

PORT OF HOOD RIVER
RESOLUTION NO. 2017-18-6

Adopting Rules for Public Private Partnerships (P3s) for Bridge Projects and Bridge Project Activities

WHEREAS, the Oregon State Legislature passed House Bill 2750 in 2017 allowing the Port of Hood River ("Port") to consider Public Private Partnerships ("P3s") subject to adoption of administrative rules for implementing the provisions of HB 2750 ("Rules"); and,

WHEREAS, drafts of the Rules were reviewed and discussed by the Port Commission at their regular meetings on January 23, February 6, February 20, and April 3, 2018; and,

WHEREAS, the first public hearing regarding draft Rules was held on March 20, 2018 after notices ran in the *Hood River News*, *White Salmon Enterprise*, *The Dalles Chronicle*, and the *Portland Daily Journal of Commerce* between February 28 and March 1, 2018; and,

WHEREAS, the second public hearing regarding draft Rules was held on May 1, 2018 after notices ran in the *Hood River News*, *White Salmon Enterprise*, *The Dalles Chronicle*, and the *Portland Daily Journal of Commerce* between April 25 and 28, 2018; and,

WHEREAS, the proposed final draft Rules were posted on the Port's website on May 11, 2018; and,

WHEREAS, the Port received comments from the P3 community, Oregon and Washington Depts. of Transportation, and the public during the public review process and revised the proposed Rules based on these comments; and,

WHEREAS, enactment of these Rules does not constitute support at this time for any specific procurement method for the replacement of the Hood River/White Salmon Bridge or Bridge Project Activities;

NOW, THEREFORE, BE IT RESOLVED BY THE PORT OF HOOD RIVER, the following:

The Port of Hood River Public Contracting Rules are hereby amended to include Rules for Public Private Partnerships for Bridge Projects and Bridge Project Activities, stated in Attachment A attached hereto and incorporated herein.

ADOPTED BY THE BOARD OF PORT COMMISSIONERS ALSO ACTING AS THE PORT OF HOOD RIVER LOCAL CONTRACT REVIEW BOARD on June 5, 2018.



Hoby Streich, President

A handwritten signature in black ink, appearing to read 'B Shortt', written over a horizontal line.

Brian Shortt, Vice President

A handwritten signature in black ink, appearing to read 'John Everitt', written over a horizontal line.

John Everitt, Secretary

A handwritten signature in black ink, appearing to read 'Ben Sheppard', written over a horizontal line.

Ben Sheppard, Treasurer

A handwritten signature in blue ink, appearing to read 'David Meriwether', written over a horizontal line.

David Meriwether, Commissioner

**PORT OF HOOD RIVER RULE
PUBLIC PRIVATE PARTNERSHIPS FOR BRIDGE PROJECTS AND BRIDGE PROJECT ACTIVITIES
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PORT OF HOOD RIVER RULE
PUBLIC PRIVATE PARTNERSHIPS FOR BRIDGE PROJECTS AND BRIDGE PROJECT ACTIVITIES

1. PURPOSE AND INTENT OF RULE

(1) The primary purpose of this Rule is to describe the process for developing and constructing a replacement bridge between Hood River, Oregon and White Salmon, Washington if undertaken as a Public-Private Partnership with the Port of Hood River.

(2) This Rule implements the authority granted to the Port by ORS 381.310 to ORS 381.314 to enter into public-private partnership agreements in connection with a Bridge Project, and is adopted in compliance with ORS 381.310(4)(b) requiring the Port to adopt rules that substantially conform with the Department of Transportation rules implementing ORS 367.800 to 367.824. Nothing in this Rule shall be interpreted as limiting the Port's authority under other state statutes, including but not limited to its authority to exempt contracts from public bidding under ORS 279C.335(2).

2. DEFINITIONS

As used in this rule:

1. "Agreement" means a written agreement, including but not limited to a contract, for a Bridge Project or Bridge Project Activity that is entered into under ORS 381.310 ORS 381.314.

2. "Bridge" means the existing Port interstate bridge as of the effective date of this Rule, or a completed bridge that results from a Bridge Project, and any Related Facilities.

3. "Bridge Project" means a project to construct, reconstruct, or replace a bridge that spans the Columbia River, and any Related Facilities, that a Private Entity undertakes in accordance with an Agreement with the Port of Hood River that requires a Private Contribution.

4. "Bridge Project Activity" means an activity that a Private Entity undertakes in accordance with an Agreement with the Port of Hood River to plan, acquire, finance, develop, design, construct, reconstruct, replace, improve, maintain, manage, repair, lease, or operate a bridge, Bridge Project, or any Related Facility, including all ancillary activities.

5. "Business Days" means all days when the Port of Hood River offices are scheduled to be open to the public for general business.

6. "Clarification" means additional materials or information regarding a Submission that is provided to the Port by the proposer at the request of the Port.

7. “Commission” means the Port of Hood River Commission.
8. “Competitive Negotiations” means negotiations of Term Sheets or Agreements between the Port and multiple proposers that are undertaken as part of the process of evaluating and selecting the preferred Submission, as more fully described in subsection 7.3(2)(b) and (3) of the Rule.
9. “Days” means calendar days, unless specified as business days, and include Saturdays, Sundays, and legal holidays in the State of Oregon, except that if the last day of any period falls on any Saturday, Sunday, or legal holiday, the period shall be extended to include the next day which is not a Saturday, Sunday or legal holiday.
10. “Direct Negotiations” means the undertaking of negotiations between the Port and a single selected proposer regarding a Term Sheet or Agreement, as described in paragraph 2(a) of subsection 7.3.
11. “Director” means the Executive Director of the Port of Hood River, a Port employee authorized in writing by the Executive Director to act under this Rule in the place of, on behalf of, and with the authority of the Executive Director to perform specified Executive Director tasks, or a Port employee authorized by the Commission to act in the place of and with the authority of the Executive Director under this Rule if the Executive Director is unavailable.
12. “Evaluation Panel” means the panel of persons appointed by the Director to evaluate a proposal for a Bridge Project or Bridge Project Activity under subsection 5.1 of this Rule.
13. “Key Person” means an official in a Managing Entity, Ownership Entity, or Major Subcontractors who plays a critical role in running the enterprise or a critical role in a proposal and whose loss or unavailability could jeopardize the success of the proposal.
14. “Local Government” has the meaning given that term in ORS 174.116.
15. “Major Partner” means a Private Entity that has an ownership interest in excess of 25% in a Managing Entity, Ownership Entity, or Major Subcontractor, as applicable.
16. “Major Subcontractor” is the member of the Team, other than the Managing Entity, designated in the proposal to have primary responsibility for one or more of the following: project development, engineering, architecture/design, project management, construction (including any construction subcontractors with subcontracts of at least 10% of the construction budget), legal, financial, operations, or maintenance.
17. “Managing Entity” means the Private Entity or Private Entities authorized to execute Agreements for the proposal and that will have primary management and oversight responsibility for the

performance of the obligations under an Agreement. The Managing Entity may also be a Major Subcontractor or an Ownership Entity.

18. "Negotiation Team" shall have the meaning provided in paragraph (1) of subsection 7.1 of this Rule.

19. "Notice of an Unresponsive Submission" means a written notice sent by the Director to a proposer stating that (a) the proposal was deemed incomplete or otherwise unresponsive to the requirements of these Rules or the Solicitation Document; (b) the proposal will not be considered further, and (c) the reasons for the determination.

20. "Organizational Disclosure Requirements" means any information, certifications, forms, or attestations required by the Port regarding the qualifications, expertise, experience, financial backing, integrity, ownership, litigation and claims history, organizational structure, and decision-making structure of any Team member, Key Person, or Major Partner associated with a proposal.

21. "Ownership Entity" means a Private Entity or Private Entities anticipated to have an ownership interest in the Bridge Project of at least 25% or that are the managing partners of an ownership group anticipated to have an ownership interest in the Bridge Project of at least 25%

22. "Port" means the Port of Hood River.

23. "Private Contribution" means resources supplied by a Private Entity to accomplish all or part of the work on a Bridge Project, including but not limited to, funding; financing; providing income or revenue; in-kind contributions of engineering, construction, or maintenance services; the acceptance of risks otherwise borne by the public, or other services or items of value provided by a Private Entity.

24. "Private Entity" means any entity that is not a unit of government, including but not limited to a corporation, partnership, company, nonprofit organization, joint venture, or other legal entity, or a natural person.

25. "Project" means a Bridge Project or Bridge Project Activity.

