

Enrolled
House Bill 2140

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Attorney General Hardy Myers for Department of Justice)

CHAPTER

AN ACT

Relating to the Public Contracting Code; creating new provisions; amending ORS 279A.010, 279A.025, 279A.050, 279A.200, 279B.005, 279B.050, 279B.080, 279B.085, 279B.130, 279B.200, 279B.270, 279B.405, 279B.415, 279C.320, 279C.335, 279C.345, 279C.350, 279C.355, 279C.365, 279C.375, 279C.390, 279C.400, 279C.405, 279C.410, 279C.460, 279C.800, 279C.810, 279C.815, 279C.830, 279C.836 and 279C.870 and sections 105, 105b, 110, 113 and 132, chapter 794, Oregon Laws 2003; repealing section 332a, chapter 794, Oregon Laws 2003; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 279A.010 is amended to read:

279A.010. (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.”**

[(i)(A)] **(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.

[(j)] **(L)** “Industrial oil” means any compressor, turbine or bearing oil, hydraulic oil, metal-working oil or refrigeration oil.

[(k)] **(m)** “Judicial department” has the meaning given that term in ORS 174.113.

[(L)] **(n)** “Legislative department” has the meaning given that term in ORS 174.114.

[(m)] **(o)** “Local contract review board” means a local contract review board described in ORS 279A.060.

[(n)] **(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.

[(o)] **(q)** “Local government” has the meaning given that term in ORS 174.116.

[(p)] **(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.

[(q)] **(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.

[(r)] **(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.

[(s)] **(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.

[(t)] **(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.

[(u)] **(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.

[(v)] **(x)** “Proposer” means a person that submits a proposal in response to a request for proposals.

[(w)] **(y)** “Public body” has the meaning given that term in ORS 174.109.

[(x)] **(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.

[(y)] **(aa)** “Public contracting” means procurement activities described in the Public Contracting Code relating to obtaining, modifying or administering public contracts or price agreements.

[(z)] **(bb)** “Public Contracting Code” or “code” means ORS chapters 279A, 279B and 279C.

[(aa)] **(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.

[(bb)] **(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.

[(cc)] **(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.

[(dd)] **(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.

[(ee)] **(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.

[(ff)] **(hh)** “Recycled PETE” means post-consumer polyethylene terephthalate material.

[(gg)] **(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.

[(hh)] **(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.

[(ii)] **(LL)** “Special government body” has the meaning given that term in ORS 174.117.

[(jj)] **(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.

[(kk)] **(nn)** “State contracting agency” means an executive department entity authorized by law to conduct a procurement.

[(LL)] **(oo)** “State government” has the meaning given that term in ORS 174.111.

[(mm)] **(pp)** “Used oil” has the meaning given that term in ORS 459A.555.

[(nn)] **(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 and 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

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| (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)] | “Goods and services” or “goods or services” | ORS 279B.005] |
| (z) | “Housing” | ORS 279C.800 |
| (aa) | “Interstate cooperative procurement” | ORS 279A.200 |
| (bb) | “Invitation to bid” | ORS 279B.005and 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.500and 279C.815 |
| (nn) | “Personal services” | ORS 279C.100 |
| (oo) | “Prevailing rate of wage” | ORS 279C.800 |
| (pp) | “Procurement description” | ORS 279B.005 |
| (qq) | “Property” | ORS 279A.250 |
| (rr) | “Public agency” | ORS 279C.800 |
| (ss) | “Public contract” | ORS 279A.190 |
| [(tt)] | “Public contract for goods or services” | ORS 279B.005] |
| [(uu)] | (tt) “Public works” | ORS 279C.800 |
| [(vv)] | (uu) “Purchasing contracting agency” | ORS 279A.200 |
| [(ww)] | (vv) “Regularly organized fire department” | ORS 279A.190 |
| [(xx)] | (ww) “Related services” | ORS 279C.100 |
| [(yy)] | (xx) “Request for proposals” | ORS 279B.005 |
| [(zz)] | (yy) “Resident bidder” | ORS 279A.120 |
| [(aaa)] | (zz) “Responsible bidder” | ORS 279A.105and 279B.005 |
| [(bbb)] | (aaa) “Responsible proposer” | ORS 279B.005 |
| [(ccc)] | (bbb) “Responsive bid” | ORS 279B.005 |
| [(ddd)] | (ccc) “Responsive proposal” | ORS 279B.005 |
| [(eee)] | (ddd) “Retainage” | ORS 279C.550 |

- [(fff)] (eee) “Special procurement”.....ORS 279B.085
- [(ggg)] (fff) “Specification”.....ORS 279B.200
- [(hhh)] (ggg) “State agency”ORS 279A.250
- [(iii)] (hhh) “Substantial completion”ORS 279C.465
- [(jjj)] (iii) “Surplus property”ORS 279A.250
- [(kkk)] (jjj) “Unnecessarily restrictive”ORS 279B.405

SECTION 2. ORS 279A.025 is amended to read:

279A.025. (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 [*contracting agencies or between contracting agencies and the federal government*]; **a contracting agency and:**

