitive procurement requirements for public art. In other words, the City's procurement of public art is subject to the Oregon Public Procurement Code, the City's Public Contracting Code, *and* the City's Public Art Policy.

### **iii. Legal Standard for Exemptions from Competitive Procurement**

The Oregon Public Procurement Code allows the City to exempt specific types of goods and services from the processes prescribed by the Oregon Public Procurement Code (i.e., the rules outlined in Section I(i), above). To create a new exemption, City Council must find that the

alternative procedure (i.e., the procedure that must be used in lieu of the processes prescribed by the Oregon Public Procurement Code):

- 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. **Staff Recommendations**

After studying this issue, the Legal Department recommends that the City exempt public art from competitive procurement requirements, and instead use the procurement processes prescribed in the City's Public Art Policy, which is attached as **Exhibit 1**.

The Legal Department believes that the applicable legal standard is satisfied for the following reasons:

- The City's Public Art Policy prescribes its own competitive procurement policy for public art, this exemption will not encourage favoritism or diminish competition for these contracts.
- In situations where the Public Art Policy prescribes a less burdensome process than what is required under the Oregon Public Procurement Code, the City will save time and money.
- Allowing the ACH Committee to control the procurement rules that apply to public art procurements will allow the City's public art program to maintain more control over procurement processes for public art, potentially developing rules that better allow the City to meet the goals articulated in the Public Art Program.

### **EXPECTED RESULTS:**

Any recommendation made by the ACH Committee regarding treatment of public art under the City's public contracting program will be relayed to City Council.

### **TIMELINE:**

These are the deadlines applicable to this project:

- February 22, 2024: City Council held its first work session to guide the Legal Department's work to update the City's public contracting code.
- March 18, 2024: City Council will hold a second work session to review the Legal Department's recommended updates to the City's public contracting code.
- May 6, 2024: City Council will hold a public hearing and conduct a first reading of the Legal Department's proposed revisions to the City's Public Contracting Code.
- May 20, 2024: City Council will conduct a second reading of the Legal Department's proposed revisions to the City's Public Contracting Code.

**CURRENT YEAR BUDGET IMPACTS:**

N/A

**COMMUNITY INVOLVEMENT PROCESS:**

N/A

**POTENTIAL IMPACTS OR BENEFIT TO THE COMMUNITY:**

Exempting public art from competitive procurement requirements under state law, and subjecting it to the procurement requirements in the City’s Public Art Policy, will allow the ACH Committee and City Council to update and change these requirements – as is deemed necessary or beneficial – as the City’s public art program evolves. Further, public art is arguably different than many other types of “goods” that are procured by public bodies in the normal course of business, and therefore, some may argue that it makes sense to use procurement rules that reflect these differences.

**ALTERNATIVES:**

If the City does nothing, procurement of public art will continue to be subject to the procurement rules in state law.

**CITY MANAGER COMMENT:**

N/A

**ATTACHMENTS:**

1. Excerpt of Public Art Policy and Guidelines: Procurement Rules

**Attachment 1**  
**Excerpt of Public Art Policy and Guidelines: Procurement Rules**

**VII. ACQUISITION OF PUBLIC ART**

The City may acquire artwork for the Public Art Collection in four ways, by: commissioning artwork, purchasing existing artwork, leasing artwork, or accepting a donation of existing artwork.

**A. Commission of Artwork**

The ACHC may recommend to the City Council or City staff a public artist selection process under this section, subject to compliance with the restrictions in this Policy, any applicable laws, and oversight by City staff.

**1. Procurement Processes**

City staff are responsible for selecting and undertaking the appropriate procurement process, and ensuring the City's compliance with state and local public contracting laws at all phases of a project:

- Public Improvements. A "Public Improvement" is a project for construction, reconstruction, or major renovation on real property by or for the City (ORS 279A.010(1)(cc)). Generally, artwork will not meet the definition of Public Improvement, but in the event it does, the City will follow state and local public contracting laws and regulations for the selection of the successful bid, including, but not limited to ORS 279C.300 *et seq.* and OAR Chapter 137-049.
- Large Projects That Are Not Public Improvements. A project that is estimated to cost more than small procurement threshold stated in ORS 279B.065 ("Small Procurement") and that is not a "Public Improvement" must be conducted using a request for qualification (RFQ) process in accordance with applicable law and established City processes.

