

ORDINANCE NO. 160

**AN ORDINANCE CONCERNING PUBLIC CONTRACTING;
REPEALING AND REPLACING CHAPTER 33 OF THE
CODE OF DUNES CITY; AND DECLARING AN
EMERGENCY.**

THE CITY OF DUNES CITY ORDAINS AS FOLLOWS:

Section 1. Chapter 33 of the Dunes City Code is hereby repealed and replaced by the following Chapter 33:

CHAPTER 33: CITY CONTRACTS

SECTION:

- 33.01** Contract review board
- 33.02** Definitions
- 33.03** Competitive bids required; Award of contracts
- 33.04** Exempt contracts
- 33.05** Exemption by contract review board
- 33.06** Hearing for exemption of public improvement contract
- 33.07** Emergency exemption
- 33.08** Negotiation after failed bid
- 33.09** Preferences
- 33.10** Competitive procurement methods
- 33.11** Purchasing agent
- 33.12** Surplus property
- 33.13** Brand name specifications in contract
- 33.14** Personal services contracts
- 33.15** Bid and performance bonds
- 33.16** Bid rejection
- 33.17** Disqualification from consideration for award of contracts; written decision required
- 33.18** Appeal of disqualification or pre-qualification decision
- 33.19** Adoption of Model Rules; conflict of rules; review of rules

33.01 Contract review board.

Pursuant to ORS 279.055, the Council of Dunes City is hereby designated as the city's contract review board. The contract review board shall have all the powers granted to contract review boards by state law.

33.02 Definitions.

(A) **"Bid"** means a competitive offer in which price, delivery (or project completion) and conformance to specifications will be the predominant award criteria. As required by the context of these laws or in state statutes that govern the selection and award of contractors and contracts, the terms "bid," "bidding" or "bidder" also refer to "proposals," the process of selection through requests for proposals, or persons who submit proposals.

(B) **"Emergency"** means circumstances that could not have been reasonably foreseen that create a substantial risk of loss, damage, interruption of services or threat to the public health or safety that requires prompt execution of a contract to remedy the condition.

(C) **"Findings"** means the justification for the act taken that includes, but is not limited to, information regarding:

- (1) Operational, budget and financial data. (2) Public benefits.
- (3) Value engineering. (4) Specialized expertise required. (5) Public safety.
- (6) Market conditions. (7) Technical complexity. (8) Funding sources.

(D) **"Formal bid"** or **"Formal Proposal"** means a procedure in which written sealed bids, or proposals are solicited by advertising using instructions to bidders or requests for proposals, and specifications, and are opened at an announced place, date and time.

(E) **"Formal quotation"** means a procedure in which written bids are solicited by advertising or other writing stating the quantity and quality of goods or services to be acquired, and which bids are received by the city on or before a stated date.

(F) **"Goods"** means, except for works of art, any tangible personal property including but not limited to materials, supplies and equipment.

(G) **"Informal quotation"** means a procedure in which written or verbal bids are gathered by correspondence, telephone or personal contact.

(H) **"Lowest responsible bidder"** means the lowest bidder who is not on the list of entities not qualified to bid on public contracts established by the Construction Contractors Board pursuant to ORS 701.227 and who has:

- (1) Substantially complied with all prescribed public bidding procedures and requirements;
- (2) Met the standards of responsibility. In determining if a prospective bidder has met the standards of responsibility, the purchasing agent shall consider whether a prospective bidder has:
 - (i) Available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise,

necessary to indicate the capability of the prospective bidder to meet all contractual responsibilities;

(ii) A satisfactory record of performance. The purchasing agent shall document the record of performance of a prospective bidder if the purchasing agent finds the prospective bidder not to be responsible under this sub-subparagraph;

(iii) A satisfactory record of integrity. The purchasing agent shall document the record of integrity of a prospective bidder if the purchasing agent finds the prospective bidder not to be responsible under this sub-subparagraph;

(iv) Qualified legally to contract with the city; and

(v) Supplied all necessary information in connection with the inquiry concerning responsibility. If a prospective bidder fails to promptly supply information requested by the city concerning responsibility, the purchasing agent shall base the determination of responsibility upon any available information, or may find the prospective bidder not to be responsible; and

(3) Not been disqualified by the city pursuant to ORS 279.037.

(I) **"Personal services contract"** means a contract with an independent contractor predominantly for services requiring special training or certification, independent judgment, skill or creativity, or specialized experience. It may include but is not limited to a contract for the services of professionals, performing artists, advertisers, printers, visual artists, real estate, financial and other consultants, researchers, and computer programmers. Personal service contracts do not include contracts for trade services or for services provided by secretaries, food service workers or other skilled workers where the individual qualifications of the persons performing the services (other than competence) are not essential to the award of the contract. Within the limitations of this definition, the entity responsible for awarding the contract shall have the discretion to determine whether a contract is one for personal services.

