

PORT OF BROOKINGS HARBOR
Board of Commissioners
Special Meeting Agenda
Port Office
16330 Lower Harbor Rd
Brookings OR 97415

Wednesday, December 13, 2017 • 6:00 pm

Agenda

- 1. Call to Order and Roll Call**
- 2. Approval of Agenda**
- 3. Agenda Related Public Comments ***
- 4. Executive Session – pursuant to ORS 192.660(2)(e)(f)(h)**
 - a. Claim to Prescriptive Easement on Righetti/Port Boundary
 - b. Dave Hoover Construction
 - c. Sale of Port Real Property
- 5. Old Business**
 - a. Port Counsel Procurement Process
- 6. New Business**
 - a. Resolution No. 483, POBH Authorizing the Sale of Port Real Property
 - b. Procurement Request for Zola's Sewer Upgrade
- 7. Non-Agenda Related Public Comments ***
- 8. Adjournment**

* Limited to a maximum of three minutes per person. A “Public Comment Request”, located near the entrance, must be completed and turned into the Chairman prior to the beginning of the meeting.

FULL MEETING PACKET AVAILABLE AT www.portofbrookingsharbor.com

OLD BUSINESS AGENDA ITEM

DATE: *December 13, 2017*
RE: *General Port Counsel Procurement Process*
TO: *Port of Brookings Harbor, Board of Commissioners*
ISSUED BY: *Gary Dehlinger, Port Manager*

OVERVIEW

- Board approved written statement of work for Port Counsel during the November 21, 2017 meeting.
- Board instructed Port Manager to proceed with the procurement process.
- Port Manager requested review of Port procurement policies before proceeding with "Request For Proposals" to ensure the procurement policy is following current public contracting laws.
- Staff reviewed Resolution No 368 and 370 and has determined the Port does not have the proper public contracting policy in place to select attorney proposals based on criteria other than lowest bid.
- SDAO provided the draft Public Contracting Personal Services Policy that was used to develop the proposed draft to the Board.
- Staff has prepared a draft Resolution 484 and Public Contracting Policy to achieve the Board's request to select attorney proposals based on multiple criteria and not lowest bid.
- Estimated expenses for Port Counsel in one calendar year is \$20,000.

DOCUMENTS

- Draft Resolution No. 484 Public Contracting Personal Services..... Page 1
- General Port Counsel Statement..... Page 7
- OAR 137-047-0255..... Page 9
- OAR 137-047-0260..... Page 12
- OAR 137-048-0200..... Page 15
- OAR 137-048-0210..... Page 17
- OAR 137-048-0220..... Page 20
- OAR 137-048-0120..... Page 26
- ORS 279A..... Page 28
- ORS 279B..... Page 46
- ORS 279C..... Page 64
- Resolution No. 368 Procedures for Public Contracting..... Page 95
- Payments to Stebbins & Coffey since 2006..... Page 105

COMMISSIONERS ACTION

- Board review and approval of Resolution No. 484 Public Contracting Personal Services.

**CURRY COUNTY, OREGON
THE PORT OF BROOKINGS HARBOR**

RESOLUTION NO. 484

**A RESOLUTION OF THE BOARD OF COMMISSIONERS
ADOPTING PUBLIC CONTRACTING RULES AND PRESCRIBING
RULES AND PROCEDURES FOR PUBLIC CONTRACTING**

WHEREAS, the Port of Brookings Harbor is an Oregon special district which is subject to Oregon Public Contracting Law; and

WHEREAS, in 2003 the Oregon Legislature substantially revised the Oregon Public Contracting Code, and most of these revisions took effect March 1, 2005; and

WHEREAS, on March 1, 2005, the Port of Brookings Harbor's existing public contracting rules became void, and the Port is required to adopt new public contracting rules consistent with the revised Oregon Public Contracting Code; and

WHEREAS, ORS 279A.065(5) provides that a local contracting agency may adopt its own rules of procedure for public contracts that:

- (A) Specifically state that the model rules adopted by the Attorney General do not apply to the contracting agency; and
- (B) Prescribe the rules of procedure that the contracting agency will use for public contracts, which may include portions of the model rules adopted by the Attorney General.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The Port of Brookings Harbor adopts the rules and procedure as described in Exhibit A (attached).
2. The rules and procedure described in Exhibit A shall supercede only Section 12 of Resolution 368.

PASSED AND ADOPTED on this 13th day of December 2017.

Angi Christian, President

ATTEST: _____
Commissioner

EXHIBIT A

**RULES AND PROCEDURE FOR PUBLIC CONTRACTING INCLUDING
PERSONAL SERVICES**

For non-state agencies (such as special districts), "personal services" are whatever the governing body decides they will be, by rule or legislative act. [See ORS 279A.055.] ORS 279A.070 permits a local contracting agency to adopt rules governing personal services contracts, and requires them to create procedures for screening and selection. Typical examples of personal services contracts are those with accountants, attorneys, consultants, physicians, artists, architects, engineers, land surveying and related services (procured under ORS 279C.105 or 279C.110).

Note: The Attorney General's Public Contracting Code and Model Rules for personal services contracts expressly do not apply to local contracting agencies. Thus, there are no "default" rules for personal services contracts. A district that wants to enter into personal services contracts without competitively bidding those contracts, must adopt rules for doing so.

Purpose

The purpose of this policy is to establish guidelines for authorization regarding personal services contracts, governed by State statutes, primarily ORS 279A and 279C, as modified and adopted by the Board of Commissioners.

Policy

The Port of Brookings Harbor, as a special district, is subject to the Model Rules adopted by the Attorney General under ORS 279A, 279B, and 279C, which includes Division 46, 47, 48 and 49 in the Attorney General's Public Model Rules for contracting activities. Division 46 and 47 are applicable to Personal Services contracts, while Division 48 rules are limited to professional services to be performed by a licensed Architect or a Registered Professional Engineer (A&E). The following policy governs all personal services contracts; subset apply only to A&E Contracts, and are identified as such.

Definition

Personal services shall be defined to include those services that require specialized technical, creative, professional, or communication skills or talents, unique and specialized knowledge, or the exercise of discretionary judgment, and for which the quality of the service depends on attributes that are unique to the service provider. Such services shall include, but are not limited to: architects, engineers, surveyors, attorneys, accountants, auditors, computer programmers, artists, designers, performers, and consultants. The Port Manager or their designee shall have the authority to determine whether a particular service is a "personal service" under this definition.

Personal service contracts do not require a competitive bidding process. When screening or selecting a personal service contractor, the District will consider qualifications, performance history, expertise, knowledge and creativity, and the ability to exercise sound judgment. The selection is based primarily on these factors rather than price.

Selection Process for Personal Service Contracts other than A&E

a. Informal Selection Process (Under \$100,000)

When the estimated cost of Consultant Services is not expected to exceed \$100,000 annually, proposals may be awarded that are solicited informally, either orally or in writing. If it is practicable, proposals shall be solicited from a sufficient number of qualified prospective proposes to ensure that no fewer than three qualified proposes submit proposals. If fewer than three qualified proposes submit proposals, the efforts made to solicit proposals shall be documented in the District's files. The selection may be based on criteria including, but not limited to, each proposer's:

- i. Particular capability to perform the services required;
- ii. Experienced staff available to perform the services required, including each proposer's recent, current and projected workloads;
- iii. Performance history;
- iv. Approach and philosophy used in providing services;
- v. Fees or costs; and
- vi. Geographic proximity to the project or the area where the services are to be performed.

Price may be considered, but need not be the determining factor. Proposals may also be solicited using a written request for proposal, at the District's discretion.

b. Formal Selecting Process (Over \$100,000)

The formal procedure shall be used whenever the estimated cost of Consultant exceeds \$100,000. Consultation Services may be obtained using the formal selection procedure set forth in OAR 137-047-0255 or 137-047-0260.

Architect, Engineer, and related Services are a special class of Personal Services Contracts, which are defined by ORS 279C.100 and are subject to special provisions of these rules.

Selection Process for A&E Consultants

a. Direct Appointment Process (Under \$50,000)

Consulting Services may be entered into a contract directly, when the estimated cost does not exceed \$50,000, as set forth in OAR 137-048-0200.

b. Informal Selection Process (Under \$150,000)

When the estimated cost of Consultant Services is not expected to exceed \$150,000, the informal selection procedure set forth in OAR 137-048-0210, shall be used.

c. Formal Selecting Process (Over \$150,000)

The formal procedure shall be used whenever the estimated cost of Consultant Services exceeds \$150,000, using the formal selection procedure set forth in OAR 137-048-0220.

Procedures

The following procedures must be used for solicitation of A&E contracts:

Competitive Procurement

a. Direct Appointment Process

A&E Consultation Services may be appointed directly without completing the competitive procurement process if the contract is under \$50,000. The appointment can include, but not be limited to: District's current list of consultants (OAR 137-048-0120); or another public contracting agency's current list of consultants, pursuant to an interagency or intergovernmental agreement.

b. Informal Selection Process

When the estimated cost is equal to or less than \$150,000 the following informal selection process should be used:

i. Written Solicitation - Solicitations inviting written proposals shall be sent to a minimum of five (5) prospective A&E Consultants to include at least:

- (1) Description of project
- (2) Anticipated contract performance schedule
- (3) Conditions or limitations
- (4) Date and time proposals are due
- (5) Criteria upon qualified consultant will be selected
- (6) Statement that proposer is responding at the own expense
- (7) Statement directing proposers to protest procedures set forth in Division 48 of these rules.

ii. Review Proposals - All proposals shall be reviewed, and the three most qualified consultants selected and ranked.

iii. Competitive Informal Selection - The informal selection procedure shall be competitive to the maximum extent practicable and the selection and

ranking based on criteria which include, but not limited to consultant's capacity to perform; number of experienced staff; performance history; project approach and design philosophy; compensation information; geographic proximity to the project.

- iv. Negotiate Scope of Services- The District shall discuss and refine the scope of services for the project and shall negotiate conditions, including but not limited to a compensation and performance schedule with the highest ranked consultant.

Note: If the scope of a project is revised during negotiations and the estimated cost of the consultant's services exceeds \$150,000, then the informal process will be terminated, and the services of a qualified consultant shall be solicited using the formal selection process below.

c. Formal Selection Process

This formal procedure shall be used whenever the estimated cost of A&E consultant services exceeds \$150,000.

- i. Advertising - The Board of Directors must authorize the advertisement to bid for goods and services when services exceed \$150,000. All rules related to advertising must be followed.
 - (1) Request for Qualifications (RFQ) - Used to develop a short list of at least three qualified Consultants. Must be followed by a Request for Proposal.
 - (2) Request for Proposal (RFP) - Whether preceded by an RFQ, the RFP shall describe or contain project description, evaluation process, whether interviews are anticipated, closing date and time, reservation to reject any or all proposals, contract requirements, and a sample contract.
 - (a) Procuring Departments shall create a Request for Proposals (RFP) to include at a minimum:
 - (i) Background information and project description;
 - (ii) Evaluation Criteria for Selection;
 - (iii) Conditions or Limitations;
 - (iv) Whether interviews are possible;
 - (v) Proposal Due Date;
 - (vi) Reservation of the right to: seek clarification, negotiate, and reject any and all proposals;
 - (vii) Statement that Proposers responding at own expense;
 - (viii) Protest Procedures
 - (ix) Special Contract Requirements;

- (x) Statement of whether a pre-Proposal meeting will be held;
 - (xii) Sample Contract
- (b) District shall advertise each RFP at least once in the publication of general circulation, such as the Daily Journal of Commerce, no fewer than fourteen (14) calendar days before the closing date of the RFP.
- ii. Pre-proposal meeting - May be held for all interested consultants to discuss the proposed project and the required consultant services.
 - iii. RFP Analysis - Consultant selection committee shall review, score and rank all responsive proposals according to the criteria included in the RFP.
 - iv. Contract Negotiations - Contract negotiations with the highest ranked consultant shall be directed toward obtaining written agreement.
 - v. Contract Award - Only the Board of Directors has the authority to award a contract for services.
- d. Solicitation Requirements
- All formal solicitations require an RFP or RFQ, and must be in writing and advertised at least once in the publication of general circulation, such as the Daily Journal of Commerce, no fewer than fourteen (14) calendar days before the closing date of the RFP or RFQ. Upon completion of contractor selection and competitive procurement procedures, refer to Purchasing Authority Policy.



Port of Brookings Harbor

A Special District of the State of Oregon

GENERAL PORT COUNSEL

The Port of Brookings Harbor, a Special District of the State of Oregon, is recruiting for general port counsel. We invite skilled attorneys with local government experience to apply for this position.

ABOUT THIS POSITION:

On a routine basis you will report directly to the Port Manager, but may interact directly with Commissioners or employees when advisable in the Port's interest. You will be responsible for a wide range of legal matters, procurements, resolution of legal claims against the Port or claims made by the Port on others, public records, meetings & contracts, preparation of ordinances & resolutions, employment, leases, boundary issues, board operation and ethics.

RESPONSIBILITIES:

- Advise and counsel the Port Manager and/or the Board of Commissioners regarding a wide variety of issues relating to local government;
- Prompt communication via telephone and email;
- Draft, review, negotiate and approve contracts, especially related to construction, professional services, property transactions and leases.
- Work with our insurer on worker's compensation and third-party claims;
- Conduct research on a wide variety of issues and draft memos summarizing the research; and
- Lead responses to audits and investigations.
- Attend commissioner meetings as requested.

QUALIFICATIONS:

- Member of the Oregon State bar;
- 5+ years of legal experience with a primary emphasis on local government;
- Must be familiar with employment law, SDAO, OSHA and litigation management;
- Demonstrated sound business and legal judgement;
- Excellent organizational skills and ability to manage multiple projects simultaneously;
- Excellent writing and legal research skills
- Excellent references

Many issues may be handled via phone or email correspondence, however occasional travel may be required if the Port Manager or Board of Commissioners request that you be present for a meeting.

HOW TO APPLY:

If you are interested in representing the Port of Brookings Harbor as legal counsel, please send a cover letter, C.V., rate proposal, references and a proposed contract to:

Port of Brookings Harbor
P.O. Box 848
Brookings, OR 97415
info@portofbrookingsharbor.com

ABOUT THE PORT OF BROOKINGS HARBOR:

The Port District of Brookings Harbor covers an area of 400 square miles reaching from the mouth of the Chetco River to the Oregon-California border, north to the drainage of the Pistol River, and east to the Curry-Josephine County line. The Port District is governed by a five-member commission elected at-large from the district, which has a population of approximately 16,000 people. The five-member Port Commission is responsible for all the activities of the Port and the management of public assets. Commissioners are elected at large from the district residents and serve without compensation for a term of four years. There are four official positions within the Commission: President, Vice President, Treasurer and Secretary. These positions are filled by election, within the Commission.

The Mission of the Port of Brookings Harbor is to preserve and enhance its economic activities; to facilitate, through the creation of local, state and federal partnerships, the full economic potential of the Port of Brookings Harbor and Curry County; and to develop a course of action, that over time, ensures the self-sufficiency of the Port District. The Commissioners, Management and Staff of the Port of Brookings Harbor recognize their primary responsibility is to optimally manage the publicly owned assets of the Port for serving the public interest by encouraging economic growth of the Port District as well as Curry County.

- The Port of Brookings Harbor District covers over 400 square-miles.
- The assessed valuation of the Port District is \$968,000,000.
- The Port of Brookings Harbor represents over 75 percent of the population base for Curry County.
- The Port of Brookings is the busiest recreational Port on the Oregon Coast with more than 31,000 bar crossings and more than 95,000 recreational users annually.
- The Port has more than 5,000 commercial fishing vessels that visit the Port annually.
- The Port moves more than 20 million pounds of bait, fuel, ice and fish products across its docks annually.
- Because of its location and geographical configuration, the Port of Brookings Harbor is listed as a "Harbor of Refuge" by the U.S. Coast Guard.
- The Chetco River, on which the Port is located, is the safest bar on the Oregon Coast with more than 280 passable days per year.
- The Port of Brookings Harbor is classified as a Shallow-draft harbor. Shallow-draft harbors are defined as those with 14 feet or less depth.
- Shallow-draft harbors are dependent upon commercial and recreational fishing to maintain port infrastructure.

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Department of Justice

Chapter 137

Division 47

MODEL RULES PUBLIC PROCUREMENTS FOR GOODS OR SERVICES

137-047-0255

Competitive Sealed Bidding

(1) Generally, A Contracting Agency may procure Goods or Services by competitive sealed bidding as set forth in ORS 279B.055. An Invitation to Bid is used to initiate a competitive sealed bidding solicitation and shall contain the information required by 279B.055(2) and by section 2 of this rule. The Contracting Agency shall provide public notice of the competitive sealed bidding solicitation as set forth in OAR 137-047-0300.

(2) Invitation to Bid. In addition to the provisions required by ORS 279B.055(2), the Invitation to Bid shall include the following:

(a) General Information.

(A) Notice of any pre-Offer conference as follows:

(i) The time, date and location of any pre-Offer conference;

(ii) Whether attendance at the conference will be mandatory or voluntary; and

(iii) A provision that provides that statements made by the Contracting Agency's representatives at the conference are not binding upon the Contracting Agency unless confirmed by Written Addendum.

(B) The form and instructions for submission of Bids and any other special information, e.g., whether Bids may be submitted by electronic means (See OAR 137-047-0330 for required provisions of electronic Bids);

(C) The time, date and place of Opening;

(D) The office where the Solicitation Document may be reviewed;

(E) A statement that each Bidder must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120 (1);

(F) Bidder's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110 (4). (See OAR 137-046-0210(2)); and

(G) How the Contracting Agency will notify Bidders of Addenda and how the Contracting Agency will make Addenda available (See OAR 137-047-0430)

(b) Contracting Agency Need to Purchase. The character of the Goods or Services the Contracting Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by Oregon Laws 2009, chapter 880, section 5, the Contracting Agency's description of its need to purchase must:

(A) Identify the scope of the work to be performed under the resulting Contract, if the Contracting Agency awards one;

(B) Outline the anticipated duties of the Contractor under any resulting Contract;

(C) Establish the expectations for the Contractor's performance of any resulting Contract; and

(D) Unless the Contracting Agency for Good Cause specifies otherwise, the scope of work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the Contracting Agency is purchasing.

(c) Bidding and Evaluation Process.

(A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;

(B) The Contracting Agency shall set forth objective evaluation criteria in the Solicitation Document in accordance with the requirements of ORS 279B.055(6)(a). Evaluation criteria need not be precise predictors of actual future costs, but to the extent possible, the evaluation factors shall be reasonable estimates of actual future costs based on information the Contracting Agency has available concerning future use; and

(C) If the Contracting Agency intends to Award Contracts to more than one Bidder pursuant to OAR 137-047-0600(4) (c), the Contracting Agency shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award.

(d) Applicable preferences pursuant to ORS 279B.055(6)(b).

(e) For Contracting Agencies subject to ORS 305.385, Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385.

(f) All contractual terms and conditions in the form of Contract provisions the Contracting Agency determines are applicable to the Procurement. As required by Oregon Laws 2009, chapter 880, section 5, the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:

(A) The Contracting Agency's reduction or withholding of payment under the Contract;

(B) The Contracting Agency's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the statement of work or to meet the performance standards established by the resulting Contract; and

(C) The Contracting Agency's rights, which the Contracting Agency may assert individually or in combination, to declare a default of the resulting Contract, to terminate the resulting Contract, and to seek damages and other relief available under the resulting Contract or applicable law.

(3) Good Cause. For the purposes of this rule, "Good Cause" means a reasonable explanation for not requiring Contractor to meet the highest standards, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of the Contracting Agency. The Contracting Agency shall document in the Procurement file the basis for the determination of Good Cause for specification otherwise. A Contracting Agency will have Good Cause to specify otherwise under the following circumstances:

(a) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;

(b) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the Goods or Services will be compatible with or will operate efficiently or effectively with components, equipment, parts, Services or information technology including hardware, Services or software with which the Goods or Services will be used, integrated, or coordinated;

(c) The circumstances of the industry or business that provides the Goods or Services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, scientific developments, that a reliable highest prevalent standard does not exist or has not been developed;

(d) Any other circumstances in which Contracting Agency's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs the Contracting Agency's practical need for the highest prevalent standard in the applicable or closest industry or business that supplies the Goods or Services to be delivered under the resulting Contract

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279B.055

History:

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

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Department of Justice

Chapter 137

Division 47

MODEL RULES PUBLIC PROCUREMENTS FOR GOODS OR SERVICES

137-047-0260

Competitive Sealed Proposals

(1) Generally, A Contracting Agency may procure Goods or Services by competitive sealed Proposals as set forth in ORS 279B.060. A Contracting Agency shall use a Request for Proposal to initiate a competitive sealed Proposal solicitation. The Request for Proposal must contain the information required by 279B.060(2) and by section (2) of this rule. The Contracting Agency shall provide public notice of the Request for Proposal as set forth in OAR 137-047-0300.

(2) Request for Proposal. In addition to the provisions required by ORS 279B.060(2), the Request for Proposal must include the following:

(a) General Information.

(A) Notice of any pre- Offer conference as follows:

(i) The time, date and location of any pre- Offer conference;

(ii) Whether attendance at the conference will be mandatory or voluntary; and

(iii) A provision that provides that statements made by the Contracting Agency's representatives at the conference are not binding on the Contracting Agency unless confirmed by Written Addendum.

(B) The form and instructions for submission of Proposals and any other special information, e.g., whether Proposals may be submitted by electronic means. (See OAR 137-047-0330 for required provisions of electronic Proposals);

(C) The time, date and place of Opening;

(D) The office where the Solicitation Document may be reviewed;

(E) Proposer's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-046-0210(2)); and

(F) How the Contracting Agency will notify Proposers of Addenda and how the Contracting Agency will make Addenda available. (See OAR 137-047-0430).

(b) Contracting Agency Need to Purchase. The character of the Goods or Services the Contracting Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.060(2)(c), the Contracting Agency's description of its need to purchase must:

(A) Identify the scope of the work to be performed under the resulting Contract, if the Contracting Agency awards one;

(B) Outline the anticipated duties of the Contractor under any resulting Contract;

(C) Establish the expectations for the Contractor's performance of any resulting Contract; and

(D) Unless the Contractor under any resulting Contract will provide architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services that are subject to ORS 279C.100 to 279C.125, or the Contracting Agency for Good Cause specifies otherwise, the scope of work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the Contracting Agency is purchasing.

(c) Proposal and Evaluation Process.

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- (A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;
- (B) The Contracting Agency shall set forth selection criteria in the Solicitation Document in accordance with the requirements of ORS 279B.060(3)(e). Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, the criteria shall:
- (i) Afford the Contracting Agency the ability to compare the Proposals and Proposers, applying the same standards of comparison to all Proposers;
 - (ii) Rationally reflect Proposers' abilities to perform the resulting Contract in compliance with the Contract's requirements; and
 - (iii) Permit the Contracting Agency to determine the relative pricing offered by the Proposers, and to reasonably estimate the costs to the Contracting Agency of entering into a Contract based on each Proposal, considering information available to the Contracting Agency and subject to the understanding that the actual Contract costs may vary as a result of the Statement of Work ultimately negotiated or the quantity of Goods or Services for which the Contracting Agency contracts.
- (C) If the Contracting Agency's solicitation process calls for the Contracting Agency to establish a Competitive Range, the Contracting Agency shall generally describe, in the Solicitation Document, the criteria or parameters the Contracting Agency will apply to determine the Competitive Range. The Contracting Agency, however, subsequently may determine or adjust the number of Proposers in the Competitive Range in accordance with OAR 137-047-0261(6).
- (d) Applicable Preferences, including those described in ORS 279A.120, 279A.125(2) and 282.210.
- (e) For Contracting Agencies subject to ORS 305.385, the Proposers' certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
- (f) All contractual terms and conditions the Contracting Agency determines are applicable to the Procurement. The Contracting Agency's determination of contractual terms and conditions that are applicable to the Procurement may take into consideration, as authorized by ORS 279B.060(3), those contractual terms and conditions the Contracting Agency will not include in the Request for Proposal because the Contracting Agency either will reserve them for negotiation, or will request Proposers to offer or suggest those terms or conditions. (See OAR 137-047-0260(3)).
- (g) As required by ORS 279B.060(2)(h), the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:
- (A) The Contracting Agency's reduction or withholding of payment under the Contract;
 - (B) The Contracting Agency's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the scope of work or to meet the performance standards established by the resulting Contract; and
 - (C) The Contracting Agency's rights, which the Contracting Agency may assert individually or in combination, to declare a default of the resulting Contract, to terminate the resulting Contract, and to seek damages and other relief available under the resulting Contract or applicable law.
- (3) The Contracting Agency may include the applicable contractual terms and conditions in the form of Contract provisions, or legal concepts to be included in the resulting Contract. Further, the Contracting Agency may specify that it will include or use Proposer's terms and conditions that have been pre-negotiated under OAR 137-047-0550(3), but the Contracting Agency may only include or use a Proposer's pre-negotiated terms and conditions in the resulting Contract to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. The Contracting Agency shall not agree to any Proposer's terms and conditions that were expressly rejected in a solicitation protest under OAR 137-047-0420.
- (4) For multiple Award Contracts, the Contracting Agency may enter into Contracts with different terms and conditions with each Contractor to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. The Contracting Agency shall not agree to any Proposer's terms and conditions that were expressly rejected in a solicitation protest under OAR 137-047-0420.
- (5) Good Cause. For the purposes of this rule, "Good Cause" means a reasonable explanation for not requiring Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services under the Contract, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of the Contracting Agency. The Contracting Agency shall document in the Procurement file the basis for the determination of Good Cause for specifying otherwise. A Contracting Agency will have Good Cause to specify otherwise when the Contracting Agency determines:
- (a) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;

(b) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the Goods or Services will be compatible with, or will operate efficiently or effectively with, associated information technology, hardware, software, components, equipment, parts, or on-going Services with which the Goods or Services will be used, integrated, or coordinated;

(c) The circumstances of the industry or business that provides the Goods or Services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, or scientific developments, that a reliable highest prevalent standard does not exist or has not been developed;

(d) That other circumstances exist in which the Contracting Agency's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs the Contracting Agency's practical need for the highest standard prevalent in the applicable or closest industry or business that supplies the Goods or Services to be delivered under the resulting Contract.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279B.060, OL 2015 & ch 325 (HB 2716)

History:

DOJ 18-2015, f. 12-31-15, cert. ef. 1-1-16

DOJ 2-2015, f. & cert. ef. 2-3-15

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DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

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Chapter 137

Division 48

MODEL RULES CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING AND LAND SURVEYING SERVICES AND RELATED SERVICES CONTRACTS

137-048-0200

Direct Appointment Procedure

(1) Contracting Agencies may enter into a Contract directly with a Consultant without following the selection procedures set forth elsewhere in these rules if:

(a) Emergency. Contracting Agency finds that an Emergency exists; or

(b) Small Estimated Fee. The Estimated Fee to be paid under the Contract does not exceed \$100,000; or

(c) Continuation of Project With Intermediate Estimated Fee. For Contracting Agencies where a Project is being continued, as more particularly described below, and where the Estimated Fee will not exceed \$250,000, the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be performed under the Contract must meet the following requirements:

(A) The services consist of or are related to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that have been substantially described, planned or otherwise previously studied in an earlier Contract with the same Consultant and are rendered for the same Project as the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services rendered under the earlier Contract;

(B) The Estimated Fee to be made under the Contract does not exceed \$250,000; and

(C) The Contracting Agency used either the formal selection procedure under OAR 137-048-0220 (Formal Selection Procedure) or the formal selection procedure applicable to selection of the Consultant at the time of original selection to select the Consultant for the earlier Contract; or

(d) Continuation of Project With Extensive Estimated Fee. For Contracting Agencies where a Project is being continued, as more particularly described below, and where the Estimated Fee is expected to exceed \$250,000, the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be performed under the Contract must meet the following requirements:

(A) The services consist of or are related to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that have been substantially described, planned or otherwise previously studied under an earlier Contract with the same Consultant and are rendered for the same Project as the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services rendered under the earlier Contract;

(B) The Contracting Agency used either the formal selection procedure under OAR 137-048-0220 (Formal Selection Procedure) or the formal selection procedure applicable to selection of the Consultant at the time of original selection to select the Consultant for the earlier Contract; and

(C) The Contracting Agency makes written findings that entering into a Contract with the Consultant, whether in the form of an amendment to an existing Contract or a separate Contract for the additional scope of services, will:

(i) Promote efficient use of public funds and resources and result in substantial cost savings to the Contracting Agency; and,

(ii) Protect the integrity of the Public Contracting process and the competitive nature of the Procurement by not encouraging favoritism or substantially diminishing competition in the award of the Contract

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(2) Contracting Agencies may select a Consultant for a Contract under this rule from the following sources:

(a) The Contracting Agency's list of Consultants that is created under OAR 137-048-0120 (List of Interested Consultants; Performance Record);

(b) Another Contracting Agency's list of Consultants that the Contracting Agency has created under OAR 137-048-0120 (List of Interested Consultants; Performance Record), with written consent of that Contracting Agency; or

(c) All Consultants offering the required Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that the Contracting Agency reasonably can identify under the circumstances.

(3) The Contracting Agency shall direct negotiations with a Consultant selected under this rule toward obtaining written agreement on:

(a) The Consultant's performance obligations and performance schedule;

(b) Payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the Contracting Agency as determined solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services; and

(c) Any other provisions the Contracting Agency believes to be in the Contracting Agency's best interest to negotiate.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458

Statutes/Other Implemented: ORS 279C.110 & 279C.115, OL 2011 & ch 458

History:

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

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Chapter 137

Division 48

MODEL RULES CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING AND LAND SURVEYING SERVICES AND RELATED SERVICES CONTRACTS

137-048-0210

Informal Selection Procedure

(1) Contracting Agencies may use the informal selection procedure described in this rule to obtain a Contract if the Estimated Fee is expected not to exceed \$250,000.

(2) Contracting Agencies using the informal selection procedure on the basis of qualifications alone or, for Related Services, on the basis of price and qualifications shall:

(a) Create a request for Proposals ("RFP") that includes at a minimum the following:

(A) A description of the Project for which a Consultant's Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services are needed and a description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that will be required under the resulting Contract;

(B) The anticipated Contract performance schedule;

(C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including construction services;

(D) The date and time Proposals are due and other directions for submitting Proposals;

(E) Criteria upon which the most qualified Consultant will be selected. Selection criteria may include, but are not limited to, the following:

(i) The amount and type of resources and number of experienced staff the Consultant has committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP within the applicable time limits, including the current and projected workloads of such staff and the proportion of time such staff would have available for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services;

(ii) Proposed management techniques for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;

(iii) A Consultant's capability, experience and past performance history and record in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, including but not limited to quality of work, ability to meet schedules, cost control methods and Contract administration practices;

(iv) A Consultant's approach to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP and design philosophy, if applicable;

(v) A Consultant's geographic proximity to and familiarity with the physical location of the Project;

(vi) Volume of work, if any, previously awarded to a Consultant, with the objective of effecting equitable distribution of Contracts among qualified Consultants, provided such distribution does not violate the principle of selecting the most qualified Consultant for the type of professional services required;

(vii) A Consultant's ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;

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(viii) If the Contracting Agency is selecting a Consultant to provide Related Services, pricing policies and pricing proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead.

(F) A Statement that Proposers responding to the RFP do so solely at their expense, and Contracting Agency is not responsible for any Proposer expenses associated with the RFP;

(G) A statement directing Proposers to the protest procedures set forth in these Division 48 rules; and

(H) A sample form of the Contract.

(b) Provide an RFP to a minimum of five (5) prospective Consultants. If fewer than five (5) prospective Consultants are available, Contracting Agencies shall provide the RFP to all available prospective Consultants and shall maintain a written record of the Contracting Agencies' efforts to locate available prospective Consultants for the RFP. Contracting Agencies shall draw prospective Consultants from:

(A) The Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record);

(B) Another Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record); or

(C) All Consultants that the Contracting Agency reasonably can locate that offer the desired Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, or any combination of the foregoing.

(c) Review and rank all Proposals received according to the criteria set forth in the RFP, and select the three highest ranked Proposers.

(3) Contracting Agencies using the informal selection procedure for Related Services on the basis of price Proposals and other pricing information alone shall:

(a) Create an RFP that includes at a minimum the following:

(A) A description of the Project for which a Consultant's Related Services are needed and a description of the Related Services that will be required under the resulting Contract;

(B) The anticipated Contract performance schedule;

(C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including construction services;

(D) The date and time Proposals are due and other directions for submitting Proposals;

(E) Any minimum or pass-fail qualifications that the Proposers must meet, including but not limited to any such qualifications in the subject matter areas described in section (2)(a)(E)(i) through section (2)(a)(E)(vii) of this rule that are related to the Related Services described in the RFP;

(F) Pricing criteria upon which the highest ranked Consultant will be selected. Pricing criteria may include, but are not limited to, the total price for the Related Services described in the RFP, Consultant pricing policies and other pricing information such as the Consultant's estimated number of staff hours needed to perform the Related Services described in the RFP, expenses, hourly rates and overhead;

(G) A statement directing Proposers to the protest procedures set forth in these Division 48 rules; and

(H) A sample form of the Contract.

(b) Provide the RFP to a minimum of five (5) prospective Consultants. If fewer than five (5) prospective Consultants are available, Contracting Agencies shall provide the RFP to all available prospective Consultants and shall maintain a written record of the Contracting Agencies' efforts to locate available prospective Consultants for the RFP. Contracting Agencies shall draw prospective Consultants from:

(A) The Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record);

(B) Another Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record); or

(C) All Consultants that the Contracting Agency reasonably can locate that offer the desired Related Services; and.

(c) Review and rank all responsive Proposals received, according to the total price for the Related Services described in the RFP, Consultant pricing policies and other pricing information requested in the RFP, including but not limited to the number of hours proposed for the Related Services required, expenses, hourly rates and overhead, and select the three highest-ranked Proposers.

(4) When the Estimated Fee in an informal selection procedure is expected not to exceed \$150,000, the Contracting Agency is only required to provide the RFP under sections (2) and (3) of this rule to three (3) prospective Consultants. If fewer than three (3) prospective Consultants are available, the Contracting Agency shall provide the RFP to all available prospective Consultants and shall maintain a written record of the Contracting Agency's efforts to locate available prospective Consultants for the RFP.

(5) If the Contracting Agency does not cancel the RFP after it reviews the Proposals and ranks each Proposer, the Contracting Agency will begin negotiating a Contract with the highest ranked Proposer. The Contracting Agency shall direct Contract negotiations toward obtaining written agreement on the following:

(a) The Consultant's performance obligations and performance schedule;

(b) Payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the Contracting Agency as determined solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services; and

(c) Any other provisions the Contracting Agency believes to be in the Contracting Agency's best interest to negotiate.

(6) The Contracting Agency shall, either orally or in writing, formally terminate negotiations with the highest ranked Proposer, if the Contracting Agency and the Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The Contracting Agency may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, in accordance with section (4) of this rule, until negotiations result in a Contract. If negotiations with any of the top three Proposers do not result in a Contract within a reasonable amount of time, the Contracting Agency may end the particular informal solicitation and thereafter may proceed with a new informal solicitation under this rule or proceed with a formal solicitation under OAR 137-048-0220 (Formal Selection Procedure).

(7) The Contracting Agency shall terminate the informal selection procedure and proceed with the formal selection procedure under OAR 137-048-0220 if the scope of the anticipated Contract is revised during negotiations so that the Estimated Fee will exceed \$250,000.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458

Statutes/Other Implemented: ORS 279C.110, OL 2011 & ch 458

History:

DOJ 2-2015, f. & cert. ef. 2-3-15

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DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14

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DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

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Chapter 137

Division 48

MODEL RULES CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING AND LAND SURVEYING SERVICES AND RELATED SERVICES CONTRACTS

137-048-0220

Formal Selection Procedure

(1) Subject to OAR 137-048-0130 (Applicable Selection Procedures, Pricing Information; Disclosure of Proposals), Contracting Agencies shall use the formal selection procedure described in this rule to select a Consultant if the Consultant cannot be selected under either 137-048-0200 (Direct Appointment Procedure) or under 137-048-0210 (Informal Selection Procedure). The formal selection procedure described in this rule may otherwise be used at Contracting Agencies' discretion.

(2) Contracting Agencies using the formal selection procedure shall obtain Contracts through public advertisement of RFPs, or Requests for Qualifications followed by RFPs.

(a) Except as provided in subsection (b) of this section, a Contracting Agency shall advertise each RFP and RFQ at least once in at least one newspaper of general circulation in the area where the Project is located and in as many other issues and publications as may be necessary or desirable to achieve adequate competition. Other issues and publications may include, but are not limited to, local newspapers, trade journals, and publications targeted to reach disadvantaged business enterprise ("DBE"), service-disabled veteran business ("SDVB"), minority business enterprise ("MBE"), women business enterprise ("WBE") and emerging small business enterprise ("ESB") audiences.

(A) A Contracting Agency shall publish the advertisement within a reasonable time before the deadline for the Proposal submission or response to the RFQ or RFP, but in any event no fewer than fourteen (14) calendar days before the closing date set forth in the RFQ or RFP.

(B) A Contracting Agency shall include a brief description of the following items in the advertisement:

(i) The Project;

(ii) A description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services the Contracting Agency seeks;

(iii) How and where Consultants may obtain a copy of the RFQ or RFP, and

(iv) The deadline for submitting a Proposal or response to the RFQ or RFP.

(b) In the alternative to advertising in a newspaper as described in subsection (2)(a) of this rule, the Contracting Agency shall publish each RFP and RFQ by one or more of the electronic methods identified in OAR 137-046-0110(14). The Contracting Agency shall comply with subsections (2)(a)(A) and (2)(a)(B) of this rule when publishing advertisements by electronic methods.

(c) A Contracting Agency may send notice of the RFP or RFQ directly to all Consultants on the Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants, Performance Record).

(3) Request for Qualifications Procedure. Contracting Agencies may use the RFQ procedure to evaluate potential Consultants and establish a short list of qualified Consultants to whom the Contracting Agency may issue an RFP for some or all of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ.

(a) A Contracting Agency shall include the following, at a minimum, in each RFQ:

(A) A brief description of the Project for which the Contracting Agency is seeking a Consultant;

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(B) A description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services the Contracting Agency seeks for the Project;

(C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including but not limited to construction services;

(D) The deadline for submitting a response to the RFQ;

(E) A description of required Consultant qualifications for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services the Contracting Agency seeks;

(F) The RFQ evaluation criteria, including weights, points or other classifications applicable to each criterion;

(G) A statement whether or not the Contracting Agency will hold a pre-qualification meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ and if a pre-qualification meeting will be held, the location of the meeting and whether or not attendance is mandatory; and

(H) A Statement that Consultants responding to the RFQ do so solely at their expense, and that the Contracting Agency is not responsible for any Consultant expenses associated with the RFQ.

(b) A Contracting Agency may include a request for any or all of the following in each RFQ:

(A) A statement describing Consultants' general qualifications and related performance information;

(B) A description of Consultants' specific qualifications to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ including Consultants' committed resources and recent, current and projected workloads;

(C) A list of similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services and references concerning past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control and contract administration;

(D) A copy of all records, if any, of Consultants' performance under Contracts with any other Contracting Agency;

(E) The number of Consultants' experienced staff committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ, including such personnel's specific qualifications and experience and an estimate of the proportion of time that such personnel would spend on those services;

(F) Consultants' approaches to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ and design philosophy, if applicable;

(G) Consultants' geographic proximity to and familiarity with the physical location of the Project;

(H) Consultants' Ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;

(I) If the Contracting Agency is selecting a Consultant to provide Related Services, Consultants' pricing policies and pricing Proposals or other pricing information, including the number of hours estimated for the services required, expenses, hourly rates and overhead;

(J) Consultants' ability to assist a State Contracting Agency in complying with art acquisition requirements, pursuant to ORS 276.073 through 276.090;

(K) Consultants' ability to assist a State Contracting Agency in complying with State of Oregon energy efficient design requirements, pursuant to ORS 276.900 through 276.915;

(L) Consultants' ability to assist a Contracting Agency in complying with the energy technology requirements of ORS 279C.527 and 279C.528; and

(M) Any other information the Contracting Agency deems reasonably necessary to evaluate Consultants' qualifications.

(c) RFQ Evaluation Committee. The Contracting Agency shall establish an RFQ evaluation committee of at least two (2) individuals to review, score and rank the responding Consultants according to the evaluation criteria. The Contracting Agency may appoint to the evaluation committee Contracting Agency employees or employees of other public agencies with experience in Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, Related Services, construction services or Public Contracting. If the Contracting Agency procedure permits, the Contracting Agency may include on the evaluation committee private practitioners of architecture, engineering, photogrammetry, transportation planning, land surveying or related professions. The Contracting Agency shall designate one member of the evaluation committee as the evaluation committee chairperson.

(d) A Contracting Agency may use any reasonable screening or evaluation method to establish a short list of qualified Consultants, including but not limited to, the following:

(A) Requiring Consultants responding to an RFQ to achieve a threshold score before qualifying for placement on the short list;

(B) Placing a pre-determined number of the highest scoring Consultants on a short list;

(C) Placing on a short list only those Consultants with certain essential qualifications or experience, whose practice is limited to a particular subject area, or who practice in a particular geographic locale or region, provided that such factors are material, would not unduly restrict competition, and were announced as dispositive in the RFQ.

(e) After the evaluation committee reviews, scores and ranks the responding Consultants, the Contracting Agency shall establish a short list of at least three qualified Consultants, if feasible; provided however, if four or fewer Consultants responded to the RFQ or if fewer than three Consultants fail to meet the Contracting Agency's minimum requirements, then:

(A) The Contracting Agency may establish a short list of fewer than three qualified Consultants; or

(B) The Contracting Agency may cancel the RFQ and issue an RFP.

(f) No Consultant will be eligible for placement on a Contracting Agency's short list established under subsection (3)(d) of this rule if Consultant or any of Consultant's principals, partners or associates are members of the Contracting Agency's RFQ evaluation committee.

(g) Except when the RFQ is cancelled, a Contracting Agency shall provide a copy of the subsequent RFP to each Consultant on the short list.

(4) Formal Selection of Consultants through Request for Proposals. Contracting Agencies shall use the procedure described in section (4) of this rule when issuing an RFP for a Contract described in section (1) of this rule.

(a) RFP Required Contents. Contracting Agencies using the formal selection procedure shall include at least the following in each RFP, whether or not the RFP is preceded by an RFQ:

(A) General background information, including a description of the Project and the specific Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services sought for the Project, the estimated Project cost, the estimated time period during which the Project is to be completed, and the estimated time period in which the specific Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services sought will be performed;

(B) The RFP evaluation process and the criteria which will be used to select the most qualified Proposer, including the weights, points or other classifications applicable to each criterion. If the Contracting Agency does not indicate the applicable number of points, weights or other classifications, then each criterion is of equal value. Evaluation criteria may include, but are not limited to, the following:

(i) Proposers' availability and capability to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;

(ii) Experience of Proposers' key staff persons in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, or Related Services on comparable projects;

(iii) The amount and type of resources, and number of experienced staff persons Proposers have committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;

(iv) The recent, current and projected workloads of the staff and resources referenced in section (4)(a)(B)(iii), above;

(v) The proportion of time Proposers estimate that the staff referenced in section (4)(a)(B)(iii), above, would spend on the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;

(vi) Proposers' demonstrated ability to complete successfully similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services on time and within budget, including whether or not there is a record of satisfactory performance under OAR 137-048-0120 (List of Interested Consultants; Performance Record);

(vii) References and recommendations from past clients;

(viii) Proposers' performance history in meeting deadlines, submitting accurate estimates, producing high quality work, meeting financial obligations, price and cost data from previous projects, cost controls and contract administration;

(ix) Status and quality of any required license or certification;

(x) Proposers' knowledge and understanding of the Project and Architectural, Engineering and Land Surveying Services or Related Services described in the RFP as shown in Proposers' approaches to staffing and scheduling needs for the

Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services and proposed solutions to any perceived design and constructability issues;

(xi) Results from interviews, if conducted;

(xii) Design philosophy, if applicable, and approach to the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;

(xiii) If the Contracting Agency is selecting a Consultant to provide Related Services, pricing policies and pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead; and

(xiv) Any other criteria that the Contracting Agency deems relevant to the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP, including, where the nature and budget of the Project so warrant, a design competition between competing Proposers. Provided, however, these additional criteria cannot include pricing policies, pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, when the sole purpose or predominant purpose of the RFP is to obtain Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services.

(C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including but not limited to construction services;

(D) Whether interviews are possible and if so, the weight, points or other classifications applicable to the potential interview;

(E) The date and time Proposals are due, and the delivery location for Proposals;

(F) Reservation of the right to seek clarifications of each Proposal;

(G) Reservation of the right to negotiate a final Contract that is in the best interest of the Contracting Agency;

(H) Reservation of the right to reject any or all Proposals and reservation of the right to cancel the RFP at any time if doing either would be in the public interest as determined by the Contracting Agency;

(I) A Statement that Proposers responding to the RFP do so solely at their expense, and Contracting Agency is not responsible for any Proposer expenses associated with the RFP;

(J) A statement directing Proposers to the protest procedures set forth in these division 48 rules;

(K) Special Contract requirements, including but not limited to DBE, MBE, WBE, ESB and SDVB participation goals or good faith efforts with respect to DBE, MBE, WBE, ESB and SDVB participation, and federal requirements when federal funds are involved;

(L) A statement whether or not the Contracting Agency will hold a pre-Proposal meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP and if a pre-Proposal meeting will be held, the location of the meeting and whether or not attendance is mandatory;

(M) A request for any information the Contracting Agency deems reasonably necessary to permit the Contracting Agency to evaluate, rank and select the most qualified Proposer to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP; and

(N) A sample form of the Contract.

(b) RFP Contents for Related Services Selections Based on Price Only. Contracting Agencies using the formal selection procedure shall include at least the following in each RFP, whether or not the RFP is preceded by an RFQ, when the formal selection procedure is for Related Services selected on the basis of price Proposals and other pricing information only:

(A) General background information, including a description of the Project and the specific Related Services sought for the Project, the estimated Project cost, the estimated time period during which the Project is to be completed, and the estimated time period in which the specific Related Services sought will be performed;

(B) The RFP evaluation process and the price criteria which will be used to select the highest ranked Proposer, including the weights, points or other classifications applicable to each criterion. If the Contracting Agency does not indicate the applicable number of points, weights or other classifications, then each criterion is of equal value. Evaluation price criteria may include, but are not limited to, the total price for the Related Services described in the RFP, Consultant pricing policies, and other pricing information such as the Consultant's estimated number of staff hours needed to perform the Related Services described in the RFP, expenses, hourly rates and overhead;

(C) Any minimum or pass-fail qualifications that the Proposers must meet, including but not limited to any such qualifications in the subject matter areas described in section (4)(a)(B)(i) through section (4)(a)(B)(xii) of this rule; and

(D) The information listed in section (4)(a)(C) through section (4)(a)(N) of this rule pertaining to the Related Services described in the RFP.

(c) RFP Evaluation Committee. The Contracting Agency shall establish a committee of at least three individuals to review, score and rank Proposals according to the evaluation criteria set forth in the RFP. If the RFP has followed an RFQ, the Contracting Agency may include the same members who served on the RFQ evaluation committee. The Contracting Agency may appoint to the evaluation committee Contracting Agency employees or employees of other public agencies with experience in Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying, Related Services, construction services or Public Contracting. At least one member of the evaluation committee must be a Contracting Agency employee. If the Contracting Agency procedure permits, the Contracting Agency may include on the evaluation committee private practitioners of architecture, engineering, land surveying or related professions. The Contracting Agency shall designate one of its employees who also is a member of the evaluation committee as the evaluation committee chairperson.

(A) No Proposer will be eligible for award of the Contract under the RFP if Proposer or any of Proposer's principals, partners or associates are members of the Contracting Agency's RFP evaluation committee for the Contract;

(B) If the RFP provides for the possibility of Proposer interviews, the evaluation committee may elect to interview Proposers if the evaluation committee considers it necessary or desirable. If the evaluation committee conducts interviews, it shall award weights, points or other classifications indicated in the RFP for the anticipated interview; and

(C) The evaluation committee shall provide to the Contracting Agency the results of the scoring and ranking for each Proposer.

(d) If the Contracting Agency does not cancel the RFP after it receives the results of the scoring and ranking for each Proposer, the Contracting Agency will begin negotiating a Contract with the highest ranked Proposer. The Contracting Agency shall direct negotiations toward obtaining written agreement on:

(A) The Consultant's performance obligations and performance schedule;

(B) Payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the Contracting Agency as determined solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services; and

(C) Any other provisions the Contracting Agency believes to be in the Contracting Agency's best interest to negotiate

(e) The Contracting Agency shall, either orally or in writing, formally terminate negotiations with the highest ranked Proposer if the Contracting Agency and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The Contracting Agency may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, and so on, in accordance with section (4)(c) of this rule, until negotiations result in a Contract. If negotiations with any Proposer do not result in a Contract within a reasonable amount of time, the Contracting Agency may end the particular formal solicitation. Nothing in this rule precludes a Contracting Agency from proceeding with a new formal solicitation for the same Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP that failed to result in a Contract.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.110, 279C.527, OL 2015 & ch 565 (HB 3303)

History:

DOJ 18-2015, f. 12-31-15, cert. ef. 1-1-16

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12

DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14

DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

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Department of Justice

Chapter 137

Division 48

MODEL RULES CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING AND LAND SURVEYING SERVICES AND RELATED SERVICES CONTRACTS

137-048-0120

List of Interested Consultants; Performance Record

(1) Consultants who are engaged in the lawful practice of their profession and who are interested in providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, may annually submit a statement describing their qualifications and related performance information to Contracting Agencies' office addresses. Contracting Agencies shall use this information to create a list of prospective Consultants and shall update this list at least once every two years.

(2) Contracting Agencies may compile and maintain a record of each Consultant's performance under Contracts with the particular Contracting Agency, including information obtained from Consultants during an exit interview. Upon request and in accordance with the Oregon Public Records Law (ORS 192.410 through 192.505), Contracting Agencies may make available copies of the records.

(3) State Contracting Agencies shall keep a record of all Contracts with Consultants and shall make these records available to the public, consistent with the requirements of the Oregon Public Records Law (ORS 192.410 through 192.505). State Contracting Agencies shall include the following information in the record:

(a) Locations throughout the state where the Contracts are performed;

(b) Consultants' principal office address and all office addresses in the State of Oregon;

(c) Consultants' direct expenses on each Contract, whether or not those direct expenses are reimbursed. "Direct expenses" include all amounts that are directly attributable to Consultants' services performed under each Contract, including personnel travel expenses, and that would not have been incurred but for the services being performed. The record must include all personnel travel expenses as a separate and identifiable expense on the Contract; and

(d) The total number of Contracts awarded to each Consultant over the immediately preceding 10-year period from the date of the record.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458

Statutes/Other Implemented: ORS 279A.065 & 279C.110, OL 2011 & ch 458

History:

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

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Chapter 279A — Public Contracting - General Provisions

2015 EDITION

PUBLIC CONTRACTING - GENERAL PROVISIONS

PUBLIC FACILITIES, CONTRACTING & INSURANCE

GENERAL PROVISIONS

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279A.005 Short title. ORS chapters 279A, 279B and 279C may be cited as the Public Contracting Code. [2003 c.794 §1]

279A.010 Definitions for Public Contracting Code. (1) As used in the Public Contracting Code, unless the context or a specifically applicable definition requires otherwise:

(a) "Bidder" means a person that submits a bid in response to an invitation to bid.

(b) "Contracting agency" means a public body authorized by law to conduct a procurement. "Contracting agency" includes, but is not limited to, the Director of the Oregon Department of Administrative Services and any person authorized by a contracting agency to conduct a procurement on the contracting agency's behalf. "Contracting agency" does not include the judicial department or the legislative department.

- (c) "Days" means calendar days.
- (d) "Department" means the Oregon Department of Administrative Services.
- (e) "Director" means the Director of the Oregon Department of Administrative Services or a person designated by the director to carry out the authority of the director under the Public Contracting Code.
- (f) "Emergency" means circumstances that:
 - (A) Could not have been reasonably foreseen;
 - (B) Create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and
 - (C) Require prompt execution of a contract to remedy the condition.
- (g) "Energy savings performance contract" means a public contract between a contracting agency and a qualified energy service company for the identification, evaluation, recommendation, design and construction of energy conservation measures, including a design-build contract, that guarantee energy savings or performance.
- (h) "Executive department" has the meaning given that term in ORS 174.112.
- (i) "Goods" includes supplies, equipment, materials, personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, and combinations of any of the items identified in this paragraph.
- (j) "Goods and services" or "goods or services" includes combinations of any of the items identified in the definitions of "goods" and "services."
- (k)(A) "Grant" means:
 - (i) An agreement under which a contracting agency receives moneys, property or other assistance, including but not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, from a grantor for the purpose of supporting or stimulating a program or activity of the contracting agency and in which no substantial involvement by the grantor is anticipated in the program or activity other than involvement associated with monitoring compliance with the grant conditions; or
 - (ii) An agreement under which a contracting agency provides moneys, property or other assistance, including but not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, to a recipient for the purpose of supporting or stimulating a program or activity of the recipient and in which no substantial involvement by the contracting agency is anticipated in the program or activity other than involvement associated with monitoring compliance with the grant conditions.
- (B) "Grant" does not include a public contract for a public improvement, for public works, as defined in ORS 279C.800, or for emergency work, minor alterations or ordinary repair or maintenance necessary to preserve a public improvement, when under the public contract a contracting agency pays, in consideration for contract performance intended to realize or to support the realization of the purposes for which grant funds were provided to the contracting agency, moneys that the contracting agency has received under a grant.
- (L) "Industrial oil" means any compressor, turbine or bearing oil, hydraulic oil, metal-working oil or refrigeration oil.
- (m) "Judicial department" has the meaning given that term in ORS 174.113.
- (n) "Legislative department" has the meaning given that term in ORS 174.114.
- (o) "Local contract review board" means a local contract review board described in ORS 279A.060.
- (p) "Local contracting agency" means a local government or special government body authorized by law to conduct a procurement. "Local contracting agency" includes any person authorized by a local contracting agency to conduct a procurement on behalf of the local contracting agency.
- (q) "Local government" has the meaning given that term in ORS 174.116.
- (r) "Lowest responsible bidder" means the lowest bidder who:
 - (A) Has substantially complied with all prescribed public contracting procedures and requirements;
 - (B) Has met the standards of responsibility set forth in ORS 279B.110 or 279C.375;
 - (C) Has not been debarred or disqualified by the contracting agency under ORS 279B.130 or 279C.440; and
 - (D) If the advertised contract is a public improvement contract, is not on the list created by the Construction Contractors Board under ORS 701.227.
- (s) "Lubricating oil" means any oil intended for use in an internal combustion crankcase, transmission, gearbox or differential or an automobile, bus, truck, vessel, plane, train, heavy equipment or machinery powered by an internal combustion engine.
- (t) "Person" means a natural person capable of being legally bound, a sole proprietorship, a corporation, a partnership, a limited liability company or partnership, a limited partnership, a for-profit or nonprofit unincorporated association, a business trust, two or more persons having a joint or common economic interest, any other person with legal capacity to contract or a public body.
- (u) "Post-consumer waste" means a finished material that would normally be disposed of as solid waste, having completed its life cycle as a consumer item. "Post-consumer waste" does not include manufacturing waste.
- (v) "Price agreement" means a public contract for the procurement of goods or services at a set price with:
 - (A) No guarantee of a minimum or maximum purchase; or
 - (B) An initial order or minimum purchase combined with a continuing contractor obligation to provide goods or services in which the contracting agency does not guarantee a minimum or maximum additional purchase.
- (w) "Procurement" means the act of purchasing, leasing, renting or otherwise acquiring goods or services. "Procurement" includes each function and procedure undertaken or required to be undertaken by a contracting agency to enter into a public contract, administer a public contract and obtain the performance of a public contract under the Public Contracting Code.
- (x) "Proposer" means a person that submits a proposal in response to a request for proposals.
- (y) "Public body" has the meaning given that term in ORS 174.109.
- (z) "Public contract" means a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. "Public contract" does not include grants.
- (aa) "Public contracting" means procurement activities described in the Public Contracting Code relating to obtaining, modifying or administering public contracts or price agreements.
- (bb) "Public Contracting Code" or "code" means ORS chapters 279A, 279B and 279C.
- (cc) "Public improvement" means a project for construction, reconstruction or major renovation on real property by or for a contracting agency. "Public improvement" does not include:

(A) Projects for which no funds of a contracting agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or

(B) Emergency work, minor alteration, ordinary repair or maintenance necessary to preserve a public improvement.