- (A) Another contracting agency;**
- (B) The Oregon Health and Science University;**
- (C) The Oregon State Bar;**
- (D) A governmental body of another state;**
- (E) The federal government;**
- (F) An American Indian tribe or an agency of an American Indian tribe;**
- (G) A nation, or a governmental body in a nation, other than the United States; or**
- (H) 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;

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

[(c)] (d) Grants;

[(d)] (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;

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

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

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

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

[(i)] (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;

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

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

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

[(m)] (n) Sponsorship agreements entered into by the State Parks and Recreation Director in accordance with ORS 565.080 (4);

[(n)] (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[, as defined in ORS 279B.005,] is subject to ORS chapter 279B;

[(o)] (p) Contracts entered into by the State Treasurer in exercising the powers of that office prescribed in ORS chapters 178, 286, 287, 288, 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[, as defined in ORS 279B.005,] is subject to ORS chapter 279B;

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

(A) The incurring of debt by a public body, including but not limited to the issuance of bonds, certificates of participation and other debt repayment obligations, and any associated contracts, agreements or other documents, regardless of whether the obligations that the contracts, agreements or other documents establish are general, special or limited;

(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;

[(q)] (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; or

[(r)] (s) 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 [public] contracting activities of:

(a) The Oregon State Lottery Commission;

(b) The Oregon University System and member institutions, except as provided in ORS 351.086;

(c) The legislative department;

(d) The judicial department;

(e) Semi-independent state agencies listed in ORS 182.451 and 182.454, except as provided in ORS 279.835 to 279.855 and 279A.250 to 279A.290;

(f) Oregon Corrections Enterprises;

(g) The Oregon Film and Video Office, except as provided in ORS 279A.100 and 279A.250 to 279A.290;

(h) The Travel Information Council, except as provided in ORS 279A.250 to 279A.290;

(i) The Oregon 529 College Savings Network and the Oregon 529 College Savings Board;

(j) The Oregon Innovation Council; [or]

(k) The Oregon Utility Notification Center; or

[(k)] (L) 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 disabled individuals under ORS 279.835 to 279.855.

SECTION 3. ORS 279A.050 is amended to read:

279A.050. [(1)] (1)(a) Except as otherwise provided in the Public Contracting Code, a contracting agency shall exercise all [rights, powers and] **procurement** authority in accordance with the provisions of the Public Contracting Code.

(b) When 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 is not required to exercise that authority in accordance with the provisions of the code if, under ORS 279A.025, the code does not apply to the contract or contracting authority.

(2) Except as otherwise provided in the Public Contracting Code, for state agencies the Director of the Oregon Department of Administrative Services has all *[of the rights, powers and]* **the** authority *[necessary]* to carry out the provisions of the Public Contracting Code.

(3) Except as otherwise provided in the Public Contracting Code, the Director of Transportation has all *[of the rights, powers and]* **the** authority 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 relating to the operation, maintenance or construction of 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 related to the operation, maintenance or construction of 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 *[of the rights, powers and]* **the** authority to procure or supervise the procurement of goods, services and personal services related to programs under the *[direct]* authority of the Secretary of State.

(5) Except as otherwise provided in the Public Contracting Code, the State Treasurer has all *[of the rights, powers and]* **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 following specific limited authorities are subject to the provisions of the Public Contracting Code:]

(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 for the construction, demolition, exchange, maintenance, operation and equipping of housing:

(A) For the chronically mentally ill, subject to applicable provisions of ORS 426.504; and

(B) For the purpose of providing care to individuals with mental retardation or other developmental disabilities, subject to applicable provisions of ORS 427.335;

[(b) The State Department of Fish and Wildlife to procure or supervise the procurement of all goods, services, public improvements and personal services relating to dams, fishways, ponds and related fish and game propagation facilities;]

(b) 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;

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

[(d) The Oregon Department of Aviation to procure or supervise the procurement of all goods, services, public improvements and personal services related to airports owned or operated by the state;]

(d) 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;

(e) The Economic and Community 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;

[(f) The Attorney General to enter into contracts as necessary to exercise the authority granted in ORS chapter 180;]

[(g)] **(f)** 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 goods, services and personal services for the construction of all new buildings or additions for its institutions;]

(g) 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)] **(h)** 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 for its institutions;

[(j)] **(i)** 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; *[and]*

(j) 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; and

(k) Any state agency to *[make procurements]* **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) Notwithstanding this section and ORS 279A.140 (1), the Director of the Oregon Department of Administrative Services has exclusive authority to procure or supervise the procurement of all state agency information technology contracts and all price agreements on behalf of the state agencies identified in subsection (6)(a) to (j) of this section under which more than one state agency may order goods, services or personal services unless the director delegates this authority. This subsection does not apply to contracts under which the contractor delivers to the state agency information technology products or services incidental to the performance of personal services contracts described in ORS chapter 279C or construction contracts described in ORS chapter 279C. A state agency identified in subsection (3) or (6)(a) to (j) of this section may not establish a price agreement or enter into a contract for goods, services or personal services without the approval of the director if the director has established a price agreement for the goods, services or personal services.

