

House Bill 2671

Sponsored by Representative WITT; Representatives HOLVEY, RILEY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Requires public contracting agency to award public contract based on bid, proposal or offer that provides best value to agency.

A BILL FOR AN ACT

1
2 Relating to best value public contracting; creating new provisions; amending ORS 279A.015,
3 279A.200, 279B.060, 279B.085, 279C.300, 279C.305, 279C.335, 279C.410 and 279C.585 and sections
4 132 and 133, chapter 794, Oregon Laws 2003; and repealing ORS 279C.355.

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

6 **SECTION 1.** ORS 279A.015 is amended to read:

7 279A.015. It is the policy of the State of Oregon, in enacting the Public Contracting Code, that
8 a sound and responsive public contracting system should:

9 (1) Simplify, clarify and modernize procurement practices so that they reflect the marketplace
10 and industry standards.

11 (2) Instill public confidence through ethical and fair dealing, honesty and good faith on the part
12 of government officials and those who do business with the government.

13 (3) Promote efficient use of state and local government resources, maximizing the economic in-
14 vestment in public contracting within this state.

15 (4) Clearly identify rules and policies that implement each of the legislatively mandated
16 socioeconomic programs that overlay public contracting and accompany the expenditure of public
17 funds.

18 (5) Allow impartial and open competition, protecting both the integrity of the public contracting
19 process and the competitive nature of public procurement. In public procurement, as set out in ORS
20 chapter 279B, **and public improvements, as set out in ORS chapter 279C**, meaningful competition
21 may be obtained by evaluation of performance factors and other aspects of service and product
22 quality, as well as pricing, in arriving at best value.

23 (6) Provide a public contracting structure that can take full advantage of evolving procurement
24 methods as they emerge within various industries[, *while preserving competitive bidding as the*
25 *standard for public improvement contracts unless otherwise exempted*].

26 **SECTION 2.** ORS 279A.200 is amended to read:

27 279A.200. (1) As used in ORS 279A.200 to 279A.225:

28 (a) "Administering contracting agency" means a contracting agency that solicits and establishes
29 the original contract for procurement of goods, services or public improvements in a cooperative
30 procurement.

31 (b) "Cooperative procurement" means a procurement conducted by or on behalf of one or more

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted.
New sections are in **boldfaced** type.

1 contracting agencies. “Cooperative procurement” includes but is not limited to multiparty contracts
2 and price agreements.

3 (c) “Cooperative procurement group” means a group of contracting agencies joined through an
4 intergovernmental agreement for the purposes of facilitating cooperative procurements.

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

9 (e) “Joint cooperative procurement” means a cooperative procurement in which the participat-
10 ing contracting agencies or the cooperative procurement group and the agencies’ or group’s contract
11 requirements or estimated contract requirements for price agreements are identified.

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

14 (g) “Permissive cooperative procurement” means a cooperative procurement in which the pur-
15 chasing contracting agencies are not identified.

16 (h) “Purchasing contracting agency” means a contracting agency that procures goods, services
17 or public improvements from a contractor based on the original contract established by an admin-
18 istering contracting agency.

19 (2) As used in ORS 279A.210 (1)(a), 279A.215 (1)(a) and 279A.220 (1)(a), an administering con-
20 tracting agency’s solicitation and award process uses source selection methods “substantially
21 equivalent” to those identified in ORS 279B.055, 279B.060 or 279B.085 if the solicitation and award
22 process:

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

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

30 (c) Uses reasonably clear and precise specifications that promote suitability for the purposes
31 intended and that reasonably encourage competition.

32 **SECTION 3.** ORS 279B.060 is amended to read:

33 279B.060. (1) A contracting agency may solicit and award a public contract for goods or ser-
34 vices, or may award multiple public contracts for goods or services when specified in the request
35 for proposals, by requesting and evaluating competitive sealed proposals.