(dd) "Public improvement contract" means a public contract for a public improvement. "Public improvement contract" does not include a public contract for emergency work, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement.

(ee) "Recycled material" means any material that would otherwise be a useless, unwanted or discarded material except for the fact that the material still has useful physical or chemical properties after serving a specific purpose and can, therefore, be reused or recycled.

(ff) "Recycled oil" means used oil that has been prepared for reuse as a petroleum product by refining, rerefining, reclaiming, reprocessing or other means, provided that the preparation or use is operationally safe, environmentally sound and complies with all laws and regulations.

(gg) "Recycled paper" means a paper product with not less than:

(A) Fifty percent of its fiber weight consisting of secondary waste materials, or

(B) Twenty-five percent of its fiber weight consisting of post-consumer waste.

(hh) "Recycled PETE" means post-consumer polyethylene terephthalate material.

(ii) "Recycled product" means all materials, goods and supplies, not less than 50 percent of the total weight of which consists of secondary and post-consumer waste with not less than 10 percent of its total weight consisting of post-consumer waste. "Recycled product" includes any product that could have been disposed of as solid waste, having completed its life cycle as a consumer item, but otherwise is refurbished for reuse without substantial alteration of the product's form.

(jj) "Secondary waste materials" means fragments of products or finished products of a manufacturing process that has converted a virgin resource into a commodity of real economic value. "Secondary waste materials" includes post-consumer waste. "Secondary waste materials" does not include excess virgin resources of the manufacturing process. For paper, "secondary waste materials" does not include fibrous waste generated during the manufacturing process such as fibers recovered from waste water or trimmings of paper machine rolls, mill broke, wood slabs, chips, sawdust or other wood residue from a manufacturing process.

(kk) "Services" mean services other than personal services designated under ORS 279A.055, except that, for state contracting agencies with procurement authority under ORS 279A.050 or 279A.140, "services" includes personal services as designated by the state contracting agencies.

(LL) "Special government body" has the meaning given that term in ORS 174.117.

(mm) "State agency" means the executive department, except the Secretary of State and the State Treasurer in the performance of the duties of their constitutional offices.

(nn) "State contracting agency" means an executive department entity authorized by law to conduct a procurement.

(oo) "State government" has the meaning given that term in ORS 174.111.

(pp) "Used oil" has the meaning given that term in ORS 459A.555.

(qq) "Virgin oil" means oil that has been refined from crude oil and that has not been used or contaminated with impurities.

(2) Other definitions appearing in the Public Contracting Code and the sections in which they appear are:

(a)	"Adequate".....	ORS 279C.305
(b)	"Administering contracting agency".....	ORS 279A.200
(c)	"Affirmative action".....	ORS 279A.100
(d)	"Architect".....	ORS 279C.100
(e)	"Architectural, engineering, photogram-metric mapping, transportation planning or land surveying services".....	ORS 279C.100
(f)	"Bid documents".....	ORS 279C.400
(g)	"Bidder".....	ORS 279B.415
(h)	"Bids".....	ORS 279C.400
(i)	"Brand name".....	ORS 279B.405
(j)	"Brand name or equal specification".....	ORS 279B.200
(k)	"Brand name specification".....	ORS 279B.200
(L)	"Class special procurement".....	ORS 279B.085
(m)	"Consultant".....	ORS 279C.115
(n)	"Contract-specific special procurement".....	ORS 279B.085
(o)	"Cooperative procurement".....	ORS 279A.200
(p)	"Cooperative procurement group".....	ORS 279A.200
(q)	"Donee".....	ORS 279A.250
(r)	"Engineer".....	ORS 279C.100
(s)	"Findings".....	ORS 279C.330
(t)	"Fire protection equipment".....	ORS 279A.190
(u)	"Fringe benefits".....	ORS 279C.800
(v)	"Funds of a public agency".....	ORS 279C.810

(w)	"Good cause"	ORS 279C.585
(x)	"Good faith dispute"	ORS 279C.580
(y)	"Goods"	ORS 279B.115
(z)	"Housing"	ORS 279C.800
(aa)	"Interstate cooperative procurement"	ORS 279A.200
(bb)	"Invitation to bid"	ORS 279B.005 and 279C.400
(cc)	"Joint cooperative procurement"	ORS 279A.200
(dd)	"Labor dispute"	ORS 279C.650
(ee)	"Land surveyor"	ORS 279C.100
(ff)	"Legally flawed"	ORS 279B.405
(gg)	"Locality"	ORS 279C.800
(hh)	"Nonprofit organization"	ORS 279C.810
(ii)	"Nonresident bidder"	ORS 279A.120
(jj)	"Not-for-profit organization"	ORS 279A.250
(kk)	"Original contract"	ORS 279A.200
(LL)	"Permissive cooperative procurement"	ORS 279A.200
(mm)	"Person"	ORS 279C.500 and 279C.815
(nn)	"Personal services"	ORS 279C.100
(oo)	"Photogrammetric mapping"	ORS 279C.100
(pp)	"Photogrammetrist"	ORS 279C.100
(qq)	"Prevailing rate of wage"	ORS 279C.800
(rr)	"Procurement description"	ORS 279B.005
(ss)	"Property"	ORS 279A.250
(tt)	"Public agency"	ORS 279C.800
(uu)	"Public contract"	ORS 279A.190
(vv)	"Public works"	ORS 279C.800
(ww)	"Purchasing contracting agency"	ORS 279A.200
(xx)	"Regularly organized fire department"	ORS 279A.190
(yy)	"Related services"	ORS 279C.100
(zz)	"Request for proposals"	ORS 279B.005
(aaa)	"Resident bidder"	ORS 279A.120
(bbb)	"Responsible bidder"	ORS 279A.105 and 279B.005
(ccc)	"Responsible proposer"	ORS 279B.005
(ddd)	"Responsive bid"	ORS 279B.005
(eee)	"Responsive proposal"	ORS 279B.005
(ff)	"Retainage"	ORS 279C.550
(ggg)	"Special procurement"	ORS 279B.085
(hhh)	"Specification"	ORS 279B.200
(iii)	"State agency"	ORS 279A.250
(jjj)	"Substantial completion"	ORS 279C.465
(kkk)	"Surplus property"	ORS 279A.250
(LLL)	"Transportation planning services"	ORS 279C.100
(mmm)	"Unnecessarily restrictive"	ORS 279B.405 [2003 c.794 §2; 2003 c.794 §2a; 2005 c.22 §199; 2005 c.103 §1a; 2005 c.15 §1; 2005 c.360 §13; 2007 c.764 §1; 2011 c.458 §8]

279A.015 Policy. It is the policy of the State of Oregon, in enacting the Public Contracting Code, that a sound and responsive public contracting system should:

- (1) Simplify, clarify and modernize procurement practices so that they reflect the marketplace and industry standards
- (2) Instill public confidence through ethical and fair dealing, honesty and good faith on the part of government officials and those who do business with the government.

- (3) Promote efficient use of state and local government resources, maximizing the economic investment in public contracting within this state.
- (4) Clearly identify rules and policies that implement each of the legislatively mandated socioeconomic programs that overlay public contracting and accompany the expenditure of public funds.
- (5) Allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement. In public procurement, as set out in ORS chapter 279B, meaningful competition may be obtained by evaluation of performance factors and other aspects of service and product quality, as well as pricing, in arriving at best value.
- (6) Provide a public contracting structure that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competitive bidding as the standard for public improvement contracts unless otherwise exempted. [2003 c.794 §3]

279A.020 Organization of Public Contracting Code. (1) Except as otherwise provided in the Public Contracting Code, all public contracting by a contracting agency is subject to this chapter.

(2) Except as provided in ORS 279C.320, public contracting involving public improvements and other construction services is subject to this chapter and ORS chapter 279C, but not ORS chapter 279B.

(3) Public contracting involving architects, engineers, photogrammetrists, transportation planners, land surveyors and related services is subject to this chapter and ORS chapter 279C, but not ORS chapter 279B.

(4) Except as provided in ORS 279C.320, all other public contracting is subject to this chapter and ORS 279B, but not ORS chapter 279C. [2003 c.794 §4; 2005 c.103 §2; 2011 c.458 §9]

279A.025 Application of Public Contracting Code. (1) Except as provided in subsections (2) to (4) of this section, the Public Contracting Code applies to all public contracting.

(2) The Public Contracting Code does not apply to:

(a) Contracts between a contracting agency and:

- (A) Another contracting agency;
- (B) The Oregon Health and Science University;
- (C) A public university listed in ORS 352.002;
- (D) The Oregon State Bar;
- (E) A governmental body of another state;
- (F) The federal government;
- (G) An American Indian tribe or an agency of an American Indian tribe;
- (H) A nation, or a governmental body in a nation, other than the United States; or
- (I) An intergovernmental entity formed between or among:
 - (i) Governmental bodies of this or another state;
 - (ii) The federal government;
 - (iii) An American Indian tribe or an agency of an American Indian tribe;
 - (iv) A nation other than the United States; or
 - (v) A governmental body in a nation other than the United States;

(b) Agreements authorized by ORS chapter 190 or by a statute, charter provision, ordinance or other authority for establishing agreements between or among governmental bodies or agencies or tribal governing bodies or agencies;

(c) Insurance and service contracts as provided for under ORS 414.115, 414.125, 414.135 and 414.145 for purposes of source selection;

(d) Grants;

(e) Contracts for professional or expert witnesses or consultants to provide services or testimony relating to existing or potential litigation or legal matters in which a public body is or may become interested;

(f) Acquisitions or disposals of real property or interest in real property;

(g) Sole-source expenditures when rates are set by law or ordinance for purposes of source selection;

(h) Contracts for the procurement or distribution of textbooks;

(i) Procurements by a contracting agency from an Oregon Corrections Enterprises program;

(j) The procurement, transportation or distribution of distilled liquor, as defined in ORS 471.001, or the appointment of agents under ORS 471.750 by the Oregon Liquor Control Commission;

(k) Contracts entered into under ORS chapter 180 between the Attorney General and private counsel or special legal assistants;

(l) Contracts for the sale of timber from lands owned or managed by the State Board of Forestry and the State Forestry Department;

(m) Contracts for activities necessary or convenient for the sale of timber under paragraph (L) of this subsection, either separately from or in conjunction with contracts for the sale of timber, including but not limited to activities such as timber harvesting and sorting, transporting, gravel pit development or operation, and road construction, maintenance or improvement;

(n) Contracts for forest protection or forest related activities, as described in ORS 477.406, by the State Forester or the State Board of Forestry;

(o) Contracts entered into by the Housing and Community Services Department in exercising the department's duties prescribed in ORS chapters 456 and 458, except that the department's public contracting for goods and services is subject to ORS chapter 279B;

(p) Contracts entered into by the State Treasurer in exercising the powers of that office prescribed in ORS 178.010 to 178.100 and ORS chapters 286A, 287A, 289, 293, 294 and 295, including but not limited to investment contracts and agreements, banking services, clearing house services and collateralization agreements, bond documents, certificates of participation and other debt repayment agreements, and any associated contracts, agreements and documents, regardless of whether the obligations that the contracts, agreements or documents establish are general, special or limited, except that the State Treasurer's public contracting for goods and services is subject to ORS chapter 279B;

(q) Contracts, agreements or other documents entered into, issued or established in connection with:

(A) The issuance of obligations, as defined in ORS 286A.100 and 287A.310, of a public body;

(B) The making of program loans and similar extensions or advances of funds, aid or assistance by a public body to a public or private body for the purpose of carrying out, promoting or sustaining activities or programs authorized by law; or

(C) The investment of funds by a public body as authorized by law, and other financial transactions of a public body that by their character cannot practically be established under the competitive contractor selection procedures of ORS 279B.050 to 279B.085;

(r) Contracts for employee benefit plans as provided in ORS 243.105 (1), 243.125 (4), 243.221, 243.275, 243.291, 243.303 and 243.565;

(s) Contracts for employee benefit plans as provided in ORS 243.860 to 243.886; or

(t) Any other public contracting of a public body specifically exempted from the code by another provision of law.

(3) The Public Contracting Code does not apply to the contracting activities of:

- (a) The Oregon State Lottery Commission;
- (b) The legislative department;
- (c) The judicial department;
- (d) Semi-independent state agencies listed in ORS 182.454, except as provided in ORS 279.835 to 279.855 and 279A.250 to 279A.290;
- (e) Oregon Corrections Enterprises;
- (f) The Oregon Film and Video Office, except as provided in ORS 279A.100 and 279A.250 to 279A.290;
- (g) The Travel Information Council, except as provided in ORS 279A.250 to 279A.290;
- (h) The Oregon 529 Savings Network and the Oregon 529 Savings Board;
- (i) The Oregon Innovation Council;
- (j) The Oregon Utility Notification Center; or
- (k) Any other public body specifically exempted from the code by another provision of law.

(4) ORS 279A.200 to 279A.225 and 279B.050 to 279B.085 do not apply to contracts made with qualified nonprofit agencies providing employment opportunities for individuals with disabilities under ORS 279.835 to 279.855. [2003 c.794 §5; 2003 c.794 §5a; 2005 c.22 §200; 2005 c.103 §3; 2005 c.109 §3; 2005 c.297 §3; 2005 c.748 §12; 2005 c.777 §15; 2007 c.7 §19; 2007 c.70 §67; 2007 c.71 §81; 2007 c.764 §2; 2007 c.783 §91; 2011 c.637 §88; 2013 c.492 §28; 2013 c.768 §123; 2015 c.447 §3; 2015 c.843 §19]

279A.030 Federal law prevails in case of conflict. Except as otherwise expressly provided in ORS 279C.800 to 279C.870, and notwithstanding ORS 279C.005 to 279C.670 and this chapter and ORS chapter 279B, applicable federal statutes and regulations govern when federal funds are involved and the federal statutes or regulations conflict with any provision of ORS 279C.005 to 279C.670 or this chapter or ORS chapter 279B, or require additional conditions in public contracts not authorized by ORS 279C.005 to 279C.670 or this chapter or ORS chapter 279B. [2003 c.794 §6]

AUTHORITY

279A.050 Procurement authority. (1)(a) Except as otherwise provided in the Public Contracting Code, a contracting agency shall exercise all of the contracting agency's procurement authority in accordance with the provisions of the Public Contracting Code.

(b) If a contracting agency has authority under this section to carry out functions described in this section, or has authority to make procurements under a provision of law other than the Public Contracting Code, the contracting agency need not exercise the contracting agency's authority in accordance with the provisions of the code if, under ORS 279A.025, the code does not apply to the contract or contracting agency.

(2)(a) Except as otherwise provided in paragraph (b) of this subsection and the Public Contracting Code, for state agencies the Director of the Oregon Department of Administrative Services has all the authority available to carry out the provisions of the Public Contracting Code.

(b) Except as otherwise provided in the Public Contracting Code, for state agencies the director may delegate to the State Chief Information Officer the authority to procure or supervise the procurement of all goods, services and personal services related to information technology and telecommunications for state contracting agencies. This paragraph does not apply to contracts under which the contractor delivers to the state agency information technology products or services incidentally in performing a personal services contract described in ORS chapter 279C or a construction contract described in ORS chapter 279C.

(3) Except as otherwise provided in the Public Contracting Code, the Director of Transportation has all the authority available to:

(a) Procure or supervise the procurement of all services and personal services to construct, acquire, plan, design, maintain and operate passenger terminal facilities and motor vehicle parking facilities in connection with any public transportation system in accordance with ORS 184.689 (5);

(b) Procure or supervise the procurement of all goods, services, public improvements and personal services that relate to operating, maintaining or constructing highways, bridges and other transportation facilities that are subject to the authority of the Department of Transportation; and

(c) Establish standards for, prescribe forms for and conduct the prequalification of prospective bidders on public improvement contracts that relate to operating, maintaining or constructing highways, bridges and other transportation facilities that are subject to the authority of the Department of Transportation.

(4) Except as otherwise provided in the Public Contracting Code, the Secretary of State has all the authority to procure or supervise the procurement of goods, services and personal services related to programs under the authority of the Secretary of State.

(5) Except as otherwise provided in the Public Contracting Code, the State Treasurer has all the authority to procure or supervise the procurement of goods, services and personal services related to programs under the authority of the State Treasurer.

(6) The state agencies listed in this subsection have all the authority to do the following in accordance with the Public Contracting Code:

(a) The Department of Human Services to procure or supervise the procurement of goods, services and personal services under ORS 179.040 for the department's institutions and the procurement of goods, services and personal services for constructing, demolishing, exchanging, maintaining, operating and equipping housing for the purpose of providing care to individuals with intellectual disabilities or other developmental disabilities, subject to applicable provisions of ORS 427.335;

(b) The Oregon Health Authority to procure or supervise the procurement of goods, services and personal services under ORS 179.040 and construction materials, equipment and supplies for the authority's institutions and the procurement of goods, services, personal services, construction materials, equipment and supplies for constructing, demolishing, exchanging, maintaining, operating and equipping housing for individuals with chronic mental illness, subject to applicable provisions of ORS 426.504;

(c) The State Department of Fish and Wildlife to procure or supervise the procurement of construction materials, equipment, supplies, services and personal services for public improvements, public works or ordinary construction described in ORS 279C.320 that is subject to the authority of the State Department of Fish and Wildlife;

(d) The State Parks and Recreation Department to procure or supervise the procurement of all goods, services, public improvements and personal services related to state parks;

(e) The Oregon Department of Aviation to procure or supervise the procurement of construction materials, equipment, supplies, services and personal services for public improvements, public works or ordinary construction described in ORS 279C.320 that is subject to the authority of the Oregon Department of Aviation;

(f) The Oregon Business Development Department to procure or supervise the procurement of all goods, services, personal services and public improvements related to its foreign trade offices operating outside the state;

(g) The Housing and Community Services Department to procure or supervise the procurement of goods, services and personal services as provided in ORS 279A.025 (2)(o);

(h) The Department of Corrections to procure or supervise the procurement of construction materials, equipment, supplies, services and personal services for public improvements, public works or ordinary construction described in ORS 279C.320 that is subject to the authority of the Department of Corrections;

(i) The Department of Corrections, subject to any applicable provisions of ORS 279A.120, 279A.125, 279A.145 and 283.110 to 283.395, to procure or supervise the procurement of goods, services and personal services under ORS 179.040 for its institutions;

(j) The Department of Veterans' Affairs to procure or supervise the procurement of real estate broker and principal real estate broker services related to programs under the department's authority;

(k) The Oregon Military Department to procure or supervise the procurement of construction materials, equipment, supplies, services and personal services for public improvements, public works or ordinary construction described in ORS 279C.320 that is subject to the authority of the Oregon Military Department;

(L) The Department of Education, subject to any applicable provisions of ORS 329.075, 329.085 and 329.485 and the federal No Child Left Behind Act of 2001 (P.L. 107-110, 115 Stat. 1425), to procure or supervise the procurement of goods, services, personal services and information technology related to student assessment; and

(m) Any state agency to conduct a procurement when the agency is specifically authorized by any provision of law other than the Public Contracting Code to enter into a contract.

(7)(a) Notwithstanding this section and ORS 279A.140 (1), the Director of the Oregon Department of Administrative Services has exclusive authority, unless the director delegates the authority, to procure or supervise the procurement of all price agreements on behalf of the state agencies identified in subsection (6) of this section under which more than one state agency may order goods, services or personal services.

(b) The director may delegate to the State Chief Information Officer the exclusive authority to procure or supervise the procurement of all price agreements related to information technology and telecommunications on behalf of the state agencies identified in subsection (6) of this section. Notwithstanding any authority that a state agency may have under subsection (3) or (6) of this section, the state agency may not establish a price agreement or enter into a contract for goods, services or personal services without the approval of the director or the State Chief Information Officer if the director or the State Chief Information Officer has established a price agreement for the goods, services or personal services.

(c) The State Chief Information Officer may review any solicitation document for procuring information technology or telecommunications that a state agency intends to issue before the state agency issues the solicitation document and may require the state agency to name the State Chief Information Officer as a third-party beneficiary with full authority to enforce the terms and conditions of any public contract for information technology or telecommunications. The State Chief Information Officer must approve a state agency's procurement for information technology or telecommunications if the procurement has an anticipated contract price of \$1 million or more. The State Chief Information Officer may require the state agency to name the State Chief Information Officer as the contracting party on behalf of the State of Oregon in a procurement for information technology or telecommunications that has an anticipated contract price of \$1 million or more. [2003 c.794 §7; 2005 c.625 §61; 2007 c.70 §68; 2007 c.197 §1; 2007 c.764 §3; 2009 c.397 §2; 2009 c.828 §13; 2011 c.658 §36; 2011 c.720 §73a; 2013 c.492 §29; 2015 c.167 §1; 2015 c.243 §7; 2015 c.447 §4; 2015 c.807 §22]

279A.055 Personal services contracts. (1) Except as provided in ORS 279A.140, a contracting agency may enter into personal services contracts. The provisions of this section do not relieve a contracting agency of the duty to comply with ORS 279A.140, any other law applicable to state agencies or applicable city or county charter provisions.

(2) A state contracting agency with procurement authority under ORS 279A.050 or a local contract review board by ordinance, resolution, administrative rule or other regulation may designate certain service contracts or classes of service contracts as personal services contracts. [2003 c.794 §8; 2005 c.103 §4]

279A.060 Local contract review boards. If the governing body of a local contracting agency takes no action to provide otherwise, the governing body is the local contract review board of that local contracting agency. However, the governing body of a local contracting agency may, by charter, ordinance or other local legislation, authorize a body, board or commission other than the governing body to serve as the local contract review board of the local contracting agency. The governing body of a local contracting agency also may enter into intergovernmental agreements under ORS chapter 190 to permit the local contract review board of another local contracting agency or the Director of the Oregon Department of Administrative Services to exercise authority under ORS 279B.085. [2003 c.794 §9]

279A.065 Model rules generally; applicability to contracting agencies. (1) The Attorney General shall prepare and maintain model rules that specify procedures for public contracting under the Public Contracting Code and that are appropriate for all contracting agencies to use. The Attorney General may devise and publish forms for use with the model rules. The Attorney General shall adopt the model rules in accordance with ORS chapter 183. Before adopting or amending a model rule, the Attorney General shall consult with the Director of the Oregon Department of Administrative Services, the Director of Transportation, representatives of county governments, representatives of city governments, representatives of school boards and other knowledgeable persons.

(2) The Attorney General shall adopt model rules that specify procedures for all contracting agencies to use to enter into energy savings performance contracts. Before adopting or amending a rule under this subsection, the Attorney General shall consult with the Oregon Department of Administrative Services, the State Department of Energy, local contracting agencies and other knowledgeable persons. The Attorney General may develop standard contract forms for use with energy savings performance contracts.

(3)(a) The Attorney General shall adopt model rules that specify procedures for all contracting agencies to use to procure construction manager/general contractor services. Before adopting or amending a rule under this subsection, the Attorney General shall consult with the Director of the Oregon Department of Administrative Services, the Director of Transportation, local contracting agencies, construction contractors, construction subcontractors and other knowledgeable persons.

(b) Notwithstanding subsection (6) of this section, a contracting agency may not adopt the contracting agency's own rules for procuring construction manager/general contractor services.

(4) After each legislative session, the Attorney General shall review all laws the Legislative Assembly passed that affect public contracting to determine if the Attorney General should amend or repeal a model rule prepared under this section or adopt a new rule. If the Attorney General determines that a modification of the model rules is necessary, the Attorney General shall prepare the modification within such time as to allow the modification to take effect no later than 120 days after the effective date of the legislation that caused the Attorney General to modify the rule. The

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Attorney General may prepare a modification to take effect 121 or more days after the effective date of the legislation if the Attorney General, in a notice to the state agencies and persons listed in subsection (1) of this section, specifies when the modification will take effect.

(5) A contracting agency that has not adopted the contracting agency's own rules of procedure in accordance with subsection (6) of this section is subject to the model rules the Attorney General adopts under this section, including all modifications to the model rules that the Attorney General may adopt.

(6)(a) A contracting agency may adopt the contracting agency's own rules of procedure for public contracts that:

(A) Specifically state that the model rules the Attorney General adopts under this section do not apply to the contracting agency; and

(B) Prescribe the rules of procedure that the contracting agency will use for public contracts, which may include portions of the model rules the Attorney General adopts.

(b) A contracting agency that adopts rules under this subsection shall review the rules each time the Attorney General modifies the model rules under this section to determine whether the contracting agency should modify the contracting agency's rules to ensure compliance with statutory changes. [2003 c.794 §10; 2003 c.794 §10a; 2011 c.458 §10; 2013 c.522 §4; 2015 c.767 §80]

279A.070 Rules. In addition to rules adopted under ORS 279A.065 (6), a contracting agency may, in exercising authority granted under ORS 279A.050, adopt rules necessary to carry out the provisions of the Public Contracting Code, including but not limited to rules for procuring, managing, disposing of and controlling goods, services, personal services and public improvements under the Public Contracting Code. Each contracting agency authorized to enter into personal services contracts shall create procedures to screen and select persons to perform personal services [2003 c.794 §11; 2003 c.794 §11a; 2013 c.522 §5]

279A.075 Delegation. (1) Unless otherwise provided in the Public Contracting Code, a person or agency that has an authority under the code may delegate and subdelegate the exercise of the authority in whole or in part. Notwithstanding delegations of authority under this section, the code and rules adopted under the code govern a person's or agency's exercise of the delegated authority.

(2) The Secretary of State, State Treasurer, Director of the Oregon Department of Administrative Services, State Chief Information Officer and Director of Transportation and other heads of state agencies with specific limited authority identified in ORS 279A.050 (6) may delegate authority to contract for and manage public contracts for their offices or agencies. The State Chief Information Officer may require the Director of the Oregon Department of Administrative Services to obtain the State Chief Information Officer's review and approval before the director delegates authority to a state contracting agency to conduct a procurement for information technology or telecommunications. [2003 c.794 §12; 2015 c.807 §23]

DISADVANTAGED BUSINESS ENTERPRISES, MINORITY-OWNED BUSINESSES, WOMAN-OWNED BUSINESSES, BUSINESSES THAT SERVICE-DISABLED VETERANS OWN AND EMERGING SMALL BUSINESSES

279A.100 Affirmative action; limited competition permitted. (1) As used in this section:

(a) "Affirmative action" means a program designed to ensure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age or physical or mental disability or a policy to give a preference in awarding public contracts to disabled veterans.

(b) "Disabled veteran" has the meaning given that term in ORS 408.225.

(2) The provisions of the Public Contracting Code may not be construed to prohibit a contracting agency from engaging in public contracting practices designed to promote affirmative action goals, policies or programs for disadvantaged or minority groups or to give a preference in awarding public contracts to disabled veterans.

(3) In carrying out an affirmative action goal, policy or program, a contracting agency by appropriate ordinance, resolution or rule may limit competition for a public contract for goods and services, or for any other public contract estimated to cost \$50,000 or less, to contracting entities owned or controlled by persons described in subsection (1) of this section. [2003 c.794 §13; 2009 c.235 §1]

279A.105 Subcontracting to emerging small businesses or businesses that service-disabled veterans own. (1) A contracting agency may require a contractor to subcontract some part of a contract to, or to obtain materials for use in performing the contract from, a business that is certified under ORS 200.055 as an emerging small business or as a business that a service-disabled veteran owns.

(2) A contracting agency may require a contractor to subcontract some part of a contract to, or to obtain materials to be used in performing the contract from, a business that is certified under ORS 200.055 as an emerging small business and that, as identified by the contracting agency, is located in or draws the business's workforce from economically distressed areas, as designated by the Oregon Business Development Department.

(3) A contracting agency may require that a public contract be awarded to a responsible bidder or proposer, as defined in ORS 200.005, that the contracting agency determines has made good faith efforts as prescribed in ORS 200.045. [2003 c.794 §14; 2005 c.103 §5; 2009 c.235 §2; 2015 c.565 §12]

279A.107 Certification as disadvantaged business enterprise, minority-owned business, woman-owned business, business that service-disabled veteran owns or emerging small business during term of public contract; exceptions. (1) A contracting agency that under ORS 279A.105 awards a public contract to a responsible bidder, as defined in ORS 200.005, that has made good faith efforts, as described in ORS 200.045 (3), or that awards a public contract in the course of carrying out an affirmative action goal, policy or program under ORS 279A.100 shall:

(a) Provide as a material condition of the public contract that a contractor remain certified as a disadvantaged business enterprise, minority-owned business, woman-owned business, business that a service-disabled veteran owns or emerging small business under ORS 200.055 for the entire term of the public contract, if the contracting agency awarded the public contract, in whole or in part, on the basis of the contractor's certification.

(b) Require a contractor to provide in the contractor's subcontracts that a subcontractor remain certified as a disadvantaged business enterprise, minority-owned business, woman-owned business, business that a service-disabled veteran owns or emerging small business under ORS 200.055 for the entire term of the subcontract, if the contractor awards the subcontract, in whole or in part, on the basis of the subcontractor's certification.

(c) Verify the contractor's or subcontractor's compliance with the requirements set forth in paragraphs (a) and (b) of this subsection.

(d) Verify that a contractor is paying a subcontractor that is certified under ORS 200.055 promptly as provided in ORS 279B.220 or 279C.570, as appropriate.

(2)(a) If a contracting agency determines at any time during the term of a public contract that a contractor to which the contracting agency awarded the public contract on the basis described in subsection (1) of this section, or a subcontractor to which the contractor awarded a

subcontract in connection with the public contract on the basis described in subsection (1) of this section, is no longer certified, the contracting agency may:

- (A) Terminate the public contract;
- (B) Require the contractor to terminate the subcontract; or
- (C) Exercise any of the remedies for breach of contract that are reserved in the public contract.

(b) The actions a contracting agency may take under paragraph (a) of this subsection are in addition to and not in lieu of any other action the Oregon Business Development Department may take with respect to the contractor or subcontractor under ORS 200.065.

(c) Paragraph (a) of this subsection does not apply to an emerging small business as defined in ORS 200.005 that, because of growth in the number of full-time equivalent employees or average annual gross receipts that occurs during the term of the public contract, no longer qualifies as a tier one firm or tier two firm, as those terms are defined in ORS 200.005, or for which a certification under ORS 200.055 expires during the term of the public contract. [2015 c.325 §2; 2015 c.565 §26]

279A.110 Discrimination in subcontracting prohibited; remedies. (1) A bidder or proposer that competes for or is awarded a public contract may not discriminate against a subcontractor in awarding a subcontract because the subcontractor is a disadvantaged business enterprise, a minority-owned business, a woman-owned business, a business that a service-disabled veteran owns or an emerging small business that is certified under ORS 200.055.

(2) A contracting agency may debar or disqualify, under ORS 279B.130 or 279C.440, as appropriate, a bidder or proposer if the contracting agency finds that the bidder or proposer has violated subsection (1) of this section in awarding a subcontract in connection with a contract the contracting agency advertised or otherwise solicited or a contract between the contracting agency and the bidder or proposer. A debarred or disqualified bidder or proposer may appeal the debarment or disqualification under ORS 279B.425 or ORS 279C.445 and 279C.450, as appropriate.

(3) A contracting agency may not allege an occurrence of discrimination in subcontracting as a basis for debarring or disqualifying a bidder or proposer under subsection (2) of this section more than three years after the alleged discriminatory conduct occurred or more than three years after the contracting agency, in the exercise of reasonable diligence, should have discovered the conduct, whichever is later.

(4) A bidder or proposer shall certify in the bid or proposal that the bidder or proposer has not discriminated and will not discriminate, in violation of subsection (1) of this section, against a disadvantaged business enterprise, a minority-owned business, a woman-owned business, a business that a service-disabled veteran owns or an emerging small business in awarding a subcontract.

(5) If a contracting agency awards a public contract to a contractor and the contractor violates the contractor's certification under subsection (4) of this section, the contracting agency may regard the violation as a breach of contract that permits the contracting agency to:

- (a) Terminate the contract; or
- (b) Exercise any of the remedies for breach of contract that are reserved in the contract. [2003 c.794 §15; 2009 c.235 §3; 2015 c.565 §13]

CONTRACT PREFERENCES

279A.120 Preference for Oregon goods and services; nonresident bidders. (1) As used in this section:

(a) "Nonresident bidder" means a bidder who is not a resident bidder.

(b) "Resident bidder" means a bidder that has paid unemployment taxes or income taxes in this state during the 12 calendar months immediately preceding submission of the bid, has a business address in this state and has stated in the bid whether the bidder is a "resident bidder" under this paragraph.

(2) For the purposes of awarding a public contract, a contracting agency shall:

(a) Give preference to goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal; and

(b) Add a percent increase to the bid of a nonresident bidder equal to the percent, if any, of the preference given to the bidder in the state in which the bidder resides.

(3) When a public contract is awarded to a nonresident bidder and the contract price exceeds \$10,000, the bidder shall promptly report to the Department of Revenue on forms to be provided by the department the total contract price, terms of payment, length of contract and such other information as the department may require before the bidder may receive final payment on the public contract. The contracting agency shall satisfy itself that the requirement of this subsection has been complied with before the contracting agency issues a final payment on a public contract.

(4) The Oregon Department of Administrative Services on or before January 1 of each year shall publish a list of states that give preference to in-state bidders with the percent increase applied in each state. A contracting agency may rely on the names of states and percentages so published in determining the lowest responsible bidder without incurring any liability to any bidder. [2003 c.794 §16]

279A.125 Preference for recycled materials. (1) Notwithstanding provisions of law requiring a contracting agency to award a contract to the lowest responsible bidder or best proposer or provider of a quotation and subject to subsection (2) of this section, a contracting agency charged with the procurement of goods for any public use shall give preference to the procurement of goods manufactured from recycled materials.

(2) A contracting agency shall give preference to goods that are certified to be made from recycled materials if:

(a) The recycled product is available;

(b) The recycled product meets applicable standards;

(c) The recycled product can be substituted for a comparable nonrecycled product; and

(d) The recycled product's costs do not exceed the costs of nonrecycled products by more than five percent, or a higher percentage if a written determination is made by the contracting agency. [2003 c.794 §17]

279A.128 Preference for goods fabricated or processed within state or services performed within state. (1) As used in this section, "services" means services as defined in ORS 279A.010 (1)(kk) and personal services designated under ORS 279A.055.

(2)(a) Notwithstanding provisions of law requiring a contracting agency to award a contract to the lowest responsible bidder or best proposer or provider of a quotation, a contracting agency that uses public funds to procure goods or services for a public use under ORS chapter 279B may give preference to procuring goods that are fabricated or processed, or services that are performed, entirely within this state if the goods or services cost not more than 10 percent more than goods that are not fabricated or processed, or services that are not performed, entirely within this state. If more than one bidder or proposer qualifies for the preference described in this subsection, the contracting agency may give a further preference to a qualifying bidder or proposer that resides in or is headquartered in this state.

(b) The contracting agency by order may set a higher percentage than the percentage set forth in paragraph (a) of this subsection if the contracting agency, in a written determination to support the order, finds good cause to set the higher percentage and explains the contracting agency's reasons and evidence for the finding.

(3) Notwithstanding ORS 279C.320 (1), subsection (2) of this section does not apply to emergency work, minor alterations, ordinary repairs or maintenance work for public improvements or to other construction contracts described in ORS 279C.320 (1). [2009 c.214 §2, 2011 c.237 §1]

279A.130 Preference for exceeding Buy America requirements for transit projects; rules. (1) Notwithstanding provisions of law that require a contracting agency to award a contract to the lowest responsible bidder or best proposer or provider of a quotation, a contracting agency that receives and uses funds from the federal government or an agency of the federal government for a transit project may give preference to a bidder or proposer that exceeds federal Buy America requirements that apply to federally funded transit projects, as permitted under 49 C.F.R. 661.21 as that regulation existed on March 16, 2012.

(2) The Department of Transportation, the Oregon Department of Administrative Services and the Attorney General may adopt rules under ORS 279A.065 and establish policies and procedures to implement subsection (1) of this section. [2012 c.58 §2]

STATE PROCUREMENT

279A.140 State procurement of goods and services; rules. (1) The Oregon Department of Administrative Services shall conduct all procurements and administer the contracting for goods, services and personal services, including architectural, engineering, photogrammetric mapping, transportation planning or land surveying services and related services, for state agencies unless a state agency is specifically authorized by ORS 279A.050 or provisions of law other than the Public Contracting Code to enter into a contract. The authority described in this subsection may be delegated in whole or in part in accordance with ORS 279A.075.

(2) The following requirements and procedures apply to all contracts of state agencies:

(a) A personal services contract is not valid or effective without the written approval of the department unless:

(A) The contract is authorized under ORS 279A.050; or

(B) The department has delegated authority to the contracting agency under ORS 279A.075 to make the personal services contract.

(b) Neither the department nor a state agency may approve a contract before the contract has been reviewed for legal sufficiency and approved by the Attorney General, if the review and approval are required under ORS 291.047 or 291.049.

(c) Unless otherwise provided by law, the department or a state agency may enter into a public contract for any period of time, provided that the term of the contract and conditions of renewal or extension are included in the solicitation. Contracting agencies may stipulate in contracts for goods or services that any payment and performance obligations for succeeding fiscal periods are subject to the availability and appropriation of funds for the obligations. A contract for goods or services subject to this section may not be construed as violating any applicable debt limitation or limitation on a contracting agency's expenditure authority.

(d) When funds are not appropriated or otherwise made available to support continuation of the department's or a state agency's performance of a contract in a subsequent fiscal period, the department or state agency may cancel the contract and reimburse the contractor for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the goods or services delivered under the contract. The department or state agency may pay the reimbursement only from any appropriations or funds then lawfully available for such purposes.

(e) Except as otherwise provided in this chapter, a contract of a state agency will be deemed by the department to have been executed only when all requisite approvals have been obtained.

(f) Any procurement or contract by the department for a state agency must, when required by rules adopted by the department under ORS 279A.070, be made on the basis of a requisition by the state agency.

(g) The department may use moneys from the Oregon Department of Administrative Services Operating Fund to procure goods, services and personal services for the purpose of supplying requirements of state agencies, the cost of which shall be reimbursed to the fund from charges paid by state agencies on the basis of actual usage. Administrative costs incurred in the operation of the fund may be paid from the fund and the amount of such costs shall be added to the cost of the goods, services and personal services as charged to the state agencies.

(h) The department shall adopt rules necessary to implement the provisions of this subsection, including but not limited to rules establishing:

(A) A reporting system for personal service contracts, including architectural, engineering, photogrammetric mapping, transportation planning or land surveying services contracts and related services contracts, that includes the following:

(i) A state agency shall submit to the department personal services contract information as directed by the department. A state agency shall file with the department a copy of each personal services contract entered into by the state agency, including appropriate documentation as required by the department. Whenever a state agency pays more in a calendar year under a personal services contract for services historically performed by state employees than the agency would have paid to the agency's employees performing the same work, the agency shall so report to the department and include in the report a statement of justification for the greater costs.

(ii) The department shall keep the copy of the contract and the department's documentation on file for three years, after which the department may destroy the file. The department shall maintain a system for filing copies of personal services contracts and documentation submitted to the department under this paragraph. The department shall submit a biennial report to the Legislative Assembly concerning the use of personal services contracts by state agencies. The report must specify the name of each state agency, the amount paid under each personal services contract entered into by the agency, the name of the contractor, the duration of the contract and the contract's basic purpose. The report must also include the total dollar figure of all personal services contracts for each year of the preceding biennium.

(B) Procedures for the evaluation and award of personal services contracts when the department authorizes a state agency to contract directly for personal services, including architectural, engineering, photogrammetric mapping, transportation planning or land surveying services and related services, in accordance with ORS 279B.050 or 279C.100 to 279C.125.

(3) The department shall notify all state agencies of the requirements of this section. [2003 c.794 §18, 2011 c.458 §11]

279A.142 Limitation of competition. A contracting agency may, by appropriate ordinance, resolution or rule, limit competition for a public contract to emerging small businesses certified under ORS 200.055 if the contract price is estimated at \$100,000 or less and is funded by the Emerging Small Business Account established under ORS 200.180. [2007 c.344 §2, 2015 c.565 §14]

279A.145 Recycled product purchasing information. The Oregon Department of Administrative Services shall include recycled product purchasing information within publications and training programs provided to local governments requesting state government purchasing assistance. [2003 c.794 §19]

279A.150 Procurement of goods containing recycled polyethylene material. (1) The Oregon Department of Administrative Services shall provide guidelines to state agencies and contractors on the availability of necessary goods that contain recycled PETE, as well as other recycled plastic resin supplies and materials.

(2) The department shall identify suppliers able to provide necessary goods containing recycled PETE, as well as other recycled plastic resin supplies and materials. [2003 c.794 §20]

279A.155 State procurement of paper. No less than 35 percent of state agency procurements of paper products may be from recycled paper products. [2003 c.794 §21]

279A.157 State contracting agency use of contract form, contract template or solicitation template; exceptions and exemptions; rules.

(1) As used in this section:

(a)(A) "Contract form" means a document with terms and conditions that the Attorney General and the Oregon Department of Administrative Services develop, approve and make available for state contracting agencies to use without alteration, except as provided in subparagraph (B) of this paragraph, as the terms and conditions of a public contract.

(B) "Contract form" does not include specifications for a procurement, a scope of work, pricing information, information that identifies parties to the public contract or similar or related portions of a public contract that a state contracting agency necessarily develops or must alter, with approval from the Attorney General or the Oregon Department of Administrative Services, as a means of achieving the results the state contracting agency intends for the procurement.

(b)(A) "Contract template" means a document with terms and conditions that the Attorney General and the department develop, approve and make available for state contracting agencies to use, with appropriate alterations, as the basis for the terms and conditions of a public contract.

(B) "Contract template" does not include specifications for a procurement, a scope of work, pricing information, information that identifies parties to the public contract or similar or related portions of a public contract that a state contracting agency necessarily develops or must alter as a means of achieving the results the state contracting agency intends for the procurement.

(c) "Solicitation template" means a request for information, a request for a quotation, an invitation to bid, a request for proposals or other document for soliciting a procurement under the Public Contracting Code in which the Attorney General and the department develop, approve and make available standardized language that a state contracting agency must use, with appropriate alterations, for a solicitation.

(2)(a) Except as provided in paragraph (c) of this subsection, a state contracting agency shall use a solicitation template in advertising and soliciting all procurements under the Public Contracting Code and, as provided in paragraph (b) of this subsection, shall use a contract form or a contract template, as appropriate, as the basis for all public contracts into which the state contracting agency enters. A state contracting agency, in accordance with the Public Contracting Code, may negotiate the terms and conditions set forth in a contract form or contract template but may not vary the terms and conditions without the advice of the Attorney General or legal counsel that the Attorney General approves if the state contracting agency anticipates that the contract form or contract template will be the basis for a public contract with a contract price that exceeds \$150,000.

(b) A state contracting agency shall use a contract form or contract template for all price agreements, cooperative procurements or procurements for which the Attorney General or the Director of the Oregon Department of Administrative Services determines that the specifications for goods or services, the terms and conditions, the scope of work or other aspects of a procurement or a class of procurements do not vary significantly among state contracting agencies, or for procurements or classes of procurements in which the Attorney General or the director determines that using a contract form or contract template is necessary for the state contracting agency to avoid unreasonable liabilities or other risks or would promote best practices in public contracting. A state contracting agency, in accordance with the Public Contracting Code, may negotiate the terms and conditions set forth in a contract form or contract template but may not vary the terms and conditions without the advice of the Attorney General or legal counsel that the Attorney General approves if the state contracting agency anticipates that the contract form or contract template will be the basis for a public contract with a contract price that exceeds \$150,000.

(c) A state contracting agency may base a public contract on terms and conditions other than the terms and conditions set forth in a contract form or contract template only if:

(A) The state contracting agency receives approval from the Attorney General or, if the state contracting agency is subject to ORS 279A.140, from the Director of the Oregon Department of Administrative Services, unless the state contracting agency determines that the contract price for the public contract is unlikely to exceed \$150,000;

(B) The nature of the procurement is unique and the public contract requires specific terms and conditions to accommodate the unique nature of the procurement or the state contracting agency, in accordance with provisions in the solicitation documents for the procurement, negotiated terms and conditions for the public contract that differ from the terms and conditions in a contract form or contract template;

(C) The state contracting agency consults the Attorney General, or legal counsel that the Attorney General approves, to develop appropriate terms and conditions for the public contract and for legal advice during all phases of the procurement for which the Attorney General determines that legal advice is necessary and relevant; and

(D) The state contracting agency submits the public contract to the Attorney General for approval for legal sufficiency, if the provisions of ORS 291.047 require the submission.

(d) This subsection does not apply to a procurement that a state contracting agency conducts under ORS 279B.065, 279B.080 or 279C.110 (9).

(3) Notwithstanding provisions of this section that require a state contracting agency to use a solicitation template, contract form or contract template that the Attorney General and the department develop, the office of the Secretary of State and the office of the State Treasurer shall use standardized forms and templates that each office develops for each office's own use in conducting procurements or entering into public contracts. The Secretary of State and the State Treasurer may elect to use solicitation templates, contract forms or contract templates that the Attorney General and the department develop.

(4) The Attorney General and the Director of the Oregon Department of Administrative Services shall cooperate to:

(a) Develop and make available solicitation templates, contract forms and contract templates for procurements or classes of procurements that state contracting agencies require; and

(b) Adopt rules under ORS 279A.065 to implement the provisions of this section. [2015 c.646 §2]

279A.159 Education and training or experience requirements for persons that conduct procurements or administer contracts for state contracting agencies; deadlines; rules. (1) A person that conducts a procurement or administers a public contract for a state contracting agency

shall complete a course of education and training or have professional experience that, at a minimum and in accordance with standards established under subsection (2) of this section, adequately prepares the person to:

- (a) Develop specifications and develop or adapt solicitation documents for a procurement;
- (b) Read critically, understand, interpret and apply terms and conditions set forth in public contracts of the scope and nature that the person administers or will administer;
- (c) Draft scopes of work, statements of work, contract amendments, change orders, insurance requirements, notices and other documents and communications that are necessary to conduct a procurement or administer a public contract of the scope and nature for which the person is or will be responsible;
- (d) Monitor a contractor's performance under a public contract to ensure that the contractor performs services, provides goods or supplies materials according to the schedule, pricing, specifications and terms and conditions set forth in the public contract;
- (e) Manage relations between a state contracting agency and contractors so that contractors meet obligations to the state contracting agency and the state contracting agency meets obligations to contractors;
- (f) Recognize and investigate emerging disputes or other risks, unique requirements, unusual situations or other issues that arise in connection with a procurement and formulate appropriate responses and resolutions, seeking advice from legal counsel, risk management personnel or other persons when necessary;
- (g) Understand auditing requirements and procedures that apply to procurements of the scope and nature for which the person is or will be responsible and organize and maintain appropriate documentation and administrative practices that meet the auditing requirements; and
- (h) Follow regular business and office procedures, implement applicable state contracting agency policies and procedures and otherwise conduct procurements or administer public contracts for a state contracting agency in accordance with best practices.

(2)(a) The Oregon Department of Administrative Services by rule shall establish standards for the education and training or experience a person must have to conduct a procurement or administer a public contract for a state contracting agency other than the Secretary of State or State Treasurer and may specify requirements in addition to the requirements set forth in subsection (1) of this section. The standards must describe the contents and quality of a curriculum for an appropriate education or training program, fix a passing score for an examination or assessment, if appropriate, specify requirements for obtaining a certificate or other evidence of having completed the education or training program and otherwise determine the skills and the level and depth of knowledge a person must have obtained from the education or training program. The standards must also describe the length of service or other evidence of adequate experience that a person must have in order to conduct a procurement or administer a public contract for a state contracting agency.

(b) The department may establish levels or classifications of education and training or experience that are necessary for a person to conduct a procurement or administer a public contract for a state contracting agency, according to:

- (A) The complexity, scope or category of procurements a state contracting agency conducts;
- (B) The degree of responsibility a person will have for conducting a procurement or administering a public contract; or
- (C) Other appropriate criteria.

(c) The department may provide an education or training program that meets the standards the department establishes under this subsection or may approve an education or training program that meets the standards.

(d) The department by rule shall set a date, not later than December 31, 2017, by which an education or training program must meet the standards the department establishes under this subsection and a date, not later than December 31, 2018, after which all persons that conduct procurements or administer public contracts for state contracting agencies must meet the requirements specified in this section. In setting dates under this paragraph, the department shall take into account the fiscal impact of the standards and requirements on state contracting agencies and may phase in or specify incremental steps for meeting the standards and requirements.

(3) The office of the Secretary of State and the office of the State Treasurer, not later than December 31, 2017, shall each establish standards for the education and training or experience a person must have to conduct a procurement or administer a public contract for the Secretary of State or the State Treasurer. The standards for education and training or experience must meet the requirements set forth in subsection (1) of this section. The Secretary of State and the State Treasurer may specify requirements in addition to the requirements set forth in subsection (1) of this section and may elect to meet the standards that the department establishes under subsection (2) of this section. Not later than December 31, 2018, a person that conducts a procurement or administers a public contract for the office of the Secretary of State or the office of the State Treasurer shall meet the standards that the office of the Secretary of State or the office of the State Treasurer, as appropriate, establishes under this subsection. [2015 c.646 §3]

279A.161 Review and verification of advice and recommendations concerning procurements; delegation. (1) Before a state contracting agency executes a public contract with a contract price that exceeds \$150,000, the director or other head of the state contracting agency shall review, and shall verify that the person that will administer the public contract for the state contracting agency has read and understands, all advice and recommendations that the Oregon Department of Administrative Services, the Department of Justice or other legal counsel gave to the state contracting agency with respect to the public contract and the procurement that resulted in the public contract. The director or other head of the state contracting agency shall sign and retain in the state contracting agency's records a statement that acknowledges that the director or other head of the state contracting agency reviewed the advice and recommendations and made the verification described in this subsection.

(2) The director or other head of a state contracting agency that enters into more than 12 public contracts during a calendar year may delegate to a qualified employee of the state contracting agency all or a portion of the duties the director or other head of the state contracting agency has under subsection (1) of this section. [2015 c.646 §4]

279A.165 Report concerning special procurements; requirement to maintain records. (1) The Oregon Department of Administrative Services, before the beginning of each odd-numbered year regular legislative session, shall provide to an appropriate committee of the Legislative Assembly that considers questions related to public contracting a report that contains information about special procurements conducted under the provisions of ORS 279B.085 by state contracting agencies that are subject to the authority of the department under ORS 279A.050 (2) and (7). The information must include, at a minimum:

- (a) The name of each state contracting agency that conducted a procurement under the provisions;
- (b) The number of procurements the state contracting agency conducted under the provisions and the number of contracts the state contracting agency awarded under the provisions;
- (c) A summary of the reasons that the state contracting agency decided to conduct the procurement under the provisions;

(d) A descriptive summary of the procurement procedure the state contracting agency used to conduct the procurement, noting whether the procedure was competitive or not and listing the number of bids or proposals the state contracting agency received if the procedure was competitive;

(e) The contract price or estimated contract price for each contract the state contracting agency awarded under the provisions; and

(f) A summary of the protests or other responses the state contracting agency received in response to the decision to conduct the procurement under the provisions, and a summary of the disposition of the protests or other responses.

(2) A state contracting agency subject to the authority of the department under ORS 279A.050 (2) and (7) shall maintain records that enable the state contracting agency to calculate or otherwise determine and provide to the department the information described in subsection (1) of this section. The state contracting agency shall maintain the records for the purposes described under this section and may not use the information for evaluating proposals or invitations to bid that the state contracting agency receives in response to a solicitation for a procurement.

(3) This section does not apply to the Secretary of State or the State Treasurer. [2012 c.53 §4]

279A.167 Certification program for training in pay equity provisions of state law; rules. (1) The Oregon Department of Administrative Services shall establish a program to certify that a person that intends to submit a bid or proposal for a public contract understands the prohibition set forth in ORS 652.220 and in other laws or rules that prohibit discrimination in compensation or wage payments. The program must include, but is not limited to, all of these elements:

(a) A curriculum for training prospective bidders and proposers in complying with the prohibition described in this subsection. The curriculum must include hypothetical situations, case studies and other examples that show conduct that would violate the prohibition and other conduct that would constitute correct and best practices.

(b) Criteria for assessing whether prospective bidders and proposers understand the prohibition and can successfully apply best practices to a hypothetical situation that involves discrimination in compensation or wage payments.

(c) Standards for successful completion of the curriculum and assessment that will result in the department issuing the certificate.

(2) The department may conduct the training and assessment for the program described in subsection (1) of this section or may enter into an interagency agreement with the Bureau of Labor and Industries or a contract with a private entity to conduct the training and assessment.

(3) The department may by rule specify a period of time during which a certificate the department issues under this section is valid and may adopt other rules that are necessary to implement the provisions of this section. [2015 c.454 §2]

INTERGOVERNMENTAL RELATIONS

(Generally)

279A.180 Purchases through federal programs. Notwithstanding any other provision of the Public Contracting Code, a procurement may be made without competitive sealed bidding, competitive sealed proposals or other competition required under ORS 279B.050 to 279B.085 provided that:

(1) The procurement is made in accordance with rules adopted by the contracting agency for procurements under this section; and

(2) The procurement is made under 10 U.S.C. 381, the Electronic Government Act of 2002 (P.L. 107-347) or other federal law that is, as determined by the Director of the Oregon Department of Administrative Services or a local contract review board, similar to 10 U.S.C. 381 or section 211 of the Electronic Government Act of 2002 in effectuating or promoting transfers of property to contracting agencies. [2003 c.794 §22]

279A.185 Local contracting agency arrangements for use or disposition of personal property authorized. (1) Notwithstanding the competitive procurement requirements of ORS chapters 279B and 279C, a local contracting agency may sell, transfer or dispose of personal property in accordance with rules adopted under ORS 279A.070.

(2) Notwithstanding the competitive procurement requirements of ORS chapters 279B and 279C, a local contracting agency may negotiate with one or more private or public entities to establish contracts, agreements and other cooperative arrangements for the use, operation, maintenance or ultimate lawful disposition of personal property owned by or under the control of the local contracting agency, including property acquired under ORS 279A.260. Before approving such a contract, agreement or arrangement, the governing body of the local contracting agency must make a finding that the contract, agreement or arrangement will promote the economic development of the local contracting agency, of the geographical area in which the local contracting agency is situated or of other public bodies that perform similar functions. [2003 c.794 §23]

279A.190 Transfers of fire protection equipment between fire departments. (1) As used in this section:

(a) "Fire protection equipment" has the meaning given that term in ORS 476.005.

(b) "Public contract" includes a sale at no cost.

(c) "Regularly organized fire department" has the meaning given that term in ORS 652.050.