SECTION 4. ORS 279A.200 is amended to read:

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

(a) "Administering contracting agency" means a *[contracting agency]* **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 *[by or]* on behalf of *[one or]* more *[contracting agencies]* **than one governmental body**. "Cooperative procurement" includes but is not limited to *[multiparty]* **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 [contracting agencies] **governmental bodies** joined through an intergovernmental agreement for the [purposes] **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 [agencies] **governmental bodies** are located outside this state.

(e) “Joint cooperative procurement” means a cooperative procurement in which the participating [contracting agencies] **governmental bodies** or the cooperative procurement group and the [agencies’] **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 [contracting agency] **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.

SECTION 5. ORS 279B.005 is amended to read:

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

[(a) “Goods and services” or “goods or services” means supplies, equipment, materials and services other than personal services designated under ORS 279A.055 and any personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, that a contracting agency is authorized by law to procure. “Goods and services” or “goods or services” includes combinations of any of the items identified in this paragraph.]

[(b)] (a) “Invitation to bid” means all documents, whether attached or incorporated by reference, used for soliciting bids.

[(c)] (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.

[(d) “Public contract for goods or services” includes, for state contracting agencies with procurement authority under ORS 279A.050, contracts for personal services as designated by the state contracting agencies.]

[(e)] (c) “Request for proposals” means all documents, whether attached or incorporated by reference, used for soliciting proposals.

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

[(g)] (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 [(1)] contains general definitions applicable throughout this chapter.

SECTION 6. ORS 279B.050 is amended to read:

279B.050. (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) *Notwithstanding that the term “goods and services” as defined in ORS 279B.005 does not include personal services:*]

[(a)] (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.

[(b)] (5) State contracting agencies shall solicit contracts for personal services in accordance with ORS 279B.050 to 279B.085.

SECTION 6a. ORS 279B.080 is amended to read:

279B.080. (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.

SECTION 7. ORS 279B.085 is amended to read:

279B.085. (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 [*for the acquisition of a specified class of goods or services*] **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 [*for the acquisition of specified goods or services*] 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 [*proposed*] contracting procedure, the goods or services or the class of goods or services [*to be acquired through*] **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 [proposed] contracting procedure, the goods or services or the class of goods or services [to be acquired through] **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[*will*]:

(a) [Be] **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 [promote] **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 [proposed] special procurement must be given in the same manner as provided in ORS 279B.055 (4).

(6) [If a contract is awarded] **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 [whose offer] the contracting agency determines [in writing] 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.

SECTION 8. ORS 279B.130 is amended to read:

279B.130. (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 [such] **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.

(d) The prospective bidder or proposer has committed a violation of a contract provision [and debarment for such a violation was listed in the contract terms and conditions as a potential penalty] **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.

SECTION 9. ORS 279B.200 is amended to read:

279B.200. 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.

SECTION 10. ORS 279B.270 is amended to read:

279B.270. (1) A state contracting agency procuring goods[, *materials, equipment*] 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.

SECTION 11. ORS 279B.405 is amended to read:

279B.405. (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)] (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.

[(b) Notwithstanding paragraph (a) of this subsection, a contract-specific special procurement under ORS 279B.085 may not be protested, challenged or reviewed unless the approval of the special procurement by the Director of the Oregon Department of Administrative Services or a local contract review board, as applicable, has been invalidated by a reviewing circuit court under ORS 279B.400.]

(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 *[less]* **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 *[require]* **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 *[suit]* **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.

SECTION 12. ORS 279B.415 is amended to read:

279B.415. (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 [*shall file a complaint with the court*] **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.

SECTION 13. ORS 279C.320 is amended to read:

279C.320. (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. [*This subsection does not apply to emergency contracts regulated under ORS 279C.335.*] **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.

SECTION 14. ORS 279C.335 is amended to read:

279C.335. (1) All public improvement contracts shall be based upon competitive bids except:

(a) Contracts made with qualified nonprofit agencies providing employment opportunities for disabled individuals under ORS 279.835 to 279.855.

(b) A public improvement contract exempt under subsection (2) of this section.

(c) A public improvement contract with a value of less than \$5,000.

(d) A contract not to exceed \$100,000[, or not to exceed \$50,000 in the case of a contract for a highway, bridge or other transportation project,] made under procedures for competitive quotes in sections 132 and 133, chapter 794, Oregon Laws 2003.

(e) Contracts for repair, maintenance, improvement or protection of property obtained by the Department of Veterans' Affairs under ORS 407.135 and 407.145 (1).

(f) Energy savings performance contracts entered into in accordance with rules of procedure adopted under ORS 279A.065.

[(g) A public improvement contract awarded under subsection (6) of this section in response to an emergency.]

(2) Subject to subsection (4)(b) 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 requirements of subsection (1) of this section upon approval of the following findings submitted by the contracting agency **or, if a state agency is not the contracting agency, the state agency** seeking the exemption:

(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. *and*

(b) The awarding of public improvement contracts under the exemption will **likely** result in substantial cost savings to the contracting agency, **to the state agency based upon the justification and information described in ORS 279C.330** or, if the contracts are for public improvements described in ORS 279A.050 (3)(b), to the contracting agency or the public. In making the finding, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board may consider the type, cost and amount of the contract, the number of persons available to bid and such other factors as may be deemed appropriate.