26. "Public Communications" has the meaning given that term in paragraph (3) of subsection 4.5 of this Rule.

27. "Public-Private Partnership" or "PPP" means an arrangement resulting from an Agreement between the Port and one or more Private Entities for the design, construction, maintenance, operation, financing, or ownership of the Bridge Project or Bridge by one or more Private Entities that includes a Private Contribution and, in return, the right of the Private Entity (or Entities) to receive all or a portion of toll revenues from the Bridge or Bridge Project and/or other public funds or resources. The

use of the word “partnership” in all contexts under this Rule is not intended to mean or to confer on the relationship formed between the Port and a Private Entity any of the attributes or incidents of a partnership under common law or under ORS chapters 67 and 70.

28. “Related Facilities” means real or personal property for: (a) operating, maintaining, renovating, or facilitating the use of a Bridge; (b) providing goods and services to people who use a Bridge; or (c) generating revenue that can reduce tolls or that will be deposited in an account established under an Agreement.

29. “Responsive Submission” means a Submission that complies with all requirements, terms, and conditions of a Solicitation Document and this Rule.

30. “Rule” means this rule of the Port of Hood River regarding public-private partnerships for a Bridge Project or Bridge Project Activity.

31. “Sensitive Business, Commercial or Financial Information” means information submitted by a Private Entity in connection with a proposal for a Bridge Project or Bridge Project Activity, which complies with the criteria in paragraph (2) if subsection 8.1 of this Rule, and which is exempt from public disclosure under Oregon law and this Rule.

32. “Solicitation Document” means a written request for proposals, request for qualifications, or any similar call for proposals or proposers issued by the Port in connection with a Bridge Project or Bridge Project Activity, including any addenda thereto.

33. “Solicited Proposal” means a proposal submitted in response to a Solicitation Document.

34. “Submission” means a proposal or a statement of qualifications submitted in response to or in connection to a Solicitation Document.

35. “Submission Deadline” means the date and time set forth in a Solicitation Document by which a Submission is required to be received by the Port at a required location.

36. “Submission Performance Guaranty” means a legal commitment or other instrument provided by a proposer in or in conjunction with a Submission that provides assurance to the Port of the proposer’s capacity to perform or intent to perform under the Submission, should it be selected by the Port.

37. “Team” means the Managing Entities, Ownership Entities, Major Subcontractors, and other significant participants proposed to undertake a Bridge Project or Bridge Project Activity.

38. “Term Sheet” means a non-binding agreement, approved by the Commission pursuant to subsection 7.4 of this Rule, specifying preliminarily agreed-upon terms for preparing the final Agreement or Agreements.

39. “Unresponsive Submission” means a Submission that does not comply with all requirements, terms, and conditions of a Solicitation Document and this Rule.

40. “Unsolicited Proposal” means a proposal to the Port by a Private Entity for a Bridge Project or Bridge Project Activity that is not submitted pursuant to a Solicitation Document.

3. GENERAL AUTHORITY TO ENTER A PUBLIC-PRIVATE PARTNERSHIP FOR A BRIDGE PROJECT OR A BRIDGE PROJECT ACTIVITY

(1) The Port may, in accordance with ORS 381.310 to ORS 381.314 and this Rule, solicit proposals or qualifications and enter into Direct Negotiations or Competitive Negotiations for a Public-Private Partnership to plan, acquire, finance, develop, design, manage, construct, reconstruct, replace, improve, maintain, repair, operate, or own a Bridge Project or Bridge Project Activity if the Commission has determined that such an approach has the potential to accelerate cost-effective delivery of the Project or reduce the public cost or risk of carrying out the Project.

(2) The Port shall not accept or consider an Unsolicited Proposal for a Public-Private Partnership for a Bridge Project or Bridge Project Activity, unless and until this Rule is amended to allow consideration of Unsolicited Proposals.

(3) The Port may select one or more proposers for the purpose of negotiating agreements for a Bridge Project or Bridge Project Activity under Section 7 of this Rule, or may reject all proposers. With regard to a proposer selected for negotiations, the Port may enter into negotiations for the full scope of their proposal or for any part or parts of their proposal.

(4) The selection of a proposer or proposal for negotiations does not constitute a final selection of such proposer or proposal nor prohibit the Port from considering other proposers or proposals. Final selection of a proposer or proposal is subject to the Commission’s approval of an Agreement.

4. SOLICITATION OF STATEMENTS OF QUALIFICATIONS AND/OR PROPOSALS FOR A PUBLIC-PRIVATE PARTNERSHIP FOR A BRIDGE PROJECT OR BRIDGE PROJECT ACTIVITY

4.1 Solicitation Documents

(1) The Port may solicit proposals for a Bridge Project or one or more Bridge Project Activities by issuing a Request for Qualifications (RFQ), a Request for Proposals (RFP), or a multi-staged RFQ/RFP

(each referred to herein as a “Solicitation Document”), as determined by the Port. Before issuing a Solicitation Document, the Solicitation Document shall first be approved by the Commission.

(2) Each Solicitation Document shall specify the requirements for the Submission content, including Organizational Disclosure Requirements, and the criteria and procedures under which Submissions will be evaluated and selected, either by reference to this Rule or by supplementation or amendment to the provisions of this Rule. Nothing in this Rule is intended to limit the scope of the Port’s discretion or authority to develop evaluation criteria and processes for a Solicited Proposal as long as the criteria and processes comply with the requirements of ORS 381.310.

(3) The Port may require in a Solicitation Document (or an Addendum or a notice) that the proposer provide to the Port a Submission Performance Guaranty to accompany a Submission (or during the evaluation of proposals or the negotiation of Agreements). If required to accompany a Submission, the Port shall not consider a Submission that is not accompanied by the required Submission Performance Guaranty.

(4) Following approval of a Solicitation Document by the Commission, the Port will furnish reasonable announcement of the Solicitation Document, as determined by the Port, for the purpose of fostering and promoting competition. The announcement will indicate where, when, how, and for how long the Solicitation Document may be obtained and generally describe the work. The notice shall specify the date and time by which the response to the Solicitation Document must be submitted to the Port (the “Submission Deadline”) and may contain any other appropriate information. The Port may charge a fee or require a deposit for the Solicitation Document. The Port shall announce the availability of the Solicitation Documents as follows:

(a) Mail the announcement of the availability of Solicitation Documents to Private Entities that submitted a writing to the Port expressing an interest in the Port’s Bridge Project or Bridge Project Activity procurements;

(b) Place the announcement on the Port’s internet web site;

(c) Place the announcement in the Daily Journal of Commerce and any other applicable publications determined by the Director; and

(d) Use any other method the Director determines will promote competition.

(5) The Port may require potential proposers to register its name, contact information, and areas of interest as a prerequisite to receiving the Solicitation Document.

(6) Following the issuance of the initial Solicitation Document, the Port may from time to time issue an addendum to the Solicitation Document or a writing requesting Clarifications, the addition

or deletion of project features, alternative financing terms, additional Organizational Disclosure Requirements, and other materials not included in the initial Solicitation Document or initial Submissions.

(a) Except as described in paragraph (6) (c) below, before issuing an addendum to a Solicitation Document, the addendum shall first be approved by the Commission unless the Commission otherwise authorizes the Director to issue addenda without Commission approval.

(b) Notice of the availability of an addendum shall be provided as set forth in paragraph (2) of Section 10 of this Rule. Upon the Port's issuance of notice of availability of an addendum, the provisions of the Solicitation Document shall be as amended or clarified by the addendum and any previous addenda. Each addendum shall include a deadline for the Submission of requested materials. The burden of responding to an addenda accurately and completely resides with the proposer. Failure of a proposer to adequately or timely respond to such addenda shall constitute sufficient grounds to reject the applicable Submission.

(c) The Director may, without the approval of the Commission, issue an addendum that clarifies the meaning of provisions in a Solicitation Document or previous addendum, amends a process in a manner that does not violate a provision of this rule or reduce the Commission's decision-making authority, requests Clarifications from proposers, or provides additional data or other information to proposers.

(7) The Port may issue a request for information, request for industry review, expression of interest, or other preliminary documents or market-sounding mechanisms to obtain information useful in preparing a Solicitation Document.

4.2 Eligible Proposers, Team Members, Key Persons, and Major Partners

(1) All members of the proposed Team and their Major Partners and Key Persons:

(a) Must be able to legally operate and fully perform their proposed role and responsibilities under the Submission in Oregon and Washington, or provide evidence that they will have such ability prior to entering an Agreement; and

(b) Have or will have the ability to obtain the appropriate financial, material, equipment, personnel, and expertise necessary to fulfill their proposed roles and obligations under the Submission.