(2) Notwithstanding any other provision of the Public Contracting Code, transfers of fire protection equipment under public contracts between regularly organized fire departments may be made without competitive sealed bidding, competitive sealed proposals or other competition required in ORS 279B.050 to 279B.085, provided:

(a) The recipient regularly organized fire department makes a written request for the fire protection equipment to the transferor regularly organized fire department;

(b) The fire protection equipment is surplus to or unusable by the transferor;

(c) The total fair market value of fire protection equipment received by the recipient does not exceed \$50,000 per calendar year; and

(d) The transferor holds a public hearing, with hearing notice published in at least one trade newspaper of general statewide circulation a minimum of 14 days before the hearing, and finds that the public contract is in the public's interest. [2003 c.794 §24]

(Cooperative Procurement)

279A.200 Definitions for ORS 279A.200 to 279A.225. (1) As used in ORS 279A.200 to 279A.225:

(a) "Administering contracting agency" means a governmental body in this state or in another jurisdiction that solicits and establishes the original contract for the procurement of goods, services or public improvements in a cooperative procurement.

(b) "Cooperative procurement" means a procurement conducted on behalf of more than one governmental body. "Cooperative procurement" includes but is not limited to multiagency contracts and price agreements. "Cooperative procurement" does not include an agreement formed

among only governmental bodies under ORS chapter 190 or by a statute, charter provision, ordinance or other authority for establishing agreements between or among governmental bodies or agencies or tribal governing bodies or agencies

(c) "Cooperative procurement group" means a group of governmental bodies joined through an intergovernmental agreement for the purpose of facilitating cooperative procurements.

(d) "Interstate cooperative procurement" means a permissive cooperative procurement in which the administering contracting agency is a governmental body, domestic or foreign, that is authorized under the governmental body's laws, rules or regulations to enter into public contracts and in which one or more of the participating governmental bodies are located outside this state.

(e) "Joint cooperative procurement" means a cooperative procurement in which the participating governmental bodies or the cooperative procurement group and the bodies' or group's contract requirements or estimated contract requirements for price agreements are identified.

(f) "Original contract" means the initial contract or price agreement solicited and awarded during a cooperative procurement by an administering contracting agency.

(g) "Permissive cooperative procurement" means a cooperative procurement in which the purchasing contracting agencies are not identified.

(h) "Purchasing contracting agency" means a governmental body that procures goods, services or public improvements from a contractor based on the original contract established by an administering contracting agency.

(2) As used in ORS 279A.210 (1)(a), 279A.215 (1)(a) and 279A.220 (1)(a), an administering contracting agency's solicitation and award process uses source selection methods "substantially equivalent" to those identified in ORS 279B.055, 279B.060 or 279B.085 if the solicitation and award process:

(a) Calls for award of a contract on the basis of a lowest responsible bidder or a lowest and best bidder determination in the case of competitive bids, or on the basis of a determination of the proposer whose proposal is most advantageous based on evaluation factors set forth in the request for proposals in the case of competitive proposals;

(b) Does not permit the application of any geographic preference that is more favorable to bidders or proposers who reside in the jurisdiction or locality favored by the preference than the preferences provided in ORS 279A.120 (2); and

(c) Uses reasonably clear and precise specifications that promote suitability for the purposes intended and that reasonably encourage competition. [2003 c.794 §25; 2007 c.764 §4]

279A.205 Cooperative procurements authorized. (1) A contracting agency may participate in, sponsor, conduct or administer a joint cooperative procurement for the procurement of any goods, services or public improvements.

(2) A contracting agency may participate in, sponsor, conduct or administer a permissive or interstate cooperative procurement for the procurement of any goods or services, but not public improvements. [2003 c.794 §26; 2005 c.103 §6]

279A.210 Joint cooperative procurements. (1) A joint cooperative procurement is valid only if:

(a) The administering contracting agency's solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055, 279B.060 or 279B.085 or uses a competitive bidding process substantially equivalent to the competitive bidding process in ORS chapter 279C;

(b) The administering contracting agency's solicitation and the original contract or price agreement identifies the cooperative procurement group or each participating purchasing contracting agency and specifies the estimated contract requirements; and

(c) No material change is made in the terms, conditions or prices of the contract between the contractor and the purchasing contracting agency from the terms, conditions and prices of the original contract between the contractor and the administering contracting agency.

(2) A joint cooperative procurement may not be a permissive cooperative procurement. [2003 c.794 §27]

279A.215 Permissive cooperative procurements. (1) A contracting agency may establish a contract or price agreement through a permissive cooperative procurement only if:

(a) The administering contracting agency's solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055 or 279B.060;

(b) The administering contracting agency's solicitation and the original contract allow other contracting agencies to establish contracts or price agreements under the terms, conditions and prices of the original contract;

(c) The contractor agrees to extend the terms, conditions and prices of the original contract to the purchasing contracting agency; and

(d) No material change is made in the terms, conditions or prices of the contract or price agreement between the contractor and the purchasing contracting agency from the terms, conditions and prices of the original contract between the contractor and the administering contracting agency.

(2)(a) A purchasing contracting agency shall provide public notice of intent to establish a contract or price agreement through a permissive cooperative procurement if the estimated amount of the procurement exceeds \$250,000.

(b) The notice of intent must include:

(A) A description of the procurement;

(B) An estimated amount of the procurement;

(C) The name of the administering contracting agency; and

(D) A time, place and date by which comments must be submitted to the purchasing contracting agency regarding the intent to establish a contract or price agreement through a permissive cooperative procurement.

(c) Public notice of the intent to establish a contract or price agreement through a permissive cooperative procurement must be given in the same manner as provided in ORS 279B.055 (4)(b) and (c).

(d) Unless otherwise specified in rules adopted under ORS 279A.070, the purchasing contracting agency shall give public notice at least seven days before the deadline for submission of comments regarding the intent to establish a contract or price agreement through a permissive cooperative procurement.

(3) If a purchasing contracting agency is required to provide notice of intent to establish a contract or price agreement through a permissive cooperative procurement under subsection (2) of this section:

(a) The purchasing contracting agency shall provide vendors who would otherwise be prospective bidders or proposers on the contract or price agreement, if the procurement were competitively procured under ORS chapter 279B, an opportunity to comment on the intent to establish a contract or price agreement through a permissive cooperative procurement.

(b) Vendors must submit comments within seven days after the notice of intent is published.

(c) And if the purchasing contracting agency receives comments on the intent to establish a contract or price agreement through a permissive cooperative procurement, before the purchasing contracting agency may establish a contract or price agreement through the permissive cooperative

procurement, the purchasing contracting agency shall make a written determination that establishing a contract or price agreement through a permissive cooperative procurement is in the best interest of the purchasing contracting agency. The purchasing contracting agency shall provide a copy of the written determination to any vendor that submitted comments. [2003 c.794 §28]

279A.220 Interstate cooperative procurements. (1) A contracting agency may establish a contract or price agreement through an interstate cooperative procurement only if:

(a) The administering contracting agency's solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055 or 279B.060;

(b) The administering contracting agency's solicitation and the original contract allows other governmental bodies to establish contracts or price agreements under the terms, conditions and prices of the original contract; and

(c) The administering contracting agency permits the contractor to extend the use of the terms, conditions and prices of the original contract to the purchasing contracting agency.

(2) In addition to the requirements in subsection (1) of this section:

(a) The purchasing contracting agency, or the cooperative procurement group of which the purchasing contracting agency is a member, must be listed in the solicitation of the administering contracting agency as a party that may establish contracts or price agreements under the terms, conditions and prices of the original contract, and the solicitation must be advertised in Oregon; or

(b)(A) The purchasing contracting agency, or the cooperative procurement group of which the purchasing contracting agency is a member, shall advertise a notice of intent to establish a contract or price agreement through an interstate cooperative procurement.

(B) The notice of intent must include:

(i) A description of the procurement;

(ii) An estimated amount of the procurement;

(iii) The name of the administering contracting agency; and

(iv) A time, place and date by which comments must be submitted to the purchasing contracting agency regarding the intent to establish a contract or price agreement through an interstate cooperative procurement.

(C) Public notice of the intent to establish a contract or price agreement through an interstate cooperative procurement must be given in the same manner as provided in ORS 279B.055 (4)(b) and (c).

(D) Unless otherwise specified in rules adopted under ORS 279A.070, the purchasing contracting agency shall give public notice at least seven days before the deadline for submission of comments regarding the intent to establish a contract or price agreement through an interstate cooperative procurement.

(3) If a purchasing contracting agency is required to provide notice of intent to establish a contract or price agreement through an interstate cooperative procurement under subsection (2) of this section:

(a) The purchasing contracting agency shall provide vendors who would otherwise be prospective bidders or proposers on the contract or price agreement, if the procurement were competitively procured under ORS chapter 279B, an opportunity to comment on the intent to establish a contract or price agreement through an interstate cooperative procurement.

(b) Vendors must submit comments within seven days after the notice of intent is published.

(c) And if the purchasing contracting agency receives comments on the intent to establish a contract or price agreement through an interstate cooperative procurement, before the purchasing contracting agency may establish a contract or price agreement through the interstate cooperative procurement, the purchasing contracting agency shall make a written determination that establishing a contract or price agreement through an interstate cooperative procurement is in the best interest of the purchasing contracting agency. The purchasing contracting agency shall provide a copy of the written determination to any vendor that submitted comments.

(4) For purposes of this section, an administering contracting agency may be any governmental body, domestic or foreign, authorized under its laws, rules or regulations to enter into contracts for the procurement of goods and services for use by a governmental body. [2003 c.794 §29]

279A.225 Protests and disputes. (1) A protest regarding the procurement process, the contents of solicitation documents or the award or proposed award of an original contract may be directed only to the administering contracting agency. The protest must be in accordance with the provisions of ORS 279B.400 to 279B.425.

(2) A protest regarding the use of a cooperative procurement by a purchasing contracting agency after the execution of an original contract may be directed only to the purchasing contracting agency. The protest must be in accordance with the provisions of ORS 279B.400 to 279B.425 and is limited in scope to the purchasing contracting agency's authority to enter into a cooperative procurement contract.

(3) The decision of a local contracting agency to use a cooperative procurement is reviewable in the circuit court of the county where the principal offices of the local contracting agency are located. The decision of a state contracting agency to use a cooperative procurement shall be reviewable by the Circuit Court for Marion County or the circuit court of the county where the principal offices of the state contracting agency are located.

(4) Disputes regarding contract performance between a purchasing contracting agency and a contractor may be resolved solely by the purchasing contracting agency and the contractor. [2003 c.794 §30]

STATE SURPLUS PROPERTY

279A.250 Definitions for ORS 279A.250 to 279A.290. As used in ORS 279A.250 to 279A.290, unless the context requires otherwise:

(1) "Donee" means an entity eligible to acquire federal donation property based upon federal regulations or eligible to acquire surplus property in accordance with rules adopted by the Oregon Department of Administrative Services. Entities eligible to acquire federal donation property may also acquire surplus property other than federal donation property.

(2) "Not-for-profit organization" means a nonprofit corporation as defined in ORS 307.130.

(3) "Property" means personal property.

(4) "State agency" means every state officer, board, commission, department, institution, branch or agency of state government whose costs are paid wholly or in part from funds held in the State Treasury, and includes the Legislative Assembly and the courts, including the officers and committees of both, and the Secretary of State and the State Treasurer in the performance of the duties of their constitutional offices.

(5) "Surplus property" means property received by the Oregon Department of Administrative Services or a state agency as surplus from federal government units, state agencies, local governments, special government bodies, not-for-profit organizations, other states and private entities. [2003 c.794 §36]

279A.255 Inspection, appraisal and inventory of state property; reports by state agencies. The Oregon Department of Administrative Services may:

- (1) Provide for the periodic inspection and appraisal of state property;
- (2) Provide for the maintenance of current and perpetual inventories of state property; and
- (3) Require any state agency to make reports of the property in the agency's custody at such intervals and in such form as the department deems necessary. [2003 c.794 §37]

279A.260 Powers and duties of department; acquisitions by qualified donees; rules. (1) Subject to the power of the Governor to terminate the functions listed in this section, the Oregon Department of Administrative Services may:

- (a) Accept surplus property;
- (b) Distribute surplus property to donees;
- (c) Provide suitable facilities for the storage and distribution of surplus property;
- (d) Enter into reciprocal agreements and contracts with federal government units, state agencies, local governments, special government bodies, not-for-profit organizations, other states and private entities, with respect to the utilization and exchange of property, facilities, personnel and services, for the administration of the provisions of this section in accordance with federal and state laws governing the acquisition, distribution, utilization, disposal or sale of surplus property;
- (e) Expend funds in connection with the provisions of this section;
- (f) Adopt rules for the acquisition, distribution, utilization, disposal or sale of surplus property in accordance with federal and state laws;
- (g) Set charges, subject to federal and state laws, necessary to recover all direct and indirect costs associated with acquiring, purchasing, shipping, handling, warehousing, storing and distributing surplus property;
- (h) Cooperate with donees in locating, obtaining or warehousing surplus property; and
- (i) Obtain surplus property on behalf of donees.

(2) The department shall deposit all fees or charges collected or received under this section in the Oregon Department of Administrative Services Operating Fund.

(3) The governing board or the executive head of a donee may, by order or resolution, confer upon any officer or employee thereof authority to secure the acquisition of surplus property through the department in accordance with federal and state laws governing the acquisition, distribution, utilization, disposal or sale of surplus property. [2003 c.794 §38]

279A.265 Use of Oregon Department of Administrative Services Operating Fund; cash dividends. (1) In addition to the other purposes for which the Oregon Department of Administrative Services Operating Fund established under ORS 283.076 may be used, the fund hereby is appropriated continuously for and may be used for the purposes of this section and ORS 279A.260. All claims approved by the Oregon Department of Administrative Services for the purposes of this section and ORS 279A.260 shall be paid as provided in ORS 293.295 to 293.462. The department shall draw warrants on the State Treasurer for the payment thereof payable out of the fund. All moneys received under ORS 279A.260 shall be paid by the department to the State Treasurer for credit to the fund.

(2) The Director of the Oregon Department of Administrative Services may distribute in the form of cash dividends accumulated surpluses in the fund that arise because the charges collected from donees are in excess of the amount necessary to keep the activities under this section and ORS 279A.260 on a self-sustaining basis. The director shall pay the cash dividends to the donees referred to in ORS 279A.260 (1). Any dividend paid under this subsection shall be based on the ratio of the charges collected from each donee during the preceding fiscal year to the total charges collected from all donees for the fiscal year immediately preceding the fiscal year in which the dividend is authorized to be paid.

(3) Upon termination by the Governor of the functions of the department under ORS 279A.260, any balance remaining in the fund that is attributable to the activities under this section and ORS 279A.260 shall be refunded pro rata to the donees referred to in ORS 279A.260 (1) upon the basis of the total charges collected from each donee during the preceding fiscal year, unless the director determines that the cost of making the refund is excessive, in which case the unrefunded moneys shall be paid to the Treasurer of the United States. [2003 c.794 §39]

279A.270 Contracts with federal government for accepting gifts and acquiring surplus property; bids not required. The Oregon Department of Administrative Services may enter into contracts with any federal government unit for the purpose of accepting gifts and for the acquisition of surplus property upon such terms and conditions as may be agreed upon, without regard to the provisions of law requiring the posting of notices or public advertising for bids or the soliciting or receiving of competitive bids. [2003 c.794 §40]

279A.275 Leasing of state property. The Oregon Department of Administrative Services may lease any state property not needed for public use, provided the law does not prohibit the leasing and the authority to lease is not vested in any other state agency. [2003 c.794 §41]

279A.280 Disposal of surplus property; costs of disposal. (1)(a) Without requiring competitive bidding

(A) The Oregon Department of Administrative Services may sell or transfer surplus property to or transfer surplus property between donees. Donees may be given preference to acquire surplus property. Property acquired shall be used for public purpose or benefit and not for resale to a private purchaser.

(B) The department, or a public or private person or entity designated by the department, may transfer computers and related hardware that are surplus, obsolete or unused to a common or union high school district or education service district. The department, or its designee, may not charge the school district a fee for the transfer.

(C) The department, or a public or private person or entity designated by the department, may recycle or otherwise dispose of property when the department determines the value and condition of the property does not warrant the cost of a sale.

(b) Authorized transfers under this subsection include those made with or without consideration.

(2) In accordance with ORS 279B.055 or 279B.060, the department may sell surplus property.

(3) All proceeds derived from the disposal of property under this section, except proceeds that may not under federal laws or regulations be deposited in the manner provided by this section, shall be deposited in the State Treasury to the credit of the Oregon Department of Administrative Services Operating Fund.

(4) In addition to the other purposes for which the fund may be used, the fund is appropriated continuously for and may be used for paying the administrative costs incurred in the transfer or disposal of property under subsections (1) and (2) of this section, and for paying the amount due to the state agency whose property has been sold. The total amount payable to the agency whose property has been sold shall be the amount derived

from the disposal of the property less the amount of the administrative costs incurred in disposing of the property. Such total amount may be deposited in the State Treasury to the credit of the miscellaneous receipts account established under ORS 279A.290 for the agency whose property has been sold.

(5) The cost of services for disposal of property under this section that is not recoverable from the proceeds of a sale of the property shall be charged to the state agency served and paid to the department in the same manner as other claims against the agency are paid. [2003 c.794 §42]

279A.285 Disposition of moneys received as payment for repair or replacement of damaged, destroyed, lost or stolen property. All moneys received from insurers and other sources as payment for the cost and expense of repair and replacement of property of state agencies that has been damaged, destroyed, lost or stolen, except the particular moneys as may not under federal law or regulations be deposited in the manner provided by this section, may be deposited in the State Treasury to the credit of the miscellaneous receipts account established under ORS 279A.290 for the state agency whose property has been damaged, destroyed, lost or stolen. [2003 c.794 §43]

279A.290 Miscellaneous receipts accounts. (1) The State Treasurer may establish a miscellaneous receipts account for any state agency and shall credit to the account any amounts paid into the State Treasury under ORS 190.240 (1), 279A.280, 279A.285, 283.110 or 357.885 for the state agency for which the account was established. The moneys credited to the miscellaneous receipts account of a state agency established under this section are appropriated continuously for the payment of the expenses of the state agency, subject to the allotment system provided by ORS 291.234 to 291.260.

(2) Laws enacted by the Legislative Assembly limiting expenditures do not limit expenditures from miscellaneous receipts accounts established under this section except when the law limiting expenditures of a state agency specifically establishes a limit for expenditures from the miscellaneous receipts account of the agency. [2003 c.794 §44; 2003 c.794 §44a]

PENALTIES

279A.990 Penalties. (1) The provisions of ORS 291.990 apply to ORS 279A.140, 279A.280 and 279B.270. Any violation of ORS 279A.140, 279A.280 or 279B.270 shall be punished as described in ORS 291.990.

(2) Any contractor, subcontractor, agent or person in authority or in charge who violates any provision of ORS 279C.520 or 279C.540 as to hours of labor commits a Class A misdemeanor.

(3) Any contractor or subcontractor subject to ORS 279C.840 who fails to pay the prevailing rate of wage as required by ORS 279C.840 commits a Class B misdemeanor. [2003 c.794 §46; 2011 c.597 §176]

Chapter 279B — Public Contracting - Public Procurements

ORS sections in this chapter were amended or repealed by the Legislative Assembly during its 2016 regular session. See the table of ORS sections amended or repealed during the 2016 regular session: [2016 A&R Tables](#)

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GENERAL PROVISIONS

279B.005 Definitions. (1) As used in this chapter, unless the context or a specifically applicable definition requires otherwise:

(a) "Invitation to bid" means all documents, whether attached or incorporated by reference, used for soliciting bids.

(b) "Procurement description" means the words used in a solicitation to describe the goods or services to be procured. "Procurement description" includes specifications attached to or made a part of the solicitation.

(c) "Request for proposals" means all documents, whether attached or incorporated by reference, used for soliciting proposals.

(d) "Responsible bidder" or "responsible proposer" means a person who meets the standards of responsibility described in ORS 279B.110.

(e) "Responsive bid" or "responsive proposal" means a bid or proposal that substantially complies with the invitation to bid or request for proposals and all prescribed procurement procedures and requirements.

(2) ORS 279A.010 contains general definitions applicable throughout this chapter. [2003 c.794 §47, 2005 c.103 §7, 2007 c.764 §5]

279B.010 Policy. In addition to the policy stated in ORS 279A.015, it is the policy of the State of Oregon that public contracting activities should

(1) Provide effective outcomes that represent optimal value to the contracting agency and, to the greatest extent feasible, be consistent with market practices;

(2) Seek consistency in procurement practices between contracting agencies covered under the Public Contracting Code while preserving each contracting agency's ability to adopt rules to maximize the contracting agency's effectiveness; and

(3) Apply innovative practices while maintaining quality and integrity. [2003 c.794 §48]

279B.015 Applicability. Except as provided in ORS 279C.320, public contracting under this chapter is subject to ORS chapter 279A, but not ORS chapter 279C. [2003 c.794 §48a, 2005 c.103 §8]

279B.020 Maximum hours of labor on public contracts; holidays; exceptions; liability to workers; rules. (1) When labor is employed by a contracting agency through a contractor, a person may not be required or permitted to labor more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity or emergency or when the public policy absolutely requires it, in which event, the person so employed for excessive hours shall receive at least time and a half pay:

(a)(A) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or

(B) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and

(b) For all work performed on Saturday and on the following legal holidays:

(A) Each Sunday.

(B) New Year's Day on January 1.

(C) Memorial Day on the last Monday in May.

(D) Independence Day on July 4.

(E) Labor Day on the first Monday in September.

(F) Thanksgiving Day on the fourth Thursday in November.

(G) Christmas Day on December 25.

(2) An employer shall give notice in writing to employees who perform work under subsection (1) of this section, 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, of the number of hours per day and days per week that employees may be required to work.

(3) For the purpose of this section, each time a legal holiday, other than Sunday, listed in subsection (1) of this section falls on Sunday, the succeeding Monday shall be recognized as a legal holiday. Each time a legal holiday listed in subsection (1) of this section falls on Saturday, the preceding Friday shall be recognized as a legal holiday.

(4) When specifically agreed to under a written labor-management negotiated labor agreement, an employee may be paid at least time and a half pay for work performed on any legal holiday specified in ORS 187.010 and 187.020 that is not listed in subsection (1) of this section.

(5) This section does not apply to contracts for personal services designated under ORS 279A.055, provided that persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in subsection (1)(b)(B) to (G) of this section and for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(6) Subsections (1) and (2) of this section do not apply to contracts for services at a county fair or for other events authorized by a county fair board if persons employed under the contract receive at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week.

(7) Subsections (1) to (3) of this section do not apply to a contract for services if the contractor is a party to a collective bargaining agreement in effect with any labor organization.

(8)(a) Subsections (1) and (2) of this section do not apply to contracts for services. However, persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in subsection (1)(b)(B) to (G) of this section and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) An employer shall give notice in writing to employees who work on a contract for services, 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, of the number of hours per day and days per week that the employees may be required to work.

(9) Any contractor or subcontractor or contractor's or subcontractor's surety that violates the provisions of this section is liable to the affected employees in the amount of their unpaid overtime wages and in an additional amount equal to the unpaid overtime wages as liquidated damages. If the violation resulted from willful falsification of payroll records, the contractor or subcontractor or contractor's or subcontractor's surety is liable to the affected employees in the amount of their unpaid overtime wages and in an additional amount equal to twice the unpaid overtime wages as liquidated damages.

(10) An action to enforce liability to employees under subsection (9) of this section may be brought as an action on the contractor's payment bond as provided for in ORS 279C.610.

(11) This section does not apply to:

(a) Financial institutions as defined in ORS 706.008.

(b) Labor performed in the prevention or suppression of fire under contracts and agreements made pursuant to the authority of the State Forester or the State Board of Forestry under ORS 477.406.

(c) Public contracts for goods or personal property.

(12) In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries may adopt rules to carry out the provisions of this section. [2003 c.794 §48b, 2005 c.103 §8a]

279B.025 Procurement practices regarding recyclable and reusable goods. All contracting agencies shall establish procurement practices that ensure, to the maximum extent economically feasible, the procurement of goods that may be recycled or reused when discarded. [2003 c.794 §49]

279B.030 Demonstration that procurement will cost less than performing service or that performing service is not feasible; exemptions. (1) Except as provided in ORS 279B.036, before conducting a procurement for services with an estimated contract price that exceeds \$250,000, a contracting agency shall:

(a) Demonstrate, by means of a written cost analysis in accordance with ORS 279B.033, that the contracting agency would incur less cost in conducting the procurement than in performing the services with the contracting agency's own personnel and resources, or
(b) Demonstrate, in accordance with ORS 279B.036, that performing the services with the contracting agency's own personnel and resources is not feasible.

(2) If a local contracting agency authorizes a department, bureau, office or other subdivision of the local contracting agency to conduct a procurement on behalf of another department, bureau, office or subdivision of the local contracting agency, the department, bureau, office or subdivision on whose behalf the procurement is conducted shall comply with the requirement set forth in subsection (1) of this section.

(3) Subsection (1) of this section does not apply to

(a) A local contracting agency or a local contract review board for a city that has a population of not more than 15,000 or a county that has a population of not more than 30,000;

(b) A community college that enrolls not more than 1,000 full-time equivalent students, as defined in ORS 341.005;

(c) A special district, as defined in ORS 198.010, a diking district formed under ORS chapter 551 and a soil and water conservation district organized under ORS 568.210 to 568.808;

(d) The Port of Portland; or

(e) Procurements for client services, as defined in OAR 125-246-0110. [2009 c.880 §2]

279B.033 Contents of cost analysis; conditions under which procurement may proceed; exceptions. (1) In the cost analysis required under ORS 279B.030, a contracting agency shall:

(a) Estimate the contracting agency's cost of performing the services, including:

(A) Salary or wage and benefit costs for contracting agency employees who are directly involved in performing the services, including employees who inspect, supervise or monitor the performance of the services

(B) Material costs, including costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies.

(C) Costs incurred in planning for, training for, starting up, implementing, transporting and delivering the services and costs related to stopping and dismantling a project or operation because the contracting agency intends to procure a limited quantity of services or procure the services within a defined or limited period of time.

(D) Miscellaneous costs related to performing the services. The contracting agency may not include in the cost analysis the contracting agency's indirect overhead costs for existing salaries or wages and benefits for administrators or for rent, equipment, utilities and materials except to the extent that the costs are attributable solely to performing the services and would not exist unless the contracting agency performs the services.

(b) Estimate the cost a potential contractor would incur in performing the services, including:

(A) Average or actual salary or wage and benefit costs for contractors and employees who:

(i) Work in the industry or business most closely involved in performing the services that the contracting agency intends to procure, and

(ii) Would be necessary and directly involved in performing the services or who would inspect, supervise or monitor the performance of the services;

(B) Material costs, including costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies; and

(C) Miscellaneous costs related to performing the services, including but not limited to reasonably foreseeable fluctuations in the costs for the items identified in this subsection over the expected duration of the procurement.

(2)(a) After comparing the difference between the costs estimated as provided in subsection (1)(a) of this section with the costs estimated as provided in subsection (1)(b) of this section, except as provided in paragraph (b) of this subsection, the contracting agency may proceed with the procurement only if the contracting agency would incur more cost in performing the services with the contracting agency's own personnel and resources than the contracting agency would incur in procuring the services from a contractor. The contracting agency may not proceed with the procurement if the sole reason that the costs estimated in subsection (1)(b) of this section are lower than the costs estimated in subsection (1)(a) of this section is because the costs estimated in subsection (1)(b)(A) of this section are lower than the costs estimated in subsection (1)(a)(A) of this section.

(b) A contracting agency may proceed with a procurement even if the contracting agency determines that the contracting agency would incur less cost in providing the services with the contracting agency's own personnel and resources if at the time the contracting agency intends to conduct a procurement, the contracting agency lacks personnel and resources that are necessary to perform the services within the time in which the services are required. If the contracting agency conducts a procurement under the conditions described in this paragraph, the contracting agency shall:

(A) Keep a record of the cost analysis and findings that the contracting agency makes for each procurement the contracting agency conducts under this section, along with the basis for the contracting agency's decision to proceed with the procurement, and

(B) Collect and provide copies of the records described in subparagraph (A) of this paragraph each calendar quarter to the local contract review board, if the contracting agency is a local contracting agency, or to the Emergency Board, if the contracting agency is a state contracting agency.

(c) If the contracting agency is a state contracting agency, in addition to complying with the provisions of paragraph (b) of this subsection the contracting agency shall prepare a request to the Governor for an appropriation and any authority that is necessary for the contracting agency to hire personnel and obtain resources necessary to perform the services that the contracting agency procured under the conditions described in paragraph (b) of this subsection. The request must include a copy of the records that the contracting agency provided to the Emergency Board under paragraph (b)(B) of this subsection.

(3) A cost analysis, record, documentation or determination made under this section is a public record. [2009 c.880 §3]

279B.036 Determination of feasibility of procurement. (1) Notwithstanding the provisions of ORS 279B.033 (2)(a), a contracting agency may proceed with a procurement if the contracting agency reasonably determines in writing that using the contracting agency's own personnel or

resources to perform the services that the contracting agency intends to procure is not feasible. The contracting agency may make the determination described in this subsection without conducting a cost analysis under ORS 279B.033 if the contracting agency finds that:

(a) The contracting agency lacks the specialized capabilities, experience or technical or other expertise necessary to perform the services. In making the finding, the contracting agency shall compare the contracting agency's capability, experience or expertise in the field most closely involved in performing the services with a potential contractor's capability, experience or expertise in the same or a similar field.

(b) Special circumstances require the contracting agency to procure the services by contract. Special circumstances may include, but are not limited to, circumstances in which:

(A) The terms under which the contracting agency receives a grant or other funds for use in a procurement require the contracting agency to obtain services through an independent contractor;

(B) Other state or federal law requires the contracting agency to procure services through an independent contractor;

(C) The procurement is for services that are incidental to a contract for purchasing or leasing real or personal property, including service and maintenance agreements for equipment that is leased or rented;

(D) The contracting agency cannot accomplish policy, administrative or legal goals, including but not limited to avoiding conflicts of interest or ensuring independent or unbiased findings in cases when using the contracting agency's existing personnel or persons the contracting agency could hire through a regular or ordinary process would not be suitable;

(E) The procurement is for services to which the provisions of ORS 279B.080 apply;

(F) The procurement is for services, the need for which is so urgent, temporary or occasional that attempting to perform the services with the contracting agency's own personnel or resources would cause a delay that would frustrate the purpose for obtaining the services; or

(G) The services that the contracting agency intends to procure will be completed within six months after the date on which the contract for the services is executed.

(2) A finding or determination and supporting documentation for a finding or determination made under this section is a public record. [2009 c.880 §4]

279B.040 Prohibition on accepting bid or proposal from contractor that advised or assisted contracting agency to develop specifications or solicitation documents; exceptions. (1) Except as provided in subsection (2) of this section, a state contracting agency that procures personal services for the purpose of advising or assisting the state contracting agency in developing specifications, a scope or statement of work, an invitation to bid, a request for proposals or other solicitation documents and materials related to a procurement may not accept from the contractor, or an affiliate of the contractor, that advised or assisted the state contracting agency a bid or proposal for the goods or services described, specified or identified in the solicitation documents or materials if a reasonable person would believe that, by giving the advice or assistance, the contractor or affiliate would have or would appear to have an advantage in obtaining the public contract that is the subject of the solicitation.

(2)(a) If a state contracting agency anticipates that the state contracting agency will or must seek advice or assistance of the type described in subsection (1) of this section from a contractor that is also engaged in providing goods or services that will be described or identified in the solicitation documents and materials that result from the advice or assistance, and the state contracting agency wishes to accept a bid or proposal from the contractor, the state contracting agency, before awarding a contract for the advice or assistance, shall apply to the Director of the Oregon Department of Administrative Services for an exception to the prohibition set forth in subsection (1) of this section.

(b) The state contracting agency in the application for the exception shall include findings and justifications, along with sufficient facts to support the findings and justifications, that will enable the director to make an independent judgment as to whether:

(A) The state contracting agency needs advice or assistance from a contractor to develop the solicitation documents and materials described in subsection (1) of this section;

(B) Accepting a bid or proposal from the contractor that gives the advice or assistance is the only practicable way in which the state contracting agency can conduct the procurement successfully; and

(C) Approving the exception:

(i) Is unlikely to encourage favoritism in awarding public contracts or to substantially diminish competition for public contracts; and

(ii)(I) Is reasonably expected to result in substantial cost savings to the state contracting agency or the public; or

(II) Otherwise substantially promotes the public interest in a manner that could not be practicably realized by complying with the prohibition described in subsection (1) of this section.

(c)(A) If the director approves the state contracting agency's application, the director shall prepare written findings and justifications for the approval. The state contracting agency's findings, justifications and facts and the director's findings, justifications and approval are public records that are subject to disclosure as provided in ORS 192.410 to 192.505.

(B) If the director disapproves the state contracting agency's application, the director shall state the director's reasons for the disapproval in a written notice to the state contracting agency and shall indicate whether the disapproval extends only to the state contracting agency's acceptance of a bid or proposal from a contractor that gives advice or assistance in preparing solicitation documents and other materials or whether the director also disagrees with the state contracting agency's stated need for advice or assistance from a contractor.

(C) The director's approval or disapproval is final.

(3) As used in this section, "affiliate" means a person that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with a contractor described in this section.

(4) This section does not apply to:

(a) The Secretary of State or the State Treasurer; or

(b) A bid or proposal for quality management services, as defined in ORS 291.035, that a state contracting agency receives from a contractor that provided preliminary quality assurance services, as defined in ORS 291.035, for the same information technology initiative that is the subject of the state contracting agency's solicitation for quality management services. [2012 c.53 §2; 2014 c.77 §2]

279B.045 Contractor warranty and covenant concerning tax law compliance. Every public contract that is subject to this chapter must include a representation and warranty from the contractor that the contractor has complied with the tax laws of this state or a political subdivision of this state, including but not limited to ORS 305.620 and ORS chapters 316, 317 and 318. The public contract must also require a covenant from the contractor to continue to comply with the tax laws of this state or a political subdivision of this state during the term of the public contract and provide that a contractor's failure to comply with the tax laws of this state or a political subdivision of this state before the contractor executed the public contract or during the term of the public contract is a default for which a contracting agency may terminate the public contract and seek damages and other relief available under the terms of the public contract or under applicable law. [2015 c.539 §3]

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SOURCE SELECTION

(Methods of Source Selection)

279B.050 Methods of source selection. (1) Except as provided in subsection (2) of this section, a contracting agency shall award a public contract for goods or services by competitive sealed bidding under ORS 279B.055 or competitive sealed proposals under ORS 279B.060.

(2) The requirements of subsection (1) of this section do not apply to public contracts established as provided in ORS 279B.065, 279B.070, 279B.075, 279B.080 or 279B.085.

(3) Notwithstanding the applicability of ORS 279B.065, 279B.070, 279B.075, 279B.080 or 279B.085 to a public contract, a contracting agency nevertheless may award the public contract under subsection (1) of this section.

(4) A local contracting agency may elect, by rule, charter, ordinance or other appropriate legislative action, to award contracts for personal services, as designated under ORS 279A.055, under the procedures of ORS 279B.050 to 279B.085.

(5) State contracting agencies shall solicit contracts for personal services in accordance with ORS 279B.050 to 279B.085. [2003 c.794 §50; 2007 c.764 §6]

279B.055 Competitive sealed bidding. (1) A contracting agency may solicit and award a public contract for goods or services, or may award multiple public contracts for goods or services when specified in the invitation to bid, by competitive sealed bidding.

(2) The contracting agency shall issue an invitation to bid, which must:

(a) Specify a time and date by which the bids must be received and a place at which the bids must be submitted. The contracting agency, in the contracting agency's sole discretion, may receive bids by electronic means or direct or permit a bidder to submit bids by electronic means.

(b) Specify the name and title of the person designated to receive bids and the person the contracting agency designates as the contact person for the procurement, if different.

(c) Describe the procurement. In the description, the contracting agency shall identify the scope of work included within the procurement, outline the contractor's anticipated duties and set expectations for the contractor's performance. Unless the contracting agency for good cause specifies otherwise, the scope of work shall require the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the appropriate goods or services.

(d) Specify a time, date and place for prequalification applications, if any, to be filed and the classes of work, if any, for which bidders must be prequalified in accordance with ORS 279B.120.

(e) State that the contracting agency may cancel the procurement or reject any or all bids in accordance with ORS 279B.100.

(f) State that "Contractors shall use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this document." if a state contracting agency issues the invitation to bid.

(g) Require the contractor or subcontractor to possess an asbestos abatement license, if required under ORS 468A.710.

(h) Include all contractual terms and conditions applicable to the procurement. The contract terms and conditions shall specify clear consequences for a contractor's failure to perform the scope of work identified in the invitation to bid or the contractor's failure to meet established performance standards. The consequences may include, but are not limited to:

(A) Reducing or withholding payment;

(B) Requiring the contractor to perform, at the contractor's expense, additional work necessary to perform the identified scope of work or meet the established performance standards; or

(C) Declaring a default, terminating the public contract and seeking damages and other relief available under the terms of the public contract or other applicable law.

(3)(a) The contracting agency may require bid security if the contracting agency determines that bid security is reasonably necessary or prudent to protect the interests of the contracting agency.

(b) The contracting agency shall return the bid security to all bidders upon the execution of the contract.

(c) The contracting agency shall retain the bid security if a bidder who is awarded a contract fails to promptly and properly execute the contract. For purposes of this paragraph, prompt and proper execution of the contract includes all action by a bidder that is necessary to form a contract in accordance with the invitation to bid, including posting performance security and submitting proof of insurance when the invitation to bid requires the submission.

(4)(a) The contracting agency shall give public notice of an invitation to bid issued under this section. Public notice is intended to foster competition among prospective bidders. The contracting agency shall make invitations to bid available to prospective bidders.

(b) A public notice must be published at least once in at least one newspaper of general circulation in the area where the contract is to be performed and in as many additional issues and publications as the contracting agency may determine.

(c) The Director of the Oregon Department of Administrative Services or a local contract review board may, by rule or order, authorize public notice of bids or proposals to be published electronically instead of in a newspaper of general circulation if the director or board determines that electronically providing public notice of bids or proposals is likely to be cost-effective.

(d) In addition to the modes of publication authorized by paragraphs (b) and (c) of this subsection, the contracting agency may use any other medium reasonably calculated to reach prospective bidders or proposers.

(e) Rules adopted under ORS 279A.065 must prescribe the requirements for providing public notice of solicitations.

(f) Unless otherwise specified in rules adopted under ORS 279A.065, the contracting agency shall give public notice at least seven days before the solicitation closing date.

(5)(a) The contracting agency shall open bids publicly at the time, date and place designated in the invitation to bid. When authorized by, and in accordance with, rules adopted under ORS 279A.065, bids may be submitted, received and opened through electronic means.

(b) The contracting agency shall record the amount of a bid, the name of the bidder and other relevant information specified by rule adopted under ORS 279A.065. The record shall be open to public inspection.

(c) Notwithstanding a requirement to make bids open to public inspection after the contracting agency issues notice of intent to award a contract, a contracting agency may withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a bid.

(6)(a) The contracting agency shall evaluate all bids that are received before the time and date indicated for bid opening in the invitation to bid. The contracting agency shall evaluate the bids based on the requirements set forth in the invitation to bid. The requirements may include, in addition to the information described in subsection (2) of this section, criteria to determine minimum acceptability, such as inspection, testing,

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quality and suitability for intended use or purpose. Criteria that will affect the bid price and will be considered in evaluation for award including, but not limited to, discounts, transportation costs and total costs of ownership or operation of a product over the life of the product must be objectively measurable. The invitation to bid must set forth the evaluation criteria to be used. No criteria may be used in a bid evaluation that are not set forth in the invitation to bid or in a qualified products list maintained under ORS 279B.115. The contracting agency may not consider for award bids received after the time and date indicated for bid opening in the invitation to bid. The contracting agency may retain bids or copies of bids received after the bid time and date indicated in the invitation to bid.

(b) The contracting agency shall, for the purpose of evaluating bids, apply any applicable preference described in ORS 279A.120, 279A.125 or 282.210.

(7) Rules adopted under ORS 279A.065 must provide for and regulate the correction and withdrawal of bids before and after bid opening and the cancellation of awards or contracts based on bid mistakes. After bid opening, changes in bids prejudicial to the interests of the public or fair competition are not permitted. A contracting agency that permits a bidder to correct or withdraw a bid or that cancels an award or a contract based on bid mistakes, shall support the decision with a written determination that states the reasons for the action taken.

(8) The cancellation of invitations to bid and the rejection of bids must be in accordance with ORS 279B.100.

(9) The contracting agency shall, in accordance with ORS 279B.135, issue to each bidder or shall post, electronically or otherwise, a notice of intent to award.

(10) If a contracting agency awards a contract, the contracting agency shall award the contract:

(a) To the lowest responsible bidder whose bid substantially complies with the requirements and criteria set forth in the invitation to bid and with all prescribed public procurement procedures and requirements; or

(b) If the invitation to bid specifies or authorizes the award of multiple contracts, to the responsible bidders:

(A) Whose bids substantially comply with the requirements and criteria set forth in the invitation to bid and with all prescribed public procurement procedures and requirements; and

(B) Who qualify for the award of a public contract under the terms of the invitation to bid.

(11) The successful bidder shall promptly execute a contract. The successful bidder's duty to promptly execute a contract includes the duty to take all action that is necessary to form a contract in accordance with the invitation to bid, including posting performance security, submitting proof of insurance when the invitation to bid requires the submission and agreeing to perform the scope of work and meet the performance standards set forth in the invitation to bid.

(12) If a contracting agency determines that preparing a procurement description to support an award based on price is impractical, the contracting agency may issue a multistep invitation to bid that requests bidders to submit unpriced submittals, and then later issue an invitation to bid limited to the bidders that the contracting agency officer has determined are eligible to submit a priced bid under the criteria set forth in the initial solicitation of unpriced submittals.

(13) The contracting agency may issue a request for information, a request for interest or other preliminary documents to obtain information useful in preparing an invitation to bid. [2003 c.794 §51; 2009 c.880 §5]

279B.060 Competitive sealed proposals. (1) A contracting agency may solicit and award a public contract for goods or services, or may award multiple public contracts for goods or services when specified in the request for proposals, by requesting and evaluating competitive sealed proposals.

(2) The request for proposals must:

(a) Specify a time and date by which sealed proposals must be received, and a place at which the proposals must be submitted. The contracting agency, in the contracting agency's sole discretion, may receive proposals by electronic means or may direct or permit proposers to submit proposals by electronic means.

(b) Specify the name and title of the person designated to receive proposals and the person the contracting agency designates as the contact person for the procurement, if different.

(c) Describe the procurement. In the description, the contracting agency shall identify the scope of work included within the procurement, outline the contractor's anticipated duties and set expectations for the contractor's performance. Unless the contractor is providing architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or related services, as defined in ORS 279C.100, or unless the contracting agency for good cause specifies otherwise, the scope of work shall require the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the appropriate goods or services.

(d) Specify a time, date and place for prequalification applications, if any, to be filed and the classes of work, if any, for which proposers must be prequalified in accordance with ORS 279B.120.

(e) State that the contracting agency may cancel the procurement or reject any or all proposals in accordance with ORS 279B.100.

(f) State that "Contractors shall use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this document." if a state contracting agency issues the request for proposals.

(g) Require the contractor or subcontractor to possess an asbestos abatement license, if required under ORS 468A.710.

(h) Include all contractual terms and conditions applicable to the procurement. The contract terms and conditions shall specify clear consequences for a contractor's failure to perform the scope of work identified in the request for proposals or the contractor's failure to meet established performance standards. The consequences may include, but are not limited to:

(A) Reducing or withholding payment;

(B) Requiring the contractor to perform, at the contractor's expense, additional work necessary to perform the identified scope of work or meet the established performance standards; or

(C) Declaring a default, terminating the public contract and seeking damages and other relief available under the terms of the public contract or other applicable law.

(3) The request for proposals also may:

(a) Identify contractual terms or conditions that the contracting agency reserves, in the request for proposals, for negotiation with proposers;

(b) Request that proposers propose contractual terms and conditions that relate to subject matter reasonably identified in the request for proposals;

(c) Contain or incorporate the form and content of the contract that the contracting agency will accept, or suggest contract terms and conditions that nevertheless may be the subject of negotiations with proposers;

(d) Announce the method the contracting agency will use to select the contractor, which may include, but is not limited to, negotiating with the highest ranked proposer, competitive negotiations, a multiple-tiered competition that is designed to identify a class of proposers that fall within a

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competitive range or to otherwise eliminate from consideration a class of lower ranked proposers or a combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065; and

(e) Describe the manner in which the contracting agency will evaluate proposals, identifying the relative importance of price and other factors the contracting agency will use to evaluate and rate the proposals in the first tier of competition. If the contracting agency uses more than one tier of competitive evaluation, the request for proposals must describe the process the contracting agency will use to evaluate proposals in the subsequent tiers.

(4)(a) The contracting agency may require proposal security in any form the contracting agency deems prudent. Proposal security shall serve the same function with respect to requests for proposals as bid security serves with respect to invitations to bid under ORS 279B.055.

(b) The contracting agency shall return the proposal security to all proposers upon the execution of the contract.

(c) The contracting agency shall retain the proposal security if a proposer who is awarded a contract fails to promptly and properly execute the contract. For purposes of this paragraph, prompt and proper execution of the contract includes all action by a proposer that is necessary to form a contract in accordance with the request for proposals, including posting performance security and submitting proof of insurance when the request for proposals requires the submission. If contract negotiations or competitive negotiations are conducted, the failure, prior to award, of a contracting agency and a proposer to reach agreement does not constitute grounds for retaining proposal security.

(5) Public notice of the request for proposals must be given in the same manner as provided for public notice of invitations to bid in ORS 279B.055 (4).

(6)(a) Notwithstanding ORS 192.410 to 192.505, proposals may be opened in a manner to avoid disclosing contents to competing proposers during, when applicable, the process of negotiation, but the contracting agency shall record and make available the identity of all proposers as part of the contracting agency's public records after the proposals are opened. Notwithstanding ORS 192.410 to 192.505, proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued. The fact that proposals are opened at a meeting, as defined in ORS 192.610, does not make the contents of the proposals subject to disclosure, regardless of whether the public body opening the proposals fails to give notice of or provide for an executive session for the purpose of opening proposals.

(b) Notwithstanding a requirement to make proposals open to public inspection after the contracting agency issues notice of intent to award a contract, a contracting agency may withhold from disclosure to the public materials included in a proposal that are exempt or conditionally exempt from disclosure under ORS 192.501 or 192.502.

(c) If a request for proposals is canceled under ORS 279B.100 after proposals are received or if a proposal is rejected, the contracting agency may return a proposal to the proposer that made the proposal. The contracting agency shall keep a list of returned proposals in the file for the solicitation.

(7) As provided in the request for proposals or in written addenda issued thereunder, the contracting agency may conduct site tours, demonstrations, individual or group discussions and other informational activities with proposers before or after the opening of proposals for the purpose of clarification to ensure full understanding of, and responsiveness to, the solicitation requirements or to consider and respond to requests for modifications of the proposal requirements. The contracting agency shall use procedures designed to accord proposers fair and equal treatment with respect to any opportunity for discussion and revision of proposals.

(8) For purposes of evaluation, when provided for in the request for proposals, the contracting agency may employ methods of contractor selection that include, but are not limited to:

(a) An award or awards based solely on the ranking of proposals;

(b) Discussions leading to best and final offers, in which the contracting agency may not disclose private discussions leading to best and final offers;

(c) Discussions leading to best and final offers, in which the contracting agency may not disclose information derived from proposals submitted by competing proposers;

(d) Serial negotiations, beginning with the highest ranked proposer;

(e) Competitive simultaneous negotiations;

(f) Multiple-tiered competition designed to identify, at each level, a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers;

(g) A multistep request for proposals requesting the submission of unpriced technical submittals, and then later issuing a request for proposals limited to the proposers whose technical submittals the contracting agency had determined to be qualified under the criteria set forth in the initial request for proposals; or

(h) A combination of methods described in this subsection, as authorized or prescribed by rules adopted under ORS 279A.065.

(9) Revisions of proposals may be permitted after the submission of proposals and before award for the purpose of obtaining best offers or best and final offers.

(10) After the opening of proposals, a contracting agency may issue or electronically post an addendum to the request for proposals that modifies the criteria, rating process and procedure for any tier of competition before the start of the tier to which the addendum applies. The contracting agency shall send an addendum that is issued by a method other than electronic posting to all proposers who are eligible to compete under the addendum. The contracting agency shall issue or post the addendum at least five days before the start of the subject tier of competition or as the contracting agency otherwise determines is adequate to allow eligible proposers to prepare for the competition in accordance with rules adopted under ORS 279A.065.

(11) The cancellation of requests for proposals and the rejection of proposals must be in accordance with ORS 279B.100.

(12) In the request for proposals, the contracting agency shall describe the methods by which the agency will make the results of each tier of competitive evaluation available to the proposers who competed in the tier. The contracting agency shall include a description of the manner in which the proposers who are eliminated from further competition may protest or otherwise object to the contracting agency's decision.

(13) The contracting agency shall issue or electronically post the notice of intent to award described in ORS 279B.135 to each proposer who was evaluated in the final competitive tier.

(14) If the contracting agency awards a contract, the contracting agency shall award the contract to the responsible proposer whose proposal the contracting agency determines in writing is the most advantageous to the contracting agency based on the evaluation process and evaluation factors described in the request for proposals, applicable preferences described in ORS 279A.120 and 279A.125 and, when applicable, the outcome of any negotiations authorized by the request for proposals. Other factors may not be used in the evaluation. When the request for proposals specifies or authorizes awarding multiple public contracts, the contracting agency shall award public contracts to the responsible proposers who qualify for the award of a contract under the terms of the request for proposals.

(15) The contracting agency may issue a request for information, a request for interest, a request for qualifications or other preliminary documents to obtain information useful in preparing a request for proposals.

(16) Before executing a contract solicited under this section, a contracting agency shall obtain the proposer's agreement to perform the scope of work and meet the performance standards set forth in the final negotiated scope of work. [2003 c. 794 §52, 2009 c. 880 §6, 2011 c. 458 §12]

279B.065 Small procurements. (1) A contracting agency may award a procurement of goods or services that does not exceed \$10,000 in any manner the contracting agency deems practical or convenient, including by direct selection or award. A contract awarded under this section may be amended to exceed \$10,000 only in accordance with rules adopted under ORS 279A.065.

(2) A contracting agency may not artificially divide or fragment a procurement so as to constitute a small procurement under this section. [2003 c. 794 §53; 2005 c. 64 §1; 2005 c. 103 §8b; 2013 c. 66 §1]

279B.070 Intermediate procurements. (1) A contracting agency may award a procurement of goods or services that exceeds \$10,000 but does not exceed \$150,000 in accordance with intermediate procurement procedures. A contract awarded under this section may be amended to exceed \$150,000 only in accordance with rules adopted under ORS 279A.065.

(2) A contracting agency may not artificially divide or fragment a procurement so as to constitute an intermediate procurement under this section.

(3) When conducting an intermediate procurement, a contracting agency shall seek at least three informally solicited competitive price quotes or competitive proposals from prospective contractors. The contracting agency shall keep a written record of the sources of the quotes or proposals received. If three quotes or proposals are not reasonably available, fewer will suffice, but the contracting agency shall make a written record of the effort the contracting agency makes to obtain the quotes or proposals.

(4) If a contracting agency awards a contract, the contracting agency shall award the contract to the offeror whose quote or proposal will best serve the interests of the contracting agency, taking into account price as well as considerations including, but not limited to, experience, expertise, product functionality, suitability for a particular purpose and contractor responsibility under ORS 279B.110. [2003 c. 794 §54, 2013 c. 66 §2]

279B.075 Sole-source procurements. (1) A contracting agency may award a contract for goods or services without competition if the Director of the Oregon Department of Administrative Services, a local contract review board, a state contracting agency, if the state contracting agency has procurement authority under ORS 279A.050, the State Chief Information Officer, with respect to goods or services described in subsection (2)(b) of this section and if the director has delegated the necessary authority to the State Chief Information Officer, or a person designated in writing by the director, board or state contracting agency with procurement authority under ORS 279A.050, determines in writing, in accordance with rules adopted under ORS 279A.065, that the goods or services, or class of goods or services, are available from only one source.

(2) The determination of a sole source must be based on written findings that may include:

- (a) That the efficient utilization of existing goods requires acquiring compatible goods or services;
- (b) That the goods or services required to exchange software or data with other public or private agencies are available from only one source;
- (c) That the goods or services are for use in a pilot or an experimental project; or
- (d) Other findings that support the conclusion that the goods or services are available from only one source.

(3) To the extent reasonably practical, the contracting agency shall negotiate with the sole source to obtain contract terms that are advantageous to the contracting agency. [2003 c. 794 §55; 2005 c. 103 §8c; 2015 c. 807 §24]

279B.080 Emergency procurements. (1) The head of a contracting agency, or a person designated under ORS 279A.075, may make or authorize others to make emergency procurements of goods or services in an emergency. The contracting agency shall document the nature of the emergency and describe the method used for the selection of the particular contractor.

(2) For an emergency procurement of construction services that are not public improvements, the contracting agency shall ensure competition for a contract for the emergency work that is reasonable and appropriate under the emergency circumstances. In conducting the procurement, the contracting agency shall set a solicitation time period that the contracting agency determines to be reasonable under the emergency circumstances and may issue written or oral requests for offers or make direct appointments without competition in cases of extreme necessity. [2003 c. 794 §56, 2007 c. 764 §6a]

279B.085 Special procurements. (1) As used in this section and ORS 279B.400:

(a) "Class special procurement" means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of entering into a series of contracts over time or for multiple projects.

(b) "Contract-specific special procurement" means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of entering into a single contract or a number of related contracts on a one-time basis or for a single project.

(c) "Special procurement" means, unless the context requires otherwise, a class special procurement, a contract-specific special procurement or both.

(2) Except as provided in subsection (3) of this section, to seek approval of a special procurement, a contracting agency shall submit a written request to the Director of the Oregon Department of Administrative Services or the local contract review board, as applicable, that describes the contracting procedure, the goods or services or the class of goods or services that are the subject of the special procurement and the circumstances that justify the use of a special procurement under the standards set forth in subsection (4) of this section.

(3) When the contracting agency is the office of the Secretary of State or the office of the State Treasurer, to seek approval of a special procurement, the contracting agency shall submit a written request to the Secretary of State or the State Treasurer, as applicable, that describes the contracting procedure, the goods or services or the class of goods or services that are the subject of the special procurement and the circumstances that justify the use of a special procurement under the standards set forth in subsection (4) of this section.

(4) The director, a local contract review board, the Secretary of State or the State Treasurer may approve a special procurement if the director, board, Secretary of State or State Treasurer finds that a written request submitted under subsection (2) or (3) of this section demonstrates that the use of a special procurement as described in the request, or an alternative procedure prescribed by the director, board, Secretary of State or State Treasurer:

- (a) Is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts; and
- (b)(A) Is reasonably expected to result in substantial cost savings to the contracting agency or to the public; or
- (B) Otherwise substantially promotes the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under ORS 279B.055, 279B.060, 279B.065 or 279B.070 or under any rules adopted thereunder.

(5) Public notice of the approval of a special procurement must be given in the same manner as provided in ORS 279B.055 (4).

(6) If a contracting agency intends to award a contract through a special procurement that calls for competition among prospective contractors, the contracting agency shall award the contract to the offeror the contracting agency determines to be the most advantageous to the contracting agency.