(c) As an alternative to the finding described in paragraph (b) of this subsection, when a contracting agency or state agency seeks an exemption that would allow the use of an alternate contracting method that the agency has not previously used, the agency may make a finding that identifies the project as a pilot project for which the agency intends to determine whether the use of the alternate 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 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. Those characteristics shall include some 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 *[contracting]* agency's overall construction program. The *[contracting]* 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) When appropriate, direct the use of alternate 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 the awarding of 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.

(5)(a) Before final adoption of the findings required by subsection (2) of this section exempting a public improvement contract or a class of public improvement contracts from the requirement of competitive bidding, a contracting agency **or state agency** shall hold a public hearing.

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

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

(d) At the public hearing, the contracting agency **or state agency** shall offer an opportunity for any interested party to appear and present comment.

(e) If a contracting agency **or state agency** is required to act promptly due to circumstances beyond the [contracting] agency's control that do not constitute an emergency, notification of the public hearing may be published simultaneously with the [contracting] 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 meeting and approval of the findings.

[(6) After declaring that an emergency exists in accordance with rules adopted under ORS 279A.065, a contracting agency may award a public improvement contract in response to the emergency without using a competitive solicitation.]

(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 exception. 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) Public improvement contracts excepted from competitive bid requirements under subsection (1)(a), (c), (d), (e), *[(f) or (g)]* **or (f)** of this section are not subject to the exemption requirements of subsection (2) of this section.

SECTION 15. ORS 279C.335, as amended by section 104, chapter 794, Oregon Laws 2003, section 13, chapter 103, Oregon Laws 2005, and section 59, chapter 625, Oregon Laws 2005, is amended to read:

279C.335. (1) All public improvement contracts shall be based upon competitive bids except:

(a) Contracts made with qualified nonprofit agencies providing employment opportunities for disabled individuals under ORS 279.835 to 279.855.

(b) A public improvement contract exempt under subsection (2) of this section.

(c) A public improvement contract with a value of less than \$5,000.

(d) A contract not to exceed \$100,000 made under procedures for competitive quotes in sections 132 and 133, chapter 794, Oregon Laws 2003.

[(d)] (e) Contracts for repair, maintenance, improvement or protection of property obtained by the Department of Veterans' Affairs under ORS 407.135 and 407.145 (1).

[(e)] (f) Energy savings performance contracts entered into in accordance with rules of procedure adopted under ORS 279A.065.

[(f) A public improvement contract awarded under subsection (6) of this section in response to an emergency.]

(2) Subject to subsection (4)(b) 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 requirements of subsection (1) of this section

upon approval of the following findings submitted by the contracting agency **or, if a state agency is not the contracting agency, the state agency** seeking the exemption:

(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.[: and]

(b) The awarding of public improvement contracts under the exemption will **likely** result in substantial cost savings to the contracting agency, **to the state agency based upon the justification and information described in ORS 279C.330** or, if the contracts are for public improvements described in ORS 279A.050 (3)(b), to the contracting agency or the public. In making the finding, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board may consider the type, cost and amount of the contract, the number of persons available to bid and such other factors as may be deemed appropriate.

(c) **As an alternative to the finding described in paragraph (b) of this subsection, when a contracting agency or state agency seeks an exemption that would allow the use of an alternate contracting method that the agency has not previously used, the agency may make a finding that identifies the project as a pilot project for which the agency intends to determine whether the use of the alternate 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 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. Those characteristics shall include some 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 [*contracting*] agency's overall construction program. The [*contracting*] 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) When appropriate, direct the use of alternate 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 the awarding of 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.

(5)(a) Before final adoption of the findings required by subsection (2) of this section exempting a public improvement contract or a class of public improvement contracts from the requirement of competitive bidding, a contracting agency **or state agency** shall hold a public hearing.

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

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

(d) At the public hearing, the contracting agency **or state agency** shall offer an opportunity for any interested party to appear and present comment.

(e) If a contracting agency **or state agency** is required to act promptly due to circumstances beyond the [contracting] agency's control that do not constitute an emergency, notification of the public hearing may be published simultaneously with the [contracting] 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 meeting and approval of the findings.

[(6) After declaring that an emergency exists in accordance with rules adopted under ORS 279A.065, a contracting agency may award a public improvement contract in response to the emergency without using a competitive solicitation.]

(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 exception. 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) Public improvement contracts excepted from competitive bid requirements under subsection (1)(a), (c), (d), (e) or (f) of this section are not subject to the exemption requirements of subsection (2) of this section.

SECTION 16. Section 105, chapter 794, Oregon Laws 2003, as amended by section 19, chapter 103, Oregon Laws 2005, is amended to read:

Sec. 105. The amendments to ORS 279C.335 by section 104, chapter 794, Oregon Laws 2003, and the amendments to ORS 279C.375 by section 18, **chapter 103, Oregon Laws 2005**, [of this 2005 Act] become operative on [July 1, 2009] **the effective date of this 2007 Act.**

SECTION 17. ORS 279C.335, as amended by sections 104 and 105a, chapter 794, Oregon Laws 2003, sections 13 and 14, chapter 103, Oregon Laws 2005, and sections 59 and 60, chapter 625, Oregon Laws 2005, is amended to read:

279C.335. (1) All public improvement contracts shall be based upon competitive bids except:

(a) Contracts made with qualified nonprofit agencies providing employment opportunities for disabled individuals under ORS 279.835 to 279.855.