(J) **"Proposal"** means a competitive proposal in which other criteria in addition to, or in lieu of price, delivery and conformance to specification are the dominant award criteria.

(K) **"Public contract"** means, for purposes of the requirements for competitive procurement, any purchase, lease or sale by the city of personal property, public improvements or services, except personal services contracts, and, for all other purposes, any contract with the city, including contracts for personal services.

(L) **"Public improvement"** means any projects for construction, reconstruction or major renovation on real property by or for the city. "Public improvement" does not include emergency work, minor alteration, ordinary repair or maintenance necessary in order to preserve a public improvement or improvements mandated by the city when it issues a permit for work affecting the

public way or when it sells or leases real property and retains no right to occupy the real property except upon default of the purchaser or except by easement.

(M) **“Purchasing Agent”** means the City Recorder or the City Recorder’s designee.

33.03 Competitive bids required; Award of contracts.

(A) **Compliance with State law.** All contracts awarded by the City shall be solicited, awarded and managed in compliance with all applicable provisions of ORS Chapter 279.

(B) **Competitive procurement.** Except as otherwise provided in this Chapter, all public contracts shall be awarded based upon competitive bids or proposals under the applicable procurement method described in section 33.10.

(C) **Award of Contracts.** Contracts awarded by proposal shall be based on the criteria set forth in the request for proposals. Contracts awarded by bid, including all contracts for public improvements, shall be awarded to the lowest responsible bidder.

33.04. Exempt contracts. The following classes of Contracts are exempt from the requirements of section 33.03:

(A) **Between governmental units.** Contracts made with the State of Oregon, any political subdivision thereof, any public body authorized to enter into public contracts, including a public body created by intergovernmental agreement, or the federal government.

(B) **Qualified rehabilitation facilities.** Contracts for goods or services, but not for public improvements, made with qualified non-profit agencies for disabled individuals, as determined by the State Department of Administrative Services.

(C) **Contracts of \$500.00 or less.** Contracts and/or purchases of \$500 or less.

(D) **Board Exemptions.** A public contract exempted by the contract review board under section 33.05 of this Chapter.

(E) **Insurance.** Contracts for insurance, including employee benefits.

(F) **Purchases under exiting governmental contracts.** Purchases of goods or services, but not public improvements, under the terms, prices and conditions established in a contract procured by another public entity described in 33.04(A), provided that:

(1) The contract allows other public entities such as the city to enter into an agreement with the contractor to purchase goods or services under the original contract prices, terms and conditions;

(2) The original contract was awarded under competitive procurement procedures that met the requirements of this chapter; and

(3) The original contracting public entity concurs.

(G) **Sole Supplier.** Contracts determined by the purchasing agent to be available only through a sole supplier of goods, services, or both.

(H) **Regulated contracts.** Contracts for which the prices or suppliers are established by governmental regulatory authorities.

(I) **Art.** Contracts for the purchase or commissioning of works of art.

(J) **Library inventory.** Contracts for the purchase of library inventory, including but not limited to books, periodicals, sound or video recordings, films, filmstrips, maps and other printed or published materials.

(K) **Amendments.** Contract amendments for additional goods, services, or both, or for changes in the original specifications which increase the original contract price, provided that the time for performance of the contract is not extended by more than one year and;

(1) All other original contract terms and conditions apply to the performance of the amendments; and

(2) The cost of all amendments does not exceed ten percent of the original contract price. This ten percent limitation may be increased an additional ten percent upon determination by the Council that it is not reasonably feasible to require additional bidding to complete the purpose of the contract.

(L) **Equipment repair.** Contracts for equipment repair or overhauling, provided the service or parts required are unknown and the cost cannot be determined without extensive preliminary dismantling or testing.

(M) **Goods for resale.** Contracts for goods purchased for resale to customers.

(N) **Advertising.** Contracts for the purchase of the following forms of advertising: newspaper, trade journal, magazine, television, radio, and display signs.

(O) **Surplus property.** All personal property which the Council has declared surplus, subject to the provisions of section 33.12.

33.05. Exemption by contract review board. The Council, as contract review board, may exempt certain public contracts or classes of public contracts from the competitive bidding and proposal requirements of section 33.03, or from the designated method of bidding and procurement under section 33.10 upon approval of the findings of the purchasing agent or the Council that support the contract review board's conclusive findings that:

(A) It is unlikely that such exemption will encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts; and

(B) The awarding of public contracts pursuant to the exemption will result in substantial cost savings to the public contracting agency.

(C) In making such findings, the Council may consider the type, cost, amount of the contract, number of persons available to bid or propose and such other factors as may be deemed appropriate, including, but not limited to the nature of the project, the estimated cost of the project, the cost savings anticipated by the exemption and the reasons competitive bidding would be inappropriate, proposed alternative contracting and purchasing practices to be employed, and the estimated date by which it would be necessary to let the contract.

33.06 Hearing for exemption of public improvement contract.

(A) Before final adoption of the findings required by section 33.05 exempting a contract for a public improvement, the city shall hold a public hearing.

