

A-Engrossed
House Bill 2867

Ordered by the House May 29
Including House Amendments dated May 29

Sponsored by COMMITTEE ON BUSINESS AND LABOR

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.

[Requires contracting agency to establish measurable standards to assess quality of contractor's performance under public contract and specify consequences for failing to meet standards.]

[Authorizes Secretary of State