(b) A public improvement contract exempt under subsection (2) of this section.

(c) A public improvement contract with a value of less than \$5,000.

(d) A contract not to exceed \$100,000 made under procedures for competitive quotes in sections 132 and 133, chapter 794, Oregon Laws 2003.

[(d)] (e) Contracts for repair, maintenance, improvement or protection of property obtained by the Department of Veterans' Affairs under ORS 407.135 and 407.145 (1).

[(e)] (f) Energy savings performance contracts entered into in accordance with rules of procedure adopted under ORS 279A.065.

[(f) A public improvement contract awarded under subsection (6) of this section in response to an emergency.]

(2) Subject to subsection (4)(b) of this section, the Director of the Oregon Department of Administrative Services, [or] 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 requirements of subsection (1) of this section upon approval of the following findings submitted by the contracting agency **or, if a state agency is not the contracting agency, the state agency** seeking the exemption:

(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.]; *and*

(b) The awarding of public improvement contracts under the exemption will **likely** result in substantial cost savings to the contracting agency, **to the state agency based upon the justification and information described in ORS 279C.330 or, if the contracts are for public im-**

provements described in ORS 279A.050 (3)(b), to the contracting agency or the public. In making the finding, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board may consider the type, cost and amount of the contract, the number of persons available to bid and such other factors as may be deemed appropriate.

(c) As an alternative to the finding described in paragraph (b) of this subsection, when a contracting agency or state agency seeks an exemption that would allow the use of an alternate contracting method that the agency has not previously used, the agency may make a finding that identifies the project as a pilot project for which the agency intends to determine whether the use of the alternate 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 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. Those characteristics shall include some 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 [contracting] agency's overall construction program. The [contracting] 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) When appropriate, direct the use of alternate 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 the awarding of 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.

(5)(a) Before final adoption of the findings required by subsection (2) of this section exempting a public improvement contract or a class of public improvement contracts from the requirement of competitive bidding, a contracting agency or state agency shall hold a public hearing.

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

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

(d) At the public hearing, the contracting agency or state agency shall offer an opportunity for any interested party to appear and present comment.

(e) If a contracting agency or state agency is required to act promptly due to circumstances beyond the [contracting] agency's control that do not constitute an emergency, notification of the public hearing may be published simultaneously with the [contracting] 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 meeting and approval of the findings.

[6] After declaring that an emergency exists in accordance with rules adopted under ORS 279A.065, a contracting agency may award a public improvement contract in response to the emergency without using a competitive solicitation.]

(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 exception. 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) Public improvement contracts excepted from competitive bid requirements under subsection (1)(a), (c), (d), (e) or (f) of this section are not subject to the exemption requirements of subsection (2) of this section.

SECTION 18. Section 105b, chapter 794, Oregon Laws 2003, is amended to read:

Sec. 105b. The amendments to [section 103 of this 2003 Act] **ORS 279C.335** by section 105a, chapter 794, Oregon Laws 2003, [of this 2003 Act] become operative on [July 1, 2012] **the effective date of this 2007 Act.**

SECTION 19. ORS 279C.345 is amended to read:

279C.345. (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, [or] 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.

SECTION 20. ORS 279C.350, as amended by section 109, chapter 794, Oregon Laws 2003, is amended to read:

279C.350. (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 [of the director]. The order shall set forth findings supporting the decision [of the director] 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.

SECTION 21. Section 110, chapter 794, Oregon Laws 2003, is amended to read:

Sec. 110. The amendments to [section 108 of this 2003 Act] **ORS 279C.350** by section 109, chapter 794, Oregon Laws 2003, [of this 2003 Act] become operative on [July 1, 2012] **the effective date of this 2007 Act.**

SECTION 22. ORS 279C.355 is amended to read:

279C.355. (1) Upon completion of and final payment for any public improvement contract, or class of public improvement contracts [described in ORS 279A.050 (3)(b)], 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 [a class of] 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 [described in ORS 279A.050 (3)(b)].

SECTION 23. ORS 279C.355, as amended by section 112, chapter 794, Oregon Laws 2003, is amended to read:

279C.355. (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, [or] 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 [shall] **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.

SECTION 24. Section 113, chapter 794, Oregon Laws 2003, is amended to read:

Sec. 113. The amendments to [section 111 of this 2003 Act] **ORS 279C.355** by section 112, chapter 794, Oregon Laws 2003, [of this 2003 Act] become operative on [July 1, 2012] **the effective date of this 2007 Act.**

SECTION 25. ORS 279C.365 is amended to read:

279C.365. (1) A contracting agency preparing solicitation documents for a public improvement contract shall, at a minimum, include:

- (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, and may, in the sole discretion of the contracting agency, direct or permit the submission and receipt of bids by electronic means;
- (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;
- (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, [or] **the federal prevailing rates of wage under the Davis-Bacon Act** (40 U.S.C. 276a) **or both the state and federal prevailing rates of wage**, no bid will be received or considered by the contracting agency unless the bid contains a statement by the bidder that ORS **279C.838 or** 279C.840 or 40 U.S.C. 276a will be complied with;
- (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 any bid not in compliance with all prescribed public contracting procedures and requirements and may reject for good cause all bids upon a finding of the agency that it is in the public interest to do so;
- (j) Information addressing whether a contractor or subcontractor must be licensed under ORS 468A.720; and
- (k) A statement that a bid for a public improvement contract may not be received or considered by the contracting agency 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.