(B) Notification of the public hearing shall be published in at least one trade newspaper of general statewide circulation a minimum of 14 days prior to the hearing.

(C) The notice shall state that the public hearing is for the purpose of taking comments on the city's draft findings for an exemption from the competitive bidding requirement. At the time of the notice, copies of the draft findings shall be made available to the public. At the option of the city, the notice may describe the process by which the findings are finally adopted and may indicate the opportunity for any further public comment.

(D) At the public hearing, the city shall offer an opportunity for any interested party to appear and present comment.

(E) If the city is required to act promptly due to circumstances beyond its control that do not constitute an emergency, notification of the public hearing can be published simultaneously with the city's solicitation of contractors for the alternative public contracting method, as long as responses to the solicitation are due at least five days after the meeting and approval of the findings.

(F) Notwithstanding the foregoing, in accordance with Section 39 of the Dunes City Code, 1980, all public improvements made by a private contractor shall be let to the lowest responsible bidder and shall be done in accordance with plans and specifications approved by the Council.

33.07 Emergency exemption. Subject to applicable limitations under Section 39 of the city's charter, a public contract also may be exempted from the requirements of section 33.03, or from the requirements of Section 33.10 after the declaration of emergency that requires the prompt execution of a contract.

(A) The Council, by written findings, must declares that an emergency exists prior to granting the exemption, provided that, a declaration of emergency conditions and exemption of one or more contracts, in each case for less than \$50,000, may be made by written findings of the Mayor or the President of the Council, acting individually, to permit the execution of emergency contracts when the full Council cannot be conveniently convened.

(B) A declaration of emergency made by the Mayor or the President of the Council and all contracts executed under the declaration must be presented to the full Council as soon as conditions allow a quorum of the Council to be convened. Notwithstanding the foregoing, no ratification or other act of the Council shall be required to establish the authorization or validity of contracts executed by the Mayor or President pursuant to a declaration of emergency as provided in subsection (A).

(C) If an emergency is declared, any contract awarded under this section must be awarded within 60 days following declaration of the emergency, unless the Council grants an extension.

33.08 Negotiation after failed bid. If a project is competitively bid and all responsive bids from responsible bidders exceed the city's cost estimate, the city may negotiate with the lowest responsible bidder, prior to awarding the contract, in order to solicit value engineering and other options to attempt to bring the project within the city's cost estimate. A negotiation with the lowest responsible bidder pursuant to this paragraph shall not result in the award of the contract to that bidder if the scope of the project is significantly changed from the original bid proposal. Notwithstanding any other provision of law, the records of a bidder used in contract negotiation pursuant to this paragraph are not subject to public inspection until after the negotiated contract has been awarded or the negotiation process has been terminated.

33.09 Preferences.

(A) **Products and services of nonprofit agencies for disabled individuals.** Notwithstanding provisions of law requiring the city to use competitive procurement practices, the city shall purchase any product or service that is available from a qualified nonprofit agency for disabled individuals listed by the Oregon Department of Administrative Services pursuant to ORS 279.845 at the price established by the department, provided the product or service is of the appropriate specifications and is available within the period required by the city.

(B) **Recycled materials.** Notwithstanding provisions of law requiring the city to enter into contracts with the lowest responsible bidder in the purchase of materials and supplies for any public use, the city shall give preference to the purchase of materials and supplies manufactured from recycled materials, if the following conditions are met:

- (1) The recycled product is available;
- (2) The recycled product meets applicable standards;
- (3) The recycled product can be substituted for a comparable non-recycled product; and
- (4) Recycled products costs do not exceed the costs of non-recycled products by more than five percent.

(C) **Lubricating and industrial oil.** The city shall purchase lubricating oil and industrial oil from the seller whose oil product contains the greater percentage of recycled oil, unless a specific oil product containing recycled oil is:

- (1) Not available within a reasonable period of time or in quantities necessary to meet the city's needs;
- (2) Not able to meet the performance requirements or standards recommended by the equipment or vehicle manufacturer, including any warranty requirements; or
- (3) Available only at a cost greater than 105 percent of the cost of comparable virgin oil products.

(D) **Oregon products and services.** The city shall prefer goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal.

33.10 Competitive procurement methods. The following classes of public contracts are hereby created and the procedures for awarding such contracts are determined not to encourage favoritism or substantially diminish competition and to result in substantial cost savings. The procedures set forth in this section may be used whether price or other criteria are the dominant factors in contractor selection and are not exemptions from the requirements of section 33.03.