36 (2) The request for proposals must include:

37 (a) A time and date by which sealed proposals must be received, and a place at which the pro-
38 posals must be submitted, and may, in the sole discretion of the contracting agency, direct or permit
39 the submission and receipt of proposals by electronic means;

40 (b) The name and title of the person designated for receipt of proposals and the person desig-
41 nated by the contracting agency as the contact person for the procurement, if different;

42 (c) A procurement description;

43 (d) A time, date and place that prequalification applications, if any, must be filed and the classes
44 of work, if any, for which proposers must be prequalified in accordance with ORS 279B.120;

45 (e) A statement that the contracting agency may cancel the procurement or reject any or all

1 proposals in accordance with ORS 279B.100;

2 (f) A statement that “Contractors shall use recyclable products to the maximum extent eco-
3 nomically feasible in the performance of the contract work set forth in this document.” if the request
4 for proposals is issued by a state contracting agency;

5 (g) A statement that requires the contractor or subcontractor to possess an asbestos abatement
6 license, if required under ORS 468A.710; and

7 (h) All contractual terms and conditions applicable to the procurement. The request for pro-
8 posals also may:

9 (A) Identify those contractual terms or conditions the contracting agency reserves, in the re-
10 quest for proposals, for negotiation with proposers;

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

13 (C) Contain or incorporate the form and content of the contract that the contracting agency
14 will accept, or suggested contract terms and conditions that nevertheless may be the subject of ne-
15 gotiations with proposers;

16 (D) Announce the method of contractor selection that may include, but is not limited to, nego-
17 tiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition de-
18 signed to identify a class of proposers that fall within a competitive range or to otherwise eliminate
19 from consideration a class of lower ranked proposers, or any combination of methods, as authorized
20 or prescribed by rules adopted under ORS 279A.065; and

21 (E) Contain a description of the manner in which proposals will be evaluated, including the
22 relative importance of price and any other evaluation factors used to rate the proposals in the first
23 tier of competition, and if more than one tier of competitive evaluation may be used, a description
24 of the process under which the proposals will be evaluated in the subsequent tiers.

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

28 (b) The contracting agency shall return the proposal security to all proposers upon the exe-
29 cution of the contract.

30 (c) The contracting agency shall retain the proposal security if a proposer who is awarded a
31 contract fails to promptly and properly execute the contract. For purposes of this paragraph, prompt
32 and proper execution of the contract includes all action by a proposer that is necessary to the for-
33 mation of a contract in accordance with the request for proposals, including the posting of per-
34 formance security and the submission of proof of insurance when required by the request for
35 proposals. If contract negotiations or competitive negotiations are conducted, the failure, prior to
36 award, of a contracting agency and a proposer to reach agreement does not constitute grounds for
37 the retention of proposal security.

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

40 (5)(a) Notwithstanding ORS 192.410 to 192.505, proposals may be opened in a manner to avoid
41 disclosure of contents to competing proposers during, when applicable, the process of negotiation,
42 but the contracting agency shall record and make available the identity of all proposers as part of
43 the contracting agency’s public records from and after the opening of the proposals.
44 Notwithstanding ORS 192.410 to 192.505, proposals are not required to be open for public inspection
45 until after the notice of intent to award a contract is issued. The fact that proposals are opened at

1 a meeting, as defined in ORS 192.610, does not make their contents subject to disclosure, regardless
 2 of whether the public body opening the proposals fails to give notice of or provide for an executive
 3 session for the purpose of opening proposals.

4 (b) Notwithstanding any requirement to make proposals open to public inspection after the
 5 contracting agency's issuance of notice of intent to award a contract, a contracting agency may
 6 withhold from disclosure to the public materials included in a proposal that are exempt or condi-
 7 tionally exempt from disclosure under ORS 192.501 or 192.502.

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

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

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

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

21 (B) Discussions leading to best and final offers, in which the contracting agency may not dis-
 22 close private discussions leading to best and final offers;

23 (C) Discussions leading to best and final offers, in which the contracting agency may not dis-
 24 close information derived from proposals submitted by competing proposers;

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

26 (E) Competitive simultaneous negotiations;

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

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

34 (H) Any combination of methods described in this paragraph, as authorized or prescribed by
 35 rules adopted under ORS 279A.065.

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

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

1 (7) The cancellation of requests for proposals and the rejection of proposals must be in accord-
2 ance with ORS 279B.100.

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

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

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

19 (11) The contracting agency may issue a request for information, a request for interest, a re-
20 quest for qualifications or other preliminary documents to obtain information useful in the prepara-
21 tion of a request for proposals.