[2)] **(3)** All bids made to the contracting agency under ORS 279C.335 or 279C.400 must be:

- (a) In writing;
- (b) Filed with the person designated for receipt of bids by the contracting agency; and
- (c) Opened publicly by the contracting agency immediately after the deadline for submission of bids.

[3)] **(4)** After having been opened, the bids must be made available for public inspection.

[4)] **(5)** A surety bond, irrevocable letter of credit issued by an insured institution as defined in ORS 706.008, cashier's check or certified check of each bidder shall be submitted with or posted for all bids as bid security unless the contract for which a bid is submitted has been exempted from this requirement under ORS 279C.390. The security may not exceed 10 percent of the amount bid for the contract.

[5)] **(6)** Subsection [(4)] **(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.

SECTION 26. ORS 279C.375 is amended to read:

279C.375. (1) After bids are opened and a determination is made that a public improvement contract is to be awarded, the contracting agency shall award the contract to the lowest responsible bidder.

(2) 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 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 excepted or exempted from competitive bidding under ORS 279C.335 (1)(c) or (d) [or (6)]. The notice and its manner of posting or issuance 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 has met the standards of responsibility. In making the determination, the contracting agency shall consider whether a bidder has:

(A) 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.

(B) A satisfactory record of performance. The contracting agency shall document the record of performance of a bidder if the contracting agency finds the bidder not to be responsible under this subparagraph.

(C) A satisfactory record of integrity. The contracting agency shall document the record of integrity of a bidder if the contracting agency finds the bidder not to be responsible under this subparagraph.

(D) Qualified legally to contract with the contracting agency.

(E) Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder fails to promptly supply information requested by the contracting agency concerning responsibility, the contracting agency shall base the determination of responsibility upon any available information, or may find the bidder not to be 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 considered whether 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.

- Has a satisfactory record of performance.
- Has a satisfactory record of integrity.
- Is qualified legally to contract with the contracting agency.
- 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.

SECTION 27. ORS 279C.375, as amended by section 18, chapter 103, Oregon Laws 2005, is amended to read:

279C.375. (1) After bids are opened and a determination is made that a public improvement contract is to be awarded, the contracting agency shall award the contract to the lowest responsible bidder.

(2) 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 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 excepted or exempted from competitive bidding under ORS 279C.335 (1)(c) or [(6)] (d). The notice and its manner of posting or issuance 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 has met the standards of responsibility. In making the determination, the contracting agency shall consider whether a bidder has:

(A) 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.

(B) A satisfactory record of performance. The contracting agency shall document the record of performance of a bidder if the contracting agency finds the bidder not to be responsible under this subparagraph.

(C) A satisfactory record of integrity. The contracting agency shall document the record of integrity of a bidder if the contracting agency finds the bidder not to be responsible under this subparagraph.

(D) Qualified legally to contract with the contracting agency.

(E) Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder fails to promptly supply information requested by the contracting agency concerning responsibility, the contracting agency shall base the determination of responsibility upon any available information, or may find the bidder not to be 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 considered whether 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.
 - [] Has a satisfactory record of performance.
 - [] Has a satisfactory record of integrity.
 - [] Is qualified legally to contract with the contracting agency.
 - [] 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.

SECTION 28. ORS 279C.390 is amended to read:

279C.390. (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 [*by the Director of the Oregon Department of Administrative Services, the local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation*] **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.

SECTION 29. ORS 279C.400 is amended to read:

279C.400. (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.

(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) [*When award of a public improvement contract advertised by the issuance of a request for proposals may be made without negotiation,*] 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 [(4)] (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).

SECTION 30. ORS 279C.405 is amended to read:

279C.405. (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:

[(1)] (a) All required contractual terms and conditions. The request for proposals also may:

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

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

[(c)] (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.

[(2)] (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.

[(3)] (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.

SECTION 31. ORS 279C.410 is amended to read:

279C.410. (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.

[(9) 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 the preparation or distribution of a request for proposals.]

SECTION 32. Section 132, chapter 794, Oregon Laws 2003, is amended to read:

Sec. 132. (1) A public improvement contract estimated by the contracting agency not to exceed \$100,000[, or not to exceed \$50,000 in the case of contracts for highways, bridges and other transportation projects,] may be awarded in accordance with intermediate procurement procedures for competitive quotes established by rules adopted under [section 10 of this 2003 Act] **ORS 279A.065.** A

contract awarded under this section may be amended to exceed [*the thresholds set forth in this subsection*] **\$100,000** only in accordance with rules adopted under [*section 10 of this 2003 Act*] **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 [*sections 88 to 179 of this 2003 Act*] **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 [*the thresholds in subsection (1) of this section*] **\$100,000** under competitive bidding procedures.