(A) **\$500 - \$2,500.** All contracts for an amount that is more than five hundred dollars but not more than two thousand five hundred dollars shall be awarded by the purchasing agent, with approval of the Mayor or the President of the Council, based on informal quotations. Except for public improvement contracts, the award may be based on a combination of price and other criteria,

including the submission of samples. In soliciting informal quotations, the purchasing agent shall seek quotations from a sufficiently large number of potential bidders to ensure sufficient competition in price, quality and such other criteria as are considered important to meet the best interests of the city. An award based on receiving fewer than three informal quotations may be made only on a determination by the purchasing agent that potential bidders were given a reasonable opportunity to submit quotes or proposals. Notwithstanding the foregoing, no contractor may be awarded, in the aggregate, within the fiscal year, contracts in excess of \$10,000 under this subsection without formal quotations. In computing the aggregate under this subsection, awards under \$500 need not be included.

(B) **\$2,500 - \$15,000.** All contracts for an amount over two thousand five hundred dollars but not more than fifteen thousand dollars shall be awarded by the Council based on informal quotations. Except for public improvement contracts, the award may be based on a combination of price and other criteria, including the submission of samples. In soliciting informal quotations the purchasing agent shall seek quotations from a sufficiently large number of potential bidders to ensure sufficient competition in price, quality and such other criteria as are considered important to meet the best interests of the city. An award based on receiving fewer than three formal quotations may be made only on a determination by the Council that potential bidders were given a reasonable opportunity to submit quotes.

(C) **\$15,000 - \$50,000.** All contracts for an amount over fifteen thousand but not more than fifty thousand dollars shall be awarded by the Council based on formal quotations. In soliciting formal quotations, the purchasing agent shall seek quotations from a sufficiently large number of potential bidders to ensure sufficient competition in price, quality and such other criteria as are considered important to meet the best interests of the city. An award based on receiving fewer than three informal quotations may be made only on a determination by the Council that potential bidders were given a reasonable opportunity to submit quotes.

(D) **Contracts over \$50,000.** All contracts for over fifty thousand dollars value shall be awarded by the Council based on formal bids or proposals. The advertisement for bids or proposals shall be published at least once in a newspaper of general circulation in the Dunes City area and if the proposed contract is for a public improvement over fifty thousand dollars value, the solicitation shall also be published in a trade newspaper of general state-wide circulation.

33.11 Purchasing agent. In addition to the authority expressly granted in other provisions of this chapter, the purchasing agent shall have the authority to perform all of the following in accordance with the provisions of this chapter:

(A) To adopt and approve all contract forms and documents to be used by the city;

(B) To enter into all city contracts that do not exceed \$500, provided that, the purchasing agent shall not in any month enter into contracts pursuant to this exemption that in the aggregate exceed \$500.00 without approval of the Mayor or President of the Council;

(C) Subject to appropriate award and approval, to execute all contracts on behalf of the city;

(D) To dispose of all surplus personal property as provided in section 33.12;

(E) To prepare all advertisements, invitations to bid, requests for proposals and other solicitation documents, provided that the criteria and specifications for all contracts over \$2,500, and, pursuant to Section 39 of the Dunes City Charter, 1980, for all public improvement contracts over \$2,000, shall be approved by the Council before soliciting bids; and

(F) To receive and record all bids and proposals.

All contracts entered into by the purchasing agent without full Council approval shall be reported to the Council on a monthly basis.

33.12 Surplus property. All personal property which the city has acquired and used, when it is declared surplus by the Council, shall be disposed of as follows:

(A) Sold to the first qualified buyer meeting the sale terms when the purchasing agent has determined the value of each item so offered is less than \$1,000 and the sale thereof has been advertised at least once in a newspaper of general circulation in the Dunes City area not less than one week prior to the sale;

(B) Traded in on the purchase of replacement equipment or supplies; or

(C) Sold at public auction advertised at least once in a newspaper of general circulation in the Dunes City area no less than one week prior to the auction. The published notice shall specify the time, place and terms upon which the personal property shall be offered and a general description of the personal property to be sold.

(D) The purchasing agent shall select the method of disposal, which maximizes the value the city will realize from disposal of the surplus property.

33.13 Brand name specifications in contract.

(A) **No specified brand or mark, manufacturer, or seller.** Specifications for public contracts shall not require any product by brand name or mark, nor the product of any particular

manufacturer or seller unless the product is exempted under this section. However, this section shall not be construed to prevent reference in the specification to a particular product as a description of the type of item required.

(B) **Exemptions.** The contract review board may exempt certain products or classes of products from subsection 33.13(A) upon any one of the following findings:

- (1) It is unlikely that the exemption will encourage favoritism in the award of the contract or substantially diminish competition;
 - (2) The specification of a product by brand name or mark, or the product of a particular manufacturer or seller, would result in substantial cost saving to the city;
 - (3) There is only one manufacturer or seller of the product of the quality required;
- or
- (4) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies.