22 **SECTION 4.** ORS 279B.085 is amended to read:

23 279B.085. (1) As used in this section and ORS 279B.400:

24 (a) "Class special procurement" means a contracting procedure that differs from the procedures
25 described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of entering into
26 a series of contracts over time for the acquisition of a specified class of goods or services.

27 (b) "Contract-specific special procurement" means a contracting procedure that differs from the
28 procedures described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of
29 entering into a single contract or a number of related contracts for the acquisition of specified goods
30 or services on a one-time basis or for a single project.

31 (c) "Special procurement" means, unless the context requires otherwise, a class special pro-
32 curement, a contract-specific special procurement or both.

33 (2) Except as provided in subsection (3) of this section, to seek approval of a special procure-
34 ment, a contracting agency shall submit a written request to the Director of the Oregon Department
35 of Administrative Services or the local contract review board, as applicable, that describes the
36 proposed contracting procedure, the goods or services or the class of goods or services to be ac-
37 quired through the special procurement and the circumstances that justify the use of a special pro-
38 curement under the standards set forth in subsection (4) of this section.

39 (3) When the contracting agency is the office of the Secretary of State or the office of the State
40 Treasurer, to seek approval of a special procurement, the contracting agency shall submit a written
41 request to the Secretary of State or the State Treasurer, as applicable, that describes the proposed
42 contracting procedure, the goods or services or the class of goods or services to be acquired through
43 the special procurement and the circumstances that justify the use of a special procurement under
44 the standards set forth in subsection (4) of this section.

45 (4) The director, a local contract review board, the Secretary of State or the State Treasurer

1 may approve a special procurement if the director, board, Secretary of State or State Treasurer finds
 2 that a written request submitted under subsection (2) or (3) of this section demonstrates that the
 3 use of a special procurement as described in the request, or an alternative procedure prescribed by
 4 the director, board, Secretary of State or State Treasurer, will:

5 (a) Be unlikely to encourage favoritism in the awarding of public contracts or to substantially
 6 diminish competition for public contracts; and

7 (b)(A) Result in substantial cost savings to the contracting agency or to the public; or

8 (B) Otherwise substantially promote the public interest in a manner that could not practicably
 9 be realized by complying with requirements that are applicable under ORS 279B.055, 279B.060,
 10 279B.065 or 279B.070 or under any rules adopted thereunder.

11 (5) Public notice of the approval of a proposed special procurement must be given in the same
 12 manner as provided in ORS 279B.055 (4).

13 (6) If a contract is awarded through a special procurement, the contracting agency shall award
 14 the contract to the offeror whose offer the contracting agency determines in writing to be the [*most*
 15 *advantageous*] **best value** to the contracting agency.

16 (7) When the director, a local contract review board, the Secretary of State or the State
 17 Treasurer approves a class special procurement under this section, the contracting agency may
 18 award contracts to acquire goods or services within the class of goods or services in accordance
 19 with the terms of the approval without making a subsequent request for a special procurement.

20 **SECTION 5.** ORS 279C.300 is amended to read:

21 279C.300. It is the policy of the State of Oregon that public improvement contracts awarded
 22 under this chapter must be based on [*competitive bidding, except as otherwise specifically provided in*
 23 *ORS 279C.335 for exceptions and formal exemptions from competitive bidding requirements.*] **the bid,**
 24 **proposal or offer that will provide the best value to the contracting agency in a manner that**
 25 **protects the fiscal and other interests of the contracting agency. In determining which bid,**
 26 **proposal or offer provides the best value, the contracting agency shall:**

27 (1) **Consider factors specified in rules adopted under ORS 279A.065 or 279A.070; and**

28 (2) **Give greater weight to performance-related factors than to cost-related and price-**
 29 **related factors.**

30 **SECTION 6.** ORS 279C.305 is amended to read:

31 279C.305. [(1) *It is the policy of the State of Oregon that contracting agencies shall make every*
 32 *effort to construct public improvements at the least cost to the contracting agency.*]