(7) When the director, a local contract review board, the Secretary of State or the State Treasurer approves a class special procurement under this section, the contracting agency may award contracts to acquire goods or services within the class of goods or services in accordance with the terms of the approval without making a subsequent request for a special procurement. [2003 c.794 §57, 2005 c.103 §8d, 2007 c.764 §7]

(Cancellation, Rejection and Delay of Invitations for Bids or Requests for Proposals)

279B.100 Cancellation, rejection, delay of invitations for bids or requests for proposals. (1) Any solicitation or procurement described in a solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part, when the cancellation or rejection is in the best interest of the contracting agency as determined by the contracting agency. The reasons for the cancellation or rejection must be made part of the solicitation file. A contracting agency is not liable to any bidder or proposer for any loss or expense caused by or resulting from the cancellation or rejection of a solicitation, bid, proposal or award.

(2) Any solicitation or procurement described in a solicitation may be delayed or suspended when the delay or suspension is in the best interest of the contracting agency as determined by the contracting agency. The contracting agency shall make the reasons for the delay or suspension part of the solicitation file. A contracting agency is not liable to any bidder or proposer for any loss or expense caused by or resulting from the delay or suspension of a solicitation, bid, proposal or award. [2003 c.794 §58]

(Qualifications)

279B.110 Responsibility of bidders and proposers. (1) As part of a contracting agency's evaluation of a bid or proposal, the contracting agency shall determine whether the bidder or proposer is responsible in accordance with the standards of responsibility set forth in subsection (2) of this section. If the contracting agency determines that a bidder or proposer is not responsible, the contracting agency shall provide the bidder or proposer with written notice of the contracting agency's determination.

(2) In order for a contracting agency to determine that a bidder or proposer is responsible, the bidder or proposer must demonstrate to the contracting agency that the bidder or proposer:

(a) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or has the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.

(b) Completed previous contracts of a similar nature with a satisfactory record of performance. For purposes of this paragraph, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the bidder's or proposer's control, the bidder or proposer stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. The contracting agency shall document the bidder's or proposer's record of performance if the contracting agency finds under this paragraph that the bidder or proposer is not responsible.

(c) Has a satisfactory record of integrity. The contracting agency in evaluating the bidder's or proposer's record of integrity may consider, among other things, whether the bidder or proposer has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the bidder's or proposer's performance of a contract or subcontract. The contracting agency shall document the bidder's or proposer's record of integrity if the contracting agency finds under this paragraph that the bidder or proposer is not responsible.

(d) Is legally qualified to contract with the contracting agency.

(e) Complied with the tax laws of the state or a political subdivision of the state, including ORS 305.620 and ORS chapters 316, 317 and 318. The bidder or proposer shall demonstrate compliance by attesting to the bidder's or proposer's compliance in any way the contracting agency deems credible and convenient.

(f) Possesses an unexpired certificate that the Oregon Department of Administrative Services issued under ORS 279A.167 if the bidder or proposer employs 50 or more full-time workers and submitted a bid or proposal for a procurement with an estimated contract price that exceeds \$500,000 in response to an advertisement or solicitation from a state contracting agency.

(g) Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder or proposer fails to promptly supply information concerning responsibility that the contracting agency requests, the contracting agency shall determine the bidder's or proposer's responsibility based on available information or may find that the bidder or proposer is not responsible.

(h) Was not debarred by the contracting agency under ORS 279B.130.

(3) A contracting agency may refuse to disclose outside of the contracting agency confidential information furnished by a bidder or proposer under this section when the bidder or proposer has clearly identified in writing the information the bidder or proposer seeks to have treated as confidential and the contracting agency has authority under ORS 192.410 to 192.505 to withhold the identified information from disclosure. [2003 c.794 §59, 2009 c.880 §7, 2014 c.77 §3, 2015 c.539 §§1,5a]

279B.112 Personnel deployment disclosure; contents; preference for bidder or proposer that will employ more workers in state; rules; exception. (1) A bidder or proposer that submits a bid or proposal for a public contract may submit with the bid or proposal a personnel deployment disclosure. A personnel deployment disclosure that a bidder or proposer submits under this section must state:

(a) The number of workers that the bidder or proposer and the bidder or proposer's subcontractors plan to deploy to perform the work described in the invitation to bid or the request for proposals;

(b) The number of workers that the bidder or proposer and the bidder's or proposer's first-tier subcontractors will employ within this state; and

(c) The number of jobs in each of the categories described in paragraphs (a) and (b) of this subsection that would be a newly created job.

(2) A state contracting agency that receives a personnel deployment disclosure from a bidder or proposer under subsection (1) of this section may consider the personnel deployment disclosure in evaluating a bid or proposal if the contracting agency states in the solicitation documents for a procurement that the state contracting agency will consider a personnel deployment disclosure. The state contracting agency may give a preference to a bid or proposal that states that the bidder or proposer will employ more workers within this state than a competing bid or proposal if the bids or proposals otherwise suit the state contracting agency's specifications for the procurement equally well.

(3) The Director of the Oregon Department of Administrative Services, the Attorney General and a state contracting agency that adopts rules under ORS 279A.065 may adopt rules to prescribe the form and contents of a personnel deployment disclosure and otherwise to implement the provisions of this section.

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(4) This section does not apply to the Secretary of State or the State Treasurer. [2012 c.53 §6]

279B.115 Qualified products lists. (1) A contracting agency may develop and maintain a qualified products list in instances in which the testing or examination of goods before initiating a procurement is necessary or desirable in order to best satisfy the requirements of the contracting agency. For purposes of this section, "goods" includes products that have associated or incidental service components, such as supplier warranty obligations or maintenance service programs.

(2) In the initial development of any qualified products list, a contracting agency shall give public notice, in accordance with ORS 279B.055 (4), of the opportunity for potential contractors, sellers or suppliers to submit goods for testing and examination to determine their acceptability for inclusion on the list and may solicit in writing representative groups of potential contractors, sellers or suppliers to submit goods for the testing and examination. Any potential contractor, seller or supplier, even though not solicited, may offer its goods for consideration.

(3) A contracting agency's inclusion of goods on a qualified products list shall be based on the results of tests or examinations. Notwithstanding any provision of ORS 192.410 to 192.505, a contracting agency may make the test or examination results public in a manner that protects the identity of the potential contractor, seller or supplier that offered the goods for testing or examination, including by using only numerical designations. Notwithstanding any provision of ORS 192.410 to 192.505, a contracting agency may keep confidential trade secrets, test data and similar information provided by a potential contractor, seller or supplier if so requested in writing by the potential contractor, seller or supplier.

(4) The inclusion of goods on a qualified products list does not constitute and may not be construed as a prequalification under ORS 279B.120 and 279B.125 of any prospective contractor, seller or supplier of goods on the qualified products list. [2003 c.794 §60]

279B.120 Prequalification of prospective bidders and proposers. (1) A contracting agency may prequalify prospective bidders or proposers to submit bids or proposals for public contracts to provide particular types of goods or services. The method of submitting prequalification applications, the information required in order to be prequalified and the forms to be used for submitting prequalification information shall be determined by the contracting agency unless otherwise prescribed by rule adopted by the Director of the Oregon Department of Administrative Services or the local contract review board.

(2) The contracting agency shall, in response to the receipt of a prequalification application submitted under subsection (1) of this section, notify the prospective bidder or proposer whether the prospective bidder or proposer is qualified based on the standards of responsibility listed in ORS 279B.110 (2), the type and nature of contracts that the prospective bidder or proposer is qualified to compete for and the time period for which the prequalification is valid. If the contracting agency does not prequalify a prospective bidder or proposer as to any contracts covered by the prequalification process, the notice must specify which of the standards of responsibility listed in ORS 279B.110 (2) the prospective bidder or proposer failed to meet. Unless the reasons are specified, the prospective bidder or proposer shall be deemed to have been prequalified in accordance with the application.

(3) If a contracting agency subsequently discovers that a prospective bidder or proposer that prequalified under subsections (1) and (2) of this section is no longer qualified, the agency may revoke the prequalification upon reasonable notice to the prospective bidder or proposer, except that a revocation is invalid as to any contract for which an advertisement for bids or proposals has already been issued. [2003 c.794 §61]

279B.125 Application for prequalification. (1) When a contracting agency permits or requires prequalification of bidders or proposers, a prospective bidder or proposer who wishes to prequalify shall submit a prequalification application to the contracting agency on a form prescribed under ORS 279B.120 (1). Upon receipt of a prequalification application, the contracting agency shall investigate the prospective bidder or proposer as necessary to determine whether the prospective bidder or proposer is qualified. The determination shall be made in less than 30 days, if practicable, if the prospective bidder or proposer requests an early decision to allow the prospective bidder or proposer as much time as possible to prepare a bid or proposal for a contract that has been advertised. In making its determination, the contracting agency shall consider only the applicable standards of responsibility listed in ORS 279B.110 (2). The contracting agency shall promptly notify the prospective bidder or proposer whether the prospective bidder or proposer is qualified.

(2) If the contracting agency finds that a prospective bidder or proposer is qualified, the notice must state the type and nature of contracts that the prospective bidder or proposer is qualified to compete for and the period of time for which the prequalification is valid. If the agency finds that the prospective bidder or proposer is not qualified as to any contracts covered by the rule, resolution, ordinance or other regulation, the notice must specify the reasons given under ORS 279B.120 for not prequalifying the prospective bidder or proposer and inform the prospective bidder or proposer of the right to a hearing under ORS 279B.425. To be entitled to a hearing under ORS 279B.425, a prospective bidder or proposer shall, within three business days after receipt of the notice, notify the contracting agency that the prospective bidder or proposer demands a hearing under ORS 279B.425.

(3) If a contracting agency has reasonable cause to believe that there has been a substantial change in the conditions of a prequalified prospective bidder or proposer and that the prospective bidder or proposer is no longer qualified or is less qualified, the contracting agency may revoke or may revise and reissue the prequalification after reasonable notice to the prequalified prospective bidder or proposer. The notice must specify the reasons given under ORS 279B.120 for revocation or revision of the prequalification of the prospective bidder or proposer and inform the prospective bidder or proposer of the right to a hearing under ORS 279B.425. To be entitled to a hearing under ORS 279B.425, a prospective bidder or proposer shall, within three business days after receipt of the notice, notify the contracting agency that the prospective bidder or proposer demands a hearing under ORS 279B.425. A revocation or revision does not apply to any contract for which an advertisement for bids or proposals was issued before the date the notice of revocation or revision was received by the prequalified prospective bidder or proposer. [2003 c.794 §62]

279B.130 Debarment of prospective bidders and proposers. (1)(a) A contracting agency may debar a prospective bidder or proposer from consideration for award of the contracting agency's contracts for the reasons listed in subsection (2) of this section after providing the prospective bidder or proposer with notice and a reasonable opportunity to be heard.

(b) A contracting agency may not debar a prospective bidder or proposer under this section for more than three years.

(2) A prospective bidder or proposer may be debarred from consideration for award of a contracting agency's contracts if:

(a) The prospective bidder or proposer has been convicted 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 a public or private contract or subcontract.

(b) The prospective bidder or proposer has been convicted 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 prospective bidder's or proposer's responsibility as a contractor.

(c) The prospective bidder or proposer has been convicted under state or federal antitrust statutes.

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(d) The prospective bidder or proposer has committed a violation of a contract provision that is regarded by the contracting agency or the Construction Contractors Board 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 debarment.

(e) The prospective bidder or proposer does not carry workers' compensation or unemployment insurance as required by statute.

(3) A contracting agency shall issue a written decision to debar a prospective bidder or proposer under this section. The decision must:

(a) State the reasons for the action taken, and

(b) Inform the debarred prospective bidder or proposer of the appeal rights of the prospective bidder or proposer under ORS 279B.425.

(4) A copy of the decision issued under subsection (3) of this section must be mailed or otherwise furnished immediately to the debarred prospective bidder or proposer.

(5) A prospective bidder or proposer that wishes to appeal debarment shall, within three business days after receipt of notice of debarment, notify the contracting agency that the prospective bidder or proposer appeals the debarment as provided in ORS 279B.425. [2003 c.794 §63; 2007 c.764 §8]

(Notice of Intent to Award)

279B.135 Notice of intent to award. At least seven days before the award of a public contract, unless the contracting agency determines that seven days is impractical under rules adopted under ORS 279A.065, the contracting agency shall post or provide to each bidder or proposer notice of the contracting agency's intent to award a contract. This section does not apply to a contract awarded as a small procurement under ORS 279B.065, an intermediate procurement under ORS 279B.070, a sole-source procurement under ORS 279B.075, an emergency procurement under ORS 279B.080 or a special procurement under ORS 279B.085. The notice and its manner of posting or issuance must conform to rules adopted under ORS 279A.065. [2003 c.794 §64]

(Price Agreements)

279B.140 Price agreements. (1) A price agreement constitutes a firm offer by the contractor regardless of whether any order or purchase has been made or any performance has been tendered under the price agreement. Unless the price agreement otherwise provides, a price agreement is enforceable for the period stated in the price agreement and, notwithstanding ORS 72.2050, obligations thereunder are not revocable by the contractor.

(2) Under a price agreement, no quantity unreasonably disproportionate to any stated estimate or, in the absence of a stated estimate, to any normal or otherwise comparable prior requirements may be demanded unless otherwise expressly provided in the price agreement. However, a contracting agency may amend or terminate a price agreement or an order under a price agreement under any of the following circumstances:

(a) Any failure of the contracting agency to receive funding, appropriations, limitations, allotments or other expenditure authority, including the continuation of program operating authority sufficient, as determined in the discretion of the contracting agency, to sustain purchases at the levels contemplated at the time of contracting, or

(b) Any change in law or program termination that makes purchases under the price agreement no longer authorized or appropriate for the contracting agency's use.

(3) A price agreement does not constitute an exclusive dealing commitment on the part of the contracting agency or the contractor unless the price agreement expressly so provides. [2003 c.794 §68]

(Determinations)

279B.145 Finality of determinations. The determinations under ORS 279B.030, 279B.033, 279B.036, 279B.055 (3) and (7), 279B.060 (4) and (14), 279B.075, 279B.080, 279B.085 and 279B.110 are final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law. [2003 c.794 §71; 2009 c.880 §8]

SPECIFICATIONS

(General Provisions)

279B.200 Definitions for ORS 279B.200 to 279B.240. As used in ORS 279B.200 to 279B.240:

(1) "Brand name or equal specification" means a specification that uses one or more manufacturers' names, makes, catalog numbers or similar identifying characteristics to describe the standard of quality, performance, functionality or other characteristics needed to meet the contracting agency's requirements and that authorizes bidders or proposers to offer goods or services that are equivalent or superior to those named or described in the specification.

(2) "Brand name specification" means a specification limited to one or more products, brand names, makes, manufacturer's names, catalog numbers or similar identifying characteristics.

(3) "Specification" means any description of the physical or functional characteristics of, or of the nature of, goods or services to be procured by a contracting agency. "Specification" may include a description of any requirement for inspecting, testing or preparing goods or services for delivery. When a solicitation required or authorized by ORS 279B.050 (4) or (5) to be conducted under ORS 279B.055 or 279B.060 calls in whole or in part for the performance of personal services as designated under ORS 279A.055, "specification" also includes any description of the characteristics or nature of the personal services. [2003 c.794 §72; 2007 c.764 §9]

279B.205 Specifications to encourage reasonable competition. Consistent with ORS 279A.015, specifications must seek to promote optimal value and suitability for the purposes intended and to reasonably encourage competition in satisfying a contracting agency's needs. Subject to ORS 279B.405, the specification content must be determined in the sole discretion of the contracting agency. [2003 c.794 §74]

279B.210 Policy; development of specifications. It is the policy of the State of Oregon to encourage the development of clear, precise and accurate specifications in solicitations for public contracts. To that end, in developing specifications, contracting agencies may consult, under contract or otherwise, with technical experts, suppliers, prospective contractors and representatives of the industries with which the contracting

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agencies contract. However, a contracting agency shall take reasonable measures to ensure that no person who prepares or assists in the preparation of solicitation documents, specifications, plans or scopes of work, and no business with which the person is associated, realizes a material competitive advantage in a procurement that arises from the agency's use of the solicitation documents, specifications, plans or scopes of work. The policy against the realization of a material competitive advantage from the character of the specifications developed in conjunction with persons outside the contracting agency does not proscribe advantages that result incidentally from a contracting agency's specification of the characteristics of a product or work to meet the contracting agency's needs. [2003 c. 794 §75]

279B.215 Brand name or equal specification; brand name specification. (1)(a) A brand name or equal specification may be used when the use of a brand name or equal specification is advantageous to the contracting agency, because the brand name describes the standard of quality, performance, functionality and other characteristics of the product needed by the contracting agency.

(b) The contracting agency is entitled to determine what constitutes a product that is equal or superior to the product specified, and any such determination is final.

(c) Nothing in this subsection may be construed as prohibiting a contracting agency from specifying one or more comparable products as examples of the quality, performance, functionality or other characteristics of the product needed by the contracting agency.

(2) A brand name specification may be prepared and used only if the contracting agency determines for a solicitation or a class of solicitations that only the identified brand name specification will meet the needs of the contracting agency based on one or more of the following written determinations:

(a) That use of a brand name specification is unlikely to encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts;

(b) That use of a brand name specification would result in substantial cost savings to the contracting agency;

(c) That there is only one manufacturer or seller of the product of the quality, performance or functionality required, or

(d) That efficient utilization of existing goods requires the acquisition of compatible goods or services.

(3) A contracting agency's use of a brand name specification may be subject to review only as provided in ORS 279B.405. [2003 c. 794 §76, 2005 c. 103 §8e]

279B.220 Conditions concerning payment, contributions, liens, withholding. Every public contract shall contain a condition that the contractor shall:

(1) Make payment promptly, as due, to all persons supplying to the contractor labor or material for the performance of the work provided for in the contract.

(2) Pay all contributions or amounts due the Industrial Accident Fund from the contractor or subcontractor incurred in the performance of the contract.

(3) Not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished.

(4) Pay to the Department of Revenue all sums withheld from employees under ORS 316.167. [2003 c. 794 §76a]

279B.225 Condition concerning salvaging, recycling, composting or mulching yard waste material. Every public contract for lawn and landscape maintenance shall contain a condition requiring the contractor to salvage, recycle, compost or mulch yard waste material at an approved site, if feasible and cost-effective. [2003 c. 794 §76b]

279B.230 Condition concerning payment for medical care and providing workers' compensation. (1) Every public contract shall contain a condition that the contractor shall promptly, as due, make payment to any person, copartnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the contractor, of all sums that the contractor agrees to pay for the services and all moneys and sums that the contractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services.

(2) Every public contract shall contain a clause or condition that all subject employers working under the contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126. [2003 c. 794 §76c]

279B.235 Condition concerning hours of labor; compliance with pay equity provisions; employee discussions of rate of pay or benefits.

(1) Except as provided in subsections (3) to (6) of this section, every public contract subject to this chapter must provide that:

(a) A contractor may not employ an employee for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency or when the public policy absolutely requires otherwise, and in such cases, except in cases of contracts for personal services designated under ORS 279A.055, the contractor shall pay the employee at least time and a half pay for:

(A)(i) All overtime in excess of eight hours in any one day or 40 hours in any one week if the work week is five consecutive days, Monday through Friday; or

(ii) All overtime in excess of 10 hours in any one day or 40 hours in any one week if the work week is four consecutive days, Monday through Friday; and

(B) All work the employee performs on Saturday and on any legal holiday specified in ORS 279B.020.

(b) The contractor shall comply with the prohibition set forth in ORS 652.220, that compliance is a material element of the contract and that a failure to comply is a breach that entitles the contracting agency to terminate the contract for cause.

(c) The contractor may not prohibit any of the contractor's employees from discussing the employee's rate of wage, salary, benefits or other compensation with another employee or another person and may not retaliate against an employee who discusses the employee's rate of wage, salary, benefits or other compensation with another employee or another person.

(2) A contractor shall give notice in writing to employees who work on a public contract, either at the time of hire or before work begins on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the contractor may require the employees to work.

(3) A public contract for personal services, as described in ORS 279A.055, must provide that the contractor shall pay the contractor's employees who work under the public contract at least time and a half for all overtime the employees work in excess of 40 hours in any one week, except for employees under a personal services public contract who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(4) A public contract for services at a county fair, or for another event that a county fair board authorizes, must provide that the contractor shall pay employees who work under the public contract at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week. A contractor shall notify employees who work under the public contract, either at the time of hire or before work begins on the public contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the contractor may require the employees to work.

(5)(a) Except as provided in subsection (4) of this section, a public contract for services must provide that the contractor shall pay employees at least time and a half pay for work the employees perform under the public contract on the legal holidays specified in a collective bargaining agreement or in ORS 279B.020 (1)(b)(B) to (G) and for all time the employee works in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) A contractor shall notify in writing employees who work on a public contract for services, either at the time of hire or before work begins on the public contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the contractor may require the employees to work.

(6) This section does not apply to public contracts:

(a) With financial institutions as defined in ORS 706.008.

(b) Made pursuant to the authority of the State Forester or the State Board of Forestry under ORS 477.406 for labor performed in the prevention or suppression of fire.

(c) For goods or personal property. [2003 c. 794 §77; 2005 c. 103 §8f; 2015 c. 454 §4]

279B.240 Exclusion of recycled oils prohibited. Every contracting agency shall revise its procedures and specifications for the procurement of lubricating oil and industrial oil to eliminate any exclusion of recycled oils and any requirement that oils be manufactured from virgin materials. [2003 c. 794 §78]

(Specifications in State Contracts)

279B.270 State contracting agencies to use recovered resources and recycled materials; notice to prospective contractors. (1) A state contracting agency procuring goods or personal services shall:

(a) Review the contracting agency's current procurement specifications in order to eliminate, wherever economically feasible, discrimination against the procurement of recovered resources or recycled materials.

(b) Provide incentives, wherever economically feasible, in all procurement specifications issued by the contracting agency for the maximum possible use of recovered resources and recycled materials.

(c) Develop procurement practices that, to the maximum extent economically feasible, ensure the procurement of materials that are recycled or that may be recycled or reused when discarded.

(d) Establish management practices that minimize the volume of solid waste generated by reusing paper, envelopes, containers and all types of packaging and by limiting the amount of materials consumed and discarded.

(e) Use, or require persons with whom the contracting agency contracts to use in the performance of the contract work, to the maximum extent economically feasible, recycled paper and recycled PETE products as well as other recycled plastic resin products.

(2) An invitation to bid or a request for proposals issued by a state contracting agency under this chapter shall include the following language: "Vendors shall use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this document."

(3) Each state contracting agency shall strive to meet a recycled product procurement level established by rule by the Oregon Department of Administrative Services. [2003 c. 794 §79; 2007 c. 764 §10]

279B.275 Purchase of goods containing recycled polyethylene material. The Oregon Department of Administrative Services, in consultation with the Department of Environmental Quality, shall revise its procedures and specifications for state procurement of goods containing recycled PETE, as well as other recycled plastic resins, to encourage the procurement of such goods, provided similarities in quality and price exist between recycled PETE products and products not qualifying as recycled PETE products. [2003 c. 794 §80]

279B.280 Use of recycled products when economically feasible. The Oregon Department of Administrative Services shall review and work with state agencies to develop procurement specifications that encourage the use of recycled products whenever economically feasible, if the quality of a recycled product is functionally equal to the same product manufactured with virgin resources, including but not limited to recycled paper, recycled oil and recycled PETE products. Except for specifications that have been established to preserve the public health and safety, all procurement specifications shall be established in a manner that encourages the procurement of recycled products. [2003 c. 794 §81]

LEGAL REMEDIES

279B.400 Protests and judicial review of approvals of special procurements. (1) Before seeking judicial review of the approval of a special procurement, a person must file a protest, in accordance with the rules adopted under ORS 279A.065, with the Director of the Oregon Department of Administrative Services or the local contracting agency, as applicable, and exhaust all available nonjudicial remedies. The rules adopted under ORS 279A.065 shall provide a reasonable time and manner for affected persons to protest the approval of a special procurement under ORS 279B.085.

(2) The approval of a class special procurement by the director under ORS 279B.085 constitutes rulemaking and not a contested case under ORS chapter 183. Any affected person, except the state contracting agency that requested the approval or anyone representing the state contracting agency, may petition the Court of Appeals in the manner provided in ORS 183.400 to test the validity of a class special procurement approved by the director. A proceeding under ORS 183.400 does not affect the validity of a contract executed pursuant to a class special procurement before the petition is filed. Notwithstanding ORS 183.400 (1), before seeking judicial review under this subsection, a person must file a protest with the director as described in subsection (1) of this section.

(3)(a) The approval of a contract-specific special procurement by the director is reviewable under ORS 183.484, but only if judicial review is sought before the contract is awarded. Otherwise, a contract awarded pursuant to the contract-specific special procurement is conclusively presumed valid and may not, in any future judicial or administrative proceeding, be challenged on the ground that the contract was awarded under an invalid special procurement.

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(b) Judicial review may be sought from the Circuit Court for Marion County or the circuit court for the county in which the principal offices of the state contracting agency that requested the approval are located. The circuit court shall give priority on its docket and expedited review to proceedings under this subsection.

(4)(a) The approval of a special procurement by a local contract review board may be challenged by filing a writ of review under ORS chapter 34, provided that all available nonjudicial remedies first have been exhausted, including protests as described in subsection (1) of this section. Notwithstanding the 60-day filing period prescribed by ORS 34.030, the approval of a special procurement is not subject to a writ of review proceeding more than 10 days after the board approves the use of the special procurement.

(b) The writ of review may be filed with and is reviewable by the circuit court for the county in which the principal offices of the local contracting agency that requested the approval are located. The circuit court shall give priority on its docket and expedited review to proceedings under this subsection.

(5) If timely judicial review is sought regarding the approval of a special procurement under ORS 279B.085, the contracting agency may not proceed with contract execution unless the contracting agency determines that there is a compelling governmental interest in proceeding or that the goods or services are urgently needed. If the contracting agency makes such a determination, the contracting agency shall set forth the reasons for the determination in writing and immediately provide them to the person who filed the challenge. Thereafter, after joining the prospective contractor as a party to the litigation and upon motion by the person filing the challenge, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination of the existence of a compelling governmental interest in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a manifest abuse of discretion. In granting a stay, the court may require the person seeking the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in contract performance.

(6) In its review, the circuit court shall give due deference to any factual contracting decision made by the contracting agency and may not substitute its judgment for that of the contracting agency, but shall review all questions of law de novo. Thereafter:

(a) If a contract has not been executed and the court rules in favor of the party that sought judicial review, and if the violation could have affected the award of the contract, the court shall remand the procurement to the contracting agency for a determination whether to continue with the procurement process in light of the court's decision.

(b) In addition to the relief provided for in paragraph (a) of this subsection, if a contract has been executed and the court rules in favor of the party that sought judicial review, the court shall include in its order a determination whether the party that signed the contract with the contracting agency is entitled to reimbursement under the conditions of, and calculated in the same manner as provided in, ORS 279C.470. Notwithstanding that ORS 279C.470 otherwise applies only to public improvement contracts, under this paragraph the court shall apply ORS 279C.470 to both public improvement contracts and other public contracts of contracting agencies.

(c) The court may award costs and attorney fees to the prevailing party. [2003 c.794 §83, 2005 c.103 §8g]

279B.405 Protests and judicial review of solicitations. (1) As used in this section:

(a) "Brand name" means a brand name specification as defined in ORS 279B.200.

(b) "Legally flawed" means that a solicitation document contains terms or conditions that are contrary to law.

(c) "Unnecessarily restrictive" means that specifications limit competition arbitrarily, without reasonably promoting the fulfillment of the procurement needs of a contracting agency.

(2) A prospective bidder, proposer or offeror for a public contract solicited under ORS 279B.055, 279B.060 or 279B.085 may file a protest with the contracting agency if the prospective bidder, proposer or offeror believes that the procurement process is contrary to law or that a solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand name. If a prospective bidder, proposer or offeror fails to timely file such a protest, the prospective bidder, proposer or offeror may not challenge the contract on grounds under this subsection in any future legal or administrative proceeding.

(3) The contracting agency, pursuant to rules adopted under ORS 279A.065, shall notify prospective bidders, proposers or offerors of the time and manner in which a protest under this section may be filed and considered. Before seeking judicial review, a prospective bidder, proposer or offeror must file a protest with the contracting agency and exhaust all available administrative remedies.

(4) The contracting agency shall consider the protest if the protest is timely filed and contains the following:

(a) Sufficient information to identify the solicitation that is the subject of the protest;

(b) The grounds that demonstrate how the procurement process is contrary to law or how the solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand name;

(c) Evidence or supporting documentation that supports the grounds on which the protest is based, and

(d) The relief sought.

(5) If the protest meets the requirements of subsection (4) of this section, the contracting agency shall consider the protest and issue a decision in writing. Otherwise, the contracting agency shall promptly notify the prospective bidder, proposer or offeror that the protest is untimely or that the protest failed to meet the requirements of subsection (4) of this section and give the reasons for the failure.

(6) The contracting agency shall issue a decision on the protest in accordance with rules adopted under ORS 279A.065 no fewer than three business days before bids, proposals or offers are due, unless a written determination is made by the agency that circumstances exist that justify a shorter time limit.

(7) A decision of a contracting agency on a protest under this section, including a protest of a special procurement, is subject to judicial review only if the action or writ of review is filed before the opening of bids, proposals or offers.

(8)(a) A decision of a state contracting agency on a protest under this section is reviewable by the Circuit Court for Marion County or the circuit court for the county in which the principal offices of the state contracting agency are located.

(b) A decision of a local contracting agency on a protest under this section is reviewable by the circuit court for the county in which the principal offices of the local contracting agency are located.

(9) If judicial review of a contracting agency's decision on a protest under this section is sought, the contracting agency may not proceed with contract execution unless the contracting agency determines that there is a compelling governmental interest in proceeding or that the goods and services are urgently needed. If the contracting agency makes such a determination, the contracting agency shall set forth the reasons for the determination in writing and immediately provide them to the prospective bidder, proposer or offeror that filed the protest. Thereafter, after joining the contractor as a party to the litigation and upon motion from the person filing the protest, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination of the existence of a compelling governmental interest in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial

evidence or constituted a manifest abuse of discretion. In granting a stay, the court may require the person seeking the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in contract performance.

(10) In its review, the court shall give due deference to any factual decision made by the contracting agency and may not substitute its judgment for that of the contracting agency, but shall review all questions of law de novo. Thereafter:

(a) If a contract has not been executed and the court rules in favor of the party that sought judicial review, the court shall remand the procurement process to the contracting agency for a determination of whether and how to continue with the procurement process in light of the court's decision.

(b) In addition to the relief provided for in paragraph (a) of this subsection, if a contract has been executed, the court shall include in its order a determination whether the party that signed the contract with the contracting agency is entitled to reimbursement under the conditions of, and calculated in the same manner as provided in, ORS 279C.470. Notwithstanding that ORS 279C.470 otherwise applies only to public improvement contracts, under this paragraph the court shall apply ORS 279C.470 to both public improvement contracts and other public contracts of contracting agencies.

(c) The court may award costs and attorney fees to the prevailing party. [2003 c.794 §84; 2007 c.764 §11]

279B.410 Protests of contract award. (1) A bidder or proposer may protest the award of a public contract or a notice of intent to award a public contract, whichever occurs first, if:

(a) The bidder or proposer is adversely affected because the bidder or proposer would be eligible to be awarded the public contract in the event that the protest were successful, and

(b) The reason for the protest is that:

(A) All lower bids or higher ranked proposals are nonresponsive;

(B) The contracting agency has failed to conduct the evaluation of proposals in accordance with the criteria or processes described in the solicitation materials;

(C) The contracting agency has abused its discretion in rejecting the protestor's bid or proposal as nonresponsive, or

(D) The contracting agency's evaluation of bids or proposals or the contracting agency's subsequent determination of award is otherwise in violation of this chapter or ORS chapter 279A.

(2) The bidder or proposer shall submit the protest to the contracting agency in writing and shall specify the grounds for the protest to be considered by the contracting agency.

(3) The rules adopted under ORS 279A.065 shall establish a reasonable time and manner for protests to be submitted. The contracting agency may not consider late protests.

(4) The contracting agency shall consider and respond in writing to a protest in a timely manner. After the contracting agency issues the response, the bidder or proposer may seek judicial review in the manner provided in ORS 279B.415. [2003 c.794 §85]

279B.415 Judicial review of protests of contract award. (1) As used in this section, "bidder" includes a person who submits a proposal to a public contracting agency pursuant to a request for proposals.

(2) A decision by a state contracting agency on a protest of a contract award is reviewable by the Circuit Court for Marion County or the circuit court for the county in which the principal offices of the state contracting agency are located. A decision by a local contracting agency on a protest of a contract award is reviewable by the circuit court for the county in which the principal offices of the local contracting agency are located.

(3) To obtain review, a complainant must commence an action before the contract that is the subject of the protest is approved by the Attorney General, if required by ORS 291.047, and executed by the contracting agency. In the complaint, the complainant shall state the nature of the complainant's interest, the facts showing how the complainant is adversely affected or aggrieved by the contracting agency's decision and the basis upon which the decision should be reversed or remanded. The complainant shall join as parties all bidders that would be in line for an award of the contract ahead of the complainant. If injunctive relief is sought, the court may require the person seeking a stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in execution of the contract.

(4) When judicial review is sought, the contracting agency may not proceed with contract execution unless the contracting agency determines that there is a compelling governmental interest in proceeding or that the goods and services are urgently needed. If the contracting agency makes such a determination, the contracting agency shall set forth the reasons for the determination in writing and immediately provide them to the complainant. Thereafter, upon motion from the complainant, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination of the existence of a compelling governmental interest in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a manifest abuse of discretion. In granting a stay, the court may require the person seeking the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in contract performance.

(5) The court shall review the matter without a jury and shall consider only those grounds the complainant raised in the protest to the contracting agency.

(6) The court shall remand the matter to the contracting agency for a further decision if:

(a) Substantial evidence does not exist to support the contracting agency's decision. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding;

(b) The contracting agency's decision was outside the range of discretion delegated to the contracting agency by law;

(c) The decision was inconsistent with a contracting agency rule, an officially stated contracting agency position or an officially stated prior contracting agency practice, if the inconsistency is not explained by the contracting agency; or

(d) The decision was in violation of a constitutional or statutory provision.

(7)(a) In addition to remanding the decision to the contracting agency, the court may order such ancillary relief, such as the cost of bid preparation, as the court finds necessary to redress the effects of official action wrongfully taken or withheld. Ancillary relief does not include the award of a contract to the complainant or the award of lost profits or other damages.

(b) If a contract has not been executed and the court rules in favor of the complainant, the court shall remand the matter to the contracting agency for a determination whether to continue with the procurement process in light of the court's decision.

(c) If a contract has been executed, in addition to the relief provided for in paragraph (a) of this subsection, the court shall include in its order a determination whether the party that signed the contract with the contracting agency is entitled to reimbursement under the conditions of, and calculated in the same manner as provided in, ORS 279C.470. Notwithstanding that ORS 279C.470 otherwise applies only to public improvement contracts, under this paragraph the court shall apply ORS 279C.470 to both public improvement contracts and other public contracts of contracting agencies.

(d) The court may award costs and attorney fees to the prevailing party. [2003 c.794 §86; 2007 c.764 §12]

279B.420 Judicial review of other violations. (1) If a contracting agency allegedly violates a provision of ORS chapter 279A and a judicial remedy is not otherwise available under ORS chapter 279A, 279B or 279C, the alleged violation is subject to judicial review only as provided in this section.

(2) If a contracting agency allegedly violates a provision of this chapter, except a provision of ORS 279B.030, 279B.033, 279B.036, 279B.270, 279B.275, 279B.280 or 279B.400 to 279B.425, and a judicial remedy is not otherwise provided in this chapter or ORS chapter 279A, the alleged violation is subject to judicial review only as provided in this section.

(3) A person may seek judicial review under this section for a violation described in subsection (1) or (2) of this section only if:

(a) A public contract is about to be awarded or has been awarded;

(b) The alleged violation of a provision of this chapter or ORS chapter 279A, except a provision of ORS 279B.030, 279B.033, 279B.036, 279B.270, 279B.275, 279B.280 or 279B.400 to 279B.425, occurred in the procurement process for the public contract and the alleged violation resulted in or will result in an unlawful award of a contract or an unlawful failure to award the contract;

(c) The alleged violation deprived the person of the award of the contract or deprived the person of the opportunity to compete for the award of the contract;

(d) The person was qualified to receive the award of the contract under ORS 279B.110;

(e) The person gave written notice that described the alleged violation to the contracting agency not later than 10 days after the date on which the alleged violation occurred and, regardless of when the alleged violation occurred, not later than 10 days after the date of execution of the contract;

(f) The person has exhausted all administrative remedies the contracting agency provides; and

(g)(A) The alleged violation is a violation of a provision of ORS chapter 279A and no other section of ORS chapter 279A, 279B or 279C provides judicial review; or

(B) The alleged violation is a violation of a provision of this chapter, except a provision of ORS 279B.030, 279B.033, 279B.036, 279B.270, 279B.275, 279B.280 or 279B.400 to 279B.425, and no other section of this chapter or ORS chapter 279A provides judicial review.

(4) If a state contracting agency allegedly commits a violation, the Circuit Court for Marion County or the circuit court for the county in which the principal offices of the state contracting agency are located may review the alleged violation under ORS 183.484.

(5) If a local contracting agency allegedly commits a violation, the circuit court for the county in which the principal offices of the local contracting agency are located may review the alleged violation by means of a writ of review under ORS chapter 34.

(6) If a person gives the notice required under subsection (3)(e) of this section and timely seeks judicial review under this section, the contracting agency may not execute the contract unless the contracting agency determines that a compelling governmental interest exists in proceeding or that the goods and services are urgently needed. A contracting agency that makes such a determination shall set forth in writing the reasons for the determination and immediately provide the reasons to the person who filed the challenge. Thereafter, after joining the prospective contractor as a party to the litigation and upon motion by the person who filed the challenge, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination that a compelling governmental interest exists in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a manifest abuse of discretion. In granting a stay, the court may require the person who sought the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with a delay in contract performance.

(7) In a review, the circuit court shall give due deference to any factual contracting decision the contracting agency made and may not substitute the court's judgment for the contracting agency's judgment. The court shall review all questions of law de novo. Thereafter:

(a) If a contract has not been executed and the court rules in favor of the person that sought judicial review, and if the violation could have affected the award of the contract, the court shall remand the procurement to the contracting agency for a determination whether to continue with the procurement process in light of the court's decision.

(b) In addition to the relief provided for in paragraph (a) of this subsection, if a contract has been executed and the court rules in favor of the person that sought judicial review, the court shall include in the court's order a determination whether the party that signed the contract with the contracting agency is entitled to reimbursement under the conditions of, and calculated in the same manner as provided in, ORS 279C.470. Notwithstanding that ORS 279C.470 otherwise applies only to public improvement contracts, under this paragraph the court shall apply ORS 279C.470 to both public improvement contracts and other public contracts of contracting agencies.

(c) The court may award costs and attorney fees to the prevailing party. [2003 c.794 §86a; 2009 c.880 §8a; 2011 c.9 §33]

279B.425 Review of prequalification and debarment decisions. (1) The procedure for appeal from the denial, revocation or revision of a prequalification under ORS 279B.125, or from a debarment under ORS 279B.130, shall be in accordance with this section and is not subject to ORS chapter 183 except when specifically provided by this section.

(2) Upon receipt of a notice from a contracting agency of a prequalification decision under ORS 279B.125 or of a decision to debar under ORS 279B.130, a prospective bidder or proposer that wishes to appeal the decision shall, within three business days after receipt of the notice, notify the contracting agency that the prospective bidder or proposer appeals the decision as provided in this section.

(3) Immediately upon receipt of the prospective bidder's or proposer's notice of appeal, the contracting agency shall:

(a) If the contracting agency is a state contracting agency, notify the Director of the Oregon Department of Administrative Services.

(b) If the contracting agency is a local contracting agency, notify the appropriate local contract review board.

(4) Upon the receipt of notice from the contracting agency under subsection (3) of this section, the director or board shall promptly notify the person appealing and the contracting agency of the time and place of the hearing. The director or board shall conduct the hearing and decide the appeal within 30 days after receiving the notice from the contracting agency. The director or board shall set forth in writing the reasons for the hearing decision.

(5) At the hearing the director or board shall consider de novo the notice of denial, revocation or revision of a prequalification or the notice of debarment, the standards of responsibility listed in ORS 279B.110 (2) on which the contracting agency based the denial, revocation or revision of the prequalification or the reasons listed in ORS 279B.130 (2) on which the contracting agency based the debarment, and any evidence provided by the parties. In all other respects, a hearing before the director shall be conducted in the same manner as a contested case under ORS 183.417 (1) to (4) and (7), 183.425, 183.440, 183.450 and 183.452. Hearings before a board shall be conducted under rules of procedure adopted by the board.

(6) The director or board may allocate the director's or board's costs for the hearing between the person appealing and the contracting agency whose prequalification or debarment decision is being appealed. The allocation shall be based upon facts found by the director or board and stated

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in the final order that, in the director's or board's opinion, warrant such allocation of costs. If the final order does not allocate the costs for the hearing, the costs shall be paid as follows:

(a) If the decision to deny, revoke or revise a prequalification of a person as a bidder or the decision to debar a person is upheld, the costs shall be paid by the person appealing the decision.

(b) If the decision to deny, revoke or revise a prequalification of a person as a bidder or the decision to debar a person is reversed, the costs shall be paid by the contracting agency whose prequalification or debarment decision is the subject of the appeal.

(7) A decision of the director or board may be reviewed only upon a petition, filed within 15 days after the date of the decision, in the circuit court of the county in which the director or board has its principal office. The circuit court shall reverse or modify the decision only if it finds:

(a) The decision was obtained through corruption, fraud or undue means;

(b) There was evident partiality or corruption that operated to the substantial prejudice of the petitioner on the part of the director or board or any of the board's members; or

(c) There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the decision, and the miscalculation or mistake operated to the substantial prejudice of the petitioner.

(8) The procedure provided in this section is the exclusive means of judicial review of the decision of the director or board. The judicial review provisions of ORS 183.480 and writs of review and mandamus as provided in ORS chapter 34, and other legal, declaratory and injunctive remedies, are not available.

(9) The circuit court may stay the letting of the contract that is the subject of the petition in the same manner as a suit in equity. When the court determines that there has been an improper debarment or denial, revocation or revision of a prequalification and the contract has been let, the court may proceed to take evidence to determine the damages, if any, suffered by the petitioner and may award such damages as the court may find as a judgment against the director or board. The court may award costs and attorney fees to the prevailing party. [2003 c.794 §87, 2007 c.288 §12]

Chapter 279C — Public Contracting - Public Improvements and Related Contracts

New sections of law were enacted by the Legislative Assembly during its 2016 regular session and pertain to or are likely to be compiled in this ORS chapter. See sections in the following 2016 Oregon Laws chapters: [2016 Session Laws 0115](#)

2015 EDITION

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PUBLIC FACILITIES, CONTRACTING & INSURANCE

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GENERAL PROVISIONS

279C.005 Definitions. ORS 279A.010 (1) contains general definitions applicable throughout this chapter. [2003 c. 794 §88]

279C.010 Applicability. Except as provided in ORS 279C.320, public contracting under this chapter is subject to ORS chapter 279A, but not ORS chapter 279B. [2003 c. 794 §88a; 2005 c. 103 §9]

ARCHITECTURAL, ENGINEERING, PHOTOGRAMMETRIC MAPPING, TRANSPORTATION PLANNING, LAND SURVEYING AND RELATED SERVICES

279C.100 Definitions for ORS 279C.100 to 279C.125. As used in ORS 279C.100 to 279C.125:

- (1) "Architect" has the meaning given that term in ORS 671.010.
- (2) "Architectural, engineering, photogrammetric mapping, transportation planning or land surveying services" means professional services that are required to be performed by an architect, engineer, photogrammetrist, transportation planner or land surveyor.
- (3) "Engineer" means a person who is registered and holds a valid certificate in the practice of engineering in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002 (2).
- (4) "Land surveyor" means a person who is registered and holds a valid certificate in the practice of land surveying in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002 (5).
- (5) "Personal services" means the services of a person or persons that are designated by a state contracting agency with procurement authority under ORS 279A.050 or a local contracting agency as personal services. "Personal services" includes architectural, engineering, photogrammetric mapping, transportation planning or land surveying services procured under ORS 279C.105 or 279C.110 and related services procured under ORS 279C.120.
- (6) "Photogrammetric mapping" has the meaning given that term in ORS 672.002.
- (7) "Photogrammetrist" has the meaning given that term in ORS 672.002.
- (8) "Related services" means personal services, other than architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, that are related to planning, designing, engineering or overseeing public improvement projects or components of public improvement projects, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, hazardous substances or hazardous waste or toxic substances testing services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner's representation services or land-use planning services.
- (9) "Transportation planning services" means transportation planning services for projects that require compliance with the National Environmental Policy Act, 42 U.S.C. 4321 et seq. [2003 c. 794 §89, 2005 c. 103 §10; 2005 c. 445 §12; 2011 c. 458 §1; 2013 c. 196 §20]

279C.105 Contracts for architectural, engineering, photogrammetric mapping, transportation planning or land surveying and related services; procedures.

- (1) Except as provided in ORS 279A.140, a contracting agency may enter into a contract for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services and related services. The Oregon Department of Administrative Services shall enter into a contract for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services and related services on behalf of a state contracting agency that is subject to ORS 279A.140. The provisions of this section do not relieve the contracting agency of the duty to comply with ORS 279A.140, other law applicable to the state contracting agency or applicable city or county charter provisions. A contracting agency that is authorized to enter into a contract for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services and related services shall adopt procedures to screen and select persons to perform architectural, engineering, photogrammetric mapping, transportation planning or land surveying services and related services under ORS 279C.110 or 279C.120.
- (2) A state contracting agency with procurement authority under ORS 279A.050 or a local contract review board by ordinance, resolution, administrative rule or other regulation may, consistent with the provisions of ORS 279C.100 to 279C.125, designate certain personal services contracts or classes of personal service contracts as contracts for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or related services. [2003 c. 794 §90, 2005 c. 103 §11; 2011 c. 458 §2]

279C.107 Public disclosure of contents of proposals for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services; treatment of trade secrets and confidential information. (1) Notwithstanding the public records law, ORS 192.410 to 192.505, if a contracting agency solicits a contract for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or related services by a competitive proposal:

- (a) The contracting agency may open proposals so as to avoid disclosing contents to competing proposers during, when applicable, the process of negotiation.
- (b) The contracting agency need not open proposals for public inspection until after the contracting agency executes a contract.
- (2) Notwithstanding any requirement to open proposals to public inspection after the contracting agency executes a contract, a contracting agency shall withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a proposal. Opening a proposal at a public meeting, as defined in ORS 192.610, does not make the contents of the proposal subject to disclosure, regardless of whether the public body that opens the proposal fails to give notice of or provide for an executive session for the purpose of opening proposals. If a request for proposals is canceled after proposals are received, the contracting agency shall, subject to ORS 192.501 and 192.502, return a proposal and all copies of the proposal to the proposer that made the proposal. The contracting agency shall keep a list of returned proposals in the file for the solicitation. [2007 c. 764 §41; 2011 c. 458 §3]

279C.110 Selection procedure for consultants to provide services; compensation; applicability. (1) A contracting agency shall select consultants to provide architectural, engineering, photogrammetric mapping, transportation planning or land surveying services on the basis of the consultant's qualifications for the type of professional service required. A contracting agency may solicit or use pricing policies and proposals or other pricing information, including the number of hours proposed for the service required, expenses, hourly rates and overhead, to determine consultant compensation only after the contracting agency has selected a candidate pursuant to subsection (2) of this section.

(2) Subject to the requirements of subsection (1) of this section, the procedures that a contracting agency creates to screen and select consultants and to select a candidate under this section are at the contracting agency's sole discretion. The contracting agency may adjust the procedures to accommodate the contracting agency's scope, schedule or objectives for a particular project if the estimated cost of the architectural, engineering, photogrammetric mapping, transportation planning or land surveying services for the project does not exceed \$250,000.

(3) A contracting agency's screening and selection procedures under this section, regardless of the estimated cost of the architectural, engineering, photogrammetric mapping, transportation planning or land surveying services for a project, may include considering each candidate's:

- (a) Specialized experience, capabilities and technical competence, which the candidate may demonstrate with the candidate's proposed approach and methodology to meet the project requirements,
- (b) Resources committed to perform the work and the proportion of the time that the candidate's staff would spend on the project, including time for specialized services, within the applicable time limits,
- (c) Record of past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control and contract administration,
- (d) Ownership status and employment practices regarding disadvantaged business enterprises, minority-owned businesses, woman-owned businesses, businesses that service-disabled veterans own, emerging small businesses or historically underutilized businesses,
- (e) Availability to the project locale;
- (f) Familiarity with the project locale, and
- (g) Proposed project management techniques.

(4) If the screening and selection procedures a contracting agency creates under subsection (2) of this section result in the contracting agency's determination that two or more candidates are equally qualified, the contracting agency may select a candidate through any process the contracting agency adopts that is not based on the candidate's pricing policies, proposals or other pricing information.

(5) The contracting agency and the selected candidate shall mutually discuss and refine the scope of services for the project and shall negotiate conditions, including but not limited to compensation level and performance schedule, based on the scope of services. The compensation level paid must be reasonable and fair to the contracting

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agency as determined solely by the contracting agency. Authority to negotiate a contract under this section does not supersede any provision of ORS 279A.140 or 279C.520.

(6) If the contracting agency and the selected candidate are unable for any reason to negotiate a contract at a compensation level that is reasonable and fair to the contracting agency, the contracting agency shall, either orally or in writing, formally terminate negotiations with the selected candidate. The contracting agency may then negotiate with the next most qualified candidate. The negotiation process may continue in this manner through successive candidates until an agreement is reached or the contracting agency terminates the consultant contracting process.

(7) It is the goal of this state to promote a sustainable economy in the rural areas of the state. In order to monitor progress toward this goal, a state contracting agency shall keep a record of the locations in which architectural, engineering, photogrammetric mapping, transportation planning or land surveying services contracts and related services contracts are performed throughout the state, the locations of the selected consultants and the direct expenses on each contract. This record must include the total number of contracts awarded to each consultant firm over a 10-year period. The record of direct expenses must include all personnel travel expenses as a separate and identifiable expense on the contract. Upon request, the state contracting agency shall make these records available to the public.

(8) Notwithstanding the provisions of subsection (1) of this section, a contracting agency may directly appoint a consultant if the estimated cost of the architectural, engineering, photogrammetric mapping, transportation planning or land surveying services for the project does not exceed \$100,000.

(9) Notwithstanding the provisions of subsections (1) and (8) of this section, a contracting agency may directly appoint a consultant for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services in an emergency. [2003 c.794 §91, 2003 c.794 §92, 2005 c.509 §§1.3, 2011 c.458 §4, 2015 c.565 §15]

279C.115 Direct contracts for services of consultants. (1) As used in this section, "consultant" means an architect, engineer, photogrammetrist, transportation planner or land surveyor.

(2) A contracting agency may enter into a contract for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or related services directly with a consultant if the project described in the contract consists of work that has been substantially described, planned or otherwise previously studied or rendered in an earlier contract with the consultant that was awarded under rules adopted under ORS 279A.065 and the new contract is a continuation of the project.

(3) A contracting agency may adopt criteria for determining when this section applies to a contract for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or related services. [2003 c.794 §94, 2011 c.458 §5]

279C.120 Selection procedure for related services. (1) A contracting agency may select consultants to perform related services.

(a) In accordance with screening and selection procedures adopted under ORS 279C.105;

(b) On the basis of the qualifications of the consultants for the types of related services required, under the requirements of ORS 279C.110; or

(c) On the basis of price competition, price and performance evaluations, an evaluation of the capabilities of bidders to perform the needed related services or an evaluation of the capabilities of the bidders to perform the needed related services followed by negotiations between the parties on the price for those related services.

(2) Subject to the requirements of subsection (1) of this section, the procedures that a contracting agency adopts for the screening and selection of consultants and the selection of a candidate under this section is within the sole discretion of the contracting agency and may be adjusted to accommodate the contracting agency's scope, schedule and budget objectives for a particular project. Adjustments to accommodate a contracting agency's objectives may include provision for the direct appointment of a consultant if the value of the project does not exceed a threshold amount as determined by the contracting agency. [2003 c.794 §95]

279C.125 Architectural, engineering, photogrammetric mapping, transportation planning and land surveying services selection process for local public improvements procured through state agency; rules. (1) The Department of Transportation, the Oregon Department of Administrative Services or any other state contracting agency shall adopt rules establishing a two-tiered selection process for contracts with architects, engineers, photogrammetrists, transportation planners and land surveyors to perform personal services contracts. The selection process shall apply only if:

(a) A public improvement is owned and maintained by a local government; and

(b) The Department of Transportation, the Oregon Department of Administrative Services or another state contracting agency will serve as the lead state contracting agency and will execute personal services contracts with architects, engineers, photogrammetrists, transportation planners and land surveyors for work on the public improvement project.

(2) The selection process required by subsection (1) of this section must require the lead state contracting agency to select no fewer than the three most qualified consultants when feasible in accordance with ORS 279C.110.

(3) The local government is responsible for the final selection of the consultant from the list of qualified consultants selected by the lead state contracting agency or through an alternative process adopted by the local government.

(4) Nothing in this section applies to the selection process used by a local contracting agency when the contracting agency executes a contract directly with architects, engineers, photogrammetrists, transportation planners or land surveyors. [2003 c.794 §96, 2011 c.458 §6]

PROCUREMENT OF CONSTRUCTION SERVICES

(General Policies)

279C.300 Policy on competition. It is the policy of the State of Oregon that public improvement contracts awarded under this chapter must be based on competitive bidding, except as otherwise specifically provided in ORS 279C.335 for exceptions and formal exemptions from competitive bidding requirements. [2003 c.794 §97]

279C.305 Least-cost policy for public improvements; costs estimates in budget process; use of agency forces; record of costs. (1) It is the policy of the State of Oregon that contracting agencies shall make every effort to construct public improvements at the least cost to the contracting agency.

(2) Not less than 30 days prior to adoption of the contracting agency's budget for the subsequent budget period, each contracting agency shall prepare and file with the Commissioner of the Bureau of Labor and Industries a list of every public improvement known to the contracting agency that the contracting agency plans to fund in the budget period, identifying each improvement by name and estimating the total on-site construction costs. The list shall also contain a statement as to whether the contracting agency intends to perform the construction through a private contractor. If the contracting agency intends to perform construction work using the contracting agency's own equipment and personnel on a project estimated to cost more than \$125,000, the contracting agency shall also show that the contracting agency's decision conforms to the policy stated in subsection (1) of this section. The list is a public record and may be revised periodically by the agency.

(3) Before a contracting agency constructs a public improvement with its own equipment or personnel

(a) If the estimated cost exceeds \$125,000, the contracting agency shall prepare adequate plans and specifications and the estimated unit cost of each classification of work. The estimated cost of the work must include a reasonable allowance for the cost, including investment cost, of any equipment used. As used in this paragraph, "adequate" means sufficient to control the performance of the work and to ensure satisfactory quality of construction by the contracting agency personnel.

(b) The contracting agency shall cause to be kept and preserved a full, true and accurate account of the costs of performing the work, including all engineering and administrative expenses and the cost, including investment costs, of any equipment used. The final account of the costs is a public record.