(C) **Appeal by bidder.** A prospective bidder may, up to five days before bid closing, appeal in writing to the Council any brand name, brand mark or product exemption decision of the purchasing agent made pursuant to subsection 33.13(B). The notice of appeal shall state the reasons for the protest and any proposed changes to the specifications. Unless the appellant and the Council agree to a longer period, an appeal shall be heard within fifteen days of the receipt of the notice of intent to appeal. At least ten days before the hearing, the Council shall mail notice of the time and location of the hearing to the appellant. The Council shall hear and determine the appeal on the basis of the appellant's written statement, the purchasing agent's written report of his or her findings and the product(s) exempted, and any additional evidence the Council deems appropriate. The Council may permit the appellant to present testimony and oral argument. The bid opening date shall be extended if necessary to allow consideration of the appeal and issuance of addenda to bid documents.

33.14 Personal services contracts.

(A) Except as provided in subsection B of this section, for all personal service contracts over five thousand dollars in value, the purchasing agent shall solicit by invitation or advertising proposals for personal services in sufficient number to provide a choice for the Council from among qualified service providers. All personal service contracts subject to this section 33.14(A) shall be awarded by the Council based on the procedure and selection criteria adopted by the Council before bids are solicited.

(B) Without a solicitation of proposals, the purchasing agent may enter into personal service contracts:

(1) With an existing service provider whose personal service contract is being renewed on an annual basis, as provided in the original contract, or, if the purchasing agent determines that the time remaining for the solicitation of a new service contract is inadequate, for the extension of an expiring personal service contract by not more than one year after the original expiration date;

(2) With service providers determined by the purchasing agent to be sole suppliers of the services needed; or

(3) For five thousand dollars or less in any fiscal year.

33.15 Bid and performance bonds.

(A) Bid security.

(1) **Contracts under \$25,000.** Except when required by the Council, all public contracts under twenty-five thousand dollars are exempt from the requirements for bid security.

(2) **\$25,000 or more.** Except when waived by the Council, for public contracts of twenty-five thousand dollars or more, bids shall be accompanied by proper bid security.

(B) **Performance and Payment Bonds.** Except as provided in paragraph C of this section, all public improvement contracts for ten thousand dollars or more shall require good and sufficient bonds to assure performance of the contract and payment of the obligations incurred in the performance. Each required bond shall be issued in a sum equal to the contract price.

(C) **Emergency exemptions.** For contracts necessitated by emergency, or where the interest or property of the city would suffer material injury or delay or for other good cause, the Council, or as the case may be, the Mayor or President of the Council who awards the contract, may waive the requirements for bid security and good and sufficient bond to assure performance of the contract and payment of the obligations incurred in the performance, if a declaration of emergency is or other sufficient findings are made prior to awarding the contract.

(D) **Design/build.** If a public improvement contract is with a single person to provide both design and construction of the public improvement, the obligation of the surety bond, or the obligation of the bidder on the cashier's check or certified check, for the faithful performance of the

contract required by this section shall be also for the preparation and completion of the design and related services covered under the contract.

33.16 Bid rejection. The Council or the purchasing agent, whoever is awarding a public contract, may reject any bid not in substantial compliance with all prescribed public bidding procedures and requirements and may reject all bids if it is in the public interest to do so. If all bids are rejected, new bids may be called for.

33.17 Disqualification from consideration for award of contracts; written decision required.

(A) A person may be disqualified from consideration for award of the city's contracts for any of the following reasons after providing the person with notice and a reasonable opportunity to be heard. The disqualification shall not be for a period of more than three years.

(1) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.

(2) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the person's responsibility as a contractor.

(3) Conviction under state or federal antitrust statutes.

(4) Violation of a contract provision that is regarded by the city to be so serious as to justify disqualification. A violation may include but is not limited to a failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a failure to perform or an unsatisfactory performance caused by acts beyond the control of the contractor may not be considered to be a basis for disqualification.

(B) The Council shall issue a written decision to disqualify a person pursuant to this section. The decision shall:

(1) State the reasons for the action taken; and

(2) Inform the disqualified person of the appeal right of the person under section 33.18.

(3) A copy of the decision shall be mailed or otherwise furnished immediately to the disqualified person.

33.18 Appeal of disqualification or pre-qualification decision. A person who has been disqualified as a bidder or who is refused pre-qualification under rules adopted by the city may appeal the disqualification or pre-qualification decision to the contract review board as follows:

(A) The person shall, within three (3) business days after receipt of notice of the disqualification or pre-qualification decision, file a written notice of appeal with the city recorder. The notice of appeal shall specify in detail why the appellant believes that the disqualification or pre-qualification decision was in error.

(B) Immediately upon receipt of the appeal, the city recorder shall inform the Council or its designated contract review board representative of the filing of the appeal.

(C) Upon receipt of notice from the recorder, the Council or its designated contract review board representative shall notify the appellant of the time and place of an appeal hearing. The hearing shall be held within ten (10) days from the date of filing the appeal.

(D) The contract review board shall conduct the hearing according to the provisions of ORS 279.045(3) and shall set forth in writing the reasons for its decision.