33 [(2)] (1) Not less than 30 days prior to adoption of the contracting agency's budget for the sub-
 34 sequent budget period, each contracting agency shall prepare and file with the Commissioner of the
 35 Bureau of Labor and Industries a list of every public improvement known to the contracting agency
 36 that the contracting agency plans to fund in the budget period, identifying each improvement by
 37 name and estimating the total on-site construction costs. The list shall also contain a statement as
 38 to whether the contracting agency intends to perform the construction through a private contractor.
 39 [*If the contracting agency intends to perform construction work using the contracting agency's own*
 40 *equipment and personnel on a project estimated to cost more than \$125,000, the contracting agency shall*
 41 *also show that the contracting agency's decision conforms to the policy stated in subsection (1) of this*
 42 *section.*] The list is a public record and may be revised periodically by the agency.

43 [(3)] (2) Before a contracting agency constructs a public improvement with its own equipment
 44 or personnel:

45 (a) If the estimated cost exceeds \$125,000, the contracting agency shall prepare adequate plans

1 and specifications and the estimated unit cost of each classification of work. The estimated cost of
 2 the work must include a reasonable allowance for the cost, including investment cost, of any
 3 equipment used. As used in this paragraph, “adequate” means sufficient to control the performance
 4 of the work and to ensure satisfactory quality of construction by the contracting agency personnel.

5 (b) The contracting agency shall cause to be kept and preserved a full, true and accurate ac-
 6 count of the costs of performing the work, including all engineering and administrative expenses and
 7 the cost, including investment costs, of any equipment used. The final account of the costs is a
 8 public record.

9 [(4)] (3) Subsections [(2) and (3)] (1) **and** (2) of this section do not apply to a contracting agency
 10 when the public improvement is to be used for the distribution or transmission of electric power.

11 [(5)] (4) For purposes of this section, resurfacing of highways, roads or streets at a depth of two
 12 or more inches and at an estimated cost that exceeds \$125,000 is a public improvement.

13 **SECTION 7.** ORS 279C.335 is amended to read:

14 279C.335. (1) All public improvement contracts shall be based upon competitive bids **or com-**
 15 **petitive proposals** except:

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

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

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

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

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

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

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

29 (2) Subject to subsection (4)(b) of this section, the Director of the Oregon Department of Ad-
 30 ministrative Services, a local contract review board or, for contracts described in ORS 279A.050
 31 (3)(b), the Director of Transportation may exempt a public improvement contract or a class of public
 32 improvement contracts from the competitive bidding **or proposing** requirements of subsection (1)
 33 of this section upon approval of the following findings submitted by the contracting agency seeking
 34 the exemption:

35 (a) It is unlikely that the exemption will encourage favoritism in the awarding of public im-
 36 provement contracts or substantially diminish competition for public improvement contracts; and

37 (b) The awarding of public improvement contracts under the exemption will result in [*substantial*
 38 *cost savings*] **the best value** to the contracting agency or, if the contracts are for public improve-
 39 ments described in ORS 279A.050 (3)(b), to the contracting agency or the public. In making the
 40 finding, the Director of the Oregon Department of Administrative Services, the Director of Trans-
 41 portation or the local contract review board may consider the type, cost and amount of the contract,
 42 the number of persons available to bid and such other factors as may be deemed appropriate.

43 (3) In making findings to support an exemption for a class of public improvement contracts, the
 44 contracting agency shall clearly identify the class using the class’s defining characteristics. Those
 45 characteristics shall include some combination of project descriptions or locations, time periods,

1 contract values, methods of procurement or other factors that distinguish the limited and related
2 class of public improvement contracts from the contracting agency's overall construction program.
3 The contracting agency may not identify a class solely by funding source, such as a particular bond
4 fund, or by the method of procurement, but shall identify the class using characteristics that rea-
5 sonably relate to the exemption criteria set forth in subsection (2) of this section.

6 (4) In granting exemptions under subsection (2) of this section, the Director of the Oregon De-
7 partment of Administrative Services, the Director of Transportation or the local contract review
8 board shall:

9 (a) When appropriate, direct the use of alternate contracting methods that take account of
10 market realities and modern practices and are consistent with the public policy of encouraging
11 competition.