(4) Subsections (2) and (3) of this section do not apply to a contracting agency when the public improvement is to be used for the distribution or transmission of electric power.

(5) For purposes of this section, resurfacing of highways, roads or streets at a depth of two or more inches and at an estimated cost that exceeds \$125,000 is a public improvement. [2003 c.794 §98]

279C.307 Limitations in procurement of personal services; exception. (1) Except as provided in subsection (2) of this section, a contracting agency that procures personal services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a public contract that is subject to this chapter may not:

(a) Procure the personal services from a contractor or an affiliate of a contractor who is a party to the public contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the personal services; or

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(b) Procure the personal services through the public contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the personal services.

(2) Subsection (1) of this section does not apply to a procurement for construction manager/general contractor services or to a design-build procurement, as defined in rules the Attorney General or a contracting agency adopts under ORS 279A.065 [2009 c 880 §11, 2013 c 522 §6]

Note: 279C.307 was added to and made a part of ORS chapter 279C by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

279C.310 Limitation on contracting agency constructing public improvement. If a contracting agency fails to adopt and apply a cost accounting system that substantially complies with the model cost accounting guidelines developed by the Oregon Department of Administrative Services pursuant to section 3, chapter 869, Oregon Laws 1979, as determined by an accountant qualified to perform audits required by ORS 297.210 and 297.405 to 297.555 (Municipal Audit Law), the contracting agency may not construct a public improvement with the contracting agency's own equipment or personnel if the cost exceeds \$5,000. [2003 c 794 §99]

279C.315 Waiver of damages for unreasonable delay by contracting agency against public policy. (1) Any clause in a public improvement contract that purports to waive, release or extinguish the rights of a contractor to damages or an equitable adjustment arising out of unreasonable delay in performing the contract, if the delay is caused by acts or omissions of the contracting agency or persons acting therefor, is against public policy and is void and unenforceable.

(2) Subsection (1) of this section is not intended to render void any contract provision that:

- (a) Requires notice of any delay,
- (b) Provides for arbitration or other procedures for settlement of contract disputes, or
- (c) Provides for reasonable liquidated damages. [2003 c.794 §100]

279C.320 Contracts for construction other than public improvements. (1) Contracting agencies shall enter into contracts for emergency work, minor alteration, ordinary repair or maintenance of public improvements, as well as any other construction contract that is not defined as a public improvement under ORS 279A.010, in accordance with the provisions of ORS chapter 279B. Contracts for emergency work are regulated under ORS 279B.080

(2) Nothing in this section relieves contracting agencies or contractors of any other relevant requirements under this chapter, including payment of prevailing wage rates when applicable.

(3) When construction services are not considered to be a public improvement under this chapter because no funds of a public agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection, the benefiting public body may nonetheless condition acceptance of the services on receipt of such protections as the public body considers to be in the public interest, including a performance bond, a payment bond and appropriate insurance. [2003 c.794 §101, 2007 c.764 §13]

279C.325 Limitation on contracting agency awarding contract to nonresident education service district. A contracting agency may not award a public improvement contract, a contract for a public works, as defined in ORS 279C.800, or a contract for personal services, as defined in ORS 279C.100, to a nonresident bidder, as defined in ORS 279A.120, that is an education service district. [2005 c.413 §2]

(Competitive Bidding; Contract Specifications, Exceptions, Exemptions)

279C.330 "Findings" defined. (1) As used in ORS 279C.345 and 279C.350, "findings" means the justification for a contracting agency conclusion that includes, but is not limited to, information regarding:

- (a) Operational, budget and financial data;
- (b) Public benefits;
- (c) Value engineering;
- (d) Specialized expertise required;
- (e) Public safety;
- (f) Market conditions;
- (g) Technical complexity; and
- (h) Funding sources.

(2) As used in ORS 279C.335, "findings" means the justification for a conclusion that a contracting agency or state agency, in seeking an exemption from the competitive bidding requirement of ORS 279C.335 (1), reaches based on the considerations set forth in ORS 279C.335 (2). [2003 c 794 §102, 2013 c 522 §7]

279C.332 Definitions for ORS 279A.065, 279C.307, 279C.335, 279C.337 and 279C.380. As used in this section and ORS 279A.065, 279C.307, 279C.335, 279C.337 and 279C.380:

(1) "Affiliate" means a person that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with another person.

(2) "Construction manager/general contractor" means a person that provides construction manager/general contractor services to a contracting agency under a public improvement contract.

(3)(a) "Construction manager/general contractor services" means construction-related services that a contracting agency procures by means of an alternative contracting method under ORS 279C.335 and that:

(A) Include a construction manager/general contractor's:

(i) Functioning as a member of a project team that includes the contracting agency, the architect or engineer that designs the public improvement under a separate contract with the contracting agency and other contractors and consultants; and

(ii) Reviewing and analyzing a design for a public improvement in order to

(I) Suggest changes in the design that minimize potential errors, delays, unexpected costs and other problems during construction,

(II) Recommend means by which the contracting agency may achieve the functions of the public improvement or a component of the public improvement safely, reliably, efficiently and at the lowest overall cost;

(III) Improve the value and quality of the public improvement; and

(IV) Reduce the time necessary to complete the public improvement, and

(B) May include, depending on the specific terms of the public improvement contract and on whether the contracting agency decides to proceed with construction, a construction manager/general contractor's:

(i) Devising a schedule for constructing the public improvement;

(ii) Estimating construction, materials, labor and other costs for the public improvement,

(iii) Establishing a fixed price, a guaranteed maximum price or other maximum price,

(iv) Constructing portions of the public improvement and subcontracting portions to other contractors,

(v) Coordinating and overseeing the construction process; or

(vi) Performing other services related to constructing a public improvement in accordance with the terms of the public improvement contract.

(b) "Construction manager/general contractor services" does not include services related to constructing a public improvement under the terms of:

(A) A public improvement contract that a contracting agency awards on the basis of a competitive bidding process that does not require an exemption under ORS 279C.335,

(B) A public improvement contract that results from a design-build procurement, as defined in rules the Attorney General or a contracting agency adopts under ORS 279A.065, and that is exempt from the competitive bidding requirement under ORS 279C.335;

(C) An energy savings performance contract;

(D) A public improvement contract for a transportation project that:

(i) Is exempt from the competitive bidding requirement under ORS 279C.335;

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- (ii) Requires the contractor to construct the project according to plans and specifications that a design professional provides under a separate contract with the contracting agency and without significant participation from the contractor; and
- (iii) The contracting agency awards on the basis of the contracting agency's evaluation of:
 - (I) The contractor's qualifications, the price to perform the work on the project and the amount of time the contractor will take to perform the work; or
 - (II) The contractor's qualifications, past experience with similar projects, the price to perform the work on the project and the contractor's planned approach to the project; or
- (E) A public improvement contract that is otherwise exempt or excepted from the competitive bidding requirement under ORS 279C.335
- (4) "Guaranteed maximum price" means the total price at which a construction manager/general contractor agrees to provide construction manager/general contractor services to a contracting agency in accordance with the terms and conditions and scope of work for a specific public improvement contract and within which are:
 - (a) All costs the contracting agency agrees to reimburse and all fees the contracting agency agrees to pay for completing the public improvement; and
 - (b) Any contingent costs, fees or other charges specifically identified in the public improvement contract. [2013 c 522 §2]

Note: 279C.332 was added to and made a part of ORS chapter 279C by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

279C.335 Competitive bidding; exceptions; exemptions. (1) All public improvement contracts shall be based upon competitive bids except

- (a) A public improvement contract with a qualified nonprofit agency that provides employment opportunities for individuals with disabilities under ORS 279.835 to 279.855.
 - (b) A public improvement contract that is exempt under subsection (2) of this section.
 - (c) A public improvement contract with a value of less than \$5,000.
 - (d) A public improvement contract with a contract price that does not exceed \$100,000 made under procedures for competitive quotes in ORS 279C.412 and 279C.414.
 - (e) A contract to repair, maintain, improve or protect property the Department of Veterans' Affairs obtains under ORS 407.135 and 407.145 (1)
 - (f) An energy savings performance contract that a contracting agency enters into in accordance with rules of procedure adopted under ORS 279A.065
- (2) Subject to subsection (4)(b) and (c) of this section, the Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation may exempt a public improvement contract or a class of public improvement contracts from the competitive bidding requirement of subsection (1) of this section after the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board approves the following findings that the contracting agency submits or, if a state agency is not the contracting agency, that the state agency that is seeking the exemption submits:
 - (a) The exemption is unlikely to encourage favoritism in awarding public improvement contracts or substantially diminish competition for public improvement contracts.
 - (b) Awarding a public improvement contract under the exemption will likely result in substantial cost savings and other substantial benefits to the contracting agency or the state agency that seeks the exemption or, if the contract is for a public improvement described in ORS 279A.050 (3)(b), to the contracting agency or the public. In approving a finding under this paragraph, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board shall consider the type, cost and amount of the contract and, to the extent applicable to the particular public improvement contract or class of public improvement contracts, the following:
 - (A) How many persons are available to bid;
 - (B) The construction budget and the projected operating costs for the completed public improvement;
 - (C) Public benefits that may result from granting the exemption;
 - (D) Whether value engineering techniques may decrease the cost of the public improvement;
 - (E) The cost and availability of specialized expertise that is necessary for the public improvement;
 - (F) Any likely increases in public safety;
 - (G) Whether granting the exemption may reduce risks to the contracting agency, the state agency or the public that are related to the public improvement;
 - (H) Whether granting the exemption will affect the sources of funding for the public improvement;
 - (I) Whether granting the exemption will better enable the contracting agency to control the impact that market conditions may have on the cost of and time necessary to complete the public improvement;
 - (J) Whether granting the exemption will better enable the contracting agency to address the size and technical complexity of the public improvement;
 - (K) Whether the public improvement involves new construction or renovates or remodels an existing structure;
 - (L) Whether the public improvement will be occupied or unoccupied during construction;
 - (M) Whether the public improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions; and
 - (N) Whether the contracting agency or state agency has, or has retained under contract, and will use contracting agency or state agency personnel, consultants and legal counsel that have necessary expertise and substantial experience in alternative contracting methods to assist in developing the alternative contracting method that the contracting agency or state agency will use to award the public improvement contract and to help negotiate, administer and enforce the terms of the public improvement contract.
 - (c) As an alternative to the finding described in paragraph (b) of this subsection, if a contracting agency or state agency seeks an exemption that would allow the contracting agency or state agency to use an alternative contracting method that the contracting agency or state agency has not previously used, the contracting agency or state agency may make a finding that identifies the project as a pilot project for which the contracting agency or state agency intends to determine whether using the alternative contracting method actually results in substantial cost savings to the contracting agency, to the state agency or, if the contract is for a public improvement described in ORS 279A.050 (3)(b), to the contracting agency or the public. The contracting agency or state agency shall include an analysis and conclusion regarding actual cost savings, if any, in the evaluation required under ORS 279C.355.
 - (3) In making findings to support an exemption for a class of public improvement contracts, the contracting agency or state agency shall clearly identify the class using the class's defining characteristics. The characteristics must include a combination of project descriptions or locations, time periods, contract values, methods of procurement or other factors that distinguish the limited and related class of public improvement contracts from the agency's overall construction program. The agency may not identify a class solely by funding source, such as a particular bond fund, or by the method of procurement, but shall identify the class using characteristics that reasonably relate to the exemption criteria set forth in subsection (2) of this section.
 - (4) In granting exemptions under subsection (2) of this section, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board shall:
 - (a) If appropriate, direct the use of alternative contracting methods that take account of market realities and modern practices and are consistent with the public policy of encouraging competition.
 - (b) Require and approve or disapprove written findings by the contracting agency or state agency that support awarding a particular public improvement contract or a class of public improvement contracts, without the competitive bidding requirement of subsection (1) of this section. The findings must show that the exemption of a contract or class of contracts complies with the requirements of subsection (2) of this section.
 - (c) Require a contracting agency or state agency that procures construction manager/general contractor services to conduct the procurement in accordance with model rules the Attorney General adopts under ORS 279A.065 (3).
 - (5)(a) A contracting agency or state agency shall hold a public hearing before approving the findings required by subsection (2) of this section and before the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board grants an exemption from the competitive bidding requirement for a public improvement contract or a class of public improvement contracts.
 - (b) Notification of the public hearing must be published in at least one trade newspaper of general statewide circulation a minimum of 14 days before the hearing.
 - (c) The notice must state that the public hearing is for the purpose of taking comments on the draft findings for an exemption from the competitive bidding requirement. At the time of the notice, copies of the draft findings must be made available to the public. At the option of the contracting agency or state agency, the notice may describe the process by which the findings are finally adopted and may indicate the opportunity for further public comment.
 - (d) At the public hearing, the contracting agency or state agency shall offer an opportunity for any interested party to appear and comment.

(e) If a contracting agency or state agency must act promptly because of circumstances beyond the agency's control that do not constitute an emergency, notification of the public hearing may be published simultaneously with the agency'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 hearing and approval of the findings

(6) The purpose of an exemption is to exempt one or more public improvement contracts from competitive bidding requirements. The representations in and the accuracy of the findings, including any general description of the resulting public improvement contract, are the bases for approving the findings and granting the exemption. The findings may describe anticipated features of the resulting public improvement contract, but the final parameters of the contract are those characteristics or specifics announced in the solicitation document.

(7) A public improvement contract awarded under the competitive bidding requirement of subsection (1) of this section may be amended only in accordance with rules adopted under ORS 279A.065

(8) A public improvement contract that is excepted from the competitive bidding requirement under subsection (1)(a), (c), (d), (e) or (f) of this section is not subject to the exemption requirements of subsection (2) of this section. [2003 c.794 §103; 2003 c.794 §§104,105a, 2005 c.103 §§12,13,14, 2005 c.625 §§58,59,60, 2007 c.70 §§69,70,71, 2007 c.764 §§14,15,17, 2013 c.522 §8]

279C.337 Procurement of construction manager/general contractor services. (1) A contracting agency that intends to procure construction manager/general contractor services shall procure the construction manager/general contractor services in accordance with model rules the Attorney General adopts under ORS 279A.065 (3).

(2) A contracting agency shall, in documents the contracting agency uses to procure construction manager/general contractor services

(a) Describe the criteria the contracting agency will use to evaluate proposals for the construction manager/general contractor services the contracting agency seeks and what weight the contracting agency will give each criterion in the evaluation;

(b) Describe how the contracting agency will use interviews in the contracting agency's procurement and how the contracting agency will evaluate information the contracting agency obtains from interviews, if the contracting agency uses interviews in the procurement;

(c) Describe any other criteria the contracting agency may consider in selecting a construction manager/general contractor;

(d) Describe how the contracting agency will combine scoring from the interviews, from evaluating the proposals and from other criteria specified in accordance with paragraph (c) of this subsection to arrive at a proposer's final score and ranking;

(e) State that any savings the construction manager/general contractor realizes in performing the public improvement contract will accrue to the contracting agency, unless the public improvement contract provides otherwise;

(f) Specify terms and conditions that govern how the fixed price, guaranteed maximum price or other maximum price set forth in the public improvement contract will be determined and whether the price includes or is based on unit pricing or allows for work that is constructed in phases;

(g) State that the contracting agency will not pay any amount that exceeds a fixed price, guaranteed maximum price or other maximum price specified in the public improvement contract unless the amount results from material changes to the scope of work set forth in the public improvement contract and the parties to the public improvement contract agree in writing to the material changes;

(h) State that the contracting agency will conduct the procurement in accordance with model rules the Attorney General adopts under ORS 279A.065 (3); and

(i) Specify deadlines and time periods for the procurement that allow prospective contractors a reasonable opportunity to submit proposals, including but not limited to:

(A) The date and time by which the contracting agency must receive proposals;

(B) The dates on which or the time periods during which the contracting agency will conduct interviews, if the contracting agency will conduct interviews for the procurement;

(C) The date by which the contracting agency plans to indicate an intent to award the public improvement contract; and

(D) The time period during which the contracting agency will meet with proposers that the contracting agency did not select for the public improvement contract, if a proposer requests a meeting to discuss the procurement.

(3) By the earlier of the date on which a contracting agency and a construction manager/general contractor agree on a fixed price, guaranteed maximum price or other maximum price or the date on which the construction manager/general contractor begins to solicit offers for construction services from subcontractors, the public improvement contract that the contracting agency negotiates with the construction manager/general contractor must:

(a) Describe the methods the construction manager/general contractor will use to qualify and select subcontractors. The methods must be competitive and should provide prospective subcontractors with a reasonable opportunity to participate in the construction manager/general contractor's qualification and selection process.

(b) Identify the portions of the construction work under the public improvement contract for which the construction manager/general contractor may waive the qualification and selection process described in paragraph (a) of this subsection and describe:

(A) How the construction manager/general contractor may determine the portions of the construction work that will not be subject to the qualification and selection process described in paragraph (a) of this subsection; and

(B) The process the construction manager/general contractor will use to qualify and select prospective subcontractors for the portions of the construction work that are not subject to the qualification and selection process described in paragraph (a) of this subsection.

(c) Identify the conditions under which the construction manager/general contractor or an affiliate or subsidiary of the construction manager/general contractor may perform or compete with other prospective subcontractors to perform construction work under the public improvement contract and describe the methods the construction manager/general contractor will use to qualify and select an affiliate or subsidiary to perform the construction work.

(d) Describe how the construction manager/general contractor will announce which prospective subcontractors the construction manager/general contractor has selected to perform construction services in connection with the public improvement contract.

(e) Describe the conditions under which the construction manager/general contractor will discuss the qualification and selection process described in this subsection with a prospective subcontractor that the construction manager/general contractor did not select for a subcontract if the construction manager/general contractor receives a request from the prospective subcontractor to discuss the process.

(4) As used in this section, "savings" means a positive difference between a fixed price, a guaranteed maximum price or other maximum price set forth in a public improvement contract and the actual cost of the work, including costs for which a contracting agency reimburses a construction manager/general contractor and fees or profits the construction manager/general contractor earns. [2013 c.522 §3]

Note: 279C.337 was added to and made a part of ORS chapter 279C by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

279C.340 Contract negotiations. If a public improvement contract is competitively bid and all responsive bids from responsible bidders exceed the contracting agency's cost estimate, the contracting agency, in accordance with rules adopted by the contracting agency, may negotiate with the lowest responsive, responsible bidder, prior to awarding the contract, in order to solicit value engineering and other options to attempt to bring the contract within the contracting agency's cost estimate. A negotiation with the lowest responsive, responsible bidder under this section may 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 under this section are not subject to public inspection until after the negotiated contract has been awarded or the negotiation process has been terminated. [2003 c.794 §106]

279C.345 Specifications for contracts; exemptions. (1) Specifications for public improvement contracts may not expressly or implicitly require any product by any brand name or mark, nor the product of any particular manufacturer or seller unless the product is exempt under subsection (2) of this section.

(2) The Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation may exempt certain products or classes of products from subsection (1) of this section upon any of the following findings:

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

(b) The specification of a product by brand name or mark, or the product of a particular manufacturer or seller, would result in substantial cost savings to the contracting agency;

(c) There is only one manufacturer or seller of the product of the quality required; or

(d) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies. [2003 c.794 §107, 2007 c.764 §19]

279C.350 Exemption procedure; appeal. (1) Exemptions granted by the Director of the Oregon Department of Administrative Services under ORS 279C.335 (2) or 279C.345 (2) constitute rulemaking and not contested cases under ORS chapter 183. However, an exemption granted with regard to a specific public improvement contract by the Director of the Oregon Department of Administrative Services, or an exemption granted by the Director of Transportation with regard to a specific public improvement contract or class of public improvement contracts described in ORS 279A.050 (3)(b), shall be granted by order. The order shall set forth findings supporting the decision to grant or deny the request for the exemption. The order is reviewable under ORS 183.484 and does not constitute a contested case order. Jurisdiction for review of the order is with the Circuit Court of Marion County. The court may award costs and attorney fees to the prevailing party.

(2) Any person except the contracting agency or anyone representing the contracting agency may bring a petition for a declaratory judgment to test the validity of any rule adopted by the Director of the Oregon Department of Administrative Services under ORS 279C.335 or 279C.345 in the manner provided in ORS 183.400.

(3) Any person except the contracting agency or anyone representing the contracting agency may bring an action for writ of review under ORS chapter 34 to test the validity of an exemption granted under ORS 279C.335 or 279C.345 by a local contract review board. [2003 c.794 §108, 2003 c.794 §109, 2007 c.764 §20]

279C.355 Evaluation of public improvement projects not contracted by competitive bidding. (1) Upon completion of and final payment for any public improvement contract, or class of public improvement contracts, in excess of \$100,000 for which the contracting agency did not use the competitive bidding process, the contracting agency shall prepare and deliver to the Director of the Oregon Department of Administrative Services, the local contract review board or, for public improvement contracts described in ORS 279A.050 (3)(b), the Director of Transportation an evaluation of the public improvement contract or the class of public improvement contracts.

(2) The evaluation must include but is not limited to the following matters:

- (a) The actual project cost as compared with original project estimates;
- (b) The amount of any guaranteed maximum price;
- (c) The number of project change orders issued by the contracting agency;
- (d) A narrative description of successes and failures during the design, engineering and construction of the project; and
- (e) An objective assessment of the use of the alternative contracting process as compared to the findings required by ORS 279C.335.

(3) The evaluations required by this section:

- (a) Must be made available for public inspection; and
 - (b) Must be completed within 30 days of the date the contracting agency accepts.
- (A) The public improvement project, or
(B) The last public improvement project if the project falls within a class of public improvement contracts. [2003 c.794 §111, 2003 c.794 §112, 2007 c.764 §22,23]

(Solicitation, Contract Award, Rejection)

279C.360 Requirement for public improvement advertisements. (1) An advertisement for public improvement contracts must be published at least once in at least one newspaper of general circulation in the area where the contract is to be performed and in as many additional issues and publications as the contracting agency may determine. The Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation, by rule or order, may authorize advertisements for public improvement contracts to be published electronically instead of in a newspaper of general circulation if the director or board determines that electronic advertisements are likely to be cost-effective. If the public improvement contract has an estimated cost in excess of \$125,000, the advertisement must be published in at least one trade newspaper of general statewide circulation. The Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board may, by rule or order, require an advertisement to be published more than once or in one or more additional publications.

(2) All advertisements for public improvement contracts must state:

- (a) The public improvement project;
- (b) The office where the specifications for the project may be reviewed;
- (c) The date that prequalification applications must be filed under ORS 279C.430 and the class or classes of work for which bidders must be prequalified if prequalification is a requirement;

(d) The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement;

(e) The name and title of the person designated for receipt of bids;

(f) The date, time and place that the contracting agency will publicly open the bids; and

(g) If the contract is for a public works subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 et seq.). [2003 c.794 §114, 2005 c.103 §14a, 2007 c.844 §1]

279C.365 Requirements for solicitation documents and bids and proposals. (1) A contracting agency that prepares solicitation documents for a public improvement contract shall, at a minimum, include in the solicitation documents:

- (a) A designation for or description of the public improvement project;
- (b) The office where the specifications for the project may be reviewed;
- (c) The date that prequalification applications must be filed under ORS 279C.430 and the class or classes of work for which bidders must be prequalified if prequalification is a requirement;

(d) The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement, and may, in the sole discretion of the contracting agency, direct or permit bidders to submit and the contracting agency to receive bids by electronic means;

(e) The name and title of the person designated to receive bids;

(f) The date on which and the time and place at which the contracting agency will publicly open the bids;

(g) A statement that, if the contract is for a public works project subject to the state prevailing rates of wage under ORS 279C.800 to 279C.870, the federal prevailing rates of wage under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) or both the state and federal prevailing rates of wage, the contracting agency will not receive or consider a bid unless the bid contains a statement by the bidder that the bidder will comply with ORS 279C.838 or 279C.840 or 40 U.S.C. 3141 et seq.;

(h) A statement that each bid must identify whether the bidder is a resident bidder, as defined in ORS 279A.120;

(i) A statement that the contracting agency may reject a bid that does not comply with prescribed public contracting procedures and requirements, including the requirement to demonstrate the bidder's responsibility under ORS 279C.375 (3)(b), and that the contracting agency may reject for good cause all bids after finding that doing so is in the public interest;

(j) Information addressing whether a contractor or subcontractor must be licensed under ORS 468A.720; and

(k) A statement that the contracting agency may not receive or consider a bid for a public improvement contract unless the bidder is licensed by the Construction Contractors Board or the State Landscape Contractors Board.

(2) A contracting agency may provide solicitation documents by electronic means.

(3) A bid made to the contracting agency under ORS 279C.335 or 279C.400 must be:

(a) In writing;

(b) Filed with the person the contracting agency designates to receive bids; and

(c) Opened publicly by the contracting agency immediately after the deadline for submitting bids.

(4) After the contracting agency opens the bids, the contracting agency shall make the bids available for public inspection.

(5) A bidder shall submit or post a surety bond, irrevocable letter of credit issued by an insured institution as defined in ORS 706.008, cashier's check or certified check for all bids as bid security unless the contracting agency has exempted the contract for which the bidder submits a bid from this requirement under ORS 279C.390. The security may not exceed 10 percent of the amount bid for the contract.

(6) Subsection (5) of this section applies only to public improvement contracts with a value, estimated by the contracting agency, of more than \$100,000 or, in the case of contracts for highways, bridges and other transportation projects, more than \$50,000. [2003 c.794 §115, 2005 c.103 §15, 2007 c.764 §25, 2007 c.844 §2, 2009 c.368 §1]

279C.370 First-tier subcontractor disclosure. (1)(a) Within two working hours after the date and time of the deadline when bids are due to a contracting agency for a public improvement contract, a bidder shall submit to the contracting agency a disclosure of the first-tier subcontractors that

(A) Will be furnishing labor or will be furnishing labor and materials in connection with the public improvement contract, and

(B) Will have a contract value that is equal to or greater than five percent of the total project bid or \$15,000, whichever is greater, or \$350,000 regardless of the percentage of the total project bid.

(b) For each contract to which this subsection applies, the contracting agency shall designate a deadline for submission of bids that has a date on a Tuesday, Wednesday or Thursday and a time between 2 p.m. and 5 p.m., except that this paragraph does not apply to public contracts for maintenance or construction of highways, bridges or other transportation facilities.

(c) This subsection applies only to public improvement contracts with a value, estimated by the contracting agency, of more than \$100,000.

(d) This subsection does not apply to public improvement contracts that have been exempted from competitive bidding requirements under ORS 279C.335 (2).

(2) The disclosure of first-tier subcontractors under subsection (1) of this section must include the name of each subcontractor, the category of work that each subcontractor will perform and the dollar value of each subcontract. The information shall be disclosed in substantially the following form

**FIRST-TIER SUBCONTRACTOR
DISCLOSURE FORM**

PROJECT NAME _____
BID # _____
BID CLOSING Date _____ Time _____

This form must be submitted at the location specified in the Invitation to Bid on the advertised bid closing date and within two working hours after the advertised bid closing time

List below the name of each subcontractor that will be furnishing labor or will be furnishing labor and materials and that is required to be disclosed, the category of work that the subcontractor will be performing and the dollar value of the subcontract. Enter "NONE" if there are no subcontractors that need to be disclosed. (ATTACH ADDITIONAL SHEETS IF NEEDED)

NAME	DOLLAR VALUE	CATEGORY OF WORK
1) _____	\$ _____	_____
2) _____	\$ _____	_____
3) _____	\$ _____	_____
4) _____	\$ _____	_____

Failure to submit this form by the disclosure deadline will result in a nonresponsive bid. A nonresponsive bid will not be considered for award

Form submitted by (bidder name): _____

Contact name _____
Phone no.: _____

(3) A contracting agency shall accept the subcontractor disclosure. The contracting agency shall consider the bid of any contractor that does not submit a subcontractor disclosure to the contracting agency to be a nonresponsive bid and may not award the contract to the contractor. A contracting agency is not required to determine the accuracy or the completeness of the subcontractor disclosure.

(4) After the bids are opened, the subcontractor disclosures must be made available for public inspection.

(5) A contractor may substitute a first-tier subcontractor under the provisions of ORS 279C.585

(6) A subcontractor may file a complaint under ORS 279C.590 based on the disclosure requirements of subsection (1) of this section. [2003 c 794 §116, 2005 c 103 §16]

279C.375 Award and execution of contract; determination of responsibility of bidder; bonds; impermissible exclusions. (1) After a contracting agency has opened bids and determined that the contracting agency will award a public improvement contract, the contracting agency shall award the contract to the lowest responsible bidder

(2) At least seven days before awarding a public improvement contract, unless the contracting agency determines that seven days is impractical under rules adopted under ORS 279A.065, the contracting agency shall issue to each bidder or post, electronically or otherwise, a notice of the contracting agency's intent to award a contract. This subsection does not apply to a contract to which competitive bidding does not apply under ORS 279C.335 (1)(c) or (d). The notice and the manner in which the notice is posted or issued must conform to rules adopted under ORS 279A.065.

(3) In determining the lowest responsible bidder, a contracting agency shall do all of the following

(a) Check the list created by the Construction Contractors Board under ORS 701.227 for bidders who are not qualified to hold a public improvement contract

(b) Determine whether the bidder is responsible. A responsible bidder must demonstrate to the contracting agency that the bidder

(A) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or has the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.

(B) Holds current licenses that businesses or service professionals operating in this state must hold in order to undertake or perform the work specified in the contract

(C) Is covered by liability insurance and other insurance in amounts the contracting agency requires in the solicitation documents

(D) Qualifies as a carrier-insured employer or a self-insured employer under ORS 656.407 or has elected coverage under ORS 656.128

(E) Has made the disclosure required under ORS 279C.370.

(F) Completed previous contracts of a similar nature with a satisfactory record of performance. For purposes of this subparagraph, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the bidder's control, the bidder stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. The contracting agency shall document the bidder's record of performance if the contracting agency finds under this subparagraph that the bidder is not responsible.

(G) Has a satisfactory record of integrity. The contracting agency in evaluating the bidder's record of integrity may consider, among other things, whether the bidder has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the bidder's performance of a contract or subcontract. The contracting agency shall document the bidder's record of integrity if the contracting agency finds under this subparagraph that the bidder is not responsible.

(H) Is legally qualified to contract with the contracting agency.

(I) Possesses an unexpired certificate that the Oregon Department of Administrative Services issued under ORS 279A.167, if the bidder employs 50 or more full-time workers and submitted a bid for a procurement with an estimated contract price that exceeds \$500,000 in response to an advertisement or solicitation from a state contracting agency.

(J) Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder fails to promptly supply information concerning responsibility that the contracting agency requests, the contracting agency shall determine the bidder's responsibility based on available information, or may find that the bidder is not responsible.

(c) Document the contracting agency's compliance with the requirements of paragraphs (a) and (b) of this subsection in substantially the following form:

RESPONSIBILITY DETERMINATION FORM

Project Name: _____
 Bid Number: _____
 Business Entity Name: _____
 CCB License Number: _____
 Form Submitted By (Contracting Agency): _____

Form Submitted By (Contracting Agency Representative's Name): _____
 Title: _____
 Date: _____

(The contracting agency must submit this form with attachments, if any, to the Construction Contractors Board within 30 days after the date of contract award.)

The contracting agency has (check all of the following):

- ☐ Checked the list created by the Construction Contractors Board under ORS 701.227 for bidders who are not qualified to hold a public improvement contract.
- ☐ Determined whether the bidder has met the standards of responsibility. In so doing, the contracting agency has found that the bidder demonstrated that the bidder:
 - ☐ Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.
 - ☐ Holds current licenses that businesses or service professionals operating in this state must hold in order to undertake or perform the work specified in the contract.
 - ☐ Is covered by liability insurance and other insurance in amounts required in the solicitation documents.
 - ☐ Qualifies as a carrier-insured employer or a self-insured employer under ORS 656.407 or has elected coverage under ORS 656.128.
 - ☐ Has disclosed the bidder's first-tier subcontractors in accordance with ORS 279C.370.
 - ☐ Has a satisfactory record of performance.
 - ☐ Has a satisfactory record of integrity.
 - ☐ Is legally qualified to contract with the contracting agency.
 - ☐ Possesses a certificate that the Oregon Department of Administrative Services issued under ORS 279A.167.
 - ☐ Has supplied all necessary information in connection with the inquiry concerning responsibility.
- ☐ Determined the bidder to be (check one of the following):
 - ☐ Responsible under ORS 279C.375 (3)(a) and (b).
 - ☐ Not responsible under ORS 279C.375 (3)(a) and (b).

(Attach documentation if the contracting agency finds the bidder not to be responsible.)

(d) Submit the form described in paragraph (c) of this subsection, with any attachments, to the Construction Contractors Board within 30 days after the date the contracting agency awards the contract.

(4) The successful bidder shall:

(a) Promptly execute a formal contract; and

(b) Execute and deliver to the contracting agency a performance bond and a payment bond when required under ORS 279C.380.

(5) Based on competitive bids, a contracting agency may award a public improvement contract or may award multiple public improvement contracts when specified in the invitation to bid.

(6) A contracting agency may not exclude a commercial contractor from competing for a public contract on the basis that the license issued by the Construction Contractors Board is endorsed as a level 1 or level 2 license. As used in this section, "commercial contractor" has the meaning given that term in ORS 701.005. [2003 c. 794 §117, 2005 c. 103 §§17, 18, 2005 c. 376 §1, 2007 c. 764 §§26, 27, 2007 c. 836 §§42, 43, 2009 c. 880 §§9, 9a, 2015 c. 454 §5]

279C.380 Performance bond; payment bond; waiver of bonds. (1) Except as provided in ORS 279C.390, a successful bidder for a public improvement contract shall promptly execute and deliver to the contracting agency the following bonds:

(a) A performance bond in an amount equal to the full contract price conditioned on the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. The performance bond must be solely for the protection of the contracting agency that awarded the contract and any public agency or agencies for whose benefit the contract was awarded. If the public improvement contract is with a single person to provide both design and construction of a public improvement, the obligation of the performance bond for the faithful performance of the contract required by this paragraph must also be for the preparation and completion of the design and related services covered under the contract. Notwithstanding when a cause of action, claim or demand accrues or arises, the surety is not liable after final completion of the contract, or longer if provided for in the contract, for damages of any nature, economic or otherwise and including corrective work, attributable to the design aspect of a design-build project, or for the costs of design revisions needed to implement corrective work. A contracting agency may waive the requirement of a performance bond. A contracting agency may permit the successful bidder to submit a cashier's check or certified check in lieu of all or a portion of the required performance bond.

(b) A payment bond in an amount equal to the full contract price, solely for the protection of claimants under ORS 279C.600.

(2) If the public improvement contract is with a single person to provide construction manager/general contractor services, in which a guaranteed maximum price may be established by an amendment authorizing construction period services following preconstruction period services, the contractor shall provide the bonds required by subsection (1) of this section upon execution of an amendment establishing the guaranteed maximum price. The contracting agency shall also require the contractor to provide bonds equal to the value of construction services authorized by any early work amendment in advance of the guaranteed maximum price amendment. Such bonds must be provided before construction starts.

(3) Each performance bond and each payment bond must be executed solely by a surety company or companies holding a certificate of authority to transact surety business in this state. The bonds may not constitute the surety obligation of an individual or individuals. The performance and payment bonds must be payable to the contracting agency or to the public agency or agencies for whose benefit the contract was awarded, as specified in the solicitation documents, and shall be in a form approved by the contracting agency.

(4) In cases of emergency, or when the interest or property of the contracting agency or the public agency or agencies for whose benefit the contract was awarded probably would suffer material injury by delay or other cause, the requirement of furnishing a good and sufficient performance bond and a good and sufficient payment bond for the faithful performance of any public improvement contract may be excused, if a declaration of such emergency is made in accordance with rules adopted under ORS 279A.065.

(5) This section applies only to public improvement contracts with a value, estimated by the contracting agency, of more than \$100,000 or, in the case of contracts for highways, bridges and other transportation projects, more than \$50,000. [2003 c. 794 §118, 2005 c. 103 §20, 2013 c. 522 §9]

279C.385 Return or retention of bid security. (1) A contracting agency shall return the bid security of the successful bidder to the bidder after the bidder

(a) Executes the public improvement contract, and

(b) Delivers a good and sufficient performance bond, a good and sufficient payment bond and any required proof of insurance.

(2) A bidder who is awarded a contract and who fails promptly and properly to execute the contract and to deliver the performance bond, the payment bond and the proof of insurance, when bonds or insurance are required, shall forfeit the bid security that accompanied the successful bid. The bid security shall be taken and considered as liquidated damages and not as a penalty for failure of the bidder to execute the contract and deliver the bonds and proof of insurance.

(3) The contracting agency may return the bid security of unsuccessful bidders to them when the bids have been opened and the contract has been awarded, and may not retain the bid security after the contract has been duly signed. [2003 c. 794 §119, 2005 c. 103 §21]

279C.390 Exemption of contracts from bid security and bonds. (1) Subject to the provisions of subsection (2) of this section, the Director of the Oregon Department of Administrative Services, a state contracting agency with procurement authority under ORS 279A.050, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation may exempt certain contracts or classes of contracts from all or a portion of the requirement for bid security and from all or a portion of the requirement that good and sufficient bonds be furnished to ensure performance of the contract and payment of obligations incurred in the performance

(2) The contracting agency may require bid security and a good and sufficient performance bond, a good and sufficient payment bond, or any combination of such bonds, even though the public improvement contract is of a class exempted under subsection (1) of this section.

(3) The Director of Transportation may:

(a) Exempt contracts or classes of contracts financed from the proceeds of bonds issued under ORS 367.620 (3)(a) from the requirement for bid security and from the requirement that a good and sufficient bond be furnished to ensure performance of the contract, or

(b) Reduce the amount of the required performance bond for contracts or classes of contracts financed from the proceeds of the bonds issued under ORS 367.620 (3)(a) to less than 100 percent of the contract price.

(4) Any recoverable damages that exceed the amount of the performance bond required under subsection (3) of this section shall be the sole responsibility of the Department of Transportation. [2003 c. 794 §120, 2003 c. 794 §120a, 2007 c. 764 §28]

279C.395 Rejection of bids. A contracting agency may reject any bid not in compliance with all prescribed public bidding procedures and requirements, and may, for good cause, reject all bids upon a finding of the contracting agency it is in the public interest to do so. In any case where competitive bids are required and all bids are rejected, and the proposed project is not abandoned, new bids may be called for as in the first instance. [2003 c. 794 §121]

(Competitive Proposals)

279C.400 Competitive proposals; procedure. (1) When authorized or required by an exemption granted under ORS 279C.335, a contracting agency may solicit and award a public improvement contract, or may award multiple public improvement contracts when specified in the request for proposals, by requesting and evaluating competitive proposals. A contract awarded under this section may be amended only in accordance with rules adopted under ORS 279A.065.

(2) Except as provided in ORS 279C.330 to 279C.355, 279C.360 to 279C.390, 279C.395 and 279C.430 to 279C.450, competitive proposals shall be subject to the following requirements of competitive bidding:

(a) Advertisement under ORS 279C.360,

(b) Requirements for solicitation documents under ORS 279C.365,

(c) Disqualification due to a Construction Contractors Board listing as described in ORS 279C.375 (3)(a),

(d) Contract execution and bonding requirements under ORS 279C.375 and 279C.380,

(e) Determination of responsibility under ORS 279C.375 (3)(b),

(f) Rejection of bids under ORS 279C.395; and

(g) Disqualification and prequalification under ORS 279C.430, 279C.435 and 279C.440.

(3) For the purposes of applying the requirements listed in subsection (2) of this section to competitive proposals, when used in the sections listed in subsection (2) of this section, "bids" includes proposals, and "bid documents" and "invitation to bid" include requests for proposals.

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- (4) Competitive proposals are not subject to the following requirements of competitive bidding:
- (a) First-tier subcontractor disclosure under ORS 279C.370; and
 - (b) Reciprocal preference under ORS 279A.120.
- (5) The contracting agency may require proposal security that serves the same function with respect to proposals as bid security serves with respect to bids under ORS 279C.365 (5) and 279C.385, as follows:
- (a) The contracting agency may require proposal security in a form and amount as may be determined to be reasonably necessary or prudent to protect the interests of the contracting agency.
 - (b) The contracting agency shall retain the proposal security if a proposer who is awarded a contract fails to promptly and properly execute the contract and provide any required bonds or insurance.
 - (c) The contracting agency shall return the proposal security to all proposers upon the execution of the contract, or earlier in the selection process.
- (6) In all other respects, and subject to rules adopted under ORS 279A.065, references in this chapter to invitations to bid, bids or bidders shall, to the extent practicable within the proposal process, be deemed equally applicable to requests for proposals, proposals or proposers. However, notwithstanding ORS 279C.375 (1), a contracting agency may not be required to award a contract advertised under the competitive proposal process based on price, but may award the contract in accordance with ORS 279C.410 (8). [2003 c. 794 §129, 2005 c. 103 §23; 2007 c. 764 §29]

279C.405 Requests for information, interest or qualifications; requirements for requests for proposals. (1) A contracting agency may issue a request for information, a request for interest, a request for qualifications or other preliminary documents to obtain information useful in the preparation or distribution of a request for proposals.

- (2) In addition to the general requirements of ORS 279C.365, a contracting agency preparing a request for proposals shall include:
- (a) All required contractual terms and conditions. The request for proposals also may:
 - (A) Identify those contractual terms or conditions the contracting agency reserves, in the request for proposals, for negotiation with proposers;
 - (B) Request that proposers propose contractual terms and conditions that relate to subject matter reasonably identified in the request for proposals; and
 - (C) Contain or incorporate the form and content of the contract that the contracting agency will accept, or suggested contract terms and conditions that nevertheless may be the subject of negotiations with proposers.
 - (b) The method of contractor selection, which may include but is not limited to award without negotiation, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed either to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers, or any combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065.
 - (c) All evaluation factors that will be considered by the contracting agency when evaluating the proposals, including the relative importance of price and any other evaluation factors. [2003 c. 794 §130, 2007 c. 764 §30]

279C.410 Receipt of proposals; evaluation and award. (1) Notwithstanding the public records law, ORS 192.410 to 192.505:

- (a) Proposals may be opened so as to avoid disclosure of contents to competing proposers during, when applicable, the process of negotiation.
- (b) Proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued.
- (2) For each request for proposals, the contracting agency shall prepare a list of proposals.
- (3) Notwithstanding any requirement to make proposals open to public inspection after the contracting agency's issuance of notice of intent to award a contract, a contracting agency may withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a proposal. The fact that proposals are opened at a public meeting as defined in ORS 192.610 does not make their contents subject to disclosure, regardless of whether the public body opening the proposals fails to give notice of or provide for an executive session for the purpose of opening proposals. If a request for proposals is canceled after proposals are received, the contracting agency may return a proposal to the proposer that made the proposal. The contracting agency shall keep a list of returned proposals in the file for the solicitation.
- (4) As provided in the request for proposals, a contracting agency may conduct discussions with proposers who submit proposals the agency has determined to be closely competitive or to have a reasonable chance of being selected for award. The discussions may be conducted for the purpose of clarification to ensure full understanding of, and responsiveness to, the solicitation requirements. The contracting agency shall accord proposers fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions of proposals may be permitted after the submission of proposals and before award for the purpose of obtaining best and final offers. In conducting discussions, the contracting agency may not disclose information derived from proposals submitted by competing proposers.
- (5) When provided for in the request for proposals, the contracting agency may employ methods of contractor selection including but not limited to award based solely on the ranking of proposals, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers, or any combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065. When applicable, in any instance in which the contracting agency determines that impasse has been reached in negotiations with a highest ranked proposer, the contracting agency may terminate negotiations with that proposer and commence negotiations with the next highest ranked proposer.
- (6) The cancellation of requests for proposals and the rejection of proposals shall be in accordance with ORS 279C.395.
- (7) At least seven days before the award of a public improvement contract, unless the contracting agency determines that seven days is impractical under rules adopted under ORS 279A.065, the contracting agency shall issue to each proposer or post, electronically or otherwise, a notice of intent to award.
- (8) If a public improvement contract is awarded, the contracting agency shall award a public improvement contract to the responsible proposer whose proposal is determined in writing to be the most advantageous to the contracting agency based on the evaluation factors set forth in the request for proposals and, when applicable, the outcome of any negotiations authorized by the request for proposals. Other factors may not be used in the evaluation. [2003 c. 794 §131, 2005 c. 103 §24, 2007 c. 764 §31]

279C.412 Competitive quotes for intermediate procurements. (1) A public improvement contract estimated by the contracting agency not to exceed \$100,000 may be awarded in accordance with intermediate procurement procedures for competitive quotes established by rules adopted under ORS 279A.065. A contract awarded under this section may be amended to exceed \$100,000 only in accordance with rules adopted under ORS 279A.065.

- (2) A procurement may not be artificially divided or fragmented so as to constitute an intermediate procurement under this section or to circumvent competitive bidding requirements under this chapter.
- (3) Intermediate procurements under this section need not be made through competitive bidding. However, nothing in this section may be construed as prohibiting a contracting agency from conducting a procurement that does not exceed \$100,000 under competitive bidding procedures. [2003 c. 794 §132, 2007 c. 764 §32]

279C.414 Requirements for competitive quotes. (1) Rules adopted under ORS 279A.065 to govern competitive quotes shall require the contracting agency to seek at least three informally solicited competitive price quotes from prospective contractors. The contracting agency shall keep a written record of the sources and amounts of the quotes received. If three quotes are not reasonably available, fewer will suffice, but in that event the contracting agency shall make a written record of the effort made to obtain the quotes.

- (2) If a contract is to be awarded by competitive quotes, the contracting agency shall award the contract to the prospective contractor whose quote will best serve the interests of the contracting agency, taking into account price as well as any other applicable factors such as, but not limited to, experience, specific expertise, availability, project understanding, contractor capacity and responsibility. If an award is not made to the prospective contractor offering the lowest price quote, the contracting agency shall make a written record of the basis for award. [2003 c. 794 §133]

(Prequalification and Disqualification)

279C.430 Prequalification of bidders. (1) A contracting agency may adopt a rule, resolution, ordinance or other regulation requiring mandatory prequalification for all persons desiring to bid for public improvement contracts that are to be let by the agency. The rule, resolution, ordinance or other regulation authorized by this section must include the time for submitting prequalification applications and a general description of the type and nature of the contracts that may be let. The prequalification application must be in writing on a standard form prescribed under the authority of ORS 279A.050.

(2) When a contracting agency permits or requires prequalification of bidders, a person who wishes to prequalify shall submit a prequalification application to the contracting agency on a standard form prescribed under subsection (1) of this section. Within 30 days after receipt of a prequalification application, the contracting agency shall investigate the applicant as necessary to determine if the applicant is qualified. The determination shall be made in less than 30 days, if practicable, if the applicant requests an early decision to allow the applicant as much time as possible to prepare a bid on a contract that has been advertised. In making its determination, the contracting agency shall consider only the applicable standards of responsibility listed in ORS 279C.375 (3)(b). The agency shall promptly notify the applicant whether or not the applicant is qualified.

(3) If the contracting agency finds that the applicant is qualified, the notice must state the nature and type of contracts that the person is qualified to bid on and the period of time for which the qualification is valid under the contracting agency's rule, resolution, ordinance or other regulation. If the contracting agency finds the applicant is not qualified as to any contracts covered by the rule, resolution, ordinance or other regulation, the notice must specify the reasons found under ORS 279C.375 (3)(b) for not prequalifying the applicant and inform the applicant of the right to a hearing under ORS 279C.445 and 279C.450.

(4) If a contracting agency has reasonable cause to believe that there has been a substantial change in the conditions of a prequalified person and that the person is no longer qualified or is less qualified, the agency may revoke or may revise and reissue the prequalification after reasonable notice to the prequalified person. The notice shall state the reasons found under ORS 279C.375 (3)(b) for revocation or revision of the prequalification of the person and inform the person of the right to a hearing under ORS 279C.445 and 279C.450. A revocation or revision does not apply to any public improvement contract for which publication of an advertisement, in accordance with ORS 279C.360, commenced before the date the notice of revocation or revision was received by the prequalified person. [2003 c.794 §123, 2005 c.103 §25]

279C.435 Effect of prequalification by Department of Transportation or Oregon Department of Administrative Services. If a person is prequalified with the Department of Transportation or with the Oregon Department of Administrative Services, the person is rebuttably presumed qualified with any other contracting agency for the same kind of work. When qualifying for the same kind of work with another contracting agency, the person may submit proof of the prequalification in lieu of a prequalification application as required by ORS 279C.430. [2003 c.794 §128]

279C.440 Disqualification from consideration for award of contracts. (1)(a) A contracting agency may disqualify a person from consideration for award of the contracting agency's contracts for the reasons listed in subsection (2) of this section after providing the person with notice and a reasonable opportunity to be heard.

(b) In lieu of the disqualification process described in paragraph (a) of this subsection, a contracting agency contracting for a public improvement may petition the Construction Contractors Board to disqualify a person from consideration for award of the contracting agency's public improvement contracts for the reasons listed in subsection (2) of this section. The Construction Contractors Board shall provide the person with notice and a reasonable opportunity to be heard.

(c) A contracting agency or the Construction Contractors Board may not disqualify a person under this section for a period of more than three years.

(2) A person may be disqualified from consideration for award of a contracting agency's contracts for any of the following reasons

(a) The person has been convicted 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.

(b) The person has been convicted 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.

(c) The person has been convicted under state or federal antitrust statutes.

(d) The person has committed a violation of a contract provision that is regarded by the contracting agency or the Construction Contractors Board 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.

(e) The person does not carry workers' compensation or unemployment insurance as required by statute.

(3) A contracting agency or the Construction Contractors Board shall issue a written decision to disqualify a person under this section. The decision shall

(a) State the reasons for the action taken, and

(b) Inform the disqualified person of the appeal right of the person under:

(A) ORS 279C.445 and 279C.450 if the decision to disqualify was issued by a contracting agency, or

(B) ORS chapter 183 if the decision to disqualify was issued by the Construction Contractors Board.

(4) A copy of the decision issued under subsection (3) of this section must be mailed or otherwise furnished immediately to the disqualified person. [2003 c.794 §122]

279C.445 Appeal of disqualification. Any person who wishes to appeal disqualification shall, within three business days after receipt of notice of disqualification, notify the contracting agency that the person appeals the disqualification. Immediately upon receipt of the notice of appeal

(1) A state contracting agency shall notify the Director of the Oregon Department of Administrative Services

(2) All contracting agencies other than state contracting agencies shall notify the appropriate local contract review board. [2003 c.794 §124]

279C.450 Appeal procedure for decision to deny, revoke or revise prequalification; hearing; costs; judicial review. (1) An appeal from a contracting agency's disqualification or denial, revocation or revision of a prequalification is subject to the procedures set forth in this section and is not subject to ORS chapter 183 except when specifically provided in this section.

(2) Promptly upon receiving notice of appeal from a contracting agency as provided in ORS 279C.445, the Director of the Oregon Department of Administrative Services or the local contract review board shall notify the person appealing and the contracting agency of the time and place of the hearing. The director or board shall conduct the hearing and decide the appeal within 30 days after receiving the notification from the contracting agency unless the person appealing and the contracting agency mutually agree to a different period of time. The director or board shall set forth in writing the reasons for the decision.

(3) In the hearing the director or board shall consider de novo the notice of disqualification or denial, revocation or revision of a prequalification, the reasons listed in ORS 279C.440 (2) on which the contracting agency based the disqualification or the standards of responsibility listed in ORS 279C.375 (3)(b) on which the contracting agency based the denial, revocation or revision of the prequalification and any evidence provided by the parties. In all other respects, a hearing before the director shall be conducted in the same manner as a contested case under ORS 183.417 (1) to (4) and (7), 183.425, 183.440, 183.450 and 183.452.

(4) The director may allocate the director's cost for the hearing between the person appealing and the contracting agency whose disqualification or prequalification decision is being appealed. The director shall base the allocation upon facts the director finds in the record and states in the final order that, in the director's opinion, warrant such allocation of the costs. If the final order does not allocate the director's costs for the hearing, the costs must be paid as follows:

(a) If the director upholds the decision to disqualify or deny, revoke or revise a prequalification of a person, the person appealing the disqualification or prequalification decision shall pay the director's costs.

(b) If the director reverses the decision to disqualify or deny, revoke or revise a prequalification of a person, the contracting agency whose disqualification or prequalification decision is the subject of the appeal shall pay the director's costs.

(5) The decision of the director or board may be reviewed only upon a petition, filed within 15 days after the date of the decision, in the circuit court of the county in which the director or board has the director's or the board's principal office. The circuit court shall reverse or modify the decision only if the court finds

(a) The decision was obtained through corruption, fraud or undue means.

(b) There was evident partiality or corruption on the part of the director or board or any of the members of the board.

(c) There was an evident material miscalculation of figures or an evident material mistake in the description of a person, thing or property referred to in the decision.

(6) The procedure provided in this section is the exclusive means of judicial review of the decision of the director or board. The judicial review provisions of ORS 183.480, the writs of review and mandamus, as provided in ORS chapter 34, and other legal, declaratory and injunctive remedies are not available.

(7) The circuit court may, in the court's discretion, stay the letting of the contract that is the subject of the petition in the same manner as the court may issue a stay in a suit in equity. If the court determines that an improper disqualification or denial, revocation or revision of a prequalification occurred and the contract has been let, the court may proceed to take evidence to determine the damages, if any, the petitioner suffered and award such damages as the court may find as a judgment against the director or board. The court may award costs and attorney fees to the prevailing party. [2003 c.794 §125; 2005 c.103 §26, 2007 c.288 §13, 2009 c.149 §1]

(Remedies)

279C.460 Action by or on behalf of adversely affected bidder or proposer; exception for personal services contract. (1) Any bidder or proposer adversely affected or any trade association of construction contractors acting on behalf of a member of the association to protect interests common to construction contractor members may commence an action in the circuit court for the county where the principal offices of a contracting agency are located, for the purpose of requiring compliance with, or prevention of violations of, ORS 279C 300 to 279C 470 or to determine the applicability of ORS 279C 300 to 279C 470 to matters or decisions of the contracting agency.

(2) The court may order such equitable relief as the court considers appropriate in the circumstances. In addition to or in lieu of any equitable relief, the court may award an aggrieved bidder or proposer any damages suffered by the bidder or proposer as a result of violations of ORS 279C 300 to 279C 470 for the reasonable cost of preparing and submitting a bid or proposal. A decision of the contracting agency may not be voided if other equitable relief is available.

(3) If the contracting agency is successful in defending the contracting agency's actions against claims of violation or potential violation of ORS 279C 300 to 279C 470, the court may award to the aggrieved contracting agency any damages suffered as a result of the court action.

(4) The court may order payment of reasonable attorney fees and costs on trial and on appeal to a successful party in an action brought under this section.

(5) This section does not apply to personal services contracts under ORS 279C 100 to 279C 125. [2003 c.794 §134; 2007 c.764 §33]

279C.465 Action against successful bidder; amount of damages; when action to be commenced; defenses. (1) Any person that loses a competitive bid or proposal for a contract involving the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement or renovation of a building or structure may bring an action for damages against another person who is awarded the contract for which the bid or proposal was made if the person making the losing bid or proposal can establish that the other person knowingly violated ORS 279C 840, 656.017, 657.505, 701.021 or 701.026 while performing the work under the contract, or knowingly failed to pay to the Department of Revenue all sums withheld from employees under ORS 316.167.

(2) A person bringing an action under this section must establish a violation of ORS 279C 840, 316.167, 656.017, 657.505, 701.021 or 701.026 by a preponderance of the evidence.

(3) Upon establishing that the violation occurred, the person shall recover, as liquidated damages, 10 percent of the total amount of the contract or \$5,000, whichever is greater.