33.19. Adoption of Model Rules; conflict of rules; review of rules.

(A) **Adoption of Model Rules.** Except as provided in subsections (B) and (C) of this section, Oregon Administrative Rules (OAR) Chapter 137, Divisions 30, 35 and 40 (the "Model Rules"), as such rules may from time to time be amended, are hereby adopted as the rules to be used by the city in its public contracting. Except when this chapter specifically authorizes the purchasing agent to take action or exercise its discretion, all references to "public agency" in the Model Rules shall mean the entity responsible for taking the action under this chapter, or, if no entity is specified for such action, the Council.

(B) **Conflicts.** The provisions of this ordinance shall prevail when in conflict with the Model Rules.

(C) **Variance.** A variance from the provisions of the Model Rules may be granted by the Council upon determination that:

(1) The variance is unlikely to encourage favoritism or substantially diminish competition in awarding the contract, and,

(2) The variance will result in a substantial cost saving to the city.

(D) **Review of contract rules.** The purchasing agent shall review the provisions of this chapter and any forms or documents adopted for use with city contracts each time the Attorney

General of the State of Oregon adopts a modification to the Model Rules as a result of new legislation to determine whether any modifications need to be adopted by the city to ensure compliance with statutory changes.

Section 2. Filing with County. The City Recorder shall file a copy of this ordinance with the Board of County Commissioners of Lane County.

Section 3. Emergency Clause. That the matters contained herein concern the public welfare and safety and therefore, an emergency is hereby declared to exist, and this Ordinance shall become effective immediately upon its passage by the Council and approval by the Mayor.

Adopted by the Dunes City Council of Lane County, Oregon this 13th day of July, 2000 by the following vote.

Aye 4 Nay 0 Absent 2 Abstain 0



Robert B. Ward, Jr., Mayor

ATTEST:



Mary Spankroy, City Recorder

CITY OF DUNES CITY, LANE COUNTY, OREGON

RESOLUTION NO. 07-13-00

RESOLUTION ADOPTING DOCUMENTS FOR STANDARD CONTRACT PROVISIONS AND
CERTIFICATE OF BIDDER/CONTRACTOR EMPLOYEE DRUG TESTING PROGRAM

WHEREAS, Dunes City participates in various levels of public contracting, including the areas of personnel services and public improvements; and

WHEREAS, the City wishes to comply with recent legislative changes regarding public contracting;

NOW THEREFORE BE IT RESOLVED that Dunes City hereby adopts the Standard Contract Provisions as shown in attached Exhibit "A" and the Certificate of Bidder/Contractor Employee Drug Testing Program as shown in attached Exhibit "B"

ADOPTED BY THE CITY COUNCIL OF DUNES CITY, OREGON, THIS DAY OF July 13, 2000.

Ayes: 4 Nays: 0 Abstain: 0 Absent: 2

Dated this 13th day of July, 2000.


Robert B. Ward, II., Mayor
City of Dunes City

ATTEST:


Mary Spankroy, City Recorder

DUNES CITY - STANDARD CONTRACT PROVISIONS

The following provisions if applicable are hereby included in and made a part of the attached contract between Dunes City and the Contractor named thereon as provided for in the Dunes City Code and public contracting rules, the revised statutes of the State of Oregon, and federal laws, rules, regulations, and guidelines. If Contractor violates any applicable provisions set forth herein, the City may, at its option, terminate said contract and said Contractor in such event shall forfeit all rights under his/her contract except to payment for actual labor and materials furnished to the City.

1. **Fair Employment Practice Provisions.** These provisions are applicable to any contract with a Contractor if the City purchases goods or services from the Contractor costing \$2,500 or more in any fiscal year:

1.1 During the performance of this contract, the Contractor agrees as follows:

1.1.1 The Contractor will not discriminate against any employee or applicant for employment because of an individual's race, religion, color, sex, national origin, marital status, familial status, age, sexual orientation or source of income, a juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, or because an individual is a person with a disability which, with reasonable accommodation by the employer does not prevent the performance of the work involved, unless based upon a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business.

1.1.2 Those Contractors employing 15 or more individuals will develop and implement an affirmative action plan to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, sex, age or national origin. Such plan shall include, but not be limited to the following: employment, upgrading, demotion, transfer, recruitment, recruitment advertising, layoff or termination, rates of pay or other forms of compensation and selection for training, including apprenticeship.

1.1.3 The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Human Rights Commission setting forth the provisions of this nondiscrimination clause.

1.2 The Contractor will, prior to commencement and during the term of this contract, provide to the City such documentation, and permit any inspection of records as may be required or authorized by rules adopted by the city to determine compliance with paragraph 1.1 above.

2. **Foreign Contractor Report to Department of Revenue. (ORS 279.021)(2)(a)** The following provision is applicable to all contracts with a contract price exceeding \$10,000 if the Contractor is not domiciled in or registered to do business in the state of Oregon:

The Contractor shall promptly report to the Department of Revenue on forms to be provided by the Department of Revenue the total contract price, terms of payment, length of contract and such other information as the Department of Revenue may require before final payment can be received on the public contract. The City shall satisfy itself that the requirement of this subsection has been complied with before it issues a final payment on this contract.