(2) No Submission will be considered from a Team in which a member of the Team, a Major Partner of a Team member, or a principal officer of a Team member, or a Major Partner:

(a) Is disbarred, suspended, disqualified, proposed for debarment, or declared ineligible for contracts by any federal agency or agency of the State of Oregon; or

(b) Has, within the last 3-year period, been convicted of or had a civil judgment rendered against it for commission of fraud or a criminal offense in connection with obtaining or attempting to obtain a public (federal, state, or local) contract or subcontract; violation of federal or state antitrust statutes relating to the Submission of bids, proposals, or qualifications; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion or receiving stolen property.

4.3 Contents of a Proposal or Statement of Qualifications

(1) A Submission must include all information required by this Rule and the Solicitation Document, and comply with any formatting requirements set forth in the Solicitation Document. All information must be complete, accurate, current, and truthful. The failure or refusal of any proposer to provide complete, accurate, current, and truthful information requested by the Port shall be sufficient grounds for rejection of the Submission.

(2) A Submission must be in response to the specific language in a Solicitation Document, an addendum to a Solicitation Document, or a written notice from the Port; proposers shall not make any assumptions based on verbal statements or written statements not contained in a Solicitation Document, addendum to a Solicitation Document, or a written notice from the Port.

(3) In addition to the information required by this Rule and the Solicitation Documents, the Port may request in writing, electronically or otherwise, from time to time such Clarifications, additional Organizational Disclosure Requirements, or other materials from the proposer as the Port deems beneficial to understanding or reviewing the Submission. Failure by a proposer to provide such information or material within the time specified by the Port in the writing, or if no time is specified within a reasonable time as determined by the Port, shall be sufficient grounds for rejection of the proposal. In addition, the Port may undertake such reference checks and make such other inspections of Team members as the Port may find beneficial to reviewing a Submission.

(4) All aspects of the Submission must comply with all applicable federal, state, and local laws and regulations, including but not limited to the provisions of and this Rule.

(5) A cover letter must be attached to or incorporated in a Submission that:

(a) Incorporates a statement to the effect that by responding to the Solicitation Document, the proposer acknowledges for itself and its Team that it agrees to and accepts all terms and conditions under this Rule and the Solicitation Document, and

(b) Is signed by a duly authorized representative(s) of the Team making the Submission.

(6) The Submission must include duly executed copies of all Organizational Disclosure Requirements, including but not limited to any conflicts of interest forms, certifications, and attestations, required under the Solicitation Document.

(7) The proposer shall clearly identify any Sensitive Business, Commercial, or Financial Information in the proposal or statement of qualification that the proposer considers exempt from public disclosure under Oregon state law, as described in Section 8 of this Rule.

(8) All pages of a proposal or statement of qualification shall be double-sided and numbered. Each copy of the proposal or statement of qualification must be contained in a single volume where practicable. An electronic version of the proposal and any supporting material submitted as part of the proposal or statement of qualification shall also be provided.

4.4 Obligation to Update Changed Information

(1) The proposer must notify the Port of any change in the status of the proposer, a Team member, a Key Person, or a Major Partner within five (5) business days of the date of the known change. A change in status under this Rule includes (a) the replacement of a Team member, Key Person, or Major Partner; (b) a shift in the role or a material commitment of a Team member, Key Person, or Major Partner; and (c) reorganization of the business structure or corporate structure of the proposer, Team Member, or a Major Partner amounting to a transfer of over twenty percent (20%) of the entity's ownership (at one time or cumulatively during the procurement process). The notice to the Port shall include an explanation of the reason(s) for the change, and all information on the changed entity or entities that are required by this Rule or the Solicitation Documents. Those entities whose status has changed or who have been added are required to satisfy all Organizational Disclosure Requirements within the five (5) business day period; provided, however, the Director may prescribe in writing a longer time period for fulfillment of the Organizational Disclosure Requirements if she or he finds special circumstances that justify an extension.

(2) Any replacement or additional Team member, Key Person, or Major Partner must meet the requirements set forth in subsection 4.2 of this Rule.

(3) The burden of satisfying the Organizational Disclosure Requirements, both in terms of producing the disclosures and assuring their accuracy and completeness, resides with each proposer. Failure to meet this burden shall be sufficient grounds for rejection of the Submission.

(4) The Port shall approve or reject a proposed change to the status of the proposer, a Team member, a Key Person, or Major Partner as follows:

(a) If notice of a proposed change in the status of the proposer, a Team member, a Key Person, or a Major Partner is received by the Port prior to a Commission action approving or rejecting a Submission for detailed evaluation, the Director shall have the authority to (i) approve the change; (ii) reject the change and provide the proposer additional time to propose a different change; or (iii) reject the change and terminate further consideration of the proposal. In making this determination, the Director shall consider (i) the extent of the change proposed by the proposer, (ii) the experience, technical capacity, and organizational disclosure of the entities involved in the change, and (iii) the impacts of considering or allowing the change on the fairness and schedule of the solicitation process. Unless otherwise extended by the Director, the Director shall notify the proposer of his or her decision and reasons for the decision within a five (5) business day period from the date the Port receives notice from the proposer under subsection 4.4(1). A proposer may appeal to the Commission a rejection of a proposed status change made by the Director by filing a written appeal with the Port no later than three (3) business days after receipt of the Director's notice under this paragraph stating the reasons why the Director's determination was in error. If properly appealed, the Commission shall hear the appeal within fourteen (14) days of the Port receipt of the written appeal, unless this time is extended by the Commission. In considering the appeal, the Commission shall only consider the explanation of the error(s) set forth in the proposer's written appeal.

(b) If notice of a proposed change in the status of the proposer, a Team member, a Key Person, or a Major Partner is received by the Port following a Commission action approving or rejecting a Submission for detailed evaluation, the Commission shall have the authority to (i) approve the change; (ii) reject the change and provide the proposer additional time to propose a different change; or (iii) reject the change and terminate further consideration of the proposal. In making this determination, the Commission shall consider (i) the extent of the change proposed by the proposer, (ii) the experience, technical capacity, and organizational disclosure of the entities involved in the change, and (iii) the impacts of considering or allowing the change on the fairness and schedule of the solicitation process.

4.5 Communications during the Solicitation, Evaluation, and Negotiation Process

(1) From the date on which the Commission approves a Solicitation Document to the date on which the Commission approves an Agreement or terminates the solicitation process without approving an Agreement, all communications, whether direct or indirect, between the proposer, including any Team member, agent, or representative of the proposer, and the Port shall only be with the contact person or persons designated by the Director, and not with any other staff member, Commission member, or other official, agent, or representative of the Port.

(2) Unless otherwise authorized in writing by the Director or his or her designee as described in paragraph (4) of this subsection, no proposer or potential proposer, agent or representative of a proposer or potential proposer, Team member, or agent or representative of a Team member shall

engage in Public Communications, as described in paragraph (3) of this subsection, between the date on which the Commission approves a Solicitation Document and the date on which the Commission approves an Agreement or terminates the solicitation process without approving an Agreement.

(3) Public Communications under this Rule shall include any direct or indirect contact, not authorized under paragraph (4) of this subsection, in which a proposal for a Bridge Project or Bridge Project Activity is discussed, whether in person, in writing, or electronically, by a proposer or potential proposer or an agent or representative of a proposer or potential proposer (including any member of the Team, or an agent or representative of a Team member) with any member of the Commission; any local, state, or federal official (including presentations to any governmental boards or commissions); or persons (or agents or representatives of persons) engaged in print or electronic media..

(4) The Solicitation Documents may describe certain Public Communications that the proposer or potential proposer may engage in. In addition, the Director may authorize proposers or potential proposers to engage in Public Communications, if the Director determines such Public Communications: (i) does not afford any Private Entity an undue competitive advantage and (ii) is in the best interest of the Port. The authorization to engage in Public Communications shall be in writing and shall describe the specific purpose or purposes for which Public Communications is authorized, any limitations on the Public Communications, and the time period during which the authorization is effective. Any proposer or potential proposer, agent or representative of a proposer or potential proposer, Team member, or agent or representative of a Team member authorized to engage in Public Communications shall only do so under the terms and conditions set forth in the Solicitation Documents or Director's authorization, as applicable. Any Public Communications not complying with the terms and conditions in the Director's authorization shall constitute unauthorized Public Communications under this subsection.