(4) In any action under this section, the prevailing party is entitled to an award of reasonable attorney fees.

(5) An action under this section must be commenced within two years of the substantial completion of the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement or renovation. For the purposes of this subsection, "substantial completion" has the meaning given that term in ORS 12.135.

(6) A person may not recover any amounts under this section if the defendant in the action establishes by a preponderance of the evidence that the plaintiff:

(a) Was in violation of ORS 701.021 or 701.026 at the time of making the bid or proposal on the contract;

(b) Was in violation of ORS 316.167, 656.017 or 657.505 with respect to any employees of the plaintiff as of the time of making the bid or proposal on the contract; or

(c) Was in violation of ORS 279C 840 with respect to any contract performed by the plaintiff within one year before making the bid or proposal on the contract at issue in the action. [2003 c.794 §135; 2007 c.836 §44]

279C.470 Compensation for contractor on contract declared void by court; exceptions; applicability. (1) If a court determines that a public improvement contract is void because the contracting agency letting the contract failed to comply with any statutory or regulatory competitive bidding or other procurement requirements, and the contractor entered into the contract without intentionally violating the laws regulating public improvement contracts, then, unless the court determines that substantial injustice would result, the contractor is entitled to reimbursement for work performed under the contract as follows:

(a) If the work under the public improvement contract is substantially complete, the contracting agency shall ratify the contract.

(b) If the work under the public improvement contract is not substantially complete, the contracting agency shall ratify the contract and the contract shall be deemed terminated. Upon termination, the contractor shall be paid in accordance with ORS 279C 660, unless the court determines that payment under ORS 279C 660 would be a substantial injustice to the contracting agency or the contractor, in which case the contractor shall be paid as the court deems equitable.

(c) For the purposes of this section, a ratified contract shall be deemed valid, binding and legally enforceable, and the contractor's payment and performance bonds shall remain in full force and effect.

(2) Notwithstanding subsection (1) of this section, if a court determines that a public improvement contract is void as a result of fraudulent or criminal acts or omissions of the contractor or of both the contracting agency letting the contract and the contractor, the contractor is not entitled to reimbursement for work performed under the contract.

(3) This section does not apply to a public improvement contract if:

(a) The contracting agency's employee that awarded the public improvement contract did not have the authority to do so under law, ordinance, charter, contract or agency rule; or

(b) Payment is otherwise prohibited by Oregon law.

(4) The contractor and all subcontractors under a public improvement contract are prohibited from asserting that the public improvement contract is void for any reason described in this section. [2003 c.794 §136]

CONSTRUCTION CONTRACTS GENERALLY

(Required Contract Conditions)

279C.500 "Person" defined. As used in ORS 279C.500 to 279C.530, unless the context otherwise requires, "person" includes the State Accident Insurance Fund Corporation and the Department of Revenue. [2003 c.794 §137]

279C.505 Conditions concerning payment, contributions, liens, withholding, drug testing. (1) Every public improvement contract shall contain a condition that the contractor shall:

(a) Make payment promptly, as due, to all persons supplying to the contractor labor or material for the performance of the work provided for in the contract.

(b) Pay all contributions or amounts due the Industrial Accident Fund from the contractor or subcontractor incurred in the performance of the contract.

(c) Not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished.

(d) Pay to the Department of Revenue all sums withheld from employees under ORS 316.167.

(2) In addition to the conditions specified in subsection (1) of this section, every public improvement contract shall contain a condition that the contractor shall demonstrate that an employee drug testing program is in place. [2003 c.794 §138; 2005 c.103 §27]

279C.510 Demolition contracts to require material salvage; lawn and landscape maintenance contracts to require composting or mulching. (1) Every public improvement contract for demolition shall contain a condition requiring the contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective.

(2) Every public improvement contract for lawn and landscape maintenance shall contain a condition requiring the contractor to compost or mulch yard waste material at an approved site, if feasible and cost-effective. [2003 c.794 §139]

279C.515 Conditions concerning payment of claims by public officers, payment to persons furnishing labor or materials and complaints. (1) Every public improvement contract must contain a clause or condition that, if the contractor fails, neglects or refuses to pay promptly a person's claim for labor or services that the person provides to the contractor or a subcontractor in connection with the public improvement contract as the claim becomes due, the proper officer that represents the state or a county, school district, municipality or municipal corporation or a subdivision of the state, county, school district, municipality or municipal corporation may pay the amount of the claim to the person that provides the labor or services and charge the amount of the payment against funds due or to become due the contractor by reason of the contract.

(2) Every public improvement contract must contain a clause or condition that, if the contractor or a first-tier subcontractor fails, neglects or refuses to pay a person that provides labor or materials in connection with the public improvement contract within 30 days after receiving payment from the contracting agency or a contractor, the contractor or first-tier subcontractor owes the person the amount due plus interest charges that begin at the end of the 10-day period within which payment is due under ORS 279C.580 (4) and that end upon final payment, unless payment is subject to a good faith dispute as defined in ORS 279C.580. The rate of interest on the amount due is nine percent per annum. The amount of interest may not be waived.

(3) Every public improvement contract and every contract related to the public improvement contract must contain a clause or condition that, if the contractor or a subcontractor fails, neglects or refuses to pay a person that provides labor or materials in connection with the public improvement 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 279C.580.

(4) Paying a claim in the manner authorized in this section does not relieve the contractor or the contractor's surety from obligation with respect to an unpaid claim. [2003 c.794 §140, 2005 c.103 §28; 2012 c.4 §1]

279C.520 Condition concerning hours of labor; compliance with pay equity provisions; employee discussions of rate of pay or benefits. (1) Every public contract subject to this chapter must provide that:

(a) A contractor may not employ an employee for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency or when the public policy absolutely requires otherwise, and in such cases, except in cases of contracts for personal services as defined in ORS 279C.100, the contractor shall pay the employee at least time and a half pay for:

(A)(i) All overtime in excess of eight hours in any one day or 40 hours in any one week if the work week is five consecutive days, Monday through Friday; or

(ii) All overtime in excess of 10 hours in any one day or 40 hours in any one week if the work week is four consecutive days, Monday through Friday; and

(B) All work the employee performs on Saturday and on any legal holiday specified in ORS 279C.540.

(b) The contractor shall comply with the prohibition set forth in ORS 652.220, that compliance is a material element of the contract and that a failure to comply is a breach that entitles the contracting agency to terminate the contract for cause.

(c) The contractor may not prohibit any of the contractor's employees from discussing the employee's rate of wage, salary, benefits or other compensation with another employee or another person and may not retaliate against an employee who discusses the employee's rate of wage, salary, benefits or other compensation with another employee or another person.

(2) A contractor shall give notice in writing to employees who work on a public contract, either at the time of hire or before work begins on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the contractor may require the employees to work.

(3) A public contract for personal services, as defined in ORS 279C.100, must provide that the contractor shall pay the contractor's employees who work under the public contract at least time and a half for all overtime the employees work in excess of 40 hours in any one week, except for employees under a personal services public contract who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(4) A public contract for services at a county fair, or for another event that a county fair board authorizes, must provide that the contractor shall pay employees who work under the public contract at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week. A contractor shall notify employees who work under the public contract, either at the time of hire or before work begins on the public contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the contractor may require the employees to work.

(5)(a) Except as provided in subsection (4) of this section, a public contract for services must provide that the contractor shall pay employees at least time and a half pay for work the employees perform under the public contract on the legal holidays specified in a collective bargaining agreement or in ORS 279C.540 (1)(b)(B) to (G) and for all time the employees work in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) A contractor shall notify in writing employees who work on a public contract for services, either at the time of hire or before work begins on the public contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the contractor may require the employees to work. [2003 c.794 §141; 2005 c.103 §29; 2015 c.454 §6]

279C.525 Provisions concerning environmental and natural resources laws; remedies. (1) Solicitation documents for a public improvement contract shall make specific reference to federal, state and local agencies that have enacted ordinances, rules or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that affect the performance of the contract. If the successful bidder awarded the project is delayed or must undertake additional work by reason of existing ordinances, rules or regulations of agencies not cited in the public improvement contract or due to the enactment of new or the amendment of existing statutes, ordinances, rules or regulations relating to the prevention of environmental pollution and the preservation of natural resources occurring after the submission of the successful bid, the contracting agency may:

(a) Terminate the contract;

(b) Complete the work itself;

(c) Use nonagency forces already under contract with the contracting agency;

(d) Require that the underlying property owner be responsible for cleanup;

(e) Solicit bids for a new contractor to provide the necessary services under the competitive bid requirements of this chapter; or

(f) Issue the contractor a change order setting forth the additional work that must be undertaken.

(2) In addition to the obligation imposed under subsection (1) of this section to refer to federal, state and local agencies with ordinances, rules or regulations dealing with the prevention of environmental pollution and the preservation of natural resources, a solicitation document must also make specific reference to known conditions at the construction site that may require the successful bidder to comply with the ordinances, rules or regulations identified under subsection (1) of this section.

(3) If the successful bidder encounters a condition not referred to in the solicitation documents, not caused by the successful bidder and not discoverable by a reasonable prebid visual site inspection, and the condition requires compliance with the ordinances, rules or regulations referred to under subsection (1) of this section, the successful bidder shall immediately give notice of the condition to the contracting agency.

(4) Except in the case of an emergency and except as may otherwise be required by any environmental or natural resource ordinance, rule or regulation, the successful bidder may not commence work nor incur any additional job site costs in regard to the condition encountered and described in subsection (3) of this section without written direction from the contracting agency.

(5) Upon request by the contracting agency, the successful bidder shall estimate the emergency or regulatory compliance costs as well as the anticipated delay and costs resulting from the encountered condition. This cost estimate shall be promptly delivered to the contracting agency for resolution.

(6) Within a reasonable period of time following delivery of an estimate under subsection (5) of this section, the contracting agency may:

(a) Terminate the contract;

(b) Complete the work itself;

(c) Use nonagency forces already under contract with the contracting agency;

(d) Require that the underlying property owner be responsible for cleanup;

(e) Solicit bids for a new contractor to provide the necessary services under the competitive bid requirements of this chapter; or

(f) Issue the contractor a change order setting forth the additional work that must be undertaken.

(7)(a) If the contracting agency chooses to terminate the contract under subsection (1)(a) or (6)(a) of this section, the successful bidder shall be entitled to all costs and expenses incurred to the date of termination, including overhead and reasonable profits, on the percentage of the work completed. The contracting agency shall have access to the contractor's bid documents when making the contracting agency's determination of the additional compensation due to the contractor.

(b) If the contracting agency causes work to be done by another contractor under subsection (1)(c) or (e) or (6)(c) or (e) of this section, the initial contractor may not be held liable for actions or omissions of the other contractor.

(c) The change order under subsection (1)(f) or (6)(f) of this section shall include the appropriate extension of contract time and compensate the contractor for all additional costs, including overhead and reasonable profits, reasonably incurred as a result of complying with the applicable statutes, ordinances, rules or regulations. The contracting agency shall have access to the contractor's bid documents when making the contracting agency's determination of the additional compensation due to the contractor.

(8) Notwithstanding subsections (1) to (7) of this section, a contracting agency:

(a) May allocate all or a portion of the known environmental and natural resource risks to a contractor by listing such environmental and natural resource risks with specificity in the solicitation documents; and

(b) In a local improvement district, may allocate all or a portion of the known and unknown environmental and natural resource risks to a contractor by so stating in the solicitation documents. [2003 c 794 §142]

279C.527 Inclusion of amount for green energy technology in public improvement contract; written determination of appropriateness; exemptions and limitations. (1) As used in this section and in ORS 279C.528

(a)(A) "Green energy technology" means a system that employs:

(i) Solar or geothermal energy directly for space or water heating or to generate electricity; or

(ii) Building design that uses solar energy passively to reduce energy use from other sources by at least 20 percent from a level required under ORS 276.900 to 276.915 or achieved in buildings constructed according to state building code standards that the Department of Consumer and Business Services approves under ORS 455.496.

(B) "Green energy technology" does not include a system that:

(i) Uses water, groundwater or the ground as a heat source at temperatures less than 140 degrees Fahrenheit, or less than 128 degrees Fahrenheit if the system is used for a public school building; or

(ii) Incorporates solar energy indirectly into other methods for generating energy, such as from the action of waves on water, from hydroelectric facilities or from wind-powered turbines.

(b) "Public building" means a building that a public body, as defined in ORS 174.109, owns or controls, and that is:

(A) Used or occupied by employees of the public body; or

(B) Used for conducting public business.

(2)(a) Except as otherwise provided in this section, a contracting agency that intends to enter into a public improvement contract for constructing a public building or for reconstructing or performing a major renovation of a public building, if the cost of the reconstruction or major renovation exceeds 50 percent of the value of the public building, shall first make a determination under subsection (3) of this section as to whether green energy technology is appropriate for the public building and, if the contracting agency determines that green energy technology is appropriate, shall ensure that the public improvement contract provides an amount equal to at least 1.5 percent of the total contract price for the purpose of including appropriate green energy technology as part of the construction, reconstruction or major renovation of the public building.

(b) A public improvement contract to construct, reconstruct or renovate a public building may provide for constructing green energy technology at a site that is located away from the site of the public building if:

(A) Constructing green energy technology away from the site of the public building and using the energy from the green energy technology at the site of the public building is more cost-effective, taking into account additional costs associated with transmitting generated energy to the site of the public building, than is constructing and using green energy technology at the site of the public building;

(B) The green energy technology that is located away from the site of the public building is located within this state and in the same county as, or in a county adjacent to, the site of the public building; and

(C) The public improvement contract provides that all of the moneys for constructing green energy technology away from the site of the public building must fund new energy generating capacity that does not replace or constitute a purchase and use of energy generated from green energy technology that:

(i) Employs solar energy and that existed on the date that the original building permit for the public building was issued; or

(ii) Employs geothermal energy and for which construction was completed before January 1, 2013.

(c) In evaluating whether a contracting agency can construct green energy technology at a site away from the site of the public building in accordance with paragraph (b)(A) of this subsection, the contracting agency shall:

(A) Compare the costs of constructing green energy technology that employs solar energy at the site of the public building only with the corresponding costs of green energy technology that employs solar energy at a location away from the site of the public building; and

(B) Compare the costs of green energy technology that employs geothermal energy at the site of the public building only with the corresponding costs of green energy technology that employs geothermal energy at a location away from the site of the public building.

(3) In making a determination as to whether green energy technology is appropriate in constructing, reconstructing or performing a major renovation of a public building, a contracting agency shall list in the determination the total contract price and specify the amount the agency intends to expend on including green energy technology as part of the construction, reconstruction or major renovation. The State Department of Energy shall develop a form that a contracting agency may use to prepare the written determination described in this subsection.

(4)(a) If the contracting agency determines that green energy technology is not appropriate for the public building, subsection (2) of this section does not apply to the public improvement contract. A contracting agency's determination under this paragraph must consider whether constructing green energy technology at the site of the public building is appropriate and whether constructing green energy technology away from the site of the public building and in accordance with subsection (2)(b) and (c) of this section is appropriate.

(b) If subsection (2) of this section does not apply to the public improvement contract:

(A) The contracting agency shall spend an amount equal to at least 1.5 percent of the total contract price to include appropriate green energy technology as part of a future public building project; and

(B) The amount the contracting agency spends on the future public building project in accordance with subparagraph (A) of this paragraph is in addition to any amount required under subsection (2) of this section for including appropriate green energy technology as part of the future public building project.

(5)(a) A contracting agency need not set aside the amount described in subsection (4)(b) in an account or otherwise reserve moneys for a future public building at the time the contracting agency makes the determination described in subsection (3) of this section, but the contracting agency shall report the amount described in subsection (4)(b) to the State Department of Energy as provided in ORS 279C.528 (2)(a).

(b) Subsection (4)(b) of this section does not apply to a public improvement contract for which state funds are not directly or indirectly used.

(6)(a) This section does not exempt an authorized state agency, as defined in ORS 276.905, from complying with ORS 276.900 to 276.915, except that an authorized state agency, without complying with ORS 276.900 to 276.915, may determine that green energy technology is appropriate to include as part of constructing, reconstructing or performing a major renovation of a public building.

(b) A contracting agency may not use an amount described in subsection (4)(b) of this section to comply with requirements set forth in ORS 276.900 to 276.915 or with a state building code standard that the Department of Consumer and Business Services approves under ORS 455.496.

(7) Notwithstanding the provisions of ORS 174.108 (3), this section applies to intergovernmental entities described in ORS 174.108 (3). [2007 c 310 §2, 2012 c 83 §1, 2013 c 612 §1, 2015 c 262 §1, 2015 c 424 §1]

Note: 279C.527 and 279C.528 were added to and made a part of 279C.005 to 279C.670 by legislative action but were not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

279C.528 State Department of Energy requirements and specifications; record keeping requirements; rules. (1) Each contracting agency, in soliciting, awarding and administering public improvement contracts that are subject to ORS 279C.527, is subject to rules the State Department of Energy adopts that include, but are not limited to, requirements and specifications for:

(a) Using particular green energy technologies in public improvements;

(b) Determining the cost-effectiveness of green energy technologies;

(c) Submitting documents required under ORS 279C.527 to the department for review; and

(d) Determining whether a structure is a public building subject to the requirements of ORS 279C.527.

(2)(a) Each contracting agency shall collect and maintain information concerning the contracting agency's compliance with ORS 279C.527, which must include, at a minimum:

(A) Records that show how the contracting agency spent moneys the contracting agency used in including appropriate green energy technology as part of constructing, reconstructing or performing a major renovation of a public building;

(B) An identification of each public improvement contract for which the contracting agency spent moneys to include appropriate green technology as part of constructing, reconstructing or performing a major renovation of a public building;

(C) An identification of each public improvement contract for which the contracting agency determined that including green technology as part of constructing, reconstructing or performing a major renovation of a public building was not appropriate.

(D) The total amount the contracting agency would have spent on each public improvement contract identified in subparagraph (C) of this paragraph and the total aggregated amount that the contracting agency must spend to include green energy technology as part of constructing, reconstructing or performing a major renovation of a future public building; and

(E) An identification of each public improvement contract that uses moneys the contracting agency did not spend in a previous public improvement contract for including appropriate green energy technology as part of constructing, reconstructing or performing a major renovation of a public building.

(b) Each contracting agency shall compile the information the contracting agency collected under paragraph (a) of this subsection and report the information to the department at times, in a manner and on forms that the department specifies by rule.

(c) The department shall:

(A) Compile and summarize the information the department receives under paragraph (b) of this subsection and, in the department's compilation and summary, specifically

(i) Identify contracting agencies that have not complied with the requirements of ORS 279C.527 or the reporting requirements set forth in this section,

(ii) Identify public improvement contracts for which contracting agencies have determined that including green energy technology as part of constructing, reconstructing or performing a major renovation of a public building was not appropriate; and

(iii) Identify public improvement contracts that use moneys a contracting agency did not spend in a previous public improvement contract on including appropriate green energy technology as part of constructing, reconstructing or performing a major renovation of a public building.

(B) Deliver annually to the Legislative Assembly, on or before the date on which each regular session of the Legislative Assembly begins, a report concerning contracting agency compliance with this section and ORS 279C.527 that includes the compilation and summary the department prepared under subparagraph (A) of this paragraph. [2007 c.310 §3; 2012 c.83 §2; 2013 c.612 §2; 2015 c.424 §2]

Note: See note under 279C.527.

279C.530 Condition concerning payment for medical care and providing workers' compensation. (1) Every public improvement contract shall contain a condition that the contractor shall promptly, as due, make payment to any person, copartnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the contractor, of all sums that the contractor agrees to pay for the services and all moneys and sums that the contractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services.

(2) Every public contract subject to this chapter shall contain a clause or condition that all subject employers working under the contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126. [2003 c.794 §143; 2005 c.103 §30]

279C.535 Condition concerning steel material; rules. The Department of Transportation shall adopt rules to require that public improvement contracts entered into by the department include a price escalation and de-escalation clause relating to steel material. As used in this section, "steel material" includes structural and reinforcing steel, steel studs, sheet piling, guardrail, ductile iron pipe and other steel products used for the construction, reconstruction or major renovation of a road or highway. [2005 c.557 §6]

(Hours of Labor)

279C.540 Maximum hours of labor on public contracts; holidays; exceptions; liability to workers; rules. (1) When labor is employed by the state or a county, school district, municipality, municipal corporation or subdivision thereof through a contractor, a person may not be required or permitted to labor more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity or emergency or when the public policy absolutely requires it, in which event, the person so employed for excessive hours shall receive at least time and a half pay.

(a)(A) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday, or

(B) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday, and

(b) For all work performed on Saturday and on the following legal holidays:

(A) Each Sunday.

(B) New Year's Day on January 1.

(C) Memorial Day on the last Monday in May.

(D) Independence Day on July 4.

(E) Labor Day on the first Monday in September.

(F) Thanksgiving Day on the fourth Thursday in November.

(G) Christmas Day on December 25.

(2) An employer shall give notice in writing to employees who perform work under subsection (1) of this section, 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, of the number of hours per day and days per week that employees may be required to work.

(3) For the purpose of this section, each time a legal holiday, other than Sunday, listed in subsection (1) of this section falls on Sunday, the succeeding Monday shall be recognized as a legal holiday. Each time a legal holiday listed in subsection (1) of this section falls on Saturday, the preceding Friday shall be recognized as a legal holiday.

(4) Subsections (1) to (3) of this section do not apply to a public improvement contract or a contract for services if the contractor is a party to a collective bargaining agreement in effect with any labor organization.

(5) When specifically agreed to under a written labor-management negotiated labor agreement, an employee may be paid at least time and a half pay for work performed on any legal holiday specified in ORS 187.010 and 187.020 that is not listed in subsection (1) of this section.

(6) This section does not apply to contracts for personal services as defined in ORS 279C.100, provided that persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in subsection (1)(b)(B) to (G) of this section and for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(7) Subsections (1) and (2) of this section do not apply to contracts for services at a county fair or for other events authorized by a county fair board if persons employed under the contract receive at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week.

(8)(a) Subsections (1) and (2) of this section do not apply to contracts for services. However, persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in subsection (1)(b)(B) to (G) of this section and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) An employer shall give notice in writing to employees who work on a contract for services, 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, of the number of hours per day and days per week that the employees may be required to work.

(9) Any contractor or subcontractor or contractor's or subcontractor's surety that violates the provisions of this section is liable to the affected employees in the amount of their unpaid overtime wages and in an additional amount equal to the unpaid overtime wages as liquidated damages. If the violation results from willful falsification of payroll records, the contractor or subcontractor or contractor's or subcontractor's surety is liable to the affected employees in the amount of their unpaid overtime wages and an additional amount equal to twice the unpaid overtime wages as liquidated damages.

(10) An action to enforce liability to employees under subsection (9) of this section may be brought as an action on the contractor's payment bond as provided for in ORS 279C.610.

(11) In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries may adopt rules to carry out the provisions of this section. [2003 c.794 §144; 2005 c.103 §31]

279C.545 Time limitation on claim for overtime; posting of circular by contractor. When labor is employed by the state or a county, school district, municipality, municipal corporation or subdivision thereof through another as a contractor, any worker employed by the contractor shall be foreclosed from the right to collect for any overtime provided in ORS 279C.540 unless a claim for payment is filed with the contractor within 90 days from the completion of the contract, providing the contractor has

(1) Caused a circular clearly printed in boldfaced 12-point type and containing a copy of this section to be posted in a prominent place alongside the door of the timekeeper's office or in a similar place that is readily available and freely visible to workers employed on the work

(2) Maintained the circular continuously posted from the inception to the completion of the contract on which workers are or have been employed. [2003 c. 794 § 145]

(Retainage and Payments)

279C.550 "Retainage" defined. As used in ORS 279C.550 to 279C.570, "retainage" means the difference between the amount earned by a contractor on a public improvement contract and the amount paid on the contract by the contracting agency. [2003 c. 794 § 146, 2005 c. 103 § 32]

279C.555 Withholding of retainage. The withholding of retainage by a contractor or subcontractor on public improvement contracts shall be in accordance with ORS 701.420. [2003 c. 794 § 147; 2013 c. 410 § 1]

279C.560 Form of retainage; procedures for holding and payment. (1) Unless a contracting agency that reserves an amount as retainage under ORS 279C.570 (7) finds in writing that accepting a bond or instrument described in paragraph (a) or (b) of this subsection poses an extraordinary risk that is not typically associated with the bond or instrument, the contracting agency in lieu of withholding moneys from payment shall accept from a contractor

(a) Bonds, securities or other instruments of a character described in subsection (6) of this section that are deposited as provided in subsection (4) of this section; or

(b) A surety bond deposited as provided in subsection (7) of this section.

(2) A contracting agency that holds moneys as retainage under ORS 279C.570 (7) shall

(a) Hold the moneys in a fund and pay the moneys to the contractor in accordance with ORS 279C.570, or

(b) At the election of the contractor, pay the moneys to the contractor in accordance with subsection (4) or (5) of this section and in a manner authorized by the Director of the Oregon Department of Administrative Services.

(3) If the contracting agency incurs additional costs as a result of the exercise of an option described in subsection (1) or (5) of this section, the contracting agency may recover the costs from the contractor by reducing the final payment. As work on the contract progresses, the contracting agency shall, upon demand, inform the contractor of all accrued costs.

(4) The contractor may deposit bonds, securities or other instruments with the contracting agency or in a bank or trust company for the contracting agency to hold for the contracting agency's benefit in lieu of moneys held as retainage. If the contracting agency accepts bonds, securities or other instruments deposited as provided in this subsection, the contracting agency shall reduce the moneys held as retainage in an amount equal to the value of the bonds, securities and other instruments and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Interest or earnings on the bonds, securities or other instruments shall accrue to the contractor.

(5) If the contractor elects, the contracting agency shall deposit the retainage as accumulated in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the contracting agency. When the contracting agency is a state contracting agency, the account must be established through the State Treasurer. Earnings on the account accrue to the contractor.

(6) Bonds, securities and other instruments deposited or acquired in lieu of retainage, as permitted by this section, must be of a character approved by the Director of the Oregon Department of Administrative Services, including but not limited to:

(a) Bills, certificates, notes or bonds of the United States.

(b) Other obligations of the United States or agencies of the United States.

(c) Obligations of a corporation wholly owned by the federal government.

(d) Indebtedness of the Federal National Mortgage Association.

(e) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.

(f) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.

(7) The contractor, with the approval of the contracting agency, may deposit a surety bond for all or any portion of the amount of funds retained, or to be retained, by the contracting agency in a form acceptable to the contracting agency. The bond and any proceeds of the bond must be made subject to all claims and liens and in the same manner and priority as set forth for retainage under ORS 279C.550 to 279C.570 and 279C.600 to 279C.625. The contracting agency shall reduce the moneys the contracting agency holds as retainage in an amount equal to the value of the bond and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Whenever a contracting agency accepts a surety bond from a contractor in lieu of retainage, the contractor shall accept like bonds from a subcontractor or supplier from which the contractor has retainage. The contractor shall then reduce the moneys the contractor holds as retainage in an amount equal to the value of the bond and pay the amount of the reduction to the subcontractor or supplier. [2003 c. 794 § 148, 2009 c. 568 § 1]

279C.565 Limitation on retainage requirements. Unless otherwise specifically included by statute, the provisions of ORS 279C.560 or 279C.625 apply only as between the contracting agency or public body and the party with whom it contracts. [2003 c. 794 § 149]

279C.570 Prompt payment policy; progress payments; retainage; interest; exception; settlement of compensation disputes. (1) It is the policy of the State of Oregon that all payments due on a public improvement contract and owed by a contracting agency shall be paid promptly. No contracting agency is exempt from the provisions of this section.

(2) Contracting agencies shall make progress payments on the contract monthly as work progresses on a public improvement contract. Payments shall be based upon estimates of work completed that are approved by the contracting agency. A progress payment is not considered acceptance or approval of any work or waiver of any defects therein. The contracting agency shall pay to the contractor interest on the progress payment, not including retainage, due the contractor. The interest shall commence 30 days after receipt of the invoice from the contractor or 15 days after the payment is approved by the contracting agency, whichever is the earlier date. The rate of interest charged to the contracting agency 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 receipt of the invoice from the contractor or 15 days after the payment is approved by the contracting agency, whichever is the earlier date, but the rate of interest may not exceed 30 percent.

(3) Interest shall be paid automatically when payments become overdue. The contracting agency shall document, calculate and pay any interest due when payment is made on the principal. Interest payments shall accompany payment of net due on public improvement contracts. The contracting agency may not require the contractor to petition, invoice, bill or wait additional days to receive interest due.

(4) When an invoice is filled out incorrectly, when there is any defect or impropriety in any submitted invoice or when there is a good faith dispute, the contracting agency shall so notify the contractor within 15 days stating the reason or reasons the invoice is defective or improper or the reasons for the dispute. A defective or improper invoice, if corrected by the contractor within seven days of being notified by the contracting agency, may not cause a payment to be made later than specified in this section unless interest is also paid.

(5) If requested in writing by a first-tier subcontractor, the contractor, within 10 days after receiving the request, shall send to the first-tier subcontractor a copy of that portion of any invoice, request for payment submitted to the contracting agency or pay document provided by the contracting agency to the contractor specifically related to any labor or materials supplied by the first-tier subcontractor.

(6) Payment of interest may be postponed when payment on the principal is delayed because of disagreement between the contracting agency and the contractor. Whenever a contractor brings formal administrative or judicial action to collect interest due under this section, the prevailing party is entitled to costs and reasonable attorney fees.

(7) A contracting agency may reserve as retainage from any progress payment on a public improvement contract an amount not to exceed five percent of the payment. As work progresses, a contracting agency may reduce the amount of the retainage and the contracting agency may eliminate retainage on any remaining monthly contract payments after 50 percent of the work under the contract is completed if, in the contracting agency's opinion, such work is progressing satisfactorily. Elimination or reduction of retainage shall be allowed only upon written application by the contractor, and the application shall include written approval of the contractor's surety. However, when the contract work is 97.5 percent completed the contracting agency may, at the contracting agency's discretion and without application by the contractor,

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reduce the retained amount to 100 percent of the value of the contract work remaining to be done. Upon receipt of a written application by the contractor, the contracting agency shall respond in writing within a reasonable time.

(8) The retainage held by a contracting agency shall be included in and paid to the contractor as part of the final payment of the contract price. The contracting agency shall pay to the contractor interest at the rate of 1.5 percent per month on the final payment due the contractor, interest to commence 30 days after the work under the contract has been completed and accepted and to run until the date when the final payment is tendered to the contractor. The contractor shall notify the contracting agency in writing when the contractor considers the work complete and the contracting agency shall, within 15 days after receiving the written notice, either accept the work or notify the contractor of work yet to be performed on the contract. If the contracting agency does not, within the time allowed, notify the contractor of work yet to be performed to fulfill contractual obligations, the interest provided by this subsection shall commence to run 30 days after the end of the 15-day period.

(9)(a) The contracting agency shall pay, upon settlement or judgment in favor of the contractor regarding any dispute as to the compensation due a contractor for work performed under the terms of a public improvement contract, the amount due plus interest at the rate of two times the discount rate, but not to exceed 30 percent, on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date of the settlement or judgment, and accruing from the later of:

(A) The due date of any progress payment received under the contract for the period in which such work was performed; or

(B) Thirty days after the date on which the claim for the payment under dispute was presented to the contracting agency by the contractor in writing or in accordance with applicable provisions of the contract.

(b) Interest shall be added to and not made a part of the settlement or judgment. [2003 c 794 §150, 2005 c 103 §33]

(Subcontractors)

279C.580 Contractor's relations with subcontractors. (1) A contractor may not request payment from the contracting agency of any amount withheld or retained in accordance with subsection (5) of this section until the contractor has determined and certified to the contracting agency that the subcontractor has determined and certified to the contracting agency that the subcontractor is entitled to the payment.

(2) A dispute between a contractor and first-tier subcontractor relating to the amount or entitlement of a first-tier subcontractor to a payment or a late payment interest penalty under a clause included in the subcontract under subsection (3) or (4) of this section does not constitute a dispute to which the contracting agency is a party. The contracting agency may not be included as a party in any administrative or judicial proceeding involving such a dispute.

(3) Each public improvement contract awarded by a contracting agency must include a clause that requires the contractor to include in each subcontract for property or services the contractor enters into with a first-tier subcontractor, including a material supplier, for the purpose of performing a construction contract:

(a) A payment clause that obligates the contractor to pay the first-tier subcontractor for satisfactory performance under the subcontract within 10 days out of amounts the contracting agency pays to the contractor under the public improvement contract.

(b) A clause that requires the contractor to provide a first-tier subcontractor with a standard form that the first-tier subcontractor may use as an application for payment or as another method by which the subcontractor may claim a payment due from the contractor.

(c) A clause that requires the contractor, except as otherwise provided in this paragraph, to use the same form and regular administrative procedures for processing payments during the entire term of the subcontract. A contractor may change the form or the regular administrative procedures the contractor uses for processing payments if the contractor:

(A) Notifies the subcontractor in writing at least 45 days before the date on which the contractor makes the change; and

(B) Includes with the written notice a copy of the new or changed form or a description of the new or changed procedure.

(d) An interest penalty clause that obligates the contractor, if the contractor does not pay the first-tier subcontractor within 30 days after receiving payment from the contracting agency, to pay the first-tier subcontractor an interest penalty on amounts due in each payment the contractor does not make in accordance with the payment clause included in the subcontract under paragraph (a) of this subsection. A contractor or first-tier subcontractor is not 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 the contracting agency or contractor when payment was due. The interest penalty:

(A) Applies to the period that begins on the day after the required payment date and that ends on the date on which the amount due is paid; and

(B) Is computed at the rate specified in ORS 279C.515 (2).

(4) A public improvement contract that the contracting agency awards shall obligate the contractor, in each of the contractor's subcontracts, to require the first-tier subcontractor to include a payment clause and an interest penalty clause that conforms to the standards of subsection (3) of this section in each of the first-tier subcontractor's subcontracts and to require each of the first-tier subcontractor's subcontractors to include such clauses in the first-tier subcontractors' subcontracts with each lower-tier subcontractor or supplier.

(5)(a) The clauses required by subsections (3) and (4) of this section do not impair the right of a contractor or a subcontractor at any tier to negotiate, and to include in the subcontract, provisions that:

(A) Permit the contractor or a subcontractor to retain, in the event of a good faith dispute, an amount not to exceed 150 percent of the amount in dispute from the amount due a subcontractor under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions the parties to the subcontract agree upon, giving such recognition as the parties consider appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond;

(B) Permit the contractor or subcontractor to make a determination that part or all of the subcontractor's request for payment may be withheld in accordance with the subcontract; and

(C) Permit such withholdings without incurring any obligation to pay a late payment interest penalty if:

(i) A notice that conforms to the standards of subsection (8) of this section has been previously furnished to the subcontractor; and

(ii) A copy of any notice a contractor issues under sub-subparagraph (i) of this subparagraph has been furnished to the contracting agency.

(b) As used in this subsection, "good faith dispute" means a documented dispute concerning:

(A) Unsatisfactory job progress.

(B) Defective work not remedied.

(C) Third-party claims filed or reasonable evidence that claims will be filed.

(D) Failure to make timely payments for labor, equipment and materials.

(E) Damage to the contractor or subcontractor.

(F) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.

(6) If, after applying to a contracting agency for payment under a public improvement contract but before paying a subcontractor for the subcontractor's performance covered by the application, a contractor discovers that all or a portion of the payment otherwise due the subcontractor is subject to withholding from the subcontractor in accordance with the subcontract, the contractor shall:

(a) Furnish to the subcontractor a notice conforming to the standards of subsection (8) of this section as soon as practicable after ascertaining the cause for the withholding, but before the due date for payment to the subcontractor;

(b) Furnish to the contracting agency, as soon as practicable, a copy of the notice furnished to the subcontractor under paragraph (a) of this subsection;

(c) Reduce the progress payment to the subcontractor by an amount not to exceed the amount specified in the notice of withholding furnished under paragraph (a) of this subsection;

(d) Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency;

(e) Make such payment within:

(A) Seven days after correction of the identified subcontract performance deficiency unless the funds for the payment must be recovered from the contracting agency because of a reduction under paragraph (f)(A) of this subsection; or

(B) Seven days after the contractor recovers the funds from the contracting agency;

(f) Notify the contracting agency upon:

(A) Reduction of the amount of any subsequent certified application for payment; or

(B) Payment to the subcontractor of any withheld amounts of a progress payment, specifying

(i) The amounts of the progress payments withheld under paragraph (a) of this subsection, and

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- (ii) The dates on which the withholding began and ended; and
- (g) Be obligated to pay to the contracting agency an amount equal to interest on the withheld payments computed in the manner provided in ORS 279C.570 from the 11th day after receiving the withheld amounts from the contracting agency until:
 - (A) The day the identified subcontractor performance deficiency is corrected; or
 - (B) The date that any subsequent payment is reduced under paragraph (f)(A) of this subsection.
- (7)(a) If a contractor, after paying a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor a written notice asserting a deficiency in the first-tier subcontractor's performance under the public improvement contract for which the contractor may be ultimately liable and the contractor determines that all or a portion of future payments otherwise due the first-tier subcontractor is subject to withholding in accordance with the subcontract, the contractor may, without incurring an obligation to pay a late payment interest penalty under subsection (6)(e) of this section:
 - (A) Furnish to the first-tier subcontractor a notice that conforms to the standards of subsection (8) of this section as soon as practicable after making the determination, and
 - (B) Withhold from the first-tier subcontractor's next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under subparagraph (A) of this paragraph.
- (b) As soon as practicable, but not later than 10 days after receiving satisfactory written notice that the identified subcontract performance deficiency has been corrected, the contractor shall pay the amount withheld under paragraph (a)(B) of this subsection to the first-tier subcontractor, or shall incur an obligation to pay a late payment interest penalty to the first-tier subcontractor computed at the rate specified in ORS 279C.570
- (8) A written notice of any withholding must be issued to a subcontractor, with a copy to the contracting agency, that specifies
 - (a) The amount to be withheld,
 - (b) The specified causes for the withholding under the terms of the subcontract, and
 - (c) The remedial actions the subcontractor must take in order to receive payment of the amounts withheld.
- (9) Except as provided in subsection (2) of this section, this section does not limit or impair any contractual, administrative or judicial remedies otherwise available to a contractor or a subcontractor in the event of a dispute involving a contractor's late payment or nonpayment or a subcontractor's deficient performance or nonperformance.
- (10) A contractor's obligation to pay a late payment interest penalty to a subcontractor under the clause included in a subcontract under subsection (3) or (4) of this section is not an obligation of the contracting agency. A contract modification may not be made for the purpose of providing reimbursement of a late payment interest penalty. A cost reimbursement claim may not include any amount for reimbursement of a late payment interest penalty. [2003 c.794 §151; 2005 c.103 §34; 2012 c.4 §2]

279C.585 Authority to substitute undisclosed first-tier subcontractor; circumstances; rules. A contractor whose bid is accepted may substitute a first-tier subcontractor that was not disclosed under ORS 279C.370 by submitting the name of the new subcontractor and the reason for the substitution in writing to the contracting agency. A contractor may substitute a first-tier subcontractor under this section in the following circumstances:

- (1) When the subcontractor disclosed under ORS 279C.370 fails or refuses to execute a written contract after having had a reasonable opportunity to do so after the written contract, which must be reasonably based upon the general terms, conditions, plans and specifications for the public improvement project or the terms of the subcontractor's written bid, is presented to the subcontractor by the contractor.
- (2) When the disclosed subcontractor becomes bankrupt or insolvent.
- (3) When the disclosed subcontractor fails or refuses to perform the subcontract.
- (4) When the disclosed subcontractor fails or refuses to meet the bond requirements of the contractor that had been identified prior to the bid submittal.
- (5) When the contractor demonstrates to the contracting agency that the subcontractor was disclosed as the result of an inadvertent clerical error.
- (6) When the disclosed subcontractor does not hold a license from, or has a license that is not properly endorsed by, the Construction Contractors Board and is required to be licensed by the board.
- (7) When the contractor determines that the work performed by the disclosed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications or that the subcontractor is substantially delaying or disrupting the progress of the work.
- (8) When the disclosed subcontractor is ineligible to work on a public improvement contract under applicable statutory provisions.
- (9) When the substitution is for good cause. The Construction Contractors Board shall define "good cause" by rule. "Good cause" includes but is not limited to the financial instability of a subcontractor. The definition of "good cause" must reflect the least-cost policy for public improvements established in ORS 279C.305.
- (10) When the substitution is reasonably based on the contract alternates chosen by the contracting agency. [2003 c.794 §152; 2007 c.836 §45]

279C.590 Complaint process for substitutions of subcontractors; civil penalties. (1)(a) A subcontractor disclosed under ORS 279C.370 may file a complaint based on the subcontractor disclosure requirements under ORS 279C.370 with the Construction Contractors Board about a contractor if the contractor has substituted another subcontractor for the complaining subcontractor.

- (b) If more than one subcontractor files a complaint with the board under paragraph (a) of this subsection relating to a single subcontractor disclosure, the board shall consolidate the complaints into one proceeding. If the board imposes a civil penalty under this section against a contractor, the amount collected by the board shall be divided evenly among all of the complaining subcontractors.
- (c) Each subcontractor filing a complaint under paragraph (a) of this subsection shall post a deposit of \$500 with the board upon filing the complaint.
- (d) If the board determines that a contractor's substitution was not in compliance with ORS 279C.585, the board shall return the full amount of the deposit posted under paragraph (c) of this subsection to the complaining subcontractor.
- (e) If the board determines that a contractor has not substituted a subcontractor or that the contractor's substitution was in compliance with ORS 279C.585, the board shall award the contractor \$250 of the deposit and shall retain the other \$250, which may be expended by the board.
- (2) Upon receipt of a complaint under subsection (1) of this section, the board shall investigate the complaint. If the board determines that a contractor has substituted a subcontractor in a manner not in compliance with ORS 279C.585, the board may impose a civil penalty against the contractor under subsections (3) to (5) of this section. Civil penalties under this section shall be imposed in the manner provided under ORS 183.745.
- (3) If the board imposes a civil penalty under subsection (2) of this section and it is the first time the board has imposed a civil penalty under subsection (2) of this section against the contractor during a three-year period, the board shall:
 - (a) Impose a civil penalty on the contractor of up to 10 percent of the amount of the subcontract bid submitted by the complaining subcontractor to the contractor or \$15,000, whichever is less. Amounts collected by the board under this paragraph shall be awarded to the complaining subcontractor or subcontractors; and
 - (b) Impose a civil penalty on the contractor of up to \$1,000. Amounts collected by the board under this paragraph shall be retained by the board and may be expended by the board.
- (4) If the board imposes a civil penalty under subsection (2) of this section and it is the second time the board has imposed a civil penalty under subsection (2) of this section against the contractor during a three-year period, the board may:
 - (a) Impose a civil penalty on the contractor of up to 10 percent of the amount of the subcontract bid submitted by the complaining subcontractor to the contractor or \$15,000, whichever is less. Amounts collected by the board under this paragraph shall be awarded to the complaining subcontractor or subcontractors; and
 - (b) Impose a civil penalty on the contractor of up to \$1,000 and shall place the contractor on the list established under ORS 701.227 for up to six months. Amounts collected by the board under this paragraph shall be retained by the board and may be expended by the board.
- (5) If the board imposes a civil penalty under subsection (2) of this section and the board has imposed a civil penalty under subsection (2) of this section against the contractor three or more times during a three-year period, the board may:
 - (a) Impose a civil penalty on the contractor of up to 10 percent of the amount of the subcontract bid submitted by the complaining subcontractor to the contractor or \$15,000, whichever is less. Amounts collected by the board under this paragraph shall be awarded to the complaining subcontractor or subcontractors; and
 - (b) Impose a civil penalty on the contractor of up to \$1,000 and shall place the contractor on the list established under ORS 701.227 for up to one year. Amounts collected by the board under this paragraph shall be retained by the board and may be expended by the board.
- (6) Within 10 working days after receiving a complaint under subsection (1) of this section, the board shall notify, in writing, any contracting agency that is a party to the contract for which the complaint has been filed that the complaint has been filed. [2003 c.794 §153]

(Action on Payment Bonds and Public Works Bonds)

279C.600 Right of action on payment bond or public works bond of contractor or subcontractor; notice of claim. (1) A person claiming to have supplied labor or materials for the performance of the work provided for in a public contract, including any person having a direct contractual relationship with the contractor furnishing the payment bond or a direct contractual relationship with any subcontractor, or an assignee of such person, or a person claiming moneys due the State Accident Insurance Fund Corporation, the Unemployment Compensation Trust Fund or the Department of Revenue in connection with the performance of the contract, has a right of action on the contractor's payment bond as provided for in ORS 279C.380 and 279C.400 only if:

(a) The person or the assignee of the person has not been paid in full; and

(b) The person gives written notice of claim, as prescribed in ORS 279C.605, to the contractor and the contracting agency.

(2) When, upon investigation, the Commissioner of the Bureau of Labor and Industries has received information indicating that one or more workers providing labor on a public works have not been paid in full at the prevailing rate of wage or overtime wages, the commissioner has a right of action first on the contractor's public works bond required under ORS 279C.836 and then, for any amount of a claim not satisfied by the public works bond, on the contractor's payment bond, as provided in ORS 279C.380 and 279C.400. When an investigation indicates that a subcontractor's workers have not been paid in full at the prevailing rate of wage or overtime wages, the commissioner has a right of action first on the subcontractor's public works bond and then, for any amount of a claim not satisfied by the subcontractor's public works bond, on the contractor's payment bond. The commissioner's right of action exists without necessity of an assignment and extends to workers on the project who are not identified when the written notice of claim is given, but for whom the commissioner has received information indicating that the workers have provided labor on the public works and have not been paid in full. The commissioner shall give written notice of the claim, as prescribed in ORS 279C.605, to the contracting agency, the Construction Contractors Board, the contractor and, if applicable, the subcontractor. The commissioner may not make a claim for the same unpaid wages against more than one bond under this section. [2003 c.794 §154; 2005 c.360 §3]

279C.605 Notice of claim. (1) The notice of claim required by ORS 279C.600 must be sent by registered or certified mail or hand delivered no later than 180 days after the day the person last provided labor or furnished materials or 180 days after the worker listed in the notice of claim by the Commissioner of the Bureau of Labor and Industries last provided labor. The notice may be sent or delivered to the contractor or subcontractor at any place the contractor or subcontractor maintains an office or conducts business or at the residence of the contractor or subcontractor.

(2) Notwithstanding subsection (1) of this section, if the claim is for a required contribution to a fund of an employee benefit plan, the notice required by ORS 279C.600 must be sent or delivered within 200 days after the employee last provided labor or materials.

(3) The notice must be in writing substantially as follows:

To (here insert the name of the contractor or subcontractor and the name of the public body):

Notice hereby is given that the undersigned (here insert the name of the claimant) has a claim for (here insert a brief description of the labor or materials performed or furnished and the person by whom performed or furnished, if the claim is for other than labor or materials, insert a brief description of the claim) in the sum of (here insert the amount) dollars against the (here insert public works bond or payment bond, as applicable) taken from (here insert the name of the principal and, if known, the surety or sureties upon the public works bond or payment bond) for the work of (here insert a brief description of the work concerning which the public works bond or payment bond was taken). Such material or labor was supplied to (here insert the name of the contractor or subcontractor).

(here to be signed)

(4) When notice of claim is given by the commissioner and if the claim includes a worker who is then unidentified, the commissioner shall include in the notice a statement that the claim includes an unidentified worker for whom the commissioner has received information indicating that the worker has not been paid in full at the prevailing rate of wage required by ORS 279C.840 or overtime wages required by ORS 279C.540.

(5) The person making the claim or giving the notice shall sign the notice. [2003 c.794 §155; 2005 c.360 §4; 2009 c.160 §1]

279C.610 Action on contractor's public works bond or payment bond; time limitation. (1) The Commissioner of the Bureau of Labor and Industries or a person who has a right of action on the public works bond or the payment bond under ORS 279C.600 and, where required, who has filed and served the notice or notices of claim, as required under ORS 279C.600 and 279C.605, or that person's assignee, may institute an action on the contractor's public works bond or payment bond in a circuit court of this state or the federal district court of the district.

(2) The action shall be on the relation of the commissioner, the claimant, or that person's assignee, as the case may be, and shall be in the name of the contracting agency that let the contract or, when applicable, the public agency or agencies for whose benefit the contract was let. It may be prosecuted to final judgment and execution for the use and benefit of the commissioner or the claimant, or that person's assignee, as the fact may appear.

(3) The action shall be instituted no later than two years after the person last provided labor or materials or two years after the worker listed in the commissioner's notice of claim last provided labor. [2003 c.794 §156; 2005 c.360 §5]

279C.615 Preference for labor and material liens. All labor and material liens have preference and are superior to all other liens and claims of any kind or nature created by ORS 279C.500 to 279C.530 and 279C.600 to 279C.625. [2003 c.794 §157]

279C.620 Rights of person providing medical care to employees of contractor. A person providing medical, surgical or hospital care services or other needed care and attention, incident to sickness or injury, to the employees of a contractor or subcontractor on a public contract is deemed to have performed labor on the public contract for the purposes of ORS 279C.600 to 279C.625. [2003 c.794 §158]

279C.625 Joint liability when payment bond not executed. If the public improvement contract is one for which a payment bond as provided for in ORS 279C.380 and 279C.400 is required and the contractor fails to pay for labor or materials or to pay claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund or the Department of Revenue and the officers of the public body that authorized the contract fail or neglect to require the person entering into the contract to execute the payment bond

(1) The State of Oregon and the officers authorizing the contract shall be jointly liable for the labor and materials used in the performance of any work under the contract, and for claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund and the Department of Revenue, if the contract was entered into with the State of Oregon.

(2) The public body and the officers authorizing the contract shall be jointly liable for the labor and materials used in the performance of any work under the contract and for claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund and the Department of Revenue, if the contract was entered into on behalf of a public body other than the state. [2003 c.794 §159; 2005 c.103 §35]

(Termination or Suspension of Contract for Public Interest Reasons)

279C.650 "Labor dispute" defined. As used in ORS 279C.650 to 279C.670, "labor dispute" has the meaning given that term in ORS 662.010. [2003 c.794 §160]

279C.655 Extension and compensation when work suspended. If a public contract is not terminated but work under the contract is suspended by an order of a contracting agency for any reason considered to be in the public interest other than a labor dispute or any third-party judicial proceeding relating to the work other than a suit or action filed in regards to a labor dispute, the contractor is entitled to a reasonable extension of the contract time and reasonable compensation for all costs resulting from the suspension plus a reasonable allowance for overhead with respect to such costs. [2003 c.794 §161]

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279C.660 Compensation when contract terminated due to public interest. When a public contract is terminated by mutual agreement, provision shall be made for the payment of compensation to the contractor. In addition to a reasonable amount of compensation for preparatory work and for all costs and expenses arising out of termination, the amount to be paid to the contractor

(1) Shall be determined on the basis of the contract price in the case of any fully completed separate item or portion of the work for which there is a separate or unit contract price; and

(2) May, with respect to any other work, be a percent of the contract price equal to the percentage of the work completed. [2003 c 794 §162]

279C.665 Contractual provisions for compensation when contract terminated due to public interest. A contracting agency may provide in a public improvement contract detailed provisions under which the contractor shall be entitled, as a matter of right, to compensation upon termination of the contract on account of any reason considered to be in the public interest [2003 c 794 §163]

279C.670 Application of ORS 279C.650 to 279C.670. ORS 279C 650 to 279C 670 do not apply to suspension of the work or termination of the contract that occurs as a result of the contractor's violation of federal, state or local statutes, ordinances, rules or regulations in existence at the time the contract was executed or as a result of violations of the terms of the contract [2003 c 794 §164]

PREVAILING WAGE RATE

279C.800 Definitions for ORS 279C.800 to 279C.870. As used in ORS 279C 800 to 279C 870:

(1) "Fringe benefits" means

(a) Contributions that a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program; and

(b) Costs that a contractor or subcontractor may reasonably be anticipated to incur in providing the following items, except for items that federal, state or local law requires the contractor or subcontractor to provide

(A) Benefits to workers pursuant to an enforceable written commitment to the workers to carry out a financially responsible plan or program for:

(i) Medical or hospital care;

(ii) Pensions on retirement or death; or

(iii) Compensation for injuries or illness that result from occupational activity;

(B) Insurance to provide the benefits described in subparagraph (A) of this paragraph;

(C) Unemployment benefits;

(D) Life insurance;

(E) Disability and sickness insurance or accident insurance;

(F) Vacation and holiday pay;

(G) Costs of apprenticeship or other similar programs; or

(H) Other bona fide fringe benefits

(2) "Housing" has the meaning given that term in ORS 456 055.

(3) "Locality" means the following district in which the public works, or the major portion of the public works, is to be performed:

(a) District 1, composed of Clatsop, Columbia and Tillamook Counties;

(b) District 2, composed of Clackamas, Multnomah and Washington Counties;

(c) District 3, composed of Marion, Polk and Yamhill Counties;

(d) District 4, composed of Benton, Lincoln and Linn Counties;

(e) District 5, composed of Lane County;

(f) District 6, composed of Douglas County;

(g) District 7, composed of Coos and Curry Counties;

(h) District 8, composed of Jackson and Josephine Counties;

(i) District 9, composed of Hood River, Sherman and Wasco Counties;

(j) District 10, composed of Crook, Deschutes and Jefferson Counties;

(k) District 11, composed of Klamath and Lake Counties;

(l) District 12, composed of Gilliam, Grant, Morrow, Umatilla and Wheeler Counties;

(m) District 13, composed of Baker, Union and Wallowa Counties; and

(n) District 14, composed of Harney and Malheur Counties.

(4) "Prevailing rate of wage" means the rate of hourly wage, including all fringe benefits, that the Commissioner of the Bureau of Labor and Industries determines is paid in the locality to the majority of workers employed on projects of a similar character in the same trade or occupation.

(5) "Public agency" means the State of Oregon or a political subdivision of the State of Oregon, or a county, city, district, authority, public corporation or public entity organized and existing under law or charter or an instrumentality of the county, city, district, authority, public corporation or public entity.

(6)(a) "Public works" includes, but is not limited to:

(A) Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest;

(B) A project that uses \$750,000 or more of funds of a public agency for constructing, reconstructing, painting or performing a major renovation on a road, highway, building, structure or improvement of any type;

(C) A project that uses funds of a private entity for constructing a privately owned road, highway, building, structure or improvement of any type in which a public agency will use or occupy 25 percent or more of the square footage of the completed project;

(D) Notwithstanding the provisions of ORS 279C.810 (2)(a), (b) and (c), a device, structure or mechanism, or a combination of devices, structures or mechanisms, that

(i) Uses solar radiation as a source for generating heat, cooling or electrical energy; and

(ii) Is constructed or installed, with or without using funds of a public agency, on land, premises, structures or buildings that a public body, as defined in ORS 174 109, owns; or

(E) Notwithstanding paragraph (b)(A) of this subsection and ORS 279C.810 (2)(b) and (c), construction, reconstruction, painting or major renovation of a road, highway, building, structure or improvement of any type that occurs, with or without using funds of a public agency, on real property that a public university listed in ORS 352 002 owns.

(b) "Public works" does not include:

(A) Reconstructing or renovating privately owned property that a public agency leases; or

(B) A private nonprofit entity's renovation of publicly owned real property that is more than 75 years old if:

(i) The real property is leased to the private nonprofit entity for more than 25 years;

(ii) Funds of a public agency used in the renovation do not exceed 15 percent of the total cost of the renovation; and

(iii) Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 13, 2007. [2003 c.794 §165; 2007 c.764 §34; 2010 c.45 §1; 2013 c.203 §1; 2015 c.482 §1; 2015 c.767 §81]

279C.805 Policy. The Legislative Assembly declares that the purposes of the prevailing rate of wage law are:

(1) To ensure that contractors compete on the ability to perform work competently and efficiently while maintaining community-established compensation standards.