For those artists that are selected as finalists through the RFQ process, the City will provide a request for proposals (RFP), whereby finalists may be asked to develop a preliminary proposal which will be evaluated by a Panel. The City may elect, in its sole and absolute discretion, to remit a small payment to artists who are selected to participate in a RFP process and submit a proposal to the City.

- Small Projects That Are Not Public Improvements. With respect to a project that is is a Small Procurement and that is not a "Public Improvement," including temporary art, City staff may elect to issue a less complex "call for art" application. A call for art application

process should be utilized when working with youth artists. A work of art is considered “temporary” if it is accessible to the public for two (2) years or less.

## **2. Artist Selection Panels**

Each artist that participates in the Public Art Program must be selected and approved by an artist selection panel (a Panel, each member being a Panelist). Each Panel must also approve each project proposal submitted by each selected artist.

### **a. Panel Appointment**

The ACHC must designate each Panel, which may be the ACHC itself or the Public Art Subcommittee. The ACHC may appoint non-voting advisors to a Panel, as it deems necessary or beneficial (e.g., site users, public art specialists, City staff).

### **b. Disclosure of Conflict of Interest**

Any member of a Panel is subject to Oregon Ethics Laws concerning conflicts of interest (e.g., ORS Chapter 244).

## **3. Panel Administration**

City staff facilitate and administer Panel activities.

Prior to a Panel’s first meeting, and for each particular project, City staff must:

- Pre-screen applicants to verify that each applicant presented to the Panel meets any minimum qualifications that have been established by City staff;
- Develop goals and specifications that apply to a project;
- Determine which procurement process is appropriate for a particular project; and,
- Send each Panelist a project description along with written instructions outlining the selection process, decisions that must be made by the Panel, his or her duties and responsibilities in this selection process, potential issues or concerns that may affect artist selection, and recommended interview questions.

All project proposals must be reviewed by the Community Development Department to ensure all permitting, construction, building, public safety, and other regulatory issues have been addressed and, where applicable, mitigated prior to final selection of an artist.

## **4. Artist Roster**

City staff may maintain a list of pre-qualified artists, which should be updated periodically. This list should include established and emerging artists; and, local, regional and national artists. Further, this list should include any known information regarding each artist’s medium, and fee range. Local Arts non-profit organizations and City’s with Public Art Programs often maintain rosters which may be used as a resource by City staff to develop this list.

## **5. Evaluation Criteria**

Panelists must consider the following characteristics to evaluate artists and project proposals from artists:

- Satisfaction of acceptance criteria outlined in Section VII.D;
- Artistic excellence and quality;
- Ability to respond to the specific contextual issues and considerations of a particular project, site location, its community and users;
- Ability to successfully manage all aspects of the project including budgets, committees, sub-contractors, installers, fabricators and other construction and administrative logistics;
- Credentials including experience, past clients, training and critical or other professional recognition;
- Connection between the proposed project and the City's community or region;
- Willingness and experience working with input from the community and various stakeholders; and,
- Ability to contribute to both the diversity of artwork (temporary or permanent, style, scale, media) and artists (local and non-local, ethnic heritage, gender, etc.) represented in the Public Art Collection.

If an artist presents a project proposal, Panelists must also consider the following factors:

- The proposed materials, their characteristics (e.g., aesthetics, durability, ease of maintenance, susceptibility to theft or vandalism), and their appropriateness for the project;
- The proposed method of installation;
- The safety of the proposed artwork; and,
- The proposed budget and cost of the project.

## **6. Ineligibility and Eligibility Criteria**

Artists are not eligible for consideration if they are currently engaged in a Public Art Program project, nor are artists be eligible to receive more than one commission in connection with the Public Art Program in a three-year period. This criterion is designed to foster a broad and diverse Public Art Collection.

City staff may establish other ineligibility or eligibility criteria.

## **7. Approval by Panel**

Panel decisions are made by a vote of a simple majority of Panelists.

The Panel may impose conditions of approval regarding deadlines or timelines, necessary permits, or any other details deemed significant by the Panel.

Panelists may elect to not recommend any artist for a project, in which case City staff may recommend another artist selection process or an alternative process to the ACHC.