(5) An unauthorized Public Communications may constitute grounds for (i) disqualifying the violator but not the proposal (allowing the Team to replace the violator) or (ii) terminating consideration of the proposal of the violator, depending on the nature and extent of the unauthorized Public Communications. The Director shall determine whether unauthorized Public Communications has occurred. If the Director determines that unauthorized Public Communications occurred, the Director shall send notice to the violator or violators stating the nature of the violation and the penalty, if any.

(6) Any proposer or potential proposer receiving notice under paragraph (5) of this subsection shall have five (5) business days after receiving the Port notice to file a written appeal of the Director's determination to the Commission stating its reasons why the Director's determination is unwarranted. If the Director's determination is not appealed or the Commission upholds the Director's determination, the penalty, if any, stated in the Director's notice under subsection 4.5(5) will be imposed. If appealed, the Commission may amend or overturn the determination (and penalty) of the Director if the Commission finds that (i) there was not any improper contact or (ii) the contact was unintended or

incidental and contact could not have reasonably given the violator or the violator's proposal a competitive advantage.

5. SELECTION OF A TEAM OR TEAMS FOR NEGOTIATING AGREEMENT(S) FOR A PUBLIC-PRIVATE PARTNERSHIP FOR A BRIDGE PROJECT OR BRIDGE PROJECT ACTIVITY

5.1 Evaluation Panel

(1) Each Submission shall be evaluated by an Evaluation Panel nominated by the Director and approved by the Commission.

(2) The Evaluation Panel shall be of such size and composition as the Port determines is in the best interest of achieving a credible and technically sound assessment of the proposals, but may not consist of less than three (3) members, and may be comprised of such Port staff, including the Director, or officials, state and local staff or officials, public representatives, consultants, or other advisers as the Commission may determine.

(3) Under the direction of the Director, the Evaluation Panel shall:

(a) Screen each Submission received by the Submission Deadline for its responsiveness to the requirements in the Solicitation Document and this Rule and identify any potential Unresponsive Submission, as provided in subsection 5.2 of this Rule;

(b) Evaluate each Responsive Submission, as provided in subsection 5.3 of this Rule;
and

(c) Prepare a final report documenting the results of its evaluation, as provided in paragraph (8) of subsection 5.3 of this Rule.

5.2 Initial Screening for Responsiveness of Submissions

(1) The Port shall not accept or consider any Submission received by the Port after the Submission Deadline or at a location other than that specified in the Solicitation Document.

(2) Each Submission received by the Submission Deadline at the correct location will be assessed to determine if it is a Responsive Submission. To be a Responsive Submission, the Submission must:

(a) Be duly executed by an authorized representative of the Team;

(b) Be accompanied by the Submission Performance Guaranty, if the Solicitation Document or Addenda require such a guaranty to accompany the Submission.

(c) Satisfy all Organizational Disclosure Requirements, including all duly executed forms, certifications, and attestations, required by the Solicitation Document;

(d) Provide all information required by the Solicitation Document; and

(e) Comply with all other applicable requirements, terms, and conditions under this Rule and the Solicitation Document.

(3) Any Submission that does not comply with all criteria in paragraph (2) of this subsection shall be an Unresponsive Submission and shall be disqualified from further consideration.

(4) Following the Submission Deadline, the Director shall cause to be undertaken an initial screening of all Submissions received by the Port by the Submission Deadline, as follows:

(a) Each Submission will be reviewed to determine if it (i) is duly executed by an authorized representative of the Team, (ii) is accompanied by the Submission Performance Guaranty required by the Solicitation Document or Addenda, if any, and (iii) complies with all Organizational Disclosure Requirements, including all duly executed forms, certifications, and attestations required by the Solicitation Document.

(b) If any of the items reviewed in paragraph (4)(a) of this subsection is found to be deficient, the proposer shall be notified in writing by the Port, and the proposer must fully rectify the deficiency or deficiencies identified in the Port's notice by within five (5) business days following the date on which notice is provided, unless a later date is authorized in writing by the Director due to special circumstances. Failure to fully rectify the deficiency or deficiencies identified in the Port's notice within the required time period shall make the Submission an Unresponsive Submission that receives no further consideration.

(c) Each Submission complying with the criteria in paragraph (4)(a) of this subsection will be reviewed by the Evaluation Panel to assess if the Submission (i) provides all information required by the Solicitation Document and (ii) complies with all other applicable requirements under this Rule and the Solicitation Document. The Evaluation Panel will report its findings in writing to the Director.

(5) After reviewing the findings of the Evaluation Panel, the Director shall determine which, if any, Submissions are Unresponsive Submissions that will not receive any further consideration.

(6) If the Director determines that a Submission is an Unresponsive Submission, the Director shall promptly convey to the proposer a "Notice of an Unresponsive Submission" stating his or her reasons for the determination. A proposer receiving a Notice of an Unresponsive Submission shall have five (5) business days from the date of notice, as set forth in section 10 of this Rule, to appeal in writing to the Port. The written appeal shall explain in detail why the Notice of an Unresponsive Submission was issued

in error. If appealed, the Commission shall hear the appeal within fourteen (14) days after Port receipt of the appeal, unless the time is extended by the Commission. If not appealed, the Director's determination shall take effect at the close of the appeal period.

5.3 Evaluation of Responsive Submissions

(1) The Evaluation Panel shall evaluate each Responsive Submission in accordance with this subsection 5.3.

(2) In evaluating proposals for a Bridge Project, the following factors must be considered pursuant to ORS 381.310(6):

(a) The estimated cost of the Bridge Project;

(b) The qualities of the design that the proposer submits, if appropriate, including:

(A) The structural integrity of the design and how the design will likely affect future costs of maintaining the bridge;

(B) The aesthetic qualities of the design and other aspects of the design such as the width of lane separators, landscaping and sound walls;

(C) The traffic capacity of the design;

(D) Aspects of the design that affect safety, such as lane width, the quality of lane markers and separators, the shape and positioning of ramps and curves and changes in elevation; and

(E) The ease with which traffic will pass through any toll collection facilities;

(c) The extent to which the bridge project will involve small businesses. The Port shall encourage small businesses to participate in the bridge project to the maximum extent that the Port determines is practicable. As used in this paragraph "small business" means an independent business with fewer than 20 employees and with average annual gross receipts during the last three years of not more than \$1 million for construction firms and not more than \$300,000 for businesses that are not construction firms; however, small business does not include a subsidiary or parent company that belongs to a group of firms that the same individuals own or control and that have average aggregate annual gross receipts during the last three years in excess of \$1 million for construction firms or \$300,000 for firms that are not construction firms;

(d) The proposer's financial stability and ability to provide funding for the Bridge Project or Bridge Project Activity and obtain, or act as, a surety for the proposer's performance and financial obligations with respect to the Bridge Project or Bridge Project Activity;

(e) The experience of the proposer and the proposer's subcontractors in engaging in bridge project activities of a size and scope similar to the proposed Bridge Project or Bridge Project Activity;

(f) The terms of the financial arrangement that the proposer accepts or proposes with respect to franchise fees, license fees, lease payments, or operating expenses and the proposer's required rate of return from engaging in the bridge project activity;

(g) If the Submission proposes private sector involvement or control in the setting of toll rates and fees, the nature and level of the private sector's involvement or control, the nature and level of public oversight of the private sector's involvement or control, and, if applicable, the proposed terms regarding:

(A) The amount of proposed tolls and administrative fees;

(B) Schedules for altering tolls and administrative fees; and

(C) Any restrictions or conditions on future increases in tolls or administrative fees; and

(h) If the Submission proposes private ownership of the Bridge or Bridge Project, the organizational structure of the Ownership Entities, the experience of the Ownership Entities and Key Persons, the reversionary ownership rights of the Port, if any, and the Port's rights, if any, to approve future ownership transfers.

(3) In addition to the criteria in paragraph (2) of this subsection, the Evaluation Panel shall employ any additional criteria set forth in the Solicitation Document, and any addenda to the Solicitation Document, in evaluating a Submission.

(4) If after opening Submissions the Director determines that amendments to the criteria in the Solicitation Document or any addenda to a Solicitation Document would be beneficial to the Port, the Director may recommend such amendments to the Commission as an addendum to the Solicitation Document and, subject to the Commission approval, the Evaluation Panel may employ the amended evaluation process or criteria. At least five (5) days before the Evaluation Panel can use the amended process or criteria in an addendum, the Port shall issue in writing sent to proposers or post electronically the addendum to allow proposers adequate time to address the addendum.