(2) To recognize that local participation in publicly financed construction and family wage income and benefits are essential to the protection of community standards.

(3) To encourage training and education of workers to industry skills standards.

(4) To encourage employers to use funds allocated for employee fringe benefits for the actual purchase of those benefits. [2003 c 794 §166]

279C.807 Workforce diversity for public works projects. (1) The Bureau of Labor and Industries shall develop and adopt a plan to increase diversity statewide among workers employed on projects subject to ORS 279C.800 to 279C.870. The bureau shall develop the plan after conducting a statewide public process to solicit proposals to increase diversity and shall adopt the plan after considering proposals submitted to the bureau.

(2) The bureau shall report each year to the Legislative Assembly or to the appropriate legislative interim committee concerning progress that results from the plan adopted under this section and may submit recommendations for legislation or other measures that will improve diversity among workers employed on projects subject to ORS 279C.800 to 279C.870. The bureau shall submit the first report no later than January 1, 2009. [2007 c.844 §9]

Note: 279C.807 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 279C or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

279C.808 Rules. In accordance with applicable provisions of ORS chapter 183, the Commissioner of the Bureau of Labor and Industries shall adopt rules necessary to administer ORS 279C.800 to 279C.870. [2007 c.764 §45]

279C.810 Exemptions; rules. (1) As used in this section:

(a) "Funds of a public agency" does not include:

(A) Funds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction, reconstruction, major renovation or painting,

(B) Building and development permit fees paid or waived by the public agency;

(C) Tax credits or tax abatements;

(D) Land that a public agency sells to a private entity at fair market value;

(E) The difference between:

(i) The value of land that a public agency sells to a private entity as determined at the time of the sale after taking into account any plan, requirement, covenant, condition, restriction or other limitation, exclusive of zoning or land use regulations, that the public agency imposes on the development or use of the land; and

(ii) The fair market value of the land if the land is not subject to the limitations described in sub-subparagraph (i) of this subparagraph,

(F) Staff resources of the public agency used to manage a project or to provide a principal source of supervision, coordination or oversight of a project,

(G) Staff resources of the public agency used to design or inspect one or more components of a project,

(H) Moneys derived from the sale of bonds that are loaned by a state agency to a private entity, unless the moneys will be used for a public improvement,

(I) Value added to land as a consequence of a public agency's site preparation, demolition of real property or remediation or removal of environmental contamination, except for value added in excess of the expenses the public agency incurred in the site preparation, demolition or remediation or removal when the land is sold for use in a project otherwise subject to ORS 279C.800 to 279C.870, or

(J) Bonds, or loans from the proceeds of bonds, issued in accordance with ORS chapter 289 or ORS 441.525 to 441.595, unless the bonds or loans will be used for a public improvement.

(b) "Nonprofit organization" means an organization or group of organizations described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.

(2) ORS 279C.800 to 279C.870 do not apply to:

(a) Projects for which the contract price does not exceed \$50,000. In determining the price of a project, a public agency:

(A) May not include the value of donated materials or work performed on the project by individuals volunteering to the public agency without pay, and

(B) Shall include the value of work performed by every person paid by a contractor or subcontractor in any manner for the person's work on the project.

(b) Projects for which no funds of a public agency are directly or indirectly used. In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries shall adopt rules to carry out the provisions of this paragraph.

(c) Projects:

(A) That are privately owned;

(B) That use funds of a private entity;

(C) In which less than 25 percent of the square footage of a completed project will be occupied or used by a public agency; and

(D) For which less than \$750,000 of funds of a public agency are used.

(d) Projects for residential construction that are privately owned and that predominantly provide affordable housing. As used in this paragraph:

(A) "Affordable housing" means housing that serves occupants whose incomes are no greater than 60 percent of the area median income or, if the occupants are owners, whose incomes are no greater than 80 percent of the area median income.

(B) "Predominantly" means 60 percent or more.

(C) "Privately owned" includes:

(i) Affordable housing provided on real property owned by a public agency if the real property and related structures are leased to a private entity for 50 or more years, and

(ii) Affordable housing owned by a partnership, nonprofit corporation or limited liability company in which a housing authority, as defined in ORS 456.005, is a general partner, director or managing member and the housing authority is not a majority owner in the partnership, nonprofit corporation or limited liability company.

(D) "Residential construction" includes the construction, reconstruction, major renovation or painting of single-family houses or apartment buildings not more than four stories in height and all incidental items, such as site work, parking areas, utilities, streets and sidewalks, pursuant to the United States Department of Labor's "All Agency Memorandum No. 130. Application of the Standard of Comparison 'Projects of a Character Similar' Under Davis-Bacon and Related Acts," dated March 17, 1978. However, the commissioner may consider different definitions of residential construction in determining whether a project is a residential construction project for purposes of this paragraph, including definitions that:

(i) Exist in local ordinances or codes; or

(ii) Differ, in the prevailing practice of a particular trade or occupation, from the United States Department of Labor's description of residential construction. [2003 c.794 §172, 2005 c.153 §1, 2005 c.360 §8; 2007 c.764 §35]

279C.815 Determination of prevailing wage; sources of information; comparison of state and federal prevailing wage; other powers of commissioner. (1) As used in this section, "person" means an employer, a labor organization or an official representative of an employee or employer association.

(2)(a) The Commissioner of the Bureau of Labor and Industries at least once each year shall determine the prevailing rate of wage for workers in each trade or occupation in each locality described in ORS 279C.800 by means of an independent wage survey and shall make this information available at least twice each year. The commissioner may amend the rate at any time.

(b) If the data derived only from the survey described in paragraph (a) of this subsection appear to the commissioner to be insufficient to determine the prevailing rate of wage, the commissioner shall consider additional information such as collective bargaining agreements, other independent wage surveys and the prevailing rates of wage determined by appropriate federal agencies or agencies of adjoining states. If there is not a majority in the same trade or occupation paid at the same rate, the average rate of hourly wage, including all fringe benefits, paid in the locality to workers in the same trade or occupation is the prevailing rate. If the wage a contractor or subcontractor pays to workers on a public works is based on a period of time other than an hour, the hourly wage must be mathematically determined by the number of hours worked in that period of time.

(3) A person shall make reports and returns to the Bureau of Labor and Industries that the commissioner requires to determine the prevailing rates of wage, using forms the bureau provides and within the time the commissioner prescribes. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

(4) Notwithstanding ORS 192.410 to 192.505, reports and returns or other information provided to the commissioner under this section are confidential and not available for inspection by the public.

(5) The commissioner may enter into a contract with a public or private party to obtain data and information the commissioner needs to determine the prevailing rate of wage. The contract may provide for the manner and extent of the market review of affected trades and occupations and for other requirements regarding timelines of

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reports, accuracy of data and information and supervision and review as the commissioner prescribes [2003 c 794 § 173, 2005 c 360 § 9, 2007 c 764 § 36, 2007 c 844 § 3, 2011 c 265 § 1]

279C.817 Determination of applicability of prevailing wage rate; time limitation; hearing; rules. (1) The Commissioner of the Bureau of Labor and Industries shall, upon the request of a public agency or other interested person, make a determination about whether a project or proposed project is or would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C 840

(2) The requester shall provide the commissioner with information necessary to enable the commissioner to make the determination.

(3) The commissioner shall make the determination within 60 days after receiving the request or 60 days after the requester has provided the commissioner with the information necessary to enable the commissioner to make the determination, whichever is later. The commissioner may take additional time to make the determination if the commissioner and the requester mutually agree that the commissioner may do so

(4) The commissioner shall afford the requester or a person adversely affected or aggrieved by the commissioner's determination a hearing in accordance with ORS 183.413 to 183.470. An order the commissioner issues under ORS 183.413 to 183.470 is subject to judicial review as provided in ORS 183.482

(5) The commissioner shall adopt rules establishing the process for requesting and making the determinations described in this section. [2007 c 764 § 43]

279C.820 Advisory committee to assist commissioner. (1) The Commissioner of the Bureau of Labor and Industries shall appoint an advisory committee to assist the commissioner in the administration of ORS 279C.800 to 279C.870.

(2) The advisory committee must include equal representation of members from management and labor in the building and construction industry who perform work on public works contracts and such other interested parties as the commissioner shall appoint. [2003 c 794 § 179]

279C.825 Fees; rules. (1)(a) The Commissioner of the Bureau of Labor and Industries, by order, shall establish a fee to be paid by the public agency that awards a public works contract subject to ORS 279C.800 to 279C.870. The commissioner shall use the fee to pay the costs of:

(A) Surveys to determine the prevailing rates of wage;

(B) Administering and providing investigations under and enforcement of ORS 279C.800 to 279C.870, and

(C) Providing educational programs on public contracting law under the Public Contracting Code

(b) The commissioner shall establish the fee at 0.1 percent of the contract price. However, in no event may a fee be charged and collected that is less than \$250 or more than \$7,500.

(2) The commissioner shall pay moneys received under this section into the State Treasury. The moneys shall be credited to the Prevailing Wage Education and Enforcement Account created by ORS 651.185.

(3) The public agency shall pay the fee at the time the public agency notifies the commissioner under ORS 279C.835 a contract subject to the provisions of ORS 279C.800 to 279C.870 has been awarded. [2003 c 794 § 178, 2007 c 844 § 7, 2009 c 161 § 1, 2009 c 788 § 1]

279C.827 Division of public works project; applicability of prevailing wage rate to divided projects. (1)(a) A public agency may not divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.

(b) When the Commissioner of the Bureau of Labor and Industries determines that a public agency has divided a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner shall issue an order compelling compliance.

(c) In making determinations under this subsection, the commissioner shall consider:

(A) The physical separation of the project structures;

(B) The timing of the work on project phases or structures;

(C) The continuity of project contractors and subcontractors working on project parts or phases;

(D) The manner in which the public agency and the contractors administer and implement the project;

(E) Whether a single public works project includes several types of improvements or structures; and

(F) Whether the combined improvements or structures have an overall purpose or function.

(2) If a project is a public works of the type described in ORS 279C.800 (6)(a)(B) or (C), the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsection (1)(c) of this section to separate the parts of the project that include funds of a public agency or that will be occupied or used by a public agency from the parts of the project that do not include funds of a public agency and that will not be occupied or used by a public agency. If the commissioner divides the project, any part of the project that does not include funds of a public agency and that will not be occupied or used by a public agency is not subject to ORS 279C.800 to 279C.870.

(3) If a project includes parts that are owned by a public agency and parts that are owned by a private entity, the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsections (1)(c) and (2) of this section to separate the parts of the project that are public works from the parts of the project that are not public works. If the commissioner divides the project, parts of the project that are not public works are not subject to ORS 279C.800 to 279C.870. [2007 c 764 § 44]

279C.829 Agreement with other state to pay less than prevailing rate of wage. Notwithstanding any other provision of law, a contracting agency may not enter into an agreement with another state or a political subdivision or agency of another state in which the contracting agency agrees that a contractor or subcontractor may pay less than the prevailing rate of wage determined in accordance with ORS 279C.815 under the terms of a contract for public works to which the contracting agency is a party or of which the contracting agency is a beneficiary. [2009 c 322 § 2]

279C.830 Provisions concerning prevailing rate of wage in specifications, contracts and subcontracts; applicability of prevailing wage; bond. (1)(a) Except as provided in paragraph (e) of this subsection, the specifications for every contract for public works must contain a provision that states the existing state prevailing rate of wage and, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) that must be paid to workers in each trade or occupation that the contractor or subcontractor or other person who is a party to the contract uses in performing all or part of the contract. If the prevailing rates of wage are available electronically or are accessible on the Internet, the rates may be incorporated into the specifications by referring to the electronically accessible or Internet-accessible rates and by providing adequate information about how to access the rates.

(b) If a public agency under paragraph (a) of this subsection must include the state and federal prevailing rates of wage in the specifications, the public agency shall also require the contractor to pay the higher of the applicable state or federal prevailing rate of wage to all workers on the public works.

(c) Every contract and subcontract must provide that the workers must be paid not less than the specified minimum hourly rate of wage in accordance with ORS 279C.838 and 279C.840.

(d) If a public works project is subject both to ORS 279C.800 to 279C.870 and to the Davis-Bacon Act, every contract and subcontract must provide that workers on the public works must be paid not less than the higher of the applicable state or federal prevailing rate of wage.

(e) A public works project described in ORS 279C.800 (6)(a)(B) or (C) is subject to the existing state prevailing rate of wage or, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act that is in effect at the time a public agency enters into an agreement with a private entity for the project. After that time, the specifications for a contract for the public works must include the applicable prevailing rate of wage.

(2) The specifications for a contract for public works must provide that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9). Every contract that a contracting agency awards must require the contractor to:

(a) Have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9).

(b) Require, in every subcontract, that the subcontractor have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9). [2003 c 794 § 168, 2005 c 360 § 10, 2007 c 415 § 2, 2007 c 764 § 37, 2007 c 844 § 4, 2009 c 161 § 2, 2011 c 265 § 2]

279C.835 Notifying commissioner of public works contract subject to prevailing wage; payment of fee. Public agencies shall notify the Commissioner of the Bureau of Labor and Industries in writing, on a form prescribed by the commissioner, whenever a contract subject to the provisions of ORS 279C.800 to 279C.870 has been

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awarded. The notification shall be made within 30 days of the date that the contract is awarded. The notification shall include payment of the fee required under ORS 279C.825 and a copy of the disclosure of first-tier subcontractors that was submitted under ORS 279C.370. [2003 c.794 §175, 2009 c.161 §3]

279C.836 Public works bond; rules. (1) Except as provided in subsection (4), (7), (8) or (9) of this section, before starting work on a contract or subcontract for a public works project, a contractor or subcontractor shall file with the Construction Contractors Board a public works bond with a corporate surety authorized to do business in this state in the amount of \$30,000. The bond must provide that the contractor or subcontractor will pay claims ordered by the Bureau of Labor and Industries to workers performing labor upon public works projects. The bond must be a continuing obligation, and the surety's liability for the aggregate of claims that may be payable from the bond may not exceed the penal sum of the bond. The bond must remain in effect continuously until depleted by claims paid under this section, unless the surety sooner cancels the bond. The surety may cancel the bond by giving 30 days' written notice to the contractor or subcontractor, to the board and to the Bureau of Labor and Industries. When the bond is canceled, the surety is relieved of further liability for work performed on contracts entered into after the cancellation. The cancellation does not limit the surety's liability for work performed on contracts entered into before the cancellation.

(2) Before permitting a subcontractor to start work on a public works project, the contractor shall verify that the subcontractor has filed a public works bond as required under this section, has elected not to file a public works bond under subsection (7) or (8) of this section or is exempt under subsection (4) or (9) of this section.

(3) A contractor or subcontractor is not required under this section to file a separate public works bond for each public works project for which the contractor or subcontractor has a contract.

(4) A person that is not required under ORS 279C.800 to 279C.870 to pay prevailing rates of wage on a public works project is not required to file a public works bond under this section.

(5) A public works bond required by this section is in addition to any other bond the contractor or subcontractor is required to obtain.

(6) The board may, by rule, require a contractor or subcontractor to obtain a new public works bond if a surety pays a claim out of an existing public works bond. The new bond must be in the amount of \$30,000. The board may allow a contractor or subcontractor to obtain, instead of a new bond, a certification that the surety remains liable for the full penal sum of the existing bond, notwithstanding payment by the surety on the claim.

(7)(a) A disadvantaged business enterprise, a minority-owned business, a woman-owned business, a business that a service-disabled veteran owns or an emerging small business certified under ORS 200.055 may, for up to four years after certification, elect not to file a public works bond as required under subsection (1) of this section. If an enterprise or a business elects not to file a public works bond, the enterprise or business shall give the board written verification of the certification and written notice that the enterprise or business elects not to file the bond.

(b) An enterprise or a business that elects not to file a public works bond under this subsection shall notify the public agency for whose benefit the contract was awarded or, if the enterprise or business is a subcontractor, the contractor of the election before starting work on a public works project. When an enterprise or a business elects not to file a public works bond under this subsection, a claim for unpaid wages may be made against the payment bond of the enterprise or business or, if the enterprise or business is a subcontractor, the payment bond of the contractor.

(c) An election not to file a public works bond expires four years after the date the enterprise or business is certified. After an election has expired and before starting or continuing work on a contract or subcontract for a public works project, the enterprise or business shall file a public works bond with the board as required under subsection (1) of this section.

(8) A contractor or subcontractor may elect not to file a public works bond as required under subsection (1) of this section for any public works project for which the contract price does not exceed \$100,000.

(9) In cases of emergency, or when the interest or property of the public agency for whose benefit the contract was awarded probably would suffer material injury by delay or other cause, the requirement for filing a public works bond may be excused, if a declaration of the emergency is made in accordance with rules adopted under ORS 279A.065.

(10) The board shall make available on a searchable public website information concerning public works bonds filed with the board, claims made on those bonds, elections made by certified business enterprises not to file those bonds and the expiration date of each election. The board may adopt rules necessary to perform the duties required of the board by this section.

(11) The Commissioner of the Bureau of Labor and Industries, with approval of the board, shall adopt rules that establish language for public works bonds. [2005 c.360 §2, 2007 c.415 §1, 2007 c.764 §38, 2015 c.565 §16]

279C.838 Applicability of state and federal rates of wage; determination of site of project; determination of applicability of wage to transportation workers; waiver. When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.)

(1) If the state prevailing rate of wage is higher than the federal prevailing rate of wage, the contractor and every subcontractor on the project shall pay at least the state prevailing rate of wage as determined under ORS 279C.815;

(2) The Commissioner of the Bureau of Labor and Industries shall determine the site of the project in a manner consistent with the term "site of the work" as that term is used in federal law and in regulations adopted or guidelines issued in accordance with the Davis-Bacon Act.

(3) The commissioner shall determine in a manner that is consistent with federal law and regulations adopted or guidelines issued in accordance with the Davis-Bacon Act whether workers transporting materials and supplies to and from the site of the project are subject to the Davis-Bacon Act and are entitled to be paid the prevailing rate of wage;

(4) Except as provided in subsection (1) of this section, the commissioner, in consultation with the advisory committee appointed under ORS 279C.820, may administer and enforce ORS 279C.800 to 279C.870 in a manner that is consistent with federal law and regulations adopted or guidelines issued in accordance with the Davis-Bacon Act. The commissioner may provide a waiver from a requirement set forth in ORS 279C.800 to 279C.870 if necessary to achieve consistency with the Davis-Bacon Act and to further the purposes of ORS 279C.805, and

(5) ORS 279C.800 to 279C.870 do not apply to workers enrolled in skill training programs that are certified by the United States Secretary of Transportation under the Federal-Aid Highway Act (23 U.S.C. 113(c)). [2005 c.360 §7; 2007 c.844 §5]

279C.840 Payment of prevailing rate of wage; posting of rates and fringe benefit plan provisions. (1) The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where the labor is performed. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash, by the making of contributions of a type referred to in ORS 279C.800 (1)(a), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in ORS 279C.800 (1)(b), or any combination thereof, where the aggregate of any such payments, contributions and costs is not less than the prevailing rate of wage. The contractor or subcontractor shall pay all wages due and owing to the contractor's or subcontractor's workers upon public works on the regular payday established and maintained under ORS 652.120.

(2) After a contract for public works is executed with any contractor or work is commenced upon any public works, the amount of the prevailing rate of wage is not subject to attack in any legal proceeding by any contractor or subcontractor in connection with that contract.

(3) It is not a defense in any legal proceeding that the prevailing rate of wage is less than the amount required to be in the specifications of a contract for public works, or that there was an agreement between the employee and the employer to work at less than the wage rates required to be paid under this section.

(4) Every contractor or subcontractor engaged on a project for which there is a contract for a public works shall keep the prevailing rates of wage for that project posted in a conspicuous and accessible place in or about the project. The Commissioner of the Bureau of Labor and Industries shall furnish without charge copies of the prevailing rates of wage to contractors and subcontractors.

(5) Every contractor or subcontractor engaged on a project for which there is a contract for a public works to which the prevailing wage requirements apply that also provides or contributes to a health and welfare plan or a pension plan, or both, for the contractor or subcontractor's employees on the project shall post a notice describing the plan in a conspicuous and accessible place in or about the project. The notice preferably shall be posted in the same place as the notice required under subsection (4) of this section. In addition to the description of the plan, the notice shall contain information on how and where to make claims and where to obtain further information.

(6)(a) Except as provided in paragraph (c) of this subsection, no person other than the contractor or subcontractor may pay or contribute any portion of the prevailing rate of wage paid by the contractor or subcontractor to workers employed in the performance of a public works contract.

(b) For the purpose of this subsection, the prevailing rate of wage is the prevailing rate of wage specified in the contract.

(c) This subsection is not intended to prohibit payments to a worker who is enrolled in any government-subsidized training or retraining program.

(7) A person may not take any action that circumvents the payment of the prevailing rate of wage to workers employed on a public works contract, including, but not limited to, reducing an employee's regular rate of pay on any project not subject to ORS 279C.800 to 279C.870 in a manner that has the effect of offsetting the prevailing rate of wage on a public works project. [2003 c.794 §167; 2009 c.161 §4]

279C.845 Certified statements regarding payment of prevailing rates of wage; retainage. (1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public agency in writing, on a form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:

(a) The hourly rate of wage paid each worker whom the contractor or the subcontractor has employed upon the public works, and
(b) That no worker employed upon the public works has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract.

(2) The certified statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read the certified statement, that the contractor or subcontractor knows the contents of the certified statement and that to the contractor or subcontractor's knowledge the certified statement is true.

(3) The certified statements shall set out accurately and completely the contractor's or subcontractor's payroll records, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked and the gross wages the worker earned upon the public works during each week identified in the certified statement.

(4) The contractor or subcontractor shall deliver or mail each certified statement required by subsection (1) of this section to the public agency. Certified statements for each week during which the contractor or subcontractor employs a worker upon the public works shall be submitted once a month, by the fifth business day of the following month. Information submitted on certified statements may be used only to ensure compliance with the provisions of ORS 279C.800 to 279C.870.

(5) Each contractor or subcontractor shall preserve the certified statements for a period of three years from the date of completion of the contract.

(6) Certified statements received by a public agency are public records subject to the provisions of ORS 192.410 to 192.505.

(7) Notwithstanding ORS 279C.555 or 279C.570 (7), if a contractor is required to file certified statements under this section, the public agency shall retain 25 percent of any amount earned by the contractor on the public works until the contractor has filed with the public agency certified statements as required by this section. The public agency shall pay the contractor the amount retained under this subsection within 14 days after the contractor files the certified statements as required by this section, regardless of whether a subcontractor has failed to file certified statements as required by this section. The public agency is not required to verify the truth of the contents of certified statements filed by the contractor under this section.

(8) Notwithstanding ORS 279C.555, the contractor shall retain 25 percent of any amount earned by a first-tier subcontractor on a public works until the subcontractor has filed with the public agency certified statements as required by this section. The contractor shall verify that the first-tier subcontractor has filed the certified statements before the contractor may pay the subcontractor any amount retained under this subsection. The contractor shall pay the first-tier subcontractor the amount retained under this subsection within 14 days after the subcontractor files the certified statements as required by this section. Neither the public agency nor the contractor is required to verify the truth of the contents of certified statements filed by a first-tier subcontractor under this section. [2003 c.794 §169; 2005 c.360 §11; 2009 c.7 §1]

279C.850 Inspection to determine whether prevailing rate of wage being paid; civil action for failure to pay prevailing rate of wage or overtime. (1) At any reasonable time the Commissioner of the Bureau of Labor and Industries may enter the office or business establishment of any contractor or subcontractor performing public works and gather facts and information necessary to determine whether the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works.

(2) Upon request by the commissioner, every contractor or subcontractor performing work on public works shall make available to the commissioner for inspection during normal business hours any payroll or other records in the possession or under the control of the contractor or subcontractor that are deemed necessary by the commissioner to determine whether the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works. The commissioner's request must be made a reasonable time in advance of the inspection.

(3) Notwithstanding ORS 192.410 to 192.505, any record obtained or made by the commissioner under this section is not open to inspection by the public.

(4) The commissioner may, without necessity of an assignment, initiate legal proceedings against employers to enjoin future failures to pay required prevailing rates of wage or overtime pay and to require the payment of prevailing rates of wage or overtime pay due employees. The commissioner is entitled to recover, in addition to other costs, such sum as the court or judge may determine reasonable as attorney fees. If the commissioner does not prevail in the action, the commissioner shall pay all costs and disbursements from the Bureau of Labor and Industries Account. [2003 c.794 §170]

279C.855 Liability for violations. (1) A contractor or subcontractor or contractor's or subcontractor's surety that violates the provisions of ORS 279C.840 is liable to the workers affected in the amount of the workers' unpaid minimum wages, including all fringe benefits, and in an additional amount equal to the unpaid wages as liquidated damages.

(2) Actions to enforce liability to workers under subsection (1) of this section may be brought as actions on contractors' bonds as provided for in ORS 279C.610.

(3) If a public agency fails to provide in the advertisement for bids, the request for bids, the contract specifications, the accepted bid or elsewhere in the contract documents that the contractor and any subcontractor must comply with ORS 279C.840, the liability of the public agency for unpaid minimum wages, as described in subsection (1) of this section, is joint and several with a contractor or subcontractor that had notice of the requirement to comply with ORS 279C.840.

(4) If a public works project is subject to the Davis-Bacon Act, 40 U.S.C. 3141 et seq., and a public agency fails to include the state and federal prevailing rates of wage in the specifications for the contract for public works as required under ORS 279C.830 (1)(a), or fails to provide in the contract that workers on the public works must be paid not less than the higher of the applicable state or federal prevailing rate of wage as required under ORS 279C.830 (1)(d), the public agency is liable to each affected worker for:

(a) The worker's unpaid minimum wages, including fringe benefits, in an amount that equals, for each hour worked, the difference between the applicable higher rate of wage and the lower rate of wage, and

(b) An additional amount, equal to the amount of unpaid minimum wages due under paragraph (a) of this subsection, as liquidated damages.

(5) The Commissioner of the Bureau of Labor and Industries may enforce the provisions of subsections (3) and (4) of this section by a civil action under ORS 279C.850 (4), by a civil action on an assigned wage claim under ORS 652.330, or by an administrative proceeding on an assigned wage claim under ORS 652.332. [2003 c.794 §171; 2007 c.844 §6; 2011 c.265 §3]

279C.860 Ineligibility for public works contracts for failure to pay or post notice of prevailing rates of wage; certified payroll reports to commissioner. (1) A contractor or a subcontractor or a firm, corporation, partnership, limited liability company or association in which the contractor or subcontractor has a financial interest may not receive a contract or subcontract for public works for a period of three years after the date on which the Commissioner of the Bureau of Labor and Industries publishes the contractor's or subcontractor's name on the list described in subsection (2) of this section. The commissioner shall add a contractor's or subcontractor's name to the list after determining, in accordance with ORS chapter 183, that:

(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works,

(b) The subcontractor has failed to pay to the subcontractor's employees amounts required under ORS 279C.840 and the contractor has paid the amounts on the subcontractor's behalf,

(c) The contractor or subcontractor has intentionally failed or refused to post the prevailing rates of wage as required under ORS 279C.840 (4), or

(d) The contractor or subcontractor has intentionally falsified information in the certified statements the contractor or subcontractor submitted under ORS 279C.845.

(2) The commissioner shall maintain a written list of the names of contractors and subcontractors the commissioner determines are ineligible under this section and the period of time for which the contractors and subcontractors are ineligible. The commissioner shall publish the list, furnish a copy of the list upon request and make the list available to contracting agencies.

(3) If a contractor or subcontractor is a corporation or a limited liability company, the provisions of this section apply to any corporate officer or agent of the corporation or any member or manager of the limited liability company who is responsible for failing or refusing to pay or post the prevailing rate of wage, failing to pay to a subcontractor's employees amounts required under ORS 279C.840 that the contractor pays on the subcontractor's behalf or intentionally falsifying information in the certified statements the contractor or subcontractor submits under ORS 279C.845.

(4) For good cause shown, the commissioner may remove the name of a contractor or subcontractor from the ineligible list.

(5) When a prevailing rate of wage claim is filed or the commissioner receives evidence indicating that a violation has occurred, a contractor or subcontractor required to pay the prevailing rate of wage to workers employed upon public works under ORS 279C.800 to 279C.870 shall send a certified copy of the payroll for workers employed upon public works when the commissioner requests the certified copy. [2003 c.794 §174, 2009 c.107 §1, 2013 c.239 §1]

279C.865 Civil penalties. (1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$5,000 for each violation of any provision of ORS 279C.800 to 279C.870 or any rule of the commissioner adopted thereunder.

(2) Civil penalties under this section shall be imposed as provided in ORS 183.745.

(3) All moneys collected as penalties under this section shall be first applied toward reimbursement of costs incurred in determining violations, conducting hearings and assessing and collecting the penalties. The remainder, if any, of moneys collected as penalties under this section shall be paid into the State Treasury and credited to the General Fund and are available for general governmental expenses. [2003 c.794 §177]

279C.870 Civil action to enforce payment of prevailing rates of wage. (1) The Commissioner of the Bureau of Labor and Industries or any other person may bring a civil action in any court of competent jurisdiction to require a public agency under a public contract with a contractor to withhold twice the wages in dispute if it is shown that the contractor or subcontractor on the contract has intentionally failed or refused to pay the prevailing rate of wage to workers employed on that contract and to require the contractor to pay the prevailing rate of wage and any deficiencies that can be shown to exist because of improper wage payments already made. In addition to other relief, the court may also enjoin the contractor or subcontractor from committing future violations. The contractor or subcontractor involved shall be named as a party in all civil actions brought under this section. In addition to other costs, the court may award the prevailing party reasonable attorney fees at the trial and on appeal. However, attorney fees may not be awarded against the commissioner under this section.

(2) The court shall require any party, other than the commissioner, that brings a civil action under this section to post a bond sufficient to cover the estimated attorney fees and costs to the public agency and to the contractor or subcontractor of any temporary restraining order, preliminary injunction or permanent injunction awarded in the action, in the event that the party bringing the action does not ultimately prevail.

(3) In addition to any other relief, the court in a civil action brought under this section may enjoin the public agency from contracting with the contractor or subcontractor if the court finds that the commissioner would be entitled to place the contractor or subcontractor on the ineligible list established under ORS 279C.860. If the court issues such an injunction, the commissioner shall place the contractor or subcontractor on the list for a period of three years, subject to the provision of ORS 279C.860.

(4) [2003 c.794 §176; 2007 c.764 §39; 2009 c.107 §2]

CHAPTER 115

AN ACT

SB 1587

Relating to wages; creating new provisions; amending ORS 652.409, 652.610 and 652.750; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 652.610 is amended to read:

652.610. (1)(a) All persons, firms, partnerships, associations, cooperative associations, corporations, municipal corporations, the state and its political subdivisions, except the federal government and its agencies, employing, in this state, during any calendar month one or more persons, *[and withholding for any purpose any sum of money from the wages, salary or commission earned by an employee, shall provide the employee on regular paydays with a statement sufficiently itemized to show the amount and purpose of the deductions made during the respective period of service that the payment covers.]* shall provide the employee on regular paydays and at other times payment of wages, salary or commission is made, with an itemized statement as described in paragraph (b) of this subsection.

(b) The statement required under this subsection must be a written statement, sufficiently itemized to show:

- (A) The date of the payment;
- (B) The dates of work covered by the payment;
- (C) The name of the employee;
- (D) The name and business registry number or business identification number;
- (E) The address and telephone number of the employer;
- (F) The rate or rates of pay;
- (G) Whether the employee is paid by the hour, shift, day or week or on a salary, piece or commission basis;
- (H) Gross wages;
- (I) Net wages;
- (J) The amount and purpose of each deduction made during the respective period of service that the payment covers;
- (K) Allowances, if any, claimed as part of minimum wage;
- (L) Unless the employee is paid on a salary basis and is exempt from overtime compensation as established by local, state or federal law, the regular hourly rate or rates of pay, the overtime rate or rates of pay, the number of regular hours worked and pay for those hours, and the number of overtime hours worked and pay for those hours; and

(M) If the employee is paid a piece rate, the applicable piece rate or rates of pay, the number of pieces completed at each piece rate and the total pay for each rate.

(c) Notwithstanding paragraph (b) of this subsection, the employer may provide the state-

ment required under this subsection to the employee in electronic form pursuant to ORS 84.001 to 84.061 if:

(A) The statement contains the information described in paragraph (b) of this section;

(B) The employee expressly agrees to receive the statement in electronic form; and

(C) The employee has the ability to print or store the statement at the time of receipt.

[(2)(a) The itemized statement shall be provided to the employee at the time payment of wages, salary or commission is made.]

[(b)] (2)(a) The statement may be attached to or be a part of the check, draft, voucher or other instrument by which payment is made, or may be delivered separately from the instrument.

[(c)] (b) The statement shall be provided electronically at the time payment is made to all state officers and employees paid electronically under the state payroll system as provided by ORS 292.026.

[(d)] (c) State agencies shall provide access to electronic statements to employees who do not have regular access to computers in their workplace.

[(e)] (d) Notwithstanding paragraph [(c)] (b) of this subsection, if an officer or employee paid under the state payroll system as provided by ORS 292.026 wants to receive payment of net salary and wages by check or to receive a paper statement of itemized payroll deductions, the officer or employee shall request paper statements or payment by check in accordance with the procedures adopted by rule by the Oregon Department of Administrative Services.

(3) An employer may not withhold, deduct or divert any portion of an employee's wages unless:

- (a) The employer is required to do so by law;
- (b) The deductions are voluntarily authorized in writing by the employee, are for the employee's benefit and are recorded in the employer's books;
- (c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer and that the deduction is recorded in the employer's books;

(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party;

(e) The deduction is authorized under ORS 18.736; or

(f) The deduction is made from the payment of wages upon termination of employment and is authorized pursuant to a written agreement between the employee and employer for the repayment of a loan made to the employee by the employer, if all of the following conditions are met:

(A) The employee has voluntarily signed the agreement;

(B) The loan was paid to the employee in cash or other medium permitted by ORS 652.110;

(C) The loan was made solely for the employee's benefit and was not used, either directly or indirectly, for any purpose required by the employer or connected with the employee's employment with the employer;

(D) The amount of the deduction at termination of employment does not exceed the amount permitted to be garnished under ORS 18.385; and

(E) The deduction is recorded in the employer's books.

(4) When an employer deducts an amount from an employee's wages as required or authorized by law or agreement, the employer shall pay the amount deducted to the appropriate recipient as required by the law or agreement. The employer shall pay the amount deducted within the time required by the law or the agreement or, if the time for payment is not specified by the law or agreement, within seven days after the date the wages from which the deductions are made are due. Failure to pay the amount as required constitutes an unlawful deduction.

(5) This section does not:

(a) Prohibit the withholding of amounts authorized in writing by the employee to be contributed by the employee to charitable organizations, including contributions made pursuant to ORS 243.666 and 663.110;

(b) Prohibit deductions by checkoff dues to labor organizations or service fees when the deductions are not otherwise prohibited by law; or

(c) Diminish or enlarge the right of any person to assert and enforce a lawful setoff or counterclaim or to attach, take, reach or apply an employee's compensation on due legal process.

SECTION 2. ORS 652.750 is amended to read:

652.750. (1) As used in this section:

(a) "Employer" has the meaning given that term in ORS 656.005.

(b) "Personnel records" does not include records of an individual relating to the conviction, arrest or investigation of conduct constituting a violation of the criminal laws of this state or another state or the United States, confidential reports from previous employers or records maintained in compliance with ORS 352.226.

(c) "Public safety officer" has the meaning given that term in ORS 236.350.

(d) "Time and pay records" means payroll records and other records and data described under the administrative rules established by the Bureau of Labor and Industries pursuant to ORS 653.010 to 653.261.

(2) Except as provided in subsection (7) of this section, within 45 days after receipt of an employee's request, an employer shall provide reasonable opportunity for the employee to inspect, at the place of employment or place of work assignment, the personnel records of the employee that are used or have been used to determine the employee's qualification for employment, promotion, additional compensation, [or] employment termination or other disciplinary action and time and pay records of the employee for the period required by the Fair Labor Standards Act, 29 U.S.C. 211(c), and accompanying regulations. Within 45 days after re-

ceipt of the employee's request, the employer shall furnish a certified copy of the records.

(3) Upon termination of employment, the employer shall keep:

(a) The terminated employee's personnel records for not less than 60 days. [Within the 60-day period, the employer shall provide the employee with a certified copy of the records within 45 days of receiving the employee's request. After the 60-day period, the employer shall provide the certified copy within 45 days of receiving the employee's request if the employer has the records at the time of the request.]

(b) The terminated employee's time and pay records for not less than the period required by the Fair Labor Standards Act, 29 U.S.C. 211(c), and accompanying regulations.

(4) Notwithstanding the time periods described in [subsections] subsection (2) [and (3)] of this section, if the employee's personnel records or time and pay records are not readily available, the employer and the employee may agree to extend the time within which the employer must provide the employee reasonable opportunity to inspect the records or furnish the employee a certified copy of the records.

(5) For the services referred to in [subsections] subsection (2) [and (3)] of this section only, an employer may charge an employee no more than an amount reasonably calculated to recover the actual cost of providing the services.

(6)(a) Except as provided in paragraphs (b) and (c) of this subsection, an employer may not place an adverse comment in the personnel records of a public safety officer unless the officer has first read and signed the document containing the adverse comment.

(b) If a public safety officer refuses to sign a document containing an adverse comment, the employer may place the document in the officer's personnel records with a notation that the document was presented to the officer and the officer refused to sign it.

(c) If a public safety officer is not available to read and sign the document containing an adverse comment at the work location where the personnel files are maintained, the employer may place the document in the officer's personnel records and mail a copy of the document to the officer by regular mail or interoffice mail.

(d) A public safety officer may write a response within 30 days of being presented with a document containing an adverse comment. If a public safety officer writes a response to a document containing an adverse comment, the response must be attached to the original document and placed in the officer's personnel records.

(7)(a) Upon request, a public safety officer may inspect the officer's own personnel records at a reasonable time at the location where the records are kept by the employer.

(b) If, after inspection, a public safety officer believes that any portion of the material is mistakenly or unlawfully placed in the officer's personnel re-

cords, the officer may request in writing that the mistaken or unlawful material be corrected or deleted. The request must describe the corrections or deletions requested and the reasons supporting the request and provide any documentation that supports the request. The employer shall respond within 30 days from the date the request is received. If the employer does not correct or delete the material, the employer shall place the request and the employer's response to the request in the officer's personnel records.

SECTION 3. ORS 652.409 is amended to read:

652.409. (1) The Wage Security Fund is established separate and distinct from the General Fund. After deduction of the amounts provided in ORS 657.439 (2)(a), all moneys received by the Employment Department pursuant to ORS 657.439 (2)(a) shall be paid into the State Treasury and credited to the Wage Security Fund. All income earned on moneys in the Wage Security Fund invested by the State Treasurer shall accrue to the fund.

(2) All income earned on moneys in the Wage Security Fund, and all other moneys in the fund, are appropriated continuously to the Commissioner of the Bureau of Labor and Industries primarily to carry out the provisions of ORS 652.414. Moneys in the fund may also be used, within the division of the Bureau of Labor and Industries that enforces wage and hour laws, to investigate and enforce claims of underpaid and unpaid wages under ORS chapters 652 and 653.

SECTION 4. (1) A contractor or subcontractor, or an agent of a contractor or subcontractor, may not intentionally:

(a) Fail to pay an employee of the contractor or subcontractor the prevailing rate of wage as provided in ORS 279C.840;

(b) Reduce the rate of wage that an employee would ordinarily receive for work that is not subject to ORS 279C.800 to 279C.870 in order to recoup wages the contractor, subcontractor or agent paid in accordance with ORS 279C.840;

(c) Withhold, deduct or divert any portion of an employee's wages except as provided in ORS 652.610 (3);

(d) Enter into an agreement with an employee under the terms of which the employee performs work on a public works project at less than the prevailing rate of wage; or

(e) Otherwise deprive an employee, permanently or indefinitely, of wages due to an employee under ORS 279C.840 in an amount that equals or exceeds 25 percent of wages due to the employee under ORS 279C.840 or \$1,000 in a single pay period, whichever is greater.

(2) A violation of subsection (1) of this section is a Class C felony.

(3) In addition to and not in lieu of any action the Commissioner of the Bureau of Labor and Industries may bring under ORS 279C.870, the commissioner may:

(a) Refer a violation of subsection (1) of this section to a district attorney or the Attorney General for prosecution; and

(b) Adopt rules necessary to implement the provisions of this section.

SECTION 5. (1) Section 4 of this 2016 Act and the amendments to ORS 652.610 and 652.750 by sections 1 and 2 of this 2016 Act become operative on January 1, 2017.

(2) The Commissioner of the Bureau of Labor and Industries may adopt rules and take any other action before the operative date specified in subsection (1) of this section that is necessary to enable the commissioner, on or after the operative date specified in subsection (1) of this section, to exercise all of the duties, functions and powers conferred on the commissioner by section 4 of this 2016 Act and the amendments to ORS 652.610 and 652.750 by sections 1 and 2 of this 2016 Act.

SECTION 6. Notwithstanding any other law limiting expenditures, the limitation on expenditures established by section 3 (1), chapter 693, Oregon Laws 2015, for the biennium beginning July 1, 2015, as the maximum limit for payment of administrative expenses by the Bureau of Labor and Industries from the Wage Security Fund is increased by \$325,954.

SECTION 7. This 2016 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2016 Act takes effect on its passage.

Approved by the Governor April 4, 2016

Filed in the office of Secretary of State April 4, 2016

Effective date April 4, 2016

**CURRY COUNTY, OREGON
THE PORT OF BROOKINGS HARBOR**

RESOLUTION NO. 368

**A RESOLUTION OF THE BOARD OF COMMISSIONERS
ADOPTING PUBLIC CONTRACTING RULES AND PRESCRIBING
RULES AND PROCEDURES FOR PUBLIC CONTRACTING**

WHEREAS, the Port of Brookings Harbor is an Oregon special district which is subject to Oregon Public Contracting Law; and

WHEREAS, in 2003 the Oregon Legislature substantially revised the Oregon Public Contracting Code, and most of these revisions took effect March 1, 2005; and

WHEREAS, on March 1, 2005, the Port of Brookings Harbor's existing public contracting rules became void, and the Port is required to adopt new public contracting rules consistent with the revised Oregon Public Contracting Code; and


WHEREAS, ORS 279A.065(5) provides that a local contracting agency may adopt its own rules of procedure for public contracts that:

- (A) Specifically state that the model rules adopted by the Attorney General do not apply to the contracting agency; and
- (B) Prescribe the rules of procedure that the contracting agency will use for public contracts, which may include portions of the model rules adopted by the Attorney General.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. Except as otherwise provided herein, the Port of Brookings Harbor adopts the Oregon Attorney General's Model Public Contracting Rules ("Model Rules") as the contracting Rules for the District, as such Model Rules now exist or are later modified; and
2. The Port of Brookings Harbor adopts the public contracting Rules described in Exhibit A, which shall be in addition to, and shall supersede any conflicting provisions in the Model Rules; and
3. The Port of Brookings Harbor shall regularly review changes in the Public Contracting Code and the Model Rules to ensure that the Rules adopted in Exhibit A are consistent with current law.

PASSED AND ADOPTED on this 21st day of March, 2005.


S. John Zia, Chairman

ATTEST:

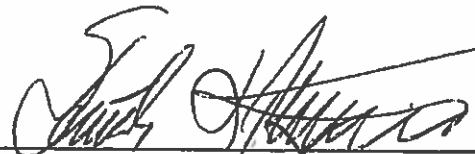

Kenneth L. Byrtus, Secretary/Treasurer

EXHIBIT A

PORT OF BROOKINGS HARBOR RULES FOR PUBLIC CONTRACTING

Section I: TITLE.

These rules shall be known as the PUBLIC CONTRACTING RULES ("RULES") FOR THE PORT OF BROOKINGS HARBOR ("PORT").

Section II: PURPOSE.

The purpose of these Rules is to establish procedures for entering into public contracts, pursuant to ORS 279A.065

Section III: DEFINITIONS.

The following definitions shall apply to these Rules:

- a. Board: The Port's Board of Commissioners.
- b. Competitive Bid: The solicitation of competitive offers using the formal process of advertising, bids, and bid opening required by ORS Chapters 279A, 279B, and 279C, and other applicable statutes and these Rules.
- c. Local Contract Review Board: The Port's Board of Commissioners, unless the Board of Commissioners, by separate act, establishes a different Local Contract Review Board ("LCRB").
- d. Public Contract: A sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. "Public contract" does not include grants.
- e. Public Improvement Contract: "Public improvement" means a project for construction, reconstruction or major renovation on real property by or for a contracting agency. "Public improvement" does not include: (A) Projects for which no funds of a contracting agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or (B) Emergency work, minor alteration, ordinary repair or maintenance necessary to preserve a public improvement.

- f. Request for Proposals: The solicitation of competitive offers for a public contract when specification and price will not necessarily be the predominant award criteria.
- g. Competitive Quotes: An informal, written or oral solicitation of offers from competitive vendors, either by advertisement or by initiating a request to vendors.

Section IV: DELEGATION.

(1) Except as otherwise provided in these Rules, the powers and duties of the Local Contract Review Board under the Public Contracting Code must be exercised and performed by the Board of Commissioners.

(2) Unless expressly limited by the Local Contract Review Board or these Rules, all powers and duties given or assigned to contract agencies by the Public Contracting Code may be exercised or performed by the Port Manager or the Port Manager's designee, including the authority to enter into emergency contracts pursuant to ORS 279B.080.

(3) All public contracts estimated to cost \$ 5,000 or more in a calendar year must be approved by the Board of Commissioners. All public contracts estimated to cost less than \$ 5,000 in a calendar year may be entered into by the Port Manager or designee without Board approval. However, emergency contracts may be entered into by either the Board or the Port Manager or designee pursuant to Section VII of these Rules, regardless of dollar limits, subject to ORS 294.455.

Section V: COMPETITIVE BIDS; EXEMPTIONS.

All public contracts shall be based upon competitive bids unless exempted from competitive bidding by the Local Contract Review Board pursuant to Section VI of these Rules, or unless granted one of the following statutory exemptions:

1. Contracts made with other public agencies or the federal government. [ORS 279A.025]
2. Public improvements for which no funds of the Port are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection. [ORS 279A.010(aa)]
3. Sole-source expenditures where the rate or price is established by law or ordinance for source selection [ORS 279A.02592(f)].
4. The investment of funds as authorized by law, and other financial transactions that by their character cannot practically be established

under the competitive contractor selection procedures of ORS 279B.050 to 279B.085 [ORS 279A.025(2)(q)(C)].

5. Sole-source acquisitions following the adoption of proper findings and provision of notice as required by ORS 279B.075 and OAR 137-047-0275.
6. Small procurements of goods and services under \$5,000. The Port Manager or designee shall make a reasonable effort to obtain competitive quotes in order to ensure the best value for the Port. The Port may amend a public contract awarded as a small procurement beyond the \$5,000 limit in accordance with OAR 137-047-0800, provided the cumulative amendments do not increase the total contract price to a sum that is greater than twenty-five percent (25%) of the original contract price.
7. Intermediate procurements. A contract for procurement of goods and services estimated to cost between \$5,000 and \$150,000 in a calendar year, or a contract for a public improvement that is estimated to cost between \$5,000 and \$100,000 in a calendar year, may be awarded using competitive quotes, according to the processes for intermediate procurements described in ORS 279B.070. The contract for an intermediate procurement may be amended beyond the stated limitations in accordance with OAR 137-047-0800, provided the cumulative amendments shall not increase the total contract price to a sum that is greater than twenty-five percent (25%) of the original contract price.
8. Contracts made with qualified non-profit agencies providing employment opportunities for disabled individuals under ORS 279.835 to ORS 279.855. [ORS 279A.025(4)].
9. Contracts for purchase or lease of personal property according to the requirements of ORS 279A.205 through 279A.215 ("Cooperative Procurements").
10. Purchases from Federal Catalogs. By Resolution No. 370, the Local Contract Review Board has adopted the following rules for procurement of goods from federal catalogs:

Subject to applicable Board approval requirements stated in the Port's Contracting Rules, the Port may purchase goods from federal catalogs without competitive bidding when the procurement is pursuant to 10 USC 381, the Electronic Government Act of 2002 (Public Law 107-347). Purchases under other federal laws will be permitted upon a finding by the LCRB that the law is similar to such Act in effectuating or promoting transfers of property to contracting agencies.

Section VI: SPECIAL PROCUREMENTS AND EXEMPTIONS.

(1) The Local Contract Review Board may exempt from competitive bidding certain contracts or classes of contracts for procurement of goods and services according to the procedures described in ORS 279B.085.

(2) The Local Contract Review Board may exempt certain contracts or classes of contracts for public improvements from competitive bidding according to the procedures described in ORS 279C.335. When exempting a public improvement from competitive bidding, the LCRB may authorize the contract to be awarded using a Request for Proposal process for public improvements, according to the processes described in OAR 137-049-0640 through 137-049-0690.

SECTION VII: EMERGENCY CONTRACTS.

(1) "Emergency" shall be defined as follows: "Circumstances that (a) could not have reasonably been foreseen; (b) create a substantial risk of loss, damage, or interruption of services or a substantial threat to property, public health, welfare or safety; and (c) require prompt execution of a contract to remedy the condition."

(2) The Board Chair, the Port Manager, or a designee of the Port Manager shall have authority to determine when emergency conditions exist sufficient to warrant an emergency contract. The nature of the emergency and the method used for the selection of the contractor shall be documented.

(3) Emergency contracts may be awarded as follows:

(a) Goods and Services. Emergency contracts for procurement of goods and services may be awarded pursuant to ORS 279B.080. Authority for entering into emergency contracts may be delegated as provided in these Rules.

(b) Public Improvements. The Port hereby adopts OAR 137-049-0150 as its contracting rules for awarding a public improvement contract under emergency conditions.

Section VIII: AWARD OF CONTRACT.

After bids are opened or quotes reported to the Local Contract Review Board, and after it is determined that the contract is to be awarded, the contract shall be awarded to the "lowest responsible bidder" as defined in ORS 278A.010.

Section IX: BID REJECTION.

The Board, or an official designated by the Board, may reject any bid not in compliance with all prescribed public bidding procedures and requirements and

may reject all bids if it is in the public interest to do so. The reasons for the rejection shall be recorded, pursuant to ORS 279B.100 and 279C.395.

Section X: REVOCATION OF PREQUALIFICATION OR DEBARMENT OF BIDDER.

The Board, or an official designated by the Board, may debar any person from bidding on a contract after providing notice and a hearing as provided in ORS 279B.120 and 279B.130, as applicable.

Section XI: APPEAL OF PREQUALIFICATION AND DEBARMENT DECISIONS.

A person who has been denied prequalification or debarred as a bidder may appeal such decision to the Board according to the following procedures as adopted by the Local Contract Review Board in Resolution No. 370.

Review of the Port's prequalification and debarment decisions shall be as set forth in ORS 279B.425. The following additional procedures shall apply to hearings on such decisions by the Local Contract Review Board:

- (a) Notices shall be submitted in writing to the Port Manager. Appeals filed after the filing period stated in ORS 279B.425 shall not be heard.
- (b) Upon opening of the hearing, Port staff shall explain the Port's decision being appealed and the justification thereof. The appellant shall then be heard. Time for the appellant's testimony shall be established by the Board Chair. The appellant may submit any testimony or evidence relevant to the decision or the appeal. Any party requesting time to testify in support of the appeal shall then be heard, subject to time limits established by the Board Chair.
- (c) Once all testimony and evidence in support of the appeal is heard, any party requesting time to testify in support of the Port's decision shall be provided time to be heard, with time limits established by the Board Chair. Any party testifying in opposition to the appeal may submit any testimony or evidence relevant to the decision or the appeal. Once all testimony in opposition to the appeal has been heard, the appellant may request time to provide rebuttal testimony. At the conclusion of the rebuttal testimony, if any, the Board Chair shall close the hearing.
- (d) When issued in writing according to the requirements of ORS 279B.425, the LCRB's decision and order shall be final.

Section XII: PERSONAL OR PROFESSIONAL SERVICE CONTRACTS.

The Board or an official designated by the Board may enter into contracts for personal services or professional services as provided in this Section.

SEE
RESOLUTION NO. 484

(1) Definition. As adopted by the Port's Local Contract Review Board in Resolution No. 370, "Personal Services" shall be defined to include those services that require specialized technical, creative, professional or communication skills or talents, unique and specialized knowledge, or the exercise of discretionary judgment, and for which the quality of the service depends on attributes that are unique to the service provider. Such services shall include, but are not limited to, architects, engineers, surveyors, attorneys, accountants, auditors, computer programmers, artists, designers, performers, and consultants. The Port Manager or designee shall have the authority to determine whether a particular service is a "personal service" under this definition.

(2) Contracts for Personal Services other than Architectural, Engineering and Surveying Services and Related Services. Personal services contracts of \$ 5,000 or less in a calendar year may be awarded by direct appointment. Personal services contracts in excess of \$ 5,000 in a calendar year shall be awarded according to the procedures described in ORS 279B.060. However, by separate resolution, the Local Contract Review Board may authorize certain personal services contracts, or a class of personal services contracts, to be exempted from competitive proposal requirements according to the requirements of ORS 279B.085. Contracts exempted from competitive proposal processes may be awarded by direct appointment. Personal services contracts existing on the effective date of these Rules may be extended by direct appointment.

(3) Contracts with architects, engineers, and land surveyors. Unless otherwise provided in this Section, contracts for Architectural, Engineering and Surveying Services and Related Services shall be awarded according to the procedures for competitive proposals described in ORS 279B.060 and these rules, and consistent with ORS 279C.110.

A contract for Architectural, Engineering and Surveying Services may be entered into by direct appointment if such contract is estimated not to exceed \$ 5,000 in a calendar year, or if the project described in the contract consists of work that has been substantially described, planned or otherwise previously studied or rendered in an earlier contract with the consultant that was awarded under these Rules, and the new contract is a continuation of that project.

Section XIII: DISPOSAL OF SURPLUS PROPERTY.

(1) "Surplus Property" is defined as any personal property of the Port that has been determined by the Port Manager or designee as being of no use or value to the Port.

(2) The Port Manager or designee may dispose of surplus property by submitting a request to the Board of Commissioners for a declaration that certain property is of no further use or value to the Port. The Board of Commissioners

shall, by resolution, declare such property "surplus" and authorize the means by which the Port Manager may dispose of the property, including granting the Port Manager discretion to dispose of the property in any appropriate manner. The Board of Commissioners may require the Port Manager to obtain an appraisal of the property prior to disposition.

(3) Surplus property may be disposed of in the manner that is most advantageous to the Port or the community at large, including, but not limited to, the following:

- (a) Public Auction. Auctions must be sufficiently advertised in the manner that is most likely to obtain a competitive bidding pool for the property. Employees of the Port may purchase surplus property from the Port only at an advertised auction, and only if the employee submits the highest bid for such property.
- (b) Donation. Surplus property may be donated or sold to any non-profit organization, any other local government, or any state or federal program created to dispose of surplus property.
- (c) Disposal. Surplus property determined to be of insufficient value to merit auction or donation may be disposed of in any appropriate manner.

Section XIV: CONCESSION AGREEMENTS.