SECTION 33. ORS 279C.460 is amended to read:

279C.460. (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 [*a suit*] **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 [*suit*] **court action.**

(4) The court may order payment of reasonable attorney fees and costs on trial and on appeal to a successful party in [*a suit*] **an action** brought under this section.

(5) This section does not apply to personal services contracts under ORS 279C.100 to 279C.125.

SECTION 34. ORS 279C.800 is amended to read:

279C.800. As used in ORS 279C.800 to 279C.870, unless the context requires otherwise:

(1) "Fringe benefits" means the amount of:

(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person under a plan, fund or program; and

(b) The rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program that is committed in writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only when the contractor or subcontractor is not required by other federal, state or local law to provide any of these benefits.

(2) "**Housing**" has the meaning given that term in **ORS 456.055.**

[(2)] (3) "Locality" means the following district in which the public works, or the major portion thereof, 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.

[3] (4) "Prevailing rate of wage" means the rate of hourly wage, including all fringe benefits, paid in the locality to the majority of workers employed on projects of similar character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries. *[In making such determinations, the commissioner shall rely on an independent wage survey to be conducted once each year. However, if it appears to the commissioner that the data derived from the survey alone are insufficient to establish the rate, the commissioner also 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 shall be the prevailing rate. If the wage paid by any contractor or subcontractor to workers on any public works is based on some period of time other than an hour, the hourly wage shall be mathematically determined by the number of hours worked in that period of time.]*

[4] (5) "Public agency" means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any *[of their instrumentalities]* **instrumentality thereof** organized and existing under law or charter.

[5] (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; *[but does not include the reconstruction or renovation of privately owned property that is leased by a public agency.]*

(B) **A project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and \$750,000 or more of funds of a public agency; or**

(C) **A project for the construction of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency.**

(b) "Public works" does not include:

(A) **The reconstruction or renovation of privately owned property that is leased by a public agency; or**

(B) **The renovation of publicly owned real property that is more than 75 years old by a private nonprofit entity 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 the effective date of this 2007 Act.**

SECTION 35. ORS 279C.810 is amended to read:

279C.810. (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 subparagraph (i) of this paragraph;**

[C] (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; [or]

[D] (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.

[(3)(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 determines that a public agency has divided a public works project 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; and]

[(D) The manner in which the public agency and the contractors administer and implement the project.]

SECTION 36. ORS 279C.815 is amended to read:

279C.815. (1) As used in this section, "person" includes any employer, labor organization or any official representative of an employee or employer association.

(2)(a) The Commissioner of the Bureau of Labor and Industries shall determine the prevailing rate of wage for workers in each trade or occupation in each locality described in ORS 279C.800 at least once each year by means of an independent wage survey and make this information available at least twice each year. The commissioner may amend the rate at any time.

(b) **If it appears to the commissioner that the data derived only from the survey described in paragraph (a) of this subsection are insufficient to determine the prevailing rate of wage, the commissioner also 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 shall be the prevailing rate. If the wage paid by any contractor or subcontractor to workers on any public works is based on some period of time other than an hour, the hourly wage shall be mathematically determined by the number of hours worked in that period of time.**

[(b)] (c) The commissioner shall compare the prevailing rate of wage determined under paragraph (a) of this subsection with the federal prevailing rate of wage required under the Davis-Bacon Act (40 U.S.C. 276a) and determine which rate is higher for workers in each trade or occupation in each locality. The commissioner shall make this information, showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality, available at the same time as the commissioner makes information available under paragraph (a) of this subsection.

(3) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed by the commissioner. 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, all reports and returns or other information provided to the commissioner under this section are confidential and not available for inspection by the public.

(5) In order to assist the commissioner in making determinations of the prevailing rates of wage, the commissioner may enter into contracts with public or private parties to obtain relevant data and information. Any such contract may include provisions for the manner and extent of the market review of affected trades and occupations and such other requirements regarding timelines of reports, accuracy of data and information and supervision and review as the commissioner may prescribe.

SECTION 37. ORS 279C.830 is amended to read:

279C.830. (1)(a) **Except as provided in paragraph (d) of this subsection**, the specifications for every contract for public works shall contain a provision stating 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. 276a) that may be paid to workers in each trade or occupation required for the public works employed in the performance of the contract either by the contractor or subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract.

(b) If a public agency is required under paragraph (a) of this subsection to include the state and federal prevailing rates of wage in the specifications, the public agency also shall include in the specifications information showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality, as determined by the Commissioner of the Bureau of Labor and Industries under ORS 279C.815 [(2)(b)] **(2)(c)**.

(c) Every contract and subcontract shall contain a provision that the workers shall be paid not less than the specified minimum hourly rate of wage in accordance with ORS 279C.838.

(d) 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 any contract for the public works shall include the applicable prevailing rate of wage.

(2) The specifications for every contract for public works between a public agency and a contractor shall contain a provision stating that a fee is required to be paid to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279C.825 (1). The contract shall contain a provision that the fee shall be paid to the commissioner under the administrative rule of the commissioner.