(5) Unless otherwise limited in the Solicitation Document, subject the approval of the Director, the Evaluation Panel may:

- (a) Request in writing Clarifications from proposers;
- (b) Employ outside technical or legal advice, subject to the decision of the Commission to retain such technical or legal advisors;
- (c) Undertake reference checks of Team members, and
- (d) Investigate the validity of assumptions and information provided by proposers.

(6) The Evaluation Panel may from time to time request proposers to make presentations regarding its Submission to the Evaluation Panel. Proposers shall be afforded not less than ten (10) business days following written notification from the Evaluation Panel to make such presentations. The format of these presentations will include a formal presentation by the proposer, followed by any questions the Evaluation Panel has pertaining to the Project, proposal, or statement of qualifications. The Evaluation Panel is not limited to asking the same or similar questions to each proposer. If there is an issue to which the proposer is unable to adequately respond during the formal presentation, the Evaluation Panel may, at its discretion, grant the proposer a reasonable period of time in which to submit a written response.

(7) As part of its evaluation of a Submission, the Port will consult with the Oregon Department of Transportation, Washington State Department of Transportation, and, as determined by the Port, other appropriate federal agencies, and state agencies and local governments in Oregon and Washington. Consultation under this Rule will occur in such manner and at such time as the Port considers appropriate in the particular circumstance, and may include but not be limited to:

- (a) An informal information-sharing opportunity prior to completion of the Port's evaluation of the proposal;
- (b) Solicitation of comments from the appropriate federal agencies, and state agencies and local governments in Oregon and Washington; and
- (c) Any additional method(s) of consultation appropriate under the circumstances.

(8) Upon the completion of its evaluation, the Evaluation Panel shall transmit to the Director a final report and any supporting materials the Evaluation Panel deems relevant. To the extent permitted by law, the Submissions and the report of the Evaluation Panel, including any documentation in connection with its preparation, shall not be subject to public disclosure until such time as the Agreement is approved under subsection 7.3, unless the Commission finds that it is in the best interest of the Port to

allow public disclosure at an earlier date. To the extent permitted by law, the Port may redact Sensitive Business, Commercial, or Financial Information from any publicly disclosed Submission; evaluation report, memorandum or documentation; or recommendation report.

6. RECOMMENDATION AND APPROVAL OF PROPOSERS FOR NEGOTIATION

6.1 Director's Recommendation to the Commission

(1) Following receipt of the Evaluation Panel report under paragraph (8) of subsection 5.3, the Director shall determine if the report is sufficient for the Director to make his or her recommendation to the Commission. If the Director finds that the report of the Evaluation Panel is insufficient to make a recommendation, the Director shall ask the Evaluation Panel for such additional analysis or documentation as the Director deems necessary to make a recommendation.

(2) Following the Director's determination that the report of the Evaluation Panel is sufficient to make a recommendation, the Director shall prepare his or her recommendation to the Commission, which may include a recommendation to:

- (a) Reject all Submissions and terminate the process;
- (b) Select one Submission for Direct Negotiations, and reject all other proposals;
- (c) Select one Submission for Direct Negotiations, and retain one or more other proposals for possible future negotiations if the initial negotiations are not successfully concluded;
- (d) Select two or more Submittals for Competitive Negotiations; and reject all other proposals; or
- (e) Such other recommendation as the Director may determine.

(3) The written recommendation of the Director must include an explanation of the reasons for the recommendation. Upon the completion of his or her recommendation, the Director shall transmit the recommendation to the Commission along with any supporting materials the Director deems relevant; provided, however, the Port may redact from the from the publicly disclosed recommendation report any Sensitive Business, Commercial or Financial Information, to the extent permitted by law. The Director shall notify proposers of his or her recommendation by emailing proposers, without confirmation of delivery, to the proposer's email address as described in paragraph (3)(b) of Section 10 of this Rule.

6.2 Commission Review and Selection of Proposers for Negotiation

(1) The Commission shall review the recommendation and any supporting materials forwarded by the Director under Section 6.1. If the Commission finds that recommendation and

supporting materials transmitted by the Director are insufficient to make a decision, the Commission shall require the Director to obtain such Clarifications as the Commission deems necessary to make its decision.

(2) If the Commission finds the recommendation of the Director and the supporting materials are sufficient for the Commission to take an action, the Commission as a whole or a sub-committee appointed by the Commission shall review the recommendation and supporting material, including holding any hearings the Commission deems necessary, and may approve, amend, or reject the Director's recommendation, with or without conditions, or take such other actions as the Commission deems in the best interest of the Port, including cancelling the solicitation process or procurement in the Solicitation Document. If the Commission acts to approve or reject Submissions for negotiations, the Commission's action(s) shall include findings stating its reasons for its action. If the Commission acts to cancel the solicitation process or procurement, the reasons for the cancellation shall be in writing and included in the solicitation file.

(3) Pursuant to ORS 381.310(6)(b), if the Commission's action is to select a single proposal for Direct Negotiations, the action must follow a public hearing in which the elements described in subsection 5.3 of this Rule are considered. The Commission shall select a Submission that provides the best overall public value. In determining the best overall public value, the Commission must find that the selected Submission, compared to other Submissions, is on balance and in overall terms likely to:

(a) Reduce the cost of constructing the Bridge Project, including reducing the technical and environmental risks of the Bridge Project;

(b) Accelerate the schedule for completing the Bridge Project; and

(c) Reduce the financial risk to the Port and the public, including the financial burden on the Port, states, and bridge users

(4) The Commission may authorize, at its option, Competitive Negotiations with multiple proposers as a means of selecting from among the Submissions selected for detailed evaluation. In making this selection, the Commission shall comply with the requirements in paragraph (3) of this subsection.

(5) Any action by the Commission to approve or disapprove one or more Submissions shall not take effect until the completion of the appeal process set forth in Section 6.3.

(6) Promptly following a Commission action to reject one or more Submissions, the Port will give, electronically or otherwise, written notice to all participating proposers of the Port's action.

6.3 Appeals of Port Action to Reject Submissions

(1) A Commission action in which one or more Submissions are rejected may be appealed by an adversely affected proposer in accordance with the provisions of this subsection 6.3. A properly filed appeal will be heard by the Commission or such other body or hearings officer as the Commission may appoint. An appeal that is not fully consistent with the requirements of this Rule shall not be heard.

(2) For purposes of this Rule, a protesting proposer is adversely affected by a Commission action only if: (i) the proposer has submitted a Responsive Submission, and (ii) the Submission was rejected for further consideration by the Commission's or Director's action.

(3) To appeal a Commission, an adversely affected proposer must submit to the Director a written protest stating the facts and providing explanations that demonstrate the Port:

(a) Committed a material violation of a provision in the Solicitation Document or this Rule in evaluating the Submission or taking the Commission action; or

(b) Otherwise abused its discretion in evaluating a proposal or proposals.

(4) The written protest must be received by the Port no later than 5:00PM (Pacific Time) on the fifth (5th) business day following the day on which the Port sent notice of the Commission or Director action under paragraphs (6) or (7) of subsection 5.2 or paragraph (5) of subsection 6.2. If the Port receives no written protest concerning the action under subsection 6.2 within the 5-business day period, then the Commission action automatically shall become effective on the sixth (6th) business day following the day on which the Port sent notice of the Commission or Director action under paragraph (6) of subsection 6.2.

(5) Unless otherwise extended by the Commission, the Commission shall hear the appeal within 14 days from the date on which it receives the appeal. In response to a protest that complies with the requirements of this rule, the Commission will issue a written decision that resolves the issues raised in the protest. In considering a timely protest, the Port may request further information from the protesting proposer and may undertake any further investigations the Commission finds beneficial. The Port will make its written decision available, by mail or by electronic means, to all proposers identified in the Port's notice.

7. NEGOTIATION AND APPROVAL OF AGREEMENTS

7.1 Negotiation Team

(1) Any Submissions approved by the Commission for negotiation of an Agreement shall be referred to a Negotiation Team nominated by the Director and appointed by the Commission. The Negotiation Team shall be of such size and composition as the Commission determines is in the best

interest of the Port, and may be comprised of such Port staff, including the Director, legal counsel, consultants, or other advisers as the Commission may determine.

(2) Under the direction of the Director, the Negotiating Team shall be responsible for Direct Negotiations with a proposer or Competitive Negotiations with proposers, as authorized by the Commission, and be subject to any terms or conditions set forth from time to time by the Commission regarding the negotiations.