(1) A "concession agreement" is a contract that authorizes and requires a private entity or individual to promote or sell, for its own business purposes, specified types of goods or services from a site within a building or upon land owned by the Port, and under which the concessionaire makes payments to the Port based, in whole or in part, on the concessionaire's sales revenues. The term "concession agreement" does not include an agreement, which is merely a flat-fee or per-foot rental, lease, license, permit, or other arrangement for the use of public property.

(2) Concession agreements are not required to be competitively bid. However, when it is in the Port's best interest to do so, the Port may obtain competitive proposals for concession agreements using the procedures described in ORS 279B.060.

Section XV: RULEMAKING AUTHORITY.

The Board shall have rulemaking authority to carry out its power and duties. Rules shall be adopted by ordinance or resolution after public notice has been given by one publication in newspaper (s) having general circulation throughout the county at least seven (7) days prior to adoption of the ordinance or resolution at a public meeting.

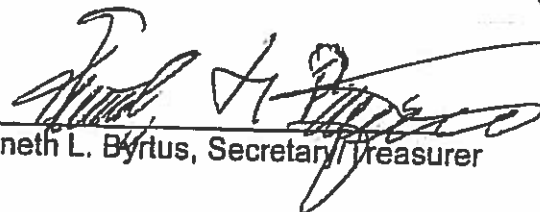
Section XVI: ADDITIONAL AUTHORITY OF THE BOARD.

In addition to the powers and duties established by these Rules, the Board shall have such additional powers as are authorized by law.

PASSED AND ADOPTED by a majority vote of the Port of Brookings Harbor Board of Commissioners and to take effect immediately on this 21st day of March, 2005.


S. John Zia, Chairman

ATTEST:


Kenneth L. Byrtus, Secretary/Treasurer

Port of Brookings Harbor Bill Payments for Stebbins Coffey & Collins

All Transactions				Yearly Totals	Average Last Two Years
Type	Num	Date	Amount		
Bill Pmt -Check	8424	11/17/2017	643.50		
Bill Pmt -Check	8373	10/24/2017	2,496.25		
Bill Pmt -Check	8317	09/19/2017	2,799.88		
Bill Pmt -Check	8275	08/23/2017	1,831.50		
Bill Pmt -Check	8227	07/27/2017	2,198.32		
Bill Pmt -Check	8192	07/05/2017	3,349.50		
Bill Pmt -Check	8122	05/12/2017	940.50		
Bill Pmt -Check	8102	05/02/2017	1,155.00		
Bill Pmt -Check	8044	03/22/2017	693.00		
Bill Pmt -Check	7998	02/28/2017	478.50		
Bill Pmt -Check	7957	02/03/2017	1,105.50		
Bill Pmt -Check	7906	01/05/2017	660.00	18,351.45	14,330.93
Bill Pmt -Check	7847	11/28/2016	990.00		
Bill Pmt -Check	7796	11/08/2016	1,485.00		
Bill Pmt -Check	7730	10/06/2016	2,655.00		
Bill Pmt -Check	7654	09/02/2016	476.40		
Bill Pmt -Check	7586	08/09/2016	60.00		
Bill Pmt -Check	7495	07/07/2016	298.00		
Bill Pmt -Check	7400	05/26/2016	2,006.00		
Bill Pmt -Check	7310	04/18/2016	1,890.00		
Bill Pmt -Check	7189	03/02/2016	390.00		
Bill Pmt -Check	7126	02/04/2016	60.00	10,310.40	
Bill Pmt -Check	7040	12/23/2015	1,479.73		
Bill Pmt -Check	6934	10/16/2015	2,703.83		
Bill Pmt -Check	6853	09/11/2015	241.00		
Bill Pmt -Check	6734	07/06/2015	2,505.00		
Bill Pmt -Check	6549	04/23/2015	120.00		
Bill Pmt -Check	6420	02/22/2015	210.00	7,259.56	
Bill Pmt -Check	6137	11/03/2014	30.00		
Bill Pmt -Check	5902	09/22/2014	525.00		
Bill Pmt -Check	5162	03/17/2014	600.00		
Bill Pmt -Check	5054	02/18/2014	810.00		
Bill Pmt -Check	31701	01/14/2014	273.00	2,238.00	
Bill Pmt -Check	31604	12/16/2013	2,552.66		
Bill Pmt -Check	31483	11/18/2013	1,545.00		
Bill Pmt -Check	31371	10/16/2013	2,265.00		
Bill Pmt -Check	31249	09/16/2013	3,304.35		
Bill Pmt -Check	31085	08/16/2013	330.00		
Bill Pmt -Check	30963	07/16/2013	240.00		
Bill Pmt -Check	30816	06/17/2013	375.00		
Bill Pmt -Check	30683	05/16/2013	585.00		
Bill Pmt -Check	30549	04/16/2013	1,185.00		
Bill Pmt -Check	30418	03/14/2013	1,320.00		
Bill Pmt -Check	30311	02/14/2013	2,580.00		

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Port of Brookings Harbor Bill Payments for Stebbins Coffey & Collins

All Transactions				
Type	Num	Date	Amount	
Bill Pmt -Check	30226	01/16/2013	2,280.00	18,562.01
Bill Pmt -Check	30127	12/17/2012	210.00	
Bill Pmt -Check	30036	11/16/2012	420.00	
Bill Pmt -Check	29925	10/16/2012	555.00	
Bill Pmt -Check	29770	09/17/2012	960.00	
Bill Pmt -Check	29464	07/16/2012	360.00	
Bill Pmt -Check	29331	06/18/2012	525.00	
Bill Pmt -Check	29073	04/16/2012	351.75	
Bill Pmt -Check	28967	03/16/2012	1,050.00	
Bill Pmt -Check	28876	02/16/2012	105.00	4,536.75
Bill Pmt -Check	28565	11/16/2011	366.75	
Bill Pmt -Check	28328	09/16/2011	825.00	
Bill Pmt -Check	28206	08/16/2011	908.50	
Bill Pmt -Check	28085	07/18/2011	1,425.00	
Bill Pmt -Check	27944	06/14/2011	837.00	
Bill Pmt -Check	27831	05/14/2011	135.00	
Bill Pmt -Check	27699	04/14/2011	1,643.04	
Bill Pmt -Check	27592	03/16/2011	240.00	
Bill Pmt -Check	27492	02/14/2011	1,215.00	
Bill Pmt -Check	27408	01/13/2011	300.00	7,895.29
Bill Pmt -Check	25780	12/14/2010	60.00	
Bill Pmt -Check	25587	10/14/2010	240.00	
Bill Pmt -Check	25479	09/14/2010	240.00	
Bill Pmt -Check	25397	08/17/2010	105.00	
Bill Pmt -Check	25281	07/13/2010	45.00	
Bill Pmt -Check	25173	06/14/2010	30.00	
Bill Pmt -Check	25083	05/12/2010	225.00	
Bill Pmt -Check	24994	04/14/2010	30.00	
Bill Pmt -Check	24830	02/17/2010	120.00	
Bill Pmt -Check	24744	01/14/2010	75.00	1,170.00
Bill Pmt -Check	24609	11/16/2009	165.00	
Bill Pmt -Check	24532	10/16/2009	210.00	
Bill Pmt -Check	24449	09/16/2009	180.00	
Bill Pmt -Check	24362	08/15/2009	30.00	
Bill Pmt -Check	24071	05/14/2009	75.00	
Bill Pmt -Check	24005	04/16/2009	180.00	
Bill Pmt -Check	23852	02/17/2009	300.00	
Bill Pmt -Check	23784	01/15/2009	165.00	1,305.00
Bill Pmt -Check	23706	12/16/2008	45.00	
Bill Pmt -Check	23543	10/16/2008	525.00	
Bill Pmt -Check	23451	09/15/2008	795.00	
Bill Pmt -Check	23352	08/14/2008	405.00	
Bill Pmt -Check	23262	07/16/2008	435.00	
Bill Pmt -Check	23165	06/16/2008	1,500.00	
Bill Pmt -Check	23074	05/16/2008	570.00	

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Port of Brookings Harbor Bill Payments for Stebbins Coffey & Collins

All Transactions

Type	Num	Date	Amount	
Bill Pmt -Check	22977	04/15/2008	615.00	
Bill Pmt -Check	22882	03/17/2008	690.00	
Bill Pmt -Check	22801	02/19/2008	435.00	
Bill Pmt -Check	22718	01/16/2008	30.00	6,045.00
Bill Pmt -Check	22633	12/17/2007	900.00	
Bill Pmt -Check	22537	11/16/2007	420.00	
Bill Pmt -Check	22442	10/16/2007	1,425.00	
Bill Pmt -Check	22347	09/17/2007	414.10	
Bill Pmt -Check	22236	08/16/2007	105.00	
Bill Pmt -Check	22141	07/17/2007	843.60	
Bill Pmt -Check	22031	06/16/2007	888.60	
Bill Pmt -Check	21944	05/16/2007	1,335.00	
Bill Pmt -Check	21852	04/13/2007	615.00	
Bill Pmt -Check	21774	03/16/2007	421.50	
Bill Pmt -Check	21692	02/16/2007	30.00	
Bill Pmt -Check	21615	01/16/2007	30.00	7,427.80
Bill Pmt -Check	21463	11/15/2006	240.00	
Bill Pmt -Check	21254	09/19/2006	780.00	
Bill Pmt -Check	21167	08/16/2006	390.00	
Bill Pmt -Check	21084	07/17/2006	495.00	
Bill Pmt -Check	20995	06/15/2006		
Bill Pmt -Check	20912	05/15/2006	600.00	
Bill Pmt -Check	20855	05/02/2006	591.50	
Bill Pmt -Check	20746	03/16/2006	295.00	3,391.50
Total			88,492.76	

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NEW BUSINESS AGENDA ITEM

DATE: *December 13, 2017*
RE: *Resolution No. 483, POBH Authorizing the Sale of Port Real Property*
TO: *Port of Brookings Harbor, Board of Commissioners*
ISSUED BY: *Gary Dehlinger, Port Manager*

OVERVIEW

- Board approved the sale of Port property to Ken Byrtus in the August 18, 2017 meeting.
- Curry County Title, Inc. requested a Resolution approving the sale of Port real property and authorizing the Port Manager to sign documents.

DOCUMENTS

- Resolution No. 483 Authorizing the Sale of Port Real Property. Page 1
- Sale Agreement with Byrtus Enterprises, LLC Page 2

COMMISSIONERS ACTION

- Board review and approval of Resolution No. 483 Authorizing the Sale of Port Real Property.

RESOLUTION NO. 483

PORT OF BROOKINGS HARBOR

**A RESOLUTION BY THE PORT OF BROOKINGS HARBOR AUTHORIZING THE
SALE OF PORT REAL PROPERTY**

WHEREAS, the Port of Brookings Harbor is a port district, organized and operated under the provisions of ORS Chapter 777, and has the authority to adopt resolutions; and

WHEREAS, the Board of Commissioners of the Port of Brookings Harbor now finds that it is necessary to adopt a resolution to authorize the sale of certain vacant real property owned by the Port of Brookings Harbor, said real property located on Lower Harbor Road, Brookings, OR, being further described as Tax Lot 41-13-08A, lot 400 (R26113); and to authorize Port Manager Gary Dehlinger to sign all sale documents.

NOW, THEREFORE, be it resolved by the Board of Commissioners of the Port of Brookings Harbor, Curry County, Oregon as follows:

1. The above recitals are true and accurate and are hereby incorporated herein by this reference.
2. That the Board of Commissioners hereby authorizes the sale of the vacant real property located on Lower Harbor Road, Brookings, OR, being further described as Tax Lot 41-13-08A, lot 400 (R26113); to Byrtus Enterprises, LLC, for the total amount of \$28,500.00.
3. That the Board of Commissioners hereby authorizes Port Manager, Gary Dehlinger to sign all sale documents on behalf of the Port of Brookings Harbor.
4. This resolution shall be effective upon its passage by the Board of Commissioners of the Port of Brookings Harbor.

**ADOPTED BY THE BOARD OF COMMISSIONERS OF THE PORT OF
BROOKINGS HARBOR THIS 15th DAY OF November, 2017.**

ATTEST:

By: Angi Christian, Board President

Andy Martin, Board Secretary

SALE AGREEMENT AND RECEIPT FOR EARNEST MONEY



ORIGINAL

DATE OF AGREEMENT: November 15, 2017

SELLER:

PORT OF BROOKINGS HARBOR
PO Box 848
Brookings, OR 97415

BUYER:

Byrtus Enterprises, LLC
16219 Lower Harbor Road
Harbor, OR 97415

RECITALS:

- A. Seller desires to sell to Buyer and Buyer desire to purchase from Seller that certain real property commonly known as:

A portion of Tax Lot 4113-08A – 400 - 27, approximately 4000 Square Feet of land, located in Harbor, Curry County, Oregon,

having the following legal description (the "Property"):

See Exhibit "A" attached hereto and incorporated herein by this reference.

AGREEMENT:

NOW, THEREFORE, FOR VALUABLE CONSIDERATION, THE PARTIES AGREE AS FOLLOWS:

1. **SALE AND PURCHASE:** Buyer agrees to purchase the property from Seller and Seller agrees to sell the property to Buyer for the sum of TWENTY EIGHT THOUSAND FIVE HUNDRED AND 00/00 DOLLARS (\$28,500.00) (the "Purchase Price").
2. **EARNEST MONEY:** Seller hereby acknowledges receipt of the sum ONE



ORIGINAL

THOUSAND and NO/100 DOLLARS (\$1,000.00) paid by Buyer as earnest money. The earnest money shall be applied to the purchase price on the closing date, as that term is defined in this agreement.

3. **PAYMENT OF PURCHASE PRICE:** The purchase price shall be paid as follows:
 - 3.1 At closing, the earnest money shall be credited to the purchase price;
 - 3.2 At closing, Buyer shall pay the balance of the purchase price, (\$27,500.00) in cash.
4. **CLOSING:** Closing shall take place on or before December 31, 2017, (the "Closing Date") at the offices of (Curry County Title, Inc. PO Box 672 Gold Beach, OR 97444) The parties recognize that it may be optimistic to close by December 31, 2017, and should that date become impractical, the parties agree to a June 30, 2018 closing date.

Buyer shall pay escrow fee, and any other fees, including the survey fee, and all costs, including the cost of the preliminary title report and title insurance.
5. **PRELIMINARY TITLE REPORT:** Within 10 days after full execution of this Agreement, Seller shall furnish to Buyer a preliminary title report showing the condition of title to the property, together with copies of all exceptions listed therein (the "Title Report"). Buyer will have 10 days from receipt of the Title Report to review the Title Report and to notify Seller, in writing of Buyer's disapproval of any exceptions shown in the Title Report. Those exceptions not objected to by Buyer are referred to below as the "Permitted Exceptions." Zoning ordinances, building restrictions, taxes due and payable for the current tax year, and reservations in federal patents and state deeds shall be deemed Permitted Exceptions. If Buyer notifies Seller of disapproval of any exceptions, Seller shall have 15 days after receiving the disapproval notice to either remove the exceptions or provide Buyer with reasonable assurances of the manner in which the exceptions will be removed before the transaction closes. If Seller does not remove the exceptions or provide Buyer with such assurances, Buyer may terminate this Agreement by written notice to Seller given within 15 days after expiration of such 15-day period, in which event the earnest money shall be refunded to Buyer and this Agreement shall be null and void.
6. **INSPECTIONS:** Buyer shall have full access to the property for the purpose of conducting Buyer's inspections. If Buyer is not satisfied, in its sole discretion, with the result of Buyer's inspections, Buyer may terminate this agreement by written notice to Seller given at any time before November 30, 2017, in which event the earnest money shall be refunded to Buyer. If Buyer fails to give any such notice of termination within the applicable time period, the respective condition will be deemed satisfied or waived.

7. **DEED:** On the Closing Date, Seller shall execute and deliver to Buyers a statutory warranty deed conveying the Property to Buyers, free and clear of all liens and encumbrances except the Permitted Exceptions.
8. **TITLE INSURANCE:** Within fifteen (15) days after closing, Buyer shall furnish Sellers with an ALTA owner's policy of title insurance in the amount of the purchase price, in standard form, insuring Buyers as the owner of the property, subject only to the usual printed exceptions and Permitted Exceptions. Buyer agrees to pay for the cost of the Title Insurance.
9. **TAXES, PRORATES:** Real property taxes for the current tax year, insurance premiums (if Buyer assumes the existing policy) and other usual items shall be prorated as of the Closing Date.
10. **POSSESSION:** Buyers shall be entitled to possession immediately upon closing.
11. **SELLER'S REPRESENTATIONS:** Buyer represents that they have accepted and executed this Agreement on the basis of their own examination and personal knowledge of the Property; that Seller and Seller's agents have made no representations, warranties, or other agreements concerning matters relating to the Property; that Seller and Seller's agency have made no agreement or promise to alter, repair, or improve the Property; and that buyer takes the Property in the condition, known or unknown, existing at the time of this Agreement, "AS IS".
12. **BINDING EFFECT/ASSIGNMENT RESTRICTED:** This agreement is binding upon and shall inure to the benefit of Seller, Buyer, and their respective heirs, legal representatives, successors and assigns. Nevertheless, Buyers shall not assign their rights under this agreement without Seller's prior written consent, which consent will not be unreasonably withheld.
13. **REMEDIES:** TIME IS OF THE ESSENCE REGARDING THIS AGREEMENT. If the transaction does not close, through no fault of Seller, before the close of business on the Closing Date, Buyer shall pay the earnest money deposit to Seller as liquidated damages. If Seller fails to deliver the deed described in Section 7 above on the Closing Date or otherwise fails to consummate this transaction, the earnest money will be refunded to Buyer.
14. **ARBITRATION:** Any controversy or claim arising out of or relating to this agreement, including, without limitation, the making, performance or interpretation of this agreement or the agreement documents, shall be settled by arbitration. If the Buyer or Seller disagree whether either is legally entitled to recovery damages under this agreement, then either party may make a written demand for arbitration. The parties agree to submit their controversy to binding arbitration before a single arbitrator. The arbitrator shall be an attorney licensed to practice law in the State of Oregon. If the parties cannot agree within 30 days



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to the selection of a single arbitrator after the election to arbitrate, either party may request that the selection of an arbitrator be made by a judge of a circuit or district court of Curry County, Oregon. Buyer and Seller will pay their own costs of arbitrator, and, unless costs are awarded by the arbitrator to the prevailing party, each are obligated to pay one-half of the arbitrator's fee.

Unless otherwise agreed, the arbitration shall be conducted in Curry County, Oregon. If arbitrator is commenced, the parties agree to permit discovery proceedings of the type provided by the Oregon Rules of Civil Procedure both in advance of and during recess of the arbitration proceedings. If arbitration is commenced, the agreement shall be governed by and construed in accordance with the laws of the State of Oregon. The parties agree that the arbitrator shall have no jurisdiction to render an award or judgment for punitive damages. The parties agree that the decision of the arbitrator shall be final and binding on the parties and a judgment may be entered on the arbitrator's award. The parties agree that all facts and other information relating to any arbitration arising under this contract shall be kept confidential to the fullest extent permitted by law. Unless otherwise inconsistent herewith, the provisions of ORS Chapter 36 shall apply to any arbitration hereunder. In the event of arbitration under the provisions of this agreement, the prevailing party shall be awarded reasonable attorney fees and related costs, disbursements, and expert witness fees as provided for in this contract.

- 15. ATTORNEYS' FEES:** In the event any action, suit, arbitration or other proceeding shall be instituted by either party to this agreement to enforce any provisions of this agreement or any matter arising therefrom, or to interpret any provisions of this agreement, the prevailing party shall be entitled to recover from the other a reasonable attorney fee to be determined by the court or arbitrator(s). In addition to recovery of a reasonable attorney fee, the prevailing party shall be entitled to recover from the other, costs and disbursements, including all costs of arbitration and the arbitrator(s) fees, and expert witness fees, as fixed by the court or tribunal in which the case is heard. In the event any such action, suit, arbitration or other proceeding is appealed to any higher court or courts, the prevailing party shall recover from the other a reasonable attorney fee for prosecuting or defending such appeal or appeals, in addition to the reasonable attorney fees in the lower court or courts or arbitration proceeding, such fee to be determined by the appellate court or lower court or arbitrator, as the appellate court may determine. In addition to recovery of a reasonable attorney fee on appeal, the prevailing party shall be entitled to recovery from the other party of costs and disbursements and expert witness fees as fixed by the appellate court. All costs and disbursements which may be awarded pursuant to this paragraph shall bear interest at the maximum legal rate from the date they are incurred until the date they are paid by the losing party.

- 16. NOTICES:** All notices and communications in connection with this agreement

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shall be given in writing and shall be transmitted by certified or registered mail, return receipt requested, to the appropriate party at the address set forth on page one of this agreement. Any notice so transmitted shall be deemed effective on the date it is placed in the United States mail, postage prepaid. Either party may, by written notice, designate another address for the purpose of this agreement.

17. **ENTIRE AGREEMENT:** This agreement sets forth the entire understanding of the parties with respect to the purchase and sale of the property. This agreement supersedes any and all prior negotiations, discussions, agreements and understandings between the parties. This agreement may not be modified or amended except by a written agreement executed by both parties.
18. **APPLICABLE LAW:** This agreement shall be construed, applied, and enforced in accordance with the laws of the State of Oregon.
19. **ACCEPTANCE:** This agreement shall be null and void unless accepted by Seller.
20. **STATUTORY WARNING:**

Pursuant to 2005 Oregon laws Chapter 311, all owners' real estate sales agreements must state the following:

THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS, WHICH, IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND WHICH LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930 IN ALL ZONES. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER CHAPTER 1, OREGON LAWS 2005 (BALLOT MEASURE 37 (2004)). BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND THE EXISTENCE OF FIRE PROTECTION FOR STRUCTURES, AND THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER CHAPTER 1, OREGON LAWS 2005 (BALLOT MEASURE 37 (2004)).

Further, pursuant to 2005 Oregon laws, Chapter 311, all instruments contracting transfer or transferring title to real property must state:

BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE



ORIGINAL

PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER CHAPTER 1, OREGON LAWS 2005 (BALLOT MEASURE 37 (2004)). THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES, AND, TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930, AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER CHAPTER 1, OREGON LAWS 2005 (BALLOT MEASURE 37 (2004)).

SELLER:

Port of Brookings Harbor by
Gary Dehlinger – Port Manager

BUYERS:

Byrtus Enterprises, LLC by
Kenneth Byrtus

 ORIGINAL

EXHIBIT A

A parcel of land lying in the Northeast Quarter of Section 8, Township 41 South, Range 13 West, Willamette Meridian, Curry County, Oregon, more particularly described as follows:

COMMENCING at a 2-1/2" brass cap in asphalt set at the Northwest corner of D.L.C. 40;

thence North 02°05'31" West 1928.39 feet to the TRUE POINT OF BEGINNING;

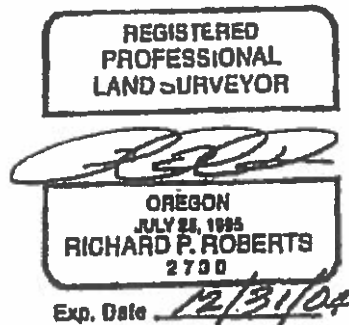
thence North 16°46'23" West 100.00 feet;

thence North 73°13'37" East 40.00 feet;

thence South 16°46'23" East 100.00 feet;

thence South 73°13'37" West 40.00 feet to the POINT OF BEGINNING.

Bearings are based on the North line of said D.L.C. 40 as being North 89°47'00" West as monumented and marked by Marquess and Associates per County Survey No. 41-1288.



NEW BUSINESS AGENDA ITEM

DATE: *December 13, 2017*
RE: *Procurement Request for Zola's Sewer Upgrade*
TO: *Port of Brookings Harbor, Board of Commissioners*
ISSUED BY: *Gary Dehlinger, Port Manager*

OVERVIEW

- Harbor Sanitary conducted Port inspection of all the sewer system throughout the Port in December 2016. Zola's sewer enclosure was a rotten wood cover. The sewer holding tank is below ground and exposed to possible storm water intrusion.
- Rotten wooden enclosure was repaired within weeks of the inspection. No other work was completed due to funding issues.
- Zola's sewer upgrade is the last upgrade needed to complete Harbor Sanitary request.
- It has come to our attention that similar projects with public funding that exceed \$50,000 are subject to prevailing wage rate laws.
- Pacific Excavation has completed two sewer upgrades this year at a total of \$45,800. Estimate to complete Zola's sewer upgrade is \$17,800. Combined total would be \$63,600.
- BOLI prohibits dividing projects to avoid prevailing wage rates.
- Requesting the Board to have staff investigate possible BOLI commission exception to the \$50,000 limit or proceed per BOLI requirements to complete this work. Further inquiry will be required to find out ramifications this will bring on prior work completed.
- Another question to the Board, is the sewer upgrade worth the cost vs the condition of the building. This upgrade will outlast the building and what is the future of the building in the next few years.

DOCUMENTS

- Photos of existing sewer system, 4 pages..... Page 1
- Pacific Excavation payments to date..... Page 5
- Pacific Excavation quote for Zola's Sewer Upgrade..... Page 6
- BOLI Prevailing Wage Rate Laws, Exemptions..... Page 8
- BOLI Public Agency Responsibilities..... Page 10

COMMISSIONERS ACTION

- Requesting the Board to have staff investigate possible BOLI commission exception to the \$50,000 limit or proceed per BOLI requirements to complete this work. Further inquiry will be required to find out ramifications this will bring on prior work completed.
- Another question to the Board, is the sewer upgrade worth the cost vs condition of the building. This upgrade will outlast the building and what is the future of the building and tenant in the next few years.

DEC 2016

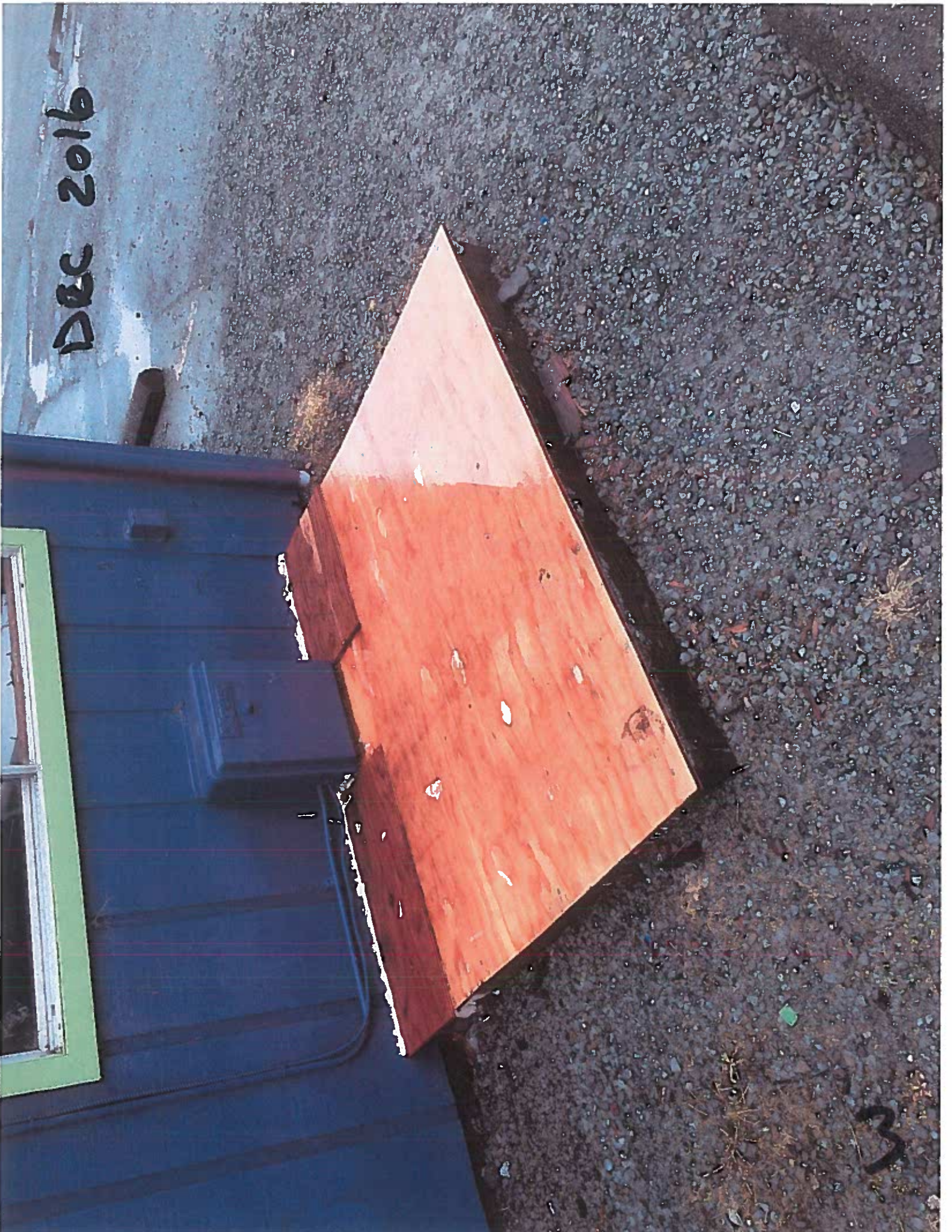


DEC 2016

2



Dec 2016



THIS IS NEXT
SEWER TANK
VICINAR / REPAIR.



Port of Brookings Harbor
Bill Payments for Pacific Excavation, Inc
All Transactions

<u>Type</u>	<u>Num</u>	<u>Date</u>	<u>Amount</u>	
Bill Pmt -Check	149	11/17/2017	15,600.00	Slugs N Stones Sewer Upgrade
Bill Pmt -Check	132	08/03/2017	30,200.00	Retail Restroom Sewer Upgrade
Total			<u><u>45,800.00</u></u>	



79 N. Danebo Ave
Eugene, OR 97402
Phone: 541-726-7380
Fax: 541-726-7943
CCB 135018

BID PROPOSAL

Project: Pump Station-Zola's
Location: Brookings, OR
Bid to: Port of Brookings
Attn: Brent
Phone: 541-661-7280
Fax:

Bid Date: 17-Nov-17
Arch/Engr: N/A
Plan Sheets: N/A
Plans Dated: N/A
Addenda Rec'd: N/A
Sheets Attached: N/A

Estimator: Beau Solesbee
Cell Number: 541-619-4196
Email Address: Beau@pacificexc.com

Pacific Excavation proposes to provide Labor, Equipment, and Materials to perform the following:

Demo:

Remove and dispose of the existing steel cover.
Remove and dispose of the existing pumps, piping, and supports.
Pacific Excavation onsite during pumping and cleaning of existing pump station.

Site Work:

Clean-up and restore site back to existing or better condition.
Install 8'x6'x4" thick concrete apron around wetwell lid.

Pump Station:

Supply and install new pumps, floats, and piping. Installation will be similar to the existing pumps and piping configuration.
Supply and install new plastic riser and lid for the existing wetwell. Wetwell riser will be sealed to prevent water penetration. All pipe penetrations will be sealed.
Make connection to existing discharge line to allow for a complete working system.
Start-up and testing of the pumps.
Pacific Excavation onsite during cleaning and removal of sewer in pump station.
(See Conditions of Bid Below)

Electrical:

Make electrical connections for the pumps and utilize the existing pump control panel.
Pumps provided are 1/2" HP, 208-230 Volt, Single Phase, and 6.8 Amps.
Supply new supports for the existing pump control panel. If not required there is \$500.00 credit.

Pump Station	\$	17,800.00
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Conditions of Bid:

This is a Lump Sum Price Proposal for Items Shown.
Price quote is contingent upon acceptance within 30 days.
Proposal is based on commercial wages.
All Work to be Performed During Standard Hours, 7:00 AM to 5:00 PM - Nights / Weekends are Not Included.
Provide a 1 year install warranty. Equipment supplied limited warranty per Manufacturer.
Port of Brookings to remove (Vac-x) any sewer left over in pump station prior and during removal of existing pumps and piping.

Exclusions:

Bonds, Permits, Builders Risk, City - County - ODOT Fees
Density Testing & Special Inspection
Surveying
Coatings & Painting
Erosion Control Measure
Construction Fencing or Temporary Facilities
Landscaping, Seeding, Topsoil, and Irrigation - Including Sleeves
Handling of Contaminated soil.
Any Utilities other than listed above.
Asphalt & Concrete Installation or Replacement

Terms and Conditions

PACIFIC EXCAVATION, INC. (Pacific)

Pacific agrees to provide all labor, equipment and material to perform the work described in the proposal form according to the plans and specifications for the project described on the proposal form. Pacific reserves the right to subcontract all or a portion of the work.

COMPLETION. The work to be completed under this contract shall be commenced as soon as possible or within _____ calendar days after receipt of a signed contract. The work shall be completed as soon as possible or within _____ calendar days after commencing the work, subject to normal delays, weather conditions, delays beyond Pacific's control and any delays caused by Customer or its agents. If Pacific's delay is caused by Customer, by any other contractor employed by Customer, or for any reasons beyond Pacific's control, the completion date shall be extended for a period equivalent to the time lost for such delays. If Pacific suffers any loss by reason of any delay not the fault of Pacific, Pacific is entitled to receive from Customer reasonable compensation for all costs resulting from the delay. In no event shall Pacific be liable for consequential damages incurred by Customer as a result of any failure by Pacific to perform this contract.

EXTRA WORK. All extra work requested in connection with this contract shall be accomplished only upon written authorization of the Customer or Customer's agent, and Pacific. The Pacific Extra Work Authorization form is hereby agreed to be written authorization to proceed with work and agreement to pay for work per contract terms. Notwithstanding the foregoing, Pacific shall be entitled to payment for changes requested orally by Customer. If the parties are unable to agree regarding a price adjustment, any extra work shall be paid on a cost plus basis, in accordance with Pacific's standard charges.

PAYMENT. Pacific shall make monthly progress billings for work completed on or about the 25th of each month, and the payment on each such billing shall be due and payable in full on the 10th of the month following the progress billing. A late charge of two percent (2%) per month will be imposed on past due balances. Final billing is due 10 days after receipt of final billing invoice.

If any of such payments are not paid when due, Pacific may, at its option and sole discretion and without prejudice to any other remedies available to it and while any such payment remains unpaid, refuse further performance of the terms and conditions of this contract and remove its men and equipment from the job site until all payments are brought current, the exercise by Pacific of this option to suspend further performance shall not subject it to any claims of liability by or to Customer for damage of any kind or nature resulting directly or indirectly from such exercise.

RETENTION. Monthly progress billings shall include a 5% retention amount. All retention accumulated shall be held by Customer or Customer's Agent until final inspection and acceptance procedures have been completed (see below). Once final inspection, acceptance, and punchlist items have been completed Customer shall release all retention within 10 days from final completion date.

ESCALATION. All material supply escalation for pipe and asphalt shall be passed on to Customer. Asphalt escalation shall be determined by the Oregon Dept. of Transportation's Monthly Asphalt Cement Material Price, (see attachment A)

LIENS. Pacific fully reserves the rights to assert any and all liens against Customer and third parties arising under all applicable Federal, State, and Local lien and bond claim statutes, in the event the amounts stated in this contract are not paid when due.

SUB-SURFACE Any area turned over to Pacific for the performance of work should be firm and unyielding and under no circumstances shall Pacific be responsible for the conditions of the base below the grade at which its portion of the work begins, or for any defects or failures in its work due to the condition of such base.

WORKING CONDITIONS If Customer insists upon completion of work against the advice of Pacific because of weather or sub-surface conditions, Customer assumes all risk for defects and all extra costs due to such weather or sub-surface conditions.

BURIED UTILITIES. The Customer assumes the risk of damage to buried, or otherwise concealed, utility lines or other facilities or objects. Pacific accepts no liability for damage resulting to utilities or other facilities or objects buried, or otherwise concealed, beneath the area of construction.

PERMITS AND LICENSES. It shall be the Customer's responsibility to obtain and pay the costs of all permits and licenses required to accomplish the work covered under this contract.

CONCEALED CONDITIONS. If conditions are encountered during the work which are either concealed physical conditions which differ materially from those specified in the plans and specifications or are unknown and unusual in nature which differ materially from those ordinarily found, Pacific is entitled to a change in the contract price and time for performance to reasonably compensate it for the changed conditions so encountered, and Pacific may suspend performance until the parties agree to additional compensation. If Pacific encounters or suspects that it may encounter any hazardous materials, as defined under any state or federal environmental law, Pacific may immediately suspend performance pending a determination of compliance with all such environmental laws and Customer's responsibility with respect to such hazardous materials. Customer shall indemnify and hold Pacific harmless from any loss, liability or expense in connection with such hazardous materials.

FINAL INSPECTION AND ACCEPTANCE. Pacific shall notify Customer when the work is substantially completed. Within 10 days after such notice, Customer shall make a final inspection and provide to Pacific a punch list of those items which Customer believes require completion prior to final acceptance, if any. If Customer fails to provide such a punch list, the work shall be deemed completed and payment in full shall be forthwith made to Pacific including any retainage.

DISPUTES. In the event of a dispute or controversy arising between the parties to this agreement, the parties, and each of them, are agreed that said controversy shall be resolved in accordance with the arbitration procedures set forth in O.R.S. 33.210 through O.R.S. 33.340, and that the parties, and each of them, shall be bound by the said procedures and the award made thereunder; provided, however, that nothing herein is intended to void any substantive rights of Pacific, provided by law and particularly any rights to file a mechanic's lien, excepting that the procedure for foreclosing said lien shall be through a Board of Arbitration as agreed hereto by the parties.

LEGAL EXPENSE. If any legal proceeding is commenced to interpret or enforce any provision of this agreement including any arbitration proceeding, the prevailing party shall be entitled to recover a reasonable attorney's fee in such proceeding, or any appeal thereof, in addition to the costs and disbursements allowed by the law.

HAZARDOUS MATERIALS. Owner represents and warrants to Pacific that there are no environmentally hazardous materials or wastes contained on the property or on or in the soil to be excavated and/or removed by Pacific, and there are no potentially hazardous environmental conditions on the property and that property has not been identified by any governmental agency as a site upon which, or potentially upon which, environmentally hazardous materials have been (or may have been) located or deposited. Owner agrees to indemnify and hold Pacific harmless for any and all damages, claims, demands, and judgments arising from or connected in any manner with hazardous materials or wastes, or hazardous environmental conditions, on the property or in the soil to be excavated or removed by Pacific.

WARRANTY. Unless otherwise stated in Project Specifications, Pacific warrants all materials or services provided by Pacific to be of good quality and workmanship and free from defects under normal proper use and service for a period of one (1) year from the date of substantial completion of the project. Pacific provides no warranty for defects caused by sub-surface conditions and/or failure of materials previously supplied by others. If defects occur, Pacific shall be notified immediately.

Agreed: _____

Date: ____/____/____

7

WAGE AND HOUR DIVISION, PREVAILING WAGE RATE UNIT



2016 Edition

Prevailing Wage Rate Laws



A Handbook for
Oregon Contractors,
Subcontractors
and Public Agencies

s into a contract that exceeds
des a covered activity (i.e.,
struction, major renovation or
ontract is subject to the PWR law.

ounty may enter into a retainer
ay maintenance wherein the scope
ivities such as sealing cracks in the
otholes, repairing culverts, fixing
traffic lanes, etc., which have been
covered activities as defined in OAR
f these maintenance duties are
the contract value is over \$50,000,
d be subject to the PWR law.
other work done in support of that
be covered.

ie prevailing wages for travel time
veling between the work site and a
l yard or another covered site. If
otherwise entitled to travel time
b site to job site during the workday,
n the employer must pay that time at
te which is at least minimum wage.

ompensable time, and if the travel time
blic contract, the hours of travel time
vard daily overtime. For more
the Overtime Requirements under the
nsibilities section of this book.

k
1 a project subject to the PWR law is
warranty, all work done under that
so be subject to the PWR law. This is
f the warranty is contracted separately
action contract.

Exemptions from the PWR Law

A project may meet the definition of the term "public works," but if one of the following exemptions applies to the project, the project will not be subject to the PWR law.

➤ Projects Costing \$50,000 or Less

Except for the construction or installation on public property of any device, structure or mechanism that uses solar energy, the PWR law does not apply to projects costing \$50,000 or less. This amount is based on the cost of the entire project, not individual contracts. The total project cost includes the value of work performed by every person paid by a contractor or subcontractor for the person's work on the project. The price of a project also includes all materials and supplies, if purchased specifically for the project.

The total project cost does not include the value of donated materials or work performed on the project by individuals volunteering to the public agency without pay. ORS 279C.810(2)(a); OAR 839-025-0100(1)(a)

If a project begins with a total project cost under \$50,000, but change orders increase the project cost to more than \$50,000, the entire project will be subject to the PWR law, including all work already performed on the project. OAR 839-025-0100(1)(a)

➤ Projects That Do Not Use Funds of a Public Agency

Generally, the PWR law does not apply to projects for which no funds of a public agency are directly or indirectly used. The exceptions to this are for the

Prevailing Wage

Department

Public Agency Responsibilities

Back to BOLI Home Page

Public agencies must comply with a host of legal contracting requirements. This guide covers only those requirements related to the PWR law. The Oregon Attorney General's Public Contracts Manual has information about other statutes, rules and guidelines that apply to public contracting.

About Us

Contact Us

Planned Public Improvement Summary

An agency must submit to BOLI a list of public improvements it plans to fund during the coming budget period. The agency must submit the list at least 30 days before it adopts a budget, and should revise the list if its plans change. If an agency plans to use its own personnel and equipment to perform any project estimated to cost more than \$125,000, it must also provide documentation showing that it is less expensive for the agency to use its own resources than it is to contract out the project. Once filed, all documents are public records. Filings should be made with the Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 N.E. Oregon Street #1045, Portland, Oregon 97232. Forms are available for providing this information (WH-118 and WH-119); they can be found in the back of every PWR rate book and on BOLI's website at www.oregon.gov/boli. ORS 279C.305; OAR 839-025-0008

Prevailing Wage Rates

Prevailing Wage Publications

Definitions of Covered Occupations

Prevailing Wage Rate Laws

Notice of Public Works

Agencies are required to notify BOLI within 30 days after awarding any public works contract subject to PWR law. Agencies must provide BOLI's Notice of Public Works form (WH-81), and include a copy of the disclosure of first-tier subcontractors submitted by the contractor to the public agency pursuant to ORS 279C.370. These must be provided to the Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 N.E. Oregon Street, #1045, Portland, Oregon 97232.

Coverage Determinations

PWR Complaint Form

When a project is a public works project of the type described in ORS 279C.800(6)(a)(B), (C), (D) or (E) (i.e., a public works project for which no public agency awards a construction contract), the public agency that enters into an agreement to provide funds, occupy or use the project, or allow construction to occur on public property must submit the WH-81 form to BOLI. The form is due at the time the agency enters into an agreement for the project. ORS 279C.835; OAR 839-025-0013

Formulario de Queja

Ineligible Contractors

Occupational Wage Survey

Prevailing Wage Fee

On all projects subject to the PWR law, the public agency must pay a fee to BOLI's PWR Unit for every contract awarded to a contractor. The amount of the fee due is one-tenth of one percent (.001) of the contract price; however, there is a minimum fee of \$250 and a maximum fee of \$7,500. The fee is due at the same time the public agency submits the Notice of Public Works (WH-81) form. If a public agency awards multiple contracts on a single project, a fee is due for each contract awarded. The public agency must submit a Public Work Contract Fee Information form (WH-39) with payment of the fee. This form can be found in the back of all PWR rate books, and also on BOLI's website at www.oregon.gov/boli. BOLI issues a Certificate of Payment as proof of payment.

PWR Advisory Committee

Oregon Revised Statutes

Administrative Rules

The public agency must submit a Fee Adjustment form (WH-40) to BOLI within 30 days of the final progress payment after completion of the contract when change orders increase or decrease the original contract by \$100,000 or more. If the fee would change by \$100 or more, the public agency must pay any additional fee and submit the adjustment form. If BOLI owes the public agency a refund, the bureau issues it once the adjustment form is processed.

If a contract does not have a "hard" bid amount, the public agency should base the initial fee on the guaranteed maximum. Once the project is complete, the public agency may file an adjustment form that reflects the actual cost of the project. If there is no guaranteed maximum amount, the agency must make a good faith estimate of the contract price and calculate the fee based on this estimated amount. ORS 279C.825; OAR 839-025-0200 et seq.

When a project is a public works project of the type described in ORS 279C.800(6)(a)(B), (C), (D), or (E), (i.e., a public works project for which no public agency awards a construction contract), the public agency that enters into an agreement to provide funds, occupy or use the project, or allow construction to occur on public property must pay a PWR fee to the PWR Unit. The amount of the fee is based on the total project amount. If the total project amount is not known, the public agency must base the fee on the guaranteed maximum amount of the project or must make a good faith estimate of the contract price. If multiple agencies commit funds or will occupy or use the space, if not otherwise previously agreed upon by the agencies, the fee will be pro-rated proportionately based on the amount of funds provided or the space occupied or used by each agency. OAR 839-025-0230

Contracts and Contract Specifications Require Specific Provisions

Public agencies must include certain items in the contract specifications and in the contracts for projects subject to the PWR law.

Contract specifications must include:

- A provision stating the applicable prevailing wage rates, including any appropriate amendment. A statement incorporating the rates by reference will satisfy this requirement, but the reference must be specific as to the title and date of the publication that applies, and the date of any amendment that applies. ORS 279C.830(1)(a); OAR 839-025-0020(4) and (5)
- If the project is subject to both the state prevailing wage rate law and the federal Davis-Bacon Act, a requirement that the contractor pay the higher of the applicable state or federal prevailing rate of wage. ORS 279C.830(1)(b); OAR 839-025-0020(4)(c)
- A provision that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt. ORS 279C.830(2); OAR 839-025-0020(e)

Contracts must include:

- A provision that workers must be paid not less than the applicable state prevailing rate of wage. ORS 279C.830(1)(c); OAR 839-025-0020(3)(a)
- If the project is subject to both the state prevailing wage rate law and the federal Davis-Bacon Act, a provision that the contractor pay the higher of the applicable state or federal prevailing rate of wage. ORS 279C.830(1)(d); OAR 839-025-0020(3)(b)
- A provision that if the contractor fails to pay for labor and services, the agency can pay for them and withhold these amounts from payments to the contractor. ORS 279C.515; OAR 839-025-0020(2)(a)

- A provision that the contractor must pay daily, weekly, weekend and holiday overtime as required in ORS 279C.540. ORS 279C.520(1); OAR 839-025-0020(2)(b)
- A provision that the employer must give written notice to the workers of the number of hours per day and days per week they may be required to work. ORS 279C.520(2); OAR 839-025-0020(2)(c)
- A provision that the contractor must make prompt payment for all medical services for which the contractor has agreed to pay, and for all amounts for which the contractor collects or deducts from the worker's wages. ORS 279C.530; OAR 839-025-0020(2)(d)
- A provision that requires the contractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt. ORS 279C.830(2)(a); OAR 839-025-0020(2)(e)(A)
- A provision that requires the contractor to include in every subcontract a provision requiring the subcontractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt. ORS 279C.830(2)(b); OAR 839-025-0020(2)(e)(B)

Public agencies are jointly and severally liable for any unpaid prevailing wages unless they have included a statement in the contract documents, such as the contract, specifications or the advertisement for bid, that all workers must be paid the applicable prevailing wage rate. ORS 279C.855(3); OAR 839-025-0080(4)

If a public works project is subject to the Davis-Bacon Act but the public agency fails to include the state and federal prevailing rates of wage in the specifications, or fails to provide in the contract that workers on the public works must be paid not less than the higher of the applicable state or federal prevailing rate of wage, and the workers on the project are paid the lower rather than the higher prevailing wage rate, the public agency is liable to the workers for the difference between the lower and the higher rate, plus an equal amount as liquidated damages, for every hour worked. ORS 279C.855(4); OAR 839-025-0080(6)

Applicable Rates for Public Works Projects

Generally, the applicable prevailing wage rates for a public works project are those in effect at the time the initial specifications are first advertised for bid solicitations by the public agency. The rates in effect at that time are the rates that are to be used for the duration of the project.

Additional provisions exist for determining the applicable rates for the following:

• Projects Subject to Both State and Federal PWR Laws

If the project is subject to both the state prevailing wage rate law and the federal Davis-Bacon Act, the public agency may opt to use the federal method described in 29 CFR 1.6 to establish the applicable state prevailing wage rates for the project. OAR 839-025-0020(4)(d)

• Projects Using a Construction Manager/General Contractor (CM/GC)

When a public agency uses a CM/GC on a public works project, the CM/GC will generally perform various pre-construction tasks such as design phase development, constructability reviews and cost estimating. A guaranteed maximum price for completion of the construction-type work is typically established by amendment of the initial contract after the pre-construction tasks are complete. The CM/GC then typically acts as the General Contractor and begins the subcontracting process. Use of a CM/GC to manage public works projects for a public agency does not relieve the agency or the CM/GC of their responsibilities under the prevailing wage rate regulations.

The rates in effect at the time the CM/GC contract becomes a public works contract are the applicable rates to be used for the duration of the project. The CM/GC contract becomes a public works contract either when the contract first constitutes a binding and enforceable obligation on the part of the CM/GC to perform or arrange for the performance of construction, reconstruction, major renovation or painting, or when the CM/GC contract enters the construction phase, whichever occurs first.

For example, the CM/GC will have a binding and enforceable obligation to perform or arrange for the performance of construction after the public agency and CM/GC commit to the guaranteed maximum price. The CM/GC contract enters the "construction phase" when the agency first authorizes the performance of early construction-type work directly related to the public works project. OAR 839-025-0020(6)

• Public/Private Projects

For projects that meet parts (B), (C), (D), or (E) of the definition of "public works" (i.e., projects on which no public agency awards a construction contract), the applicable rates are those in effect at the time the public agency first enters into an agreement with a private entity for the project. After that time, the specifications for any contract for the public works shall include the applicable prevailing rate of wage. ORS 279C.830(1)(e)

Residential Projects and Rates

BOLI has modeled its definition of "residential construction" after the U.S. Department of Labor's definition of such projects. Generally, residential construction projects are projects for the construction, reconstruction, major renovation or painting of a single family house or apartment building of no more than four stories in height. The residential project includes all incidental items associated with the project, such as site work, parking areas, utilities, streets and sidewalks. OAR 839-025-0004(24)(a)

BOLI does not survey or publish residential rates, so residential construction projects as defined in OAR 839-025-0004(24) and subject to Oregon's PWR law generally use the federal residential Davis-Bacon wage rates. These rates can be found on the U.S. Department of Labor's website, www.dol.gov. The federal residential rates apply to residential construction projects subject to Oregon's PWR law, even if the project is not subject to the federal Davis-Bacon Act. However, if the federal residential rate for a particular trade or classification is ever less than Oregon's minimum wage rate required by ORS 653.025, no less than Oregon's minimum wage must be paid to the worker.

In some instances, there are no applicable federal residential wage rates for certain trades or classifications. If a wage rate is needed on a residential project subject to both state and federal prevailing wage rate law, a request for a special wage rate determination should be submitted according to the federal requirements in Title 29 CFR, Part 5.5(a)(1)(ii).

If a wage rate is needed on a residential project that is subject only to Oregon's PWR law, the public agency must submit a request for a special wage rate determination to BOLI at least 15 days prior to the date the specifications for the project are first advertised. If a public agency fails to request a special wage rate determination as required, the rates in the applicable BOLI rate book will apply to those trades or classifications for which there is no applicable federal residential rate. OAR 839-025-0037

Ensuring a Payment Bond is Filed When Required

The public agency should verify that the contractor files a payment bond or posts another security when required pursuant to ORS 279C.380 and 279C.390. If the agency fails to do so, it is jointly liable with the contractor for any unpaid prevailing wages. The agency may pay any claims for unpaid labor and deduct the amount of the claims from the amount it pays the contractor. ORS 279C.625

Withholding Retainage

In addition to any other retainage obligated by the Public Contracting Code, the PWR law requires public agencies to withhold 25 percent of any amount earned by the prime contractor if the prime contractor does not turn in its certified payroll reports each month. Once the certified payroll reports have been submitted, the public agency must pay the 25 percent withheld within 14 days. ORS 279C.845(7); OAR 839-025-0010(5)

BOLI Prohibits Dividing Projects to Avoid PWR

Public agencies may not divide a project to avoid compliance with the PWR law. ORS 279C.827; OAR 839-025-0310

BOLI treats separate contracts for the same project as a single project for PWR purposes and may issue an order compelling the violating agency to treat the contracts as a single project.

The bureau looks at a number of factors to decide if separate contracts actually constitute a single project, such as:

- The physical separation of project structures;
- Whether a single public works project includes several types of improvements or structures;
- The anticipated outcome of the particular improvements or structures the agency plans to fund;
- Whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function;
- Whether the work on the project is performed in one time period or in several phases as components of a larger entity;
- Whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project;
- The manner in which the public agency and the contractors administer and implement the project;
- Other relevant matters as may arise in any particular case.

If a public works project is of the type described in ORS 279C.800(6)(a)(B) or (C), the Commissioner of the Bureau of Labor and Industries will divide the project if appropriate, considering the above factors, so that the parts that do not include public funds or that will not be occupied or used by the public agency will not be subject to the PWR law.

Additionally, if a project includes parts that are publicly owned and parts that are privately owned, the commissioner will divide the project if appropriate, considering the above factors, so that the parts of the project that are privately owned are not subject to the PWR law. Interested parties must submit a coverage determination request to BOLI when

considering such a division of a project. ORS 279C.827; OAR 839-025-0310; ORS 279C.815

Agreements with Agencies of Other States

A public agency in Oregon is prohibited from entering into an agreement with another state, or a political subdivision of another state, that allows a contractor or subcontractor to pay less than the applicable prevailing wage rate on a public works project. ORS 279C.829

A Checklist for Public Agencies**Required:**

- ☐ Submit the Planned Public Improvement Summary (WH-118) to BOLI prior to each budget period.
- ☐ Include the prevailing wage rates, public works bond requirement and other required language in the contract and the contract specifications.
- ☐ Submit the Notice of Public Works form (WH-81) and copy of the disclosure of first-tier subcontractors to BOLI within 30 days after awarding the contract.
- ☐ Submit the PWR fee and Public Works Fee Information form (WH-39) to BOLI for every public works contract awarded, within 30 days after awarding the contract or committing funds to the project.
- ☐ Verify that the agency has not contracted with any of the contractors on BOLI's current *List of Contractors Ineligible to Receive Public Works Contracts*. This list of debarred contractors is on BOLI's website at www.oregon.gov/boli.
- ☐ Require that the contractor has a payment bond or has obtained a cashier's check or certified check, unless exempt.
- ☐ Withhold 25 percent of any amount earned by the prime contractor if the prime contractor fails to submit its certified payroll reports as required.

Suggested:

- ☐ Verify that the project manager has knowledge of construction and worker classifications.
- ☐ Verify that subcontractors know that the job is a prevailing wage rate job.
- ☐ Verify that none of the subcontractors working on the project are on BOLI's current *List of Contractors Ineligible to Receive Public Works Contracts*.
- ☐ Confirm that the correct prevailing wage rates and the details of any benefit plans are conspicuously posted on the project site.
- ☐ Verify that all contractors and subcontractors are using the correct work classifications.
- ☐ Confirm that all contractors and subcontractors are filing complete and accurate certified payrolls, and are paying employees the correct prevailing wage rate.

Public Contracting Requirements

For information about public contracting requirements that fall outside of the PWR law, see the Oregon Attorney General's Public Contracts Manual.

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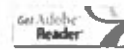
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