## **8. Approval by the ACHC**

The ACHC must approve the selection of an artist to participate in the Public Art Program. If the Panel did not consist of the entire ACHC, the Panel must forward its recommendation to the ACHC for approval. If the ACHC disagrees with the Panel's recommendation, it must direct City staff to reconvene the Panel and designate a representative to present specific concerns to the Panel for its consideration.

## **9. Approval by City Council**

In accordance with Wilsonville City Code Section 2.313(1)(a), if the cost of a proposed Public Art project is expected to exceed \$100,000, the City Council must approve the contract for the procurement of the artwork.

### **B. Purchase of Artwork**

Before purchasing an artwork for the Public Art Collection, City staff must establish that the artwork meets at least one of the following criteria:

- The proposed artwork relates to a program, building or event in the City;
- The proposed location for the artwork is unique and none of the existing artworks in the Public Art Collection are appropriate for the proposed location; or
- More than 50% of the cost of the proposed artwork is being funded through grants and or donations.

Before the ACHC conducts its review of a proposed purchase of artwork, City staff must compile a packet that includes the following materials:

- Information about the artwork proposed to be purchased, including, but not limited to, photographs, slides, renderings, descriptions of size, weight, medium, year of creation, maintenance requirements;
- The artist's resume or other information about the artist's background; and,
- Documentation establishing the seller as the clear and unencumbered titleholder of the artwork.

The ACHC must consider a proposed purchase of artwork using the acceptance criteria outlined in Section VII.D before recommending approval of the City's purchase of an artwork.

### **C. Donations**



The ACHC must review all donation applications and may recommend acceptance or refusal of a donation. The ACHC may make recommendations regarding donated artwork (e.g., regarding siting, installation, maintenance, long-term conservation and funding requirements, and Deaccession) to City staff once artwork is accepted into the Public Art Collection, or on an ongoing basis.

### **1. Monetary Donation**

The ACHC must review all proposed monetary gifts and may recommend acceptance or refusal of a donation. The ACHC's review of a proposed monetary gift must include a review of a writing from the proposed donor that gives some information about the donor's background, and that states any stipulations regarding the use of proposed donation; further, the ACHC must consider any recommendations from City staff.

If there are stipulations on the use of the funds, City staff must provide a recommendation to the ACHC after reviewing for feasibility and appropriateness.

### **2. In-Kind Donation**

Before the ACHC conducts its review of an in-kind donation (i.e., a donation of artwork), City staff must compile an application packet that includes the following materials:

- A Donation/Loan Proposal Form;
- Information about the artwork being offered for donation, including, but not limited to, photographs, slides, renderings, descriptions of size, weight, medium, year of creation, maintenance requirements;
- The artist's resume or other information about the artist's background; and,
- Documentation establishing the donor as the clear and unencumbered titleholder of the artwork.

The ACHC must consider a proposed artwork to acquire by using the acceptance criteria outlined in Section VII.D before recommending the City acquire an artwork.

The City may accept donated artwork without a valuation for tax purposes. City staff must clearly communicate to the donor that the City disclaims responsibility for establishing the value of the donated artwork.

### **3. Gifts of State**

The City, through its Mayor, City Council or various agencies, periodically receives gifts of artwork from official representatives of other cities, states and governmental agencies. City staff must refer all such "gifts of state" to the ACHC for its recommendations.

## **D. Acceptance Criteria Applicable to All Public Art Program Artworks**

The ACHC must review any proposed commission, lease, purchase, or donation of artwork for artistic merit, site appropriateness, potential liability, safety, cost of installation, cost of maintenance and any seller or donor stipulations to approve or deny the gift. An artwork may not be accepted into the Public Art Collection if the following criteria are not satisfied, which must be determined and documented by the ACHC, in consultation with City staff, prior to accession:

- The artwork must be an original and unique work, or a limited edition artwork;
- The artwork may not be a duplicated copy or reproduction;
- If the authenticity of an artwork could reasonably be questioned, it must be authenticated by a reputable authority;
- There must be a budget allocation available for the acquisition and other associated costs (e.g., transportation, installation of the artwork, installation of a plaque or signage, and maintenance); and,
- The City must be able to adequately and safely display, and maintain and reasonably secure the artwork.

Factors affecting these considerations may include materials, construction, durability (long and short term, depending on the intended life of the artwork), maintenance requirements, repair costs, potential for theft or vandalism, public access, and safety.