7.2 Legal Counsel

(1) Prior to commencing the public-private procurement process, the Port shall engage legal counsel for the purpose of:

(a) Advising the Port on the legality of specific proposed partnerships and the legal sufficiency of any Agreements;

(b) Advising the Port on the legal procedures and practices that are related to implementing a Bridge Project in a Public-Private Partnership;

(c) Assisting the Port in negotiating agreements and preparing documents related to a Public-Private Partnership;

(d) Advising the Port on accounting, investment, and tax requirements that apply to a Bridge Project the Port undertakes in a Public-Private Partnership;

(e) Advising the Port concerning any relevant federal securities or other laws and related disclosure requirements; and

(f) Issuing legal opinions.

7.3 Negotiation and Approval of Agreements

(1) Subject to its statutory authorities and this Rule, the Port may enter into one or more Agreements with Private Entities for a Bridge Project or one or more Bridge Project Activities. To the extent permitted by law, the Port may conduct negotiations regarding Agreements without public disclosure of the content of the negotiations or draft agreements, provided the final Agreement shall be subject to public disclosure.

(2) Subject to Commission approval, the Negotiation Team may enter into:

(a) Direct Negotiations with one proposer for Term Sheet or an Agreement for a Bridge Project or Bridge Project Activity. The Commission may establish terms and conditions for the

negotiations, including setting an exclusivity period for such negotiations, and may enter an exclusive negotiation agreement with a selected proposer. The Commission in its discretion may, from time to time, extend such exclusivity period. If the negotiations are not subject to an exclusivity period, at any time during the negotiations, the Director may recommend and the Commission may approve to terminate the Direct Negotiations or commence Competitive Negotiations with one or more other proposers.

(b) Competitive Negotiations with multiple proposers for Term Sheet or an Agreement for a Bridge Project or a Bridge Project Activity. Such Competitive Negotiations may be sequential or concurrent, or a combination of sequential and concurrent. The Commission may set terms and conditions for the negotiations. During the course of Competitive Negotiations the Director may from time to time recommend and the Commission may approve the termination of one or more of the Competitive Negotiations, potentially resulting in Direct Negotiations with one proposer. If more than one Competitive Negotiation successfully yields a Term Sheet or an Agreement, the Director shall evaluate the relative merits of the Term Sheets or Agreements and recommend a preferred Term Sheet or Agreement for Commission approval.

(3) The object of Competitive Negotiations is to maximize the Port's ability to obtain best value. Accordingly, the Competitive Negotiations may include but shall not be limited to:

(A) Informing proposers of deficiencies in their Submissions;

(B) Notifying proposers of parts of their Submissions for which the Port would like Clarifications; and

(C) Otherwise allowing proposers to develop revised Submissions that will permit the Port to obtain the best proposal. The scope, manner, and extent of negotiations with any proposer are subject to the discretion of the Port. In conducting these negotiations, the Port shall not engage in conduct that unfairly favors any proposer over another; nor, unless otherwise subject to public disclosure, reveal to another proposer a proposer's Sensitive Business, Commercial, or Financial Information, or reveal to another proposer a proposer's price (or pricing information) or business terms.

(4) The Negotiation Team shall transmit any final Agreements to the Director for his or her review and recommendation to the Commission. As part of the Director's review, Legal Counsel shall review the legal sufficiency of the Agreement or Agreements and the legal history/organization of the Team. Following the Director's review and Legal Counsel's approval of the legal sufficiency of the Agreement or Agreements, the Director shall transmit his or her recommendation on the Agreement or Agreements to the Commission for its approval.

(5) Following receipt of the Director's recommendation regarding an Agreement or Agreements, the Commission shall hold such work sessions, public hearings, briefings, and discussions on

the Agreement or Agreements as the Commission finds beneficial to its deliberations. Following completion of its review of the Director's recommendation and the Agreement or Agreements, the Commission may approve, reject, or offer amendments to the recommended Agreement, terminate any further consideration of the Agreement, or terminate the solicitation process.

7.4 Term Sheet

(1) The Commission may require that the Negotiation Team first negotiate a Term Sheet with a proposer before undertaking substantial work on an Agreement.

(2) If a Term Sheet is required by the Commission, the Negotiation Team shall seek to negotiate a draft Term Sheet. If the Negotiation Team:

(a) Cannot reach agreement on a draft Term Sheet or make reasonable progress toward a Term Sheet within a reasonable time period, the Negotiation Team shall so notify the Director, and the Director shall forward the information to the Commission, which may then decide to continue negotiations or terminate negotiations with the proposer.

(b) Reaches agreement on a draft Term Sheet, the Negotiation Team shall forward the draft Term Sheet to the Director. The Director may (i) direct the Negotiation Team to undertake further work on the draft Term Sheet before recommending it to the Commission, or (ii) recommend to the Commission that the draft Term Sheet be approved, rejected, or amended or that the negotiation process be terminated.

(3) After receiving a recommendation from the Director, the Commission may hold such work sessions, public hearings, briefings, and discussions on the Term Sheet as the Commission finds beneficial to its deliberations. Following completion of its review of the Term Sheet the Commission may approve or reject a Term Sheet, direct the Director to continue negotiations of the Term Sheet based on certain terms or conditions approved by the Commission, or terminate the negotiations with the proposer. The Port shall make its action available to all proposers actively engaged in the proposal selection process at the time of the Commission's action.

7.5 Terms of the Agreement

(1) The Agreement or Agreements shall define the rights and obligations of the Port and the respective proposer with regard to the Bridge Project or Bridge Project Activity. At a minimum, pursuant to ORS 381.310, an Agreement for a Bridge Project with a Private Entity must include:

(a) At what point in the Bridge Project the public and private partners will assume responsibility for specific elements of the Bridge Project;

(b) How the public and private partners will share costs and risks of the Bridge Project;

(c) How the public and private partners will allocate financial responsibility for cost overruns;

(d) Incentives to perform and remedies for failure to perform an element of the Bridge Project;

(e) Accounting and auditing standards for evaluating work on the Bridge Project; and

(f) Whether the Bridge Project is consistent with the applicable state, regional, and local transportation plans and programs, and, if not, how and when the Bridge Project will become consistent with such plans and programs.

(g) The account or accounts into which proceeds from tolls, administrative fees and civil penalties from the bridge may be deposited. The account designated for the share of toll proceeds received by the Port or another unit of government must be a depository that meets the requirements set forth in ORS chapter 295. The account designated for the share of toll proceeds received by a Private Entity shall be an insured institution, as defined in ORS 706.008.

(h) That the public has dedicated and unrestricted use of the bridge for the duration of the bridge's functional life unless the Port, a state government or the federal government declares an emergency that forbids using the bridge; and

(i) That construction of the bridge project may not proceed until the Department of Transportation has issued, in accordance with ORS 374.305, any permits that are necessary to connect the bridge project to state highways.

(2) If an Agreement is for the sale or transfer of ownership of a Bridge or Bridge Project, the Agreement shall provide that:

(a) The sale or transfer is subject to an easement in favor of public use for the duration of the functional life of the Bridge or Bridge Project;

(b) Other than for a sale or transfer to a subsidiary or affiliate of the seller, the Port has a right of first refusal in any subsequent sale or transfer of the Bridge or Bridge Project under which the seller must offer the Port a price, terms and conditions that are the same as or better than the price, terms and conditions that the seller offers to any other prospective purchaser, which allows a reasonable period of time to comply with legal requirements applicable to the purchase and to arrange financing for the purchase if needed; and

(c) If the Port declines to purchase the bridge or bridge project under paragraph (b) of this subsection, the State has a right of first refusal that the state may exercise and under which the seller must offer the State a price, terms and conditions that are the same as or better than the price, terms and conditions that the seller offers to any other prospective purchaser and to the Port.

(3) If the Agreement is for a Bridge Project Activity that is a Public Works under ORS 279C.800, the Agreement shall require that:

(a) ORS 279C.380, 279C.385 and 279C.390 and 279C.800 to 279C.870 apply to the Bridge Project Activity; and

(b) If the Agreement is for constructing, reconstructing, performing a major renovation, or painting a Bridge Project, the Agreement must provide that those workers be paid in accordance with ORS 279C.540 and 279C.800 to 279C.870.

(4) In addition to the specified requirements under law and this Rule, an Agreement for a Bridge Project or a Bridge Project Activity may include such other terms as the Port finds beneficial and legally permitted.