12 (b) Require and approve or disapprove written findings by the contracting agency that support
13 the awarding of a particular public improvement contract or a class of public improvement con-
14 tracts, without the competitive bidding **or proposing** requirement of subsection (1) of this section.
15 The findings must show that the exemption of a contract or class of contracts complies with the
16 requirements of subsection (2) of this section.

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

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

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

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

29 (e) If a contracting agency is required to act promptly due to circumstances beyond the con-
30 tracting agency's control that do not constitute an emergency, notification of the public hearing may
31 be published simultaneously with the contracting agency's solicitation of contractors for the alter-
32 native public contracting method, as long as responses to the solicitation are due at least five days
33 after the meeting and approval of the findings.

34 (6) After declaring that an emergency exists in accordance with rules adopted under ORS
35 279A.065, a contracting agency may award a public improvement contract in response to the emer-
36 gency without using a competitive solicitation.

37 (7) A public improvement contract awarded under the competitive bidding **or proposing** re-
38 quirement of subsection (1) of this section may be amended only in accordance with rules adopted
39 under ORS 279A.065.

40 (8) Public improvement contracts excepted from competitive [*bid*] **bidding or proposing** re-
41 quirements under subsection (1)(a), (c), (d), (e), (f) or (g) of this section are not subject to the ex-
42 emption requirements of subsection (2) of this section.

43 **SECTION 8.** ORS 279C.335, as amended by section 104, chapter 794, Oregon Laws 2003, section
44 13, chapter 103, Oregon Laws 2005, and section 59, chapter 625, Oregon Laws 2005, is amended to
45 read:

1 279C.335. (1) All public improvement contracts shall be based upon competitive bids **or com-**
2 **petitive proposals** except:

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

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

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

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

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

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

13 (2) Subject to subsection (4)(b) of this section, the Director of the Oregon Department of Ad-
14 ministrative Services, a local contract review board or, for contracts described in ORS 279A.050
15 (3)(b), the Director of Transportation may exempt a public improvement contract or a class of public
16 improvement contracts from the competitive bidding **or proposing** requirements of subsection (1)
17 of this section upon approval of the following findings submitted by the contracting agency seeking
18 the exemption:

19 (a) It is unlikely that the exemption will encourage favoritism in the awarding of public im-
20 provement contracts or substantially diminish competition for public improvement contracts; and

21 (b) The awarding of public improvement contracts under the exemption will result in [*substantial*
22 *cost savings*] **the best value** to the contracting agency or, if the contracts are for public improve-
23 ments described in ORS 279A.050 (3)(b), to the contracting agency or the public. In making the
24 finding, the Director of the Oregon Department of Administrative Services, the Director of Trans-
25 portation or the local contract review board may consider the type, cost and amount of the contract,
26 the number of persons available to bid and such other factors as may be deemed appropriate.

27 (3) In making findings to support an exemption for a class of public improvement contracts, the
28 contracting agency shall clearly identify the class using the class's defining characteristics. Those
29 characteristics shall include some combination of project descriptions or locations, time periods,
30 contract values, methods of procurement or other factors that distinguish the limited and related
31 class of public improvement contracts from the contracting agency's overall construction program.
32 The contracting agency may not identify a class solely by funding source, such as a particular bond
33 fund, or by the method of procurement, but shall identify the class using characteristics that rea-
34 sonably relate to the exemption criteria set forth in subsection (2) of this section.

35 (4) In granting exemptions under subsection (2) of this section, the Director of the Oregon De-
36 partment of Administrative Services, the Director of Transportation or the local contract review
37 board shall:

38 (a) When appropriate, direct the use of alternate contracting methods that take account of
39 market realities and modern practices and are consistent with the public policy of encouraging
40 competition.

41 (b) Require and approve or disapprove written findings by the contracting agency that support
42 the awarding of a particular public improvement contract or a class of public improvement con-
43 tracts, without the competitive bidding **or proposing** requirement of subsection (1) of this section.
44 The findings must show that the exemption of a contract or class of contracts complies with the
45 requirements of subsection (2) of this section.

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

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

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

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

13 (e) If a contracting agency is required to act promptly due to circumstances beyond the con-
14 tracting agency's control that do not constitute an emergency, notification of the public hearing may
15 be published simultaneously with the contracting agency's solicitation of contractors for the alter-
16 native public contracting method, as long as responses to the solicitation are due at least five days
17 after the meeting and approval of the findings.