3. **Payment of Laborers and Materialmen, Contributions to Industrial Accident Fund, Liens, and Withholding Taxes. (ORS 279.312(1))** The Contractor shall:

3.1 Make payment promptly, as due, to all persons supplying to such Contractor, labor or material for the prosecution of the work provided for in such contract.

- 3.2 Pay all contributions or amounts due the Industrial Accident Fund from such Contractor or subcontractor incurred in the performance of the contract.
- 3.3 Not permit any lien or claim to be filed or prosecuted against Dunes City or any subdivision or agency or employee thereof on account of any labor or material furnished.
- 3.4 Pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167.

4. Payment of Claims by Public Officers (ORS 279.314)

- 4.1 If the Contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to the Contractor or a subcontractor by any person in connection with the public contract as such claim becomes due, the public officer or officers representing Dunes City may pay such claims to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due the Contractor by reason of this contract. The payment of a claim in the manner authorized shall not relieve the Contractor or his/her surety from his or her obligations with respect to any unpaid claims.
- 4.2 If Contractor or a first-tier subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public contract for a public improvement within 30 days after receipt of payment from Dunes City or Contractor, Contractor or first-tier subcontractor shall owe the person the amount due plus interest charges commencing at the end of the 10-day period that payment is due under ORS 279.445(4) and ending upon final payment, unless payment is subject to a good faith dispute as defined in ORS 279.445. The rate of interest charged to Contractor or the first-tier subcontractor on the amount due shall equal three times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date that is 30 days after the date when payment was received from Dunes City or from Contractor, but the rate of interest shall not exceed 30 percent. The amount of interest may not be waived.
- 4.3 If Contractor or a subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public contract, the person may file a complaint with the Construction Contractors Board, unless payment is subject to a good faith dispute as defined in ORS 279.445. Any contractor shall announce the foregoing in any subcontract issued.

5. Hours of Labor (ORS 279.316)

- 5.1 No person shall be employed for more than ten (10) hours in any one day or forty (40) hours in any one week, except in cases of necessity, emergency or when the public policy absolutely requires it, and in such cases, *except in cases of contracts for personal services as defined in ORS 279.051*, the employee shall be paid at least time and a half pay for all overtime in excess of eight (8) hours in any one day and forty (40) hours in any one week, when the work week consists of five consecutive days, Monday through Friday, or for all overtime in excess of ten (10) hours in one day or forty (40) hours in one week, when the work week is four consecutive days, Monday through Friday, and for work performed on Saturday and on any legal holiday specified in ORS 279.334. The Contractor must give notice to employees who perform work on a public contract, in writing, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, the number of hours per day and days per week that the employees may be required to work.
- 5.2 In the case of contracts for personal services as defined in ORS 279.051, no person shall be employed for more than eight (8) hours in any one day or forty (40) hours in any one week, except in cases of necessity, emergency, or when the public policy absolutely requires it, and in such cases a laborer shall be paid at least time and a half for all overtime worked in excess of forty (40) hours in any one week, except for individuals under this contract who are excluded under ORS 653.010 to 653.261 or under 29 USC Sections 201-209 from receiving overtime.

6. Payment for Medical Care and Attention to Employees (ORS 279.320)

6.1 The Contractor shall promptly as due, make payment to any person, co-partnership or association or corporation furnishing medical, surgical, and hospital care or other needed care and attention, incident to sickness or injury, to the employees of Contractor, of all sums which the Contractor agrees to pay for such services and all monies and sums which the Contractor collected or deducted from the wages of employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service.

6.2 The Contractor and all employers working under this contract are subject employers, and agree to comply with ORS 656.017.

7. Labor Contract Conditions (ORS 279.310) In all contracts wherein labor is required, the Contractor will comply with all provisions required by the statutes of the state, of contractors on a "public contract" as defined in ORS 279.310(1).

8. Nondiscrimination on the Basis of Disability (Americans with Disabilities Act, 42 USC sec. 12101 et seq.) The Contractor shall:

8.1 Comply with all requirements of the Americans with Disabilities Act, 42 U.S.C. sec. 12101, et seq., and all regulations implementing the Act, especially including those regulations set forth at 28 C.F.R. sec. 35.130, or any later replacement for those regulations, directly or indirectly applicable to Contractor as a result of a contract with the City.

8.2 To the extent legally possible, Contractor shall indemnify and hold City, its officers, agents and employees, harmless from and against any and all claims, actions, liabilities, costs, including costs of defense, arising out of or in any way related to any act or failure to act by Contractor and Contractor's employees, agents, officers and contractors in connection with Contractor's obligations concerning services, aid or benefits to be provided to individuals with disabilities. In the event any such action or claim is brought against City, Contractor shall, upon City's tender, defend the same at its sole cost and expense, promptly satisfy any judgment adverse to City or to City and Contractor jointly, and reimburse City for any loss, cost, damage or expense (including legal fees) suffered or incurred by City. This right of indemnification and to be held harmless shall be in addition to, and not in replacement of any other right that City may have under any statute, under the common law or under this contract.