(5) If pursuant to subsection 7.4 a Term Sheet is approved by the Commission, the Negotiation Team shall seek to negotiate an Agreement or Agreements with the proposer that substantially conforms to the provisions of the Term Sheet. Circumstances discovered during the course of negotiating the Agreement or Agreements may result in refinements or amendments to the provisions in the Term Sheet. The Director shall apprise the Commission of any material changes from the provisions of the Term Sheet, and, when deemed beneficial to the negotiations, may offer amendments to the Term Sheet for Commission approval. The Port shall make its action available to all proposers actively engaged in the proposal selection process at the time of the Commission's action.

7.6 Port Approval of Major Subcontractors

(1) All Major Subcontractors must be approved or disapproved in writing by the Port prior to performing work on the Bridge Project or Bridge Project Activity. Major Subcontractors included in a Submission may be approved as part of the evaluation and selection process. To obtain Port approval of a Major Subcontractor not included in the Submission, the proposer shall submit to the Port a written statement providing (a) all information regarding the Major Subcontractor required by this Rule and the Solicitation Documents (including any Addenda) and (b) a statement of the nature of the work to be performed by the proposed Major Subcontractor. No review, approval, deemed approval, objection, or failure to object by the Port under this subsection 7.6 shall be deemed to constitute an approval, determination, or waiver of professional or contracting licensing requirements of the Major Subcontractor, or compliance with any legal requirements pertaining to the Major Subcontractor. No

approval given by the Port under this subsection 7.6 will be deemed a representation or warranty by the Port of any kind and will not give rise to any Port liability for a Major Subcontractor's deficient performance.

(a) All subcontractors, whether a Major Subcontractor or not, must be legally eligible to perform or work on public contracts under federal and Oregon law and regulations. No subcontractor will be accepted who is on the list of contractors ineligible to receive public works contracts under ORS 279C.860.

(b) During performance of the contract, the proposer shall promptly notify the Port of the engagement or disengagement of any Major Subcontractor.

(2) Except as provided in paragraph (4)(a) of subsection 4.4, if the Director objects to any proposed Major Subcontractor, whether included in the initial proposal or added pursuant to paragraph (1) of this subsection, the Director, subject to Commission approval, may require the proposer to submit for Port review an acceptable substitute subcontractor before transmitting the Agreement to the Commission for final approval. The Director, in his or her reasonable discretion, shall establish and, from time to time amend, a deadline for providing the Port, for Port review, an acceptable substitute subcontractor. A proposer's failure to submit an acceptable substitute within the deadline will constitute sufficient grounds for the Port to refuse to execute an Agreement without incurring any liability for the refusal. If the substitute subcontractor is approved by the Port, the Port may revise the proposed Agreement to account for any differences necessitated by the substitution. The Commission shall approve any substitute subcontractors.

8. PUBLIC DISCLOSURE AND PUBLIC RECORDS REQUESTS

8.1 Designation of Sensitive Business, Commercial or Financial Information

(1) By making a Submission, the proposer acknowledges and accepts that, as a public entity, the Port must comply with and will comply with public disclosure requirements under ORS 192.311, et seq. Upon written request and within a reasonable time, the Director or his designee will provide records relating to Bridge Project or Bridge Project Activity proposals for public inspection in accordance with ORS Chapter 192, unless the records are otherwise exempt from public disclosure under Oregon law and this Rule.

(2) Except as otherwise limited in a Solicitation Document, a proposer may seek an exemption from public disclosure of Sensitive Business, Commercial, and Financial Information provided to the Port for the purpose of evaluating a proposal for a Bridge Project or Bridge Project Activity if such information is:

(a) Submitted in confidence, not customarily provided to or available to business competitors, and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, and the public interest would suffer by the disclosure;

(b) A trade secret under ORS 192.345 and ORS 646.461 through ORS 646.475;

(c) Of a personal nature that if disclosed would constitute an unreasonable invasion of privacy; or

(d) Otherwise exempt from public disclosure under Oregon law under a statute cited by the proposer in writing with specific reference to information claimed to be exempt.

(3) Although some information provided by a proposer to the Port for the purpose of evaluating a proposal may be exempt from public disclosure, the terms of a proposed or final Agreement between the Port and a Private Entity are subject to public disclosure.

(4) To seek an exemption from public disclosure of Sensitive Business, Commercial, or Financial Information, the proposer must comply with the following:

(a) Each individual page submitted with such information, whether included in the proposal or otherwise submitted in connection with the proposal, shall have a statement in bold and underline text on the top of the page providing the sections or paragraphs on the page considered to be Sensitive Business, Commercial, or Financial Information; and

(b) The proposal shall include a table showing the page number of each page in the proposal containing such information.

(5) The Port may at any time, and from time to time, make a written request to the proposer to justify designating information as Sensitive Business, Commercial, or Financial Information. The proposer shall have five (5) business days from the date of the Port's request to respond in writing to the request. Failure to respond in writing within the required time may be grounds for the Port to provide public disclosure of the information.

(6) Notwithstanding a proposer's designation of information as exempt from public inspection, including information constituting Sensitive Business, Commercial, or Financial Information, or a proposer's written justification for such designation, the Port, when responding to a public records request, will independently assess whether the information constitutes Sensitive Business, Commercial, or Financial Information or is otherwise exempt from public disclosure. In determining whether the information is exempt from disclosure, the Port will consider the evidence and objections to disclosure presented by the proposer, but as custodian of the records or information the Port must make the initial determination of the records that may be withheld from disclosure.

8.2 Public Records Requests

(1) Upon written request and within a reasonable time, the Director or his designee will provide records relating to Bridge Project or Bridge Project Activity proposals for public inspection in accordance with Oregon law and this Rule.

(2) The Port may charge fees to cover its reasonable and actual costs in responding to public records requests. Such costs may include but are not limited to costs associated with locating records, separating exempt from nonexempt records, monitoring the requester's inspection of requested records, copying records and delivering copies of requested records. The Port may charge fees calculated to reimburse it for its reasonable and actual costs as authorized by the relevant provisions of the Public Records Law.

(3) The Port will prepare an estimate of the costs of responding to any request for public records as required by ORS 192.324(4), and may prepare an estimate of costs in other circumstances. The Port may require payment of all or a portion of the estimated costs before acting on the request.

(4) Records related to a proposal for a Bridge Project or Bridge Project Activity submitted to the Port under this Rule are exempt from public disclosure until the Commission has selected one or more proposals for negotiation of an Agreement, unless the Director determines that an earlier time is in the Port's best interest.

(5) Notwithstanding paragraph (4) of this subsection, Sensitive Business, Commercial or Financial Information is exempt from disclosure unless and until the records or information contained in them is submitted to the Commission in connection with its review and approval of a proposal, Term Sheet, or final Agreement for a Bridge Project or Bridge Project Activity. To the extent required by law, the Port will permit public disclosure of any Sensitive Business, Commercial, or Financial Information submitted to the Commission in connection with its review and approval of a proposal, Term Sheet, or final Agreement for a Bridge Project or Bridge Project Activity. No less than five (5) business days prior to submitting any Sensitive Business, Commercial, or Financial Information to the Commission that the Port intends to publicly disclose, the Director shall notify the proposer of his or her intent to do so. No longer than five (5) business days following receipt of the Director's notice:

(a) The proposer may (i) send notice, as described in section 10, to the Port that it disagrees with the Port's determination that such Sensitive Business, Commercial, or Financial Information is required to be publicly disclosed under applicable law and state its reasons for disagreeing, and (ii) concurrently institute appropriate proceedings in its own behalf to protect the proposer's interests in preventing the disclosure or maintaining the confidentiality of the information. The proposer shall be exclusively responsible for all costs, expenses, and attorney fees incurred in taking any action to prevent the disclosure of information. In such a case, unless the Port concurs with the proposer's reasons for

retaining confidentiality or is otherwise directed the District Attorney or court, the Port shall permit public inspection of the subject Sensitive Business, Commercial, or Financial Information;

(b) The proposer may recommend an alternative to releasing the subject Sensitive Business, Commercial, or Financial Information. In such instance, the Director shall consider the proposer's alternative and decide which Sensitive Business, Commercial, or Financial Information to submit to the Commission based on his or her determination of the information required to satisfy the Commission's needs and applicable state laws; or

(c) To the extent permitted by law, the proposer may prevent the disclosure the Sensitive Business, Commercial, or Financial Information by withdrawing its proposal from consideration.