18 (6) After declaring that an emergency exists in accordance with rules adopted under ORS
19 279A.065, a contracting agency may award a public improvement contract in response to the emer-
20 gency without using a competitive solicitation.

21 (7) A public improvement contract awarded under the competitive bidding **or proposing** re-
22 quirement of subsection (1) of this section may be amended only in accordance with rules adopted
23 under ORS 279A.065.

24 (8) Public improvement contracts excepted from competitive [*bid*] **bidding or proposing** re-
25 quirements under subsection (1)(a), (c), (d), (e) or (f) of this section are not subject to the exemption
26 requirements of subsection (2) of this section.

27 **SECTION 9.** ORS 279C.335, as amended by sections 104 and 105a, chapter 794, Oregon Laws
28 2003, sections 13 and 14, chapter 103, Oregon Laws 2005, and sections 59 and 60, chapter 625,
29 Oregon Laws 2005, is amended to read:

30 279C.335. (1) All public improvement contracts shall be based upon competitive bids **or com-**
31 **petitive proposals** except:

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

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

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

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

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

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

42 (2) Subject to subsection (4)(b) of this section, the Director of the Oregon Department of Ad-
43 ministrative Services or a local contract review board may exempt a public improvement contract
44 or a class of public improvement contracts from the competitive bidding **or proposing** requirements
45 of subsection (1) of this section upon approval of the following findings submitted by the contracting

1 agency seeking the exemption:

2 (a) It is unlikely that the exemption will encourage favoritism in the awarding of public im-
3 provement contracts or substantially diminish competition for public improvement contracts; and

4 (b) The awarding of public improvement contracts under the exemption will result in [*substantial*
5 *cost savings*] **the best value** to the contracting agency. In making the finding, the director or the
6 local contract review board may consider the type, cost and amount of the contract, the number of
7 persons available to bid and such other factors as may be deemed appropriate.

8 (3) In making findings to support an exemption for a class of public improvement contracts, the
9 contracting agency shall clearly identify the class using the class's defining characteristics. Those
10 characteristics shall include some combination of project descriptions or locations, time periods,
11 contract values, methods of procurement or other factors that distinguish the limited and related
12 class of public improvement contracts from the contracting agency's overall construction program.
13 The contracting agency may not identify a class solely by funding source, such as a particular bond
14 fund, or by the method of procurement, but shall identify the class using characteristics that rea-
15 sonably relate to the exemption criteria set forth in subsection (2) of this section.

16 (4) In granting exemptions under subsection (2) of this section, the director or the local contract
17 review board shall:

18 (a) When appropriate, direct the use of alternate contracting methods that take account of
19 market realities and modern practices and are consistent with the public policy of encouraging
20 competition.

21 (b) Require and approve or disapprove written findings by the contracting agency that support
22 the awarding of a particular public improvement contract or a class of public improvement con-
23 tracts, without the competitive bidding **or proposing** requirement of subsection (1) of this section.
24 The findings must show that the exemption of a contract or class of contracts complies with the
25 requirements of subsection (2) of this section.

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

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

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

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

38 (e) If a contracting agency is required to act promptly due to circumstances beyond the con-
39 tracting agency's control that do not constitute an emergency, notification of the public hearing may
40 be published simultaneously with the contracting agency's solicitation of contractors for the alter-
41 native public contracting method, as long as responses to the solicitation are due at least five days
42 after the meeting and approval of the findings.

43 (6) After declaring that an emergency exists in accordance with rules adopted under ORS
44 279A.065, a contracting agency may award a public improvement contract in response to the emer-
45 gency without using a competitive solicitation.

1 (7) A public improvement contract awarded under the competitive bidding **or proposing** re-
 2 quirement of subsection (1) of this section may be amended only in accordance with rules adopted
 3 under ORS 279A.065.

4 (8) Public improvement contracts excepted from competitive [*bid*] **bidding or proposing** re-
 5 quirements under subsection (1)(a), (c), (d), (e) or (f) of this section are not subject to the exemption
 6 requirements of subsection (2) of this section.