(3) The specifications for every contract for public works shall contain a provision stating 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) or (8). Every contract awarded by a contracting agency shall contain a provision requiring the contractor:

(a) To 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) or (8).

(b) 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 under ORS 279C.836 **(4)**, (7) or (8).

SECTION 38. ORS 279C.836 is amended to read:

279C.836. (1) Except as provided in subsection **(4)**, (7) or (8) 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, [or] has elected not to file a public works bond under subsection (7) of this section **or is exempt under subsection (4) or (8) 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, minority, women or emerging small business enterprise certified under ORS 200.055 may, for up to one year after certification, elect not to file a public works bond as required under subsection (1) this section. If a business enterprise elects not to file a public works bond, the business enterprise shall give the board written verification of the certification and written notice that the business enterprise elects not to file the bond.

(b) A business enterprise 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 business enterprise is a subcontractor, the contractor of the election before starting work on a public works project. When a business enterprise 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 business enterprise or, if the business enterprise is a subcontractor, the payment bond of the contractor.

(c) An election not to file a public works bond expires one year after the date the business enterprise is certified. After an election has expired and before starting or continuing work on a contract or subcontract for a public works project, the business enterprise shall file a public works bond with the board as required under subsection (1) of this section.

(8) 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.

(9) 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.

(10) The Commissioner of the Bureau of Labor and Industries, with approval of the board, shall adopt rules that establish language for public works bonds.

SECTION 39. ORS 279C.870 is amended to read:

279C.870. (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 [may] 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 (1). 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 (2).

SECTION 40. Section 41 of this 2007 Act is added to and made a part of ORS 279C.100 to 279C.125.

SECTION 41. (1) Notwithstanding the public records law, ORS 192.410 to 192.505, if a contracting agency solicits a contract for architectural, engineering or land surveying services or related services by a competitive proposal:

(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) 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.

SECTION 42. Sections 43, 44 and 45 of this 2007 Act are added to and made a part of ORS 279C.800 to 279C.870.

SECTION 43. (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.

SECTION 44. (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.

SECTION 45. 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.

SECTION 46. (1) On or before July 1, 2008, the State Treasurer shall report to the advisory committee appointed under ORS 279C.820 and to the President of the Senate and the Speaker of the House of Representatives on the loan programs under which moneys derived from the sale of bonds by the State Treasurer are loaned to private entities. The report shall include, for each loan described in this section for which a closing occurred between January 1, 2002, and December 31, 2007:

(a) Identification of the state agency for which bonds are issued;

(b) The purposes of the loan program under which the bond proceeds are issued; and

(c) The constitutional and statutory provisions authorizing the loan program.

(2) Information the State Treasurer reports under this section shall be information that the state agency involved keeps in the ordinary course of its business and that is not exempt from public disclosure under ORS 192.410 to 192.505. The information may include, but need not be limited to:

- (a) Identification of the private borrowers to whom loans were made;
- (b) The amount of each loan;
- (c) The interest rate applied to repayment of each loan; and
- (d) If known by the agency, the purpose for which the loan funds were advanced.

SECTION 47. Section 332a, chapter 794, Oregon Laws 2003, is repealed.

SECTION 48. (1) Sections 41, 43 and 44 of this 2007 Act, the amendments to ORS 279A.010, 279A.025, 279A.050, 279A.200, 279B.005, 279B.050, 279B.085, 279B.130, 279B.200, 279B.270, 279B.405, 279B.415, 279C.320, 279C.335, 279C.345, 279C.350, 279C.355, 279C.365, 279C.375, 279C.390, 279C.400, 279C.405, 279C.410, 279C.460, 279C.800, 279C.810, 279C.815, 279C.830, 279C.836 and 279C.870 and sections 105, 105b, 110, 113 and 132, chapter 794, Oregon Laws 2003, by sections 1 to 39 of this 2007 Act and the repeal of section 332a, chapter 794, Oregon Laws 2003, by section 47 of this 2007 Act apply only to public contracts first advertised, but if not advertised then entered into, on or after the effective date of this 2007 Act.

(2) Sections 43 and 44 of this 2007 Act and the amendments to ORS 279C.800, 279C.810, 279C.815 and 279C.830 by sections 34, 35, 36 and 37 of this 2007 Act do not apply to development and disposition agreements signed by an urban renewal agency before the effective date of this 2007 Act in connection with public-private projects for which no contracts for construction are advertised.

(3) Sections 43 and 44 of this 2007 Act and the amendments to ORS 279C.800, 279C.810, 279C.815 and 279C.830 by sections 34, 35, 36 and 37 of this 2007 Act do not apply to projects funded in whole or in part by bonds issued by the State of Oregon if the State Treasurer issues the bonds for the project before the effective date of this 2007 Act.

SECTION 49. This 2007 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2007 Act takes effect July 1, 2007.

Passed by House May 14, 2007

Received by Governor:

Repassed by House June 25, 2007

.....M.,....., 2007

Approved:

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Chief Clerk of House

.....M.,....., 2007

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Speaker of House

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Governor

Passed by Senate June 23, 2007

Filed in Office of Secretary of State:

.....M.,....., 2007

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President of Senate

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Secretary of State