8.3 By acceptance of this agreement, Contractor warrants that Contractor is familiar with the requirements of the Americans with Disabilities Act and the regulations to enforce the Act. Contractor further warrants that Contractor is in compliance with the requirements of the Act concerning local government services applicable to Contractor as a result of this agreement. Contractor shall continue to comply with all applicable provisions of the Act. City shall have the right to inspect, upon reasonable notice, Contractor's records and all locations where the work is to be performed to assure compliance with all applicable provisions of the Act.

9. Payment to Subcontractors. The Contractor shall include in each subcontract for property or services entered into by the contractor and a first-tier subcontractor, including a material supplier, for the purpose of performing a construction contract:

9.1. A payment clause that obligates the contractor to pay the first-tier subcontractor for satisfactory performance under its subcontract within 10 days of payment by the City out of such amounts as are paid to the contractor by Dunes City under such contract; and

9.2 An interest penalty clause that obligates the contractor, if payment is not made within 30 days after receipt of payment from Dunes City, to pay to the first-tier subcontractor an interest penalty on amounts due in the case of each payment not made in accordance with the payment clause included in the subcontract pursuant to paragraph 9.1 of this subsection. A contractor or first-tier subcontractor shall not be obligated to pay an

interest penalty if the only reason that the contractor or first-tier subcontractor did not make payment when payment was due is that the contractor or first-tier subcontractor did not receive payment from Dunes City or contractor when payment was due. The interest penalty shall be:

9.2.1 For the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

9.2.2 Computed at the rate specified in ORS 279.314(2).

10. **Drug Testing. ORS 279.312(2).** If the contract is for a public improvement, the Contractor shall demonstrate that an employee drug testing program is in place at the time of submitting its bid, and that such program will be maintained throughout the contract period, including any extensions. The failure of Contractor to have, or to maintain such a drug testing program is grounds for rejection of a bid or immediate termination of the contract.

Dunes City shall not be liable, either directly or indirectly, in any dispute arising out of the substance or procedure of Contractor's drug testing program. Nothing in this drug testing provision shall be construed as requiring Contractor to violate any legal, including constitutional, rights or any employee, including but not limited to, selection of which employees to test and the manner of such testing. The City shall not be liable for Contractor's negligence in establishing, implementing or maintaining, or failure to establish, implement or maintain a drug testing policy, or for any damage or injury caused by Contractor's employees acting under the influence of drugs while performing work covered by this contract. These are Contractor's sole responsibilities and nothing in this provision is intended to create any third party beneficiary rights against the City.

**CERTIFICATE OF BIDDER/CONTRACTOR
EMPLOYEE DRUG TESTING PROGRAM
ORS 279.312(2)**

BIDDER'S NAME: _____

ORS 279.312(2) provides that every public improvement contract contain a condition that the contractor shall demonstrate that an employee drug testing program is in place. The City's award of the contract (the "Contract") for which this certificate is required is conditioned, in part, upon the bidder's demonstration of compliance with the provisions of ORS 279.312. If the bidder named above (the "Bidder") is awarded the Contract, this certificate shall become a part of, and shall constitute a continuing representation and warranty under, the Contract.

To induce Dunes City to award the Contract to the Bidder, the undersigned, as the duly authorized representative of the Bidder, hereby represents and warrants, on behalf of the Bidder:

1) That Bidder has and enforces, and at all times during the term of the Contract will have and enforce, a written employee drug testing policy that, at a minimum:

a) Requires drug testing of an employee when the Bidder has reasonable cause to believe the employee is under the influence of drugs; and

b) Requires, where applicable, compliance with the Oregon Department of Transportation Commercial Drivers License drug testing regulations.

2) A copy of the Bidder's current written employee drug testing policy will be available for inspection by the City at any time upon the City's request.

3) The Bidder understands and agrees that its representations and warranties herein will become a continuing part of the Contract and that breach of any of the foregoing will be sufficient grounds for disqualification under ORS 279.037(2)(d).

Dunes City shall not be liable, either directly or indirectly, in any dispute arising out of the substance or procedure of Contractor's drug testing program. Nothing in this drug testing provision shall be construed as requiring Contractor to violate any legal, including constitutional, rights or any employee, including but not limited to, selection of which employees to test and the manner of such testing. The City shall not be liable for Contractor's negligence in establishing or implementing, failure to establish or implement or maintain a drug testing policy, or for any damage or injury caused by Contractor's employees acting under the influence of drugs while performing work covered by this contract. These are Bidder/Contractor's sole responsibilities.

In Witness Whereof, the Bidder has caused this document to be executed by its duly authorized representative on the date shown below.

Signature: _____

Printed Name / Title: _____

Date: _____

EXHIBIT "B"