7 **SECTION 10.** ORS 279C.410 is amended to read:

8 279C.410. (1) Notwithstanding the public records law, ORS 192.410 to 192.505:

9 (a) Proposals may be opened so as to avoid disclosure of contents to competing proposers during,
 10 when applicable, the process of negotiation.

11 (b) Proposals are not required to be open for public inspection until after the notice of intent
 12 to award a contract is issued.

13 (2) For each request for proposals, the contracting agency shall prepare a list of proposals.

14 (3) Notwithstanding any requirement to make proposals open to public inspection after the
 15 contracting agency's issuance of notice of intent to award a contract, a contracting agency may
 16 withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information
 17 submitted to a public body in confidence, as described in ORS 192.502, that are contained in a pro-
 18 posal. The fact that proposals are opened at a public meeting as defined in ORS 192.610 does not
 19 make their contents subject to disclosure, regardless of whether the public body opening the pro-
 20 posals fails to give notice of or provide for an executive session for the purpose of opening pro-
 21 posals. If a request for proposals is canceled after proposals are received, the contracting agency
 22 may return a proposal to the proposer that made the proposal. The contracting agency shall keep
 23 a list of returned proposals in the file for the solicitation.

24 (4) As provided in the request for proposals, a contracting agency may conduct discussions with
 25 proposers who submit proposals the agency has determined to be closely competitive or to have a
 26 reasonable chance of being selected for award. The discussions may be conducted for the purpose
 27 of clarification to ensure full understanding of, and responsiveness to, the solicitation requirements.
 28 The contracting agency shall accord proposers fair and equal treatment with respect to any oppor-
 29 tunity for discussion and revision of proposals. Revisions of proposals may be permitted after the
 30 submission of proposals and before award for the purpose of obtaining best and final offers. In con-
 31 ducting discussions, the contracting agency may not disclose information derived from proposals
 32 submitted by competing proposers.

33 (5) When provided for in the request for proposals, the contracting agency may employ methods
 34 of contractor selection including but not limited to award based solely on the ranking of proposals,
 35 negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition
 36 designed to identify a class of proposers that fall within a competitive range or to otherwise elimi-
 37 nate from consideration a class of lower ranked proposers, or any combination of methods, as au-
 38 thorized or prescribed by rules adopted under ORS 279A.065. When applicable, in any instance in
 39 which the contracting agency determines that impasse has been reached in negotiations with a
 40 highest ranked proposer, the contracting agency may terminate negotiations with that proposer and
 41 commence negotiations with the next highest ranked proposer.

42 (6) The cancellation of requests for proposals and the rejection of proposals shall be in accord-
 43 ance with ORS 279C.395.

44 (7) At least seven days before the award of a public improvement contract, unless the con-
 45 tracting agency determines that seven days is impractical under rules adopted under ORS 279A.065,

1 the contracting agency shall issue to each proposer or post, electronically or otherwise, a notice
2 of intent to award.

3 (8) If a public improvement contract is awarded, the contracting agency shall award a public
4 improvement contract to the responsible proposer whose proposal is determined in writing to be the
5 [*most advantageous*] **best value** to the contracting agency based on the evaluation factors set forth
6 in the request for proposals and, when applicable, the outcome of any negotiations authorized by the
7 request for proposals. Other factors may not be used in the evaluation.

8 (9) The contracting agency may issue a request for information, a request for interest, a request
9 for qualifications or other preliminary documents to obtain information useful in the preparation or
10 distribution of a request for proposals.

11 **SECTION 11.** ORS 279C.585 is amended to read:

12 279C.585. A contractor whose bid is accepted may substitute a first-tier subcontractor that was
13 not disclosed under ORS 279C.370 by submitting the name of the new subcontractor and the reason
14 for the substitution in writing to the contracting agency. A contractor may substitute a first-tier
15 subcontractor under this section in the following circumstances:

16 (1) When the subcontractor disclosed under ORS 279C.370 fails or refuses to execute a written
17 contract after having had a reasonable opportunity to do so after the written contract, which must
18 be reasonably based upon the general terms, conditions, plans and specifications for the public im-
19 provement project or the terms of the subcontractor's written bid, is presented to the subcontractor
20 by the contractor.