(6) If the Port is served with a public records request for production of a document that includes information marked by the proposer as Sensitive Business, Commercial, or Financial Information; and

(a) If the Port agrees that such information is Sensitive Business, Commercial, or Financial Information that is exempt from public disclosure, then the Port will redact the Sensitive Business, Commercial, or Financial Information from the document before the Port permits inspection of the records by the person making the request. By submitting a proposal, the proposer thereby agrees that if following a Port decision to redact information a District Attorney or a court later orders production of the redacted information, the proposer shall pay for all costs resulting from such appeal to the District Attorney or court, including any attorney fees imposed on the Port by its failure to provide the documents; or

(b) If the Port does not agree that such information is Sensitive Business, Commercial, or Financial Information exempt from public disclosure, the Port will inform the proposer of its decision to disclose the information, giving the proposer no fewer than five (5) business days in which to institute appropriate proceedings in its own behalf to protect the proposer's interests in preventing the disclosure or maintaining the confidentiality of the information. The proposer shall be exclusively responsible for all costs, expenses, and attorney fees incurred in taking any action to prevent the disclosure of information. In such a case, unless otherwise directed the District Attorney or court, the Port shall permit public inspection of the Sensitive Business, Commercial, or Financial Information.

9. TERMS AND CONDITIONS

(1) The Port reserves all rights available to it by law in administering these rules, including without limitation, the right in its sole discretion to:

(a) Reject any and all Submissions at any time.

- (b) Terminate evaluation of any and all Submissions at any time.
- (c) Suspend, discontinue and/or terminate agreement negotiations with any proposer at any time prior to the actual authorized execution of such agreement by all parties.
- (d) Negotiate with a proposer without being bound by any provision in its proposal.
- (e) Request or obtain Clarifications about any proposals or members of a Team.
- (f) Issue addenda to and/or cancel any Solicitation Document
- (g) In accordance with the applicable laws, revise, supplement, or withdraw all or any part of these Rules.
- (h) Decline to return any and all fees required to be paid by proposers hereunder.
- (i) Request revisions to proposals.

(2) Except as otherwise provided for in a Solicitation Document, by submitting a Submission, or any other information to the Port, the proposer thereby:

(a) Unless otherwise authorized in writing by the Port, waives any claim for any reimbursement of the costs and expenses of making the Submission, preparing Clarifications, or undertaking any other activity or incurring any other cost or expense related to the Port's procurement of a Bridge Project or Bridge Project Activity; and

(b) Agrees that neither the Commission, Director nor the Port, its employees, representatives, or agents are liable for, or obligated to reimburse the costs incurred by proposers in developing Submissions or in negotiating agreements. In its sole discretion, the Port may, in a Solicitation Document, provide for the possibility of payment for work product developed by a proposer in the course of developing a Submission.

(3) Any and all information the Port makes available to proposers shall be as a convenience to the proposer and without representation or warranty of any kind. If a proposer has a question regarding application of these rules, the proposer may submit the question in writing to the Director or his designee.

(4) The Port reserves the right, in the Port's discretion, to waive or to permit the correction of minor or technical violations of this Rule. The Port will not grant relief under this section in any case in which granting the relief would give the entity or person applying for relief a material competitive advantage that is not made available to its competitors.

(5) The Port reserves the right at any time in the Port's discretion to extend any deadline or time within which a proposer or the Port must take any action required or permitted this rule, and to do so if an affected proposer applies in writing for relief to the Port and demonstrates in that application that special circumstances warrant the grant of such relief. For the purpose of this subsection, special circumstances that warrant the grant of relief include practical exigencies that reasonably can be regarded as imposing a substantial, practical impediment to the proposer's ability to meet the deadline or achieve the correction of a violation of provisions of this Rule. The grant or denial of relief to a proposer under this subsection shall be determined by the Commission.

(6) By submitting a proposal, a proposer thereby waives and relinquishes any claim, right in or expectation that the proposer may assert against the Commission, the Port, or its members, officers, representatives and employees, that the proposer may occupy, use, profit from, or otherwise exercise any prerogative with respect to any route, right of way or public property identified in the proposal as being involved in or related to the proposed Bridge Project. A proposer may obtain no right to claim exclusivity or the right of use with respect to any such route, right-of-way, or public property by virtue of having submitted a proposal that proposes to use or otherwise involve or affect it.

(7) By submitting a proposal, a proposer thereby waives and relinquishes, as against the Commission, the Port, and their members, officers, representatives, and employees, any right, claim, copyright, proprietary interest or other right in any proposed route, right of way or alignment or configuration identified in the proposal as being involved in or related to the proposed Bridge Project.

(8) By submitting a Submission to the Port, the proposer thereby acknowledges that it has agreed to and accepts all terms and conditions under this Rule.

(9) Each proposer and Team member by submitting a Submission, including but not limited to information and forms satisfying Organizational Disclosure Requirements, thereby accepts all risk of adverse public notice, damages, financial loss, or criticism, that may result from any disclosure or publication of any material or information required or requested by the Port in connection with the proposer's Submission. In making a Submission, the proposer and each Team member expressly waives, on behalf of itself, its partners, joint venturers, officers, employees, representatives, and agents, any claim against the Director, the Commission, the Port, and their officers, representatives, agents, and employees for any damages that may arise therefrom.

(10) In addition to the Organizational Disclosure Requirements in a Solicitation Document, the Director or the Director's designee may impose, after the Submission, any other Organizational Disclosure Requirements the Director determines to be reasonably necessary to evaluate the Team associated with a proposal. All proposers, and Team members and Key Persons associated with a Submission, must complete and submit any required disclosure form prescribed by the Port within the deadlines set by the

Director or the Director's designee, including any documents required in the disclosure process. Failure to provide such disclosures or documents shall constitute sufficient grounds for rejection of the proposal.

(11) Any statement or representation made by the proposer, including the Team, in response to or in connection with a Solicitation Document determined to be false or fraudulent, a misrepresentation, or inaccurate because of an omission could result in a claim under the Oregon False Claim Act, ORS 180.750 to 180.785, and subject to liabilities or penalties associated with making a false claim under that Act.

(12) To the extent permitted by law, the Commission reserves the right to review in executive session any (i) information or record, (ii) recommendation of the Director or (iii) appeal of determination by the Director prepared or undertaken in connection with this Rule, including any information that contains or pertains to Sensitive Business, Commercial, or Financial Information. All final decisions and actions by the Commission shall be made in a public meeting.

10. NOTICES

(1) All notices required or permitted hereunder shall be in writing and shall be served on the Port and each proposer in the manner and at the addresses set forth hereafter. Any such notices shall either be:

(a) Sent by overnight delivery using a nationally recognized overnight courier, in which case notice shall be deemed delivered one (1) business day after deposit with such courier;

(b) Sent by U.S. mail, certified return receipt requested, in which case the notice shall be deemed delivered three (3) days from the postmark,

(c) Sent by email with confirmation of delivery in which case the notice shall be deemed delivered on the date the email is sent, except if sent after 5:00 p.m. or if sent on a day other than a regular business day receipt shall be at 8:00 a.m. on the next regular business day, or

(d) Sent by personal delivery, in which case notice shall be deemed delivered upon actual receipt.

(2) Notice of addenda to a Solicitation Document shall be sent by an electronic posting on the Port's website or by email to proposers that have registered its interest in the procurement, without confirmation of delivery, in which case the notice shall be deemed delivered on the date the posting occurred or the date the email is sent, except if sent after 5:00 p.m. or if sent on a day other than a regular business day receipt shall be at 8:00 a.m. on the next regular business day.

(3) The Port's or a proposer's address may be changed by written notice to the other party, or the Port may change its address by publishing a revised address on the Port's website, provided, however, that no notice of a change of a proposer's address shall be effective until actually received by the Port. Unless changed:

(a) Mail and courier notices to the Port shall be addressed to: Executive Director, Port of Hood River, 1000 E. Port Marina Way, Hood River, OR 97031. Mail and courier notices to a proposer shall be addressed to the physical or post office address listed by the proposer in a proposal, or in a letter sent to the Port which specifically states the address is to use when the Port sends a notice to the proposer. Unless changed by the Port, the Port's email address for notices shall be mmcelwee@portofhoodriver.com.

(b) A proposer's email address for notices sent by the Port shall be the email address the proposer provides to the Port as an email contact address, or if none is specified the proposer's email address listed in correspondence to the Port, or if none is specified a proposer's email address publicly available to receive business emails.