21 (2) When the disclosed subcontractor becomes bankrupt or insolvent.

22 (3) When the disclosed subcontractor fails or refuses to perform the subcontract.

23 (4) When the disclosed subcontractor fails or refuses to meet the bond requirements of the
24 contractor that had been identified prior to the bid submittal.

25 (5) When the contractor demonstrates to the contracting agency that the subcontractor was
26 disclosed as the result of an inadvertent clerical error.

27 (6) When the disclosed subcontractor does not hold a license from the Construction Contractors
28 Board and is required to be licensed by the board.

29 (7) When the contractor determines that the work performed by the disclosed subcontractor is
30 substantially unsatisfactory and not in substantial accordance with the plans and specifications or
31 that the subcontractor is substantially delaying or disrupting the progress of the work.

32 (8) When the disclosed subcontractor is ineligible to work on a public improvement contract
33 under applicable statutory provisions.

34 (9) When the substitution is for good cause. The Construction Contractors Board shall define
35 "good cause" by rule. "Good cause" includes but is not limited to the financial instability of a sub-
36 contractor. [*The definition of "good cause" must reflect the least-cost policy for public improvements*
37 *established in ORS 279C.305.*]

38 (10) When the substitution is reasonably based on the contract alternates chosen by the con-
39 tracting agency.

40 **SECTION 12.** Section 132, chapter 794, Oregon Laws 2003, is amended to read:

41 **Sec. 132.** (1) A public improvement contract estimated by the contracting agency not to exceed
42 \$100,000, or not to exceed \$50,000 in the case of contracts for highways, bridges and other trans-
43 portation projects, may be awarded in accordance with intermediate procurement procedures for
44 competitive quotes established by rules adopted under [*section 10 of this 2003 Act*] **ORS 279A.065.**
45 A contract awarded under this section may be amended to exceed the thresholds set forth in this

1 subsection only in accordance with rules adopted under [section 10 of this 2003 Act] **ORS 279A.065**.

2 (2) A procurement may not be artificially divided or fragmented so as to constitute an interme-
 3 diate procurement under this section or to circumvent competitive bidding **or proposing** require-
 4 ments under [sections 88 to 179 of this 2003 Act] **ORS chapter 279C**.

5 (3) Intermediate procurements under this section need not be made through competitive bidding
 6 **or proposing**. However, nothing in this section may be construed as prohibiting a contracting
 7 agency from conducting a procurement that does not exceed the thresholds in subsection (1) of this
 8 section under competitive bidding **or proposing** procedures.

9 **SECTION 13.** Section 133, chapter 794, Oregon Laws 2003, is amended to read:

10 **Sec. 133.** (1) Rules adopted under [section 10 of this 2003 Act] **ORS 279A.065** to govern compet-
 11 itive quotes shall require the contracting agency to seek at least three informally solicited compet-
 12 itive price quotes from prospective contractors. The contracting agency shall keep a written record
 13 of the sources and amounts of the quotes received. If three quotes are not reasonably available,
 14 fewer will suffice, but in that event the contracting agency shall make a written record of the effort
 15 made to obtain the quotes.

16 (2) If a contract is to be awarded by competitive quotes, the contracting agency shall award the
 17 contract to the prospective contractor whose quote will [*best serve the interests of*] **provide the best**
 18 **value to** the contracting agency, taking into account price as well as any other applicable factors
 19 such as, but not limited to, experience, specific expertise, availability, project understanding, con-
 20 tractor capacity and responsibility. If an award is not made to the prospective contractor offering
 21 the lowest price quote, the contracting agency shall make a written record of the basis for award.

22 **SECTION 14.** **ORS 279C.355 is repealed.**

23 **SECTION 15.** **The amendments to ORS 279A.015, 279A.200, 279B.060, 279B.085, 279C.300,**
 24 **279C.305, 279C.335, 279C.410 and 279C.585 and sections 132 and 133, chapter 794, Oregon Laws**
 25 **2003, and the repeal of ORS 279C.355 by sections 1 to 14 of this 2007 Act apply to public con-**
 26 **tracts first advertised, or if not advertised then entered into, on or after the effective date**
 27 **of this 2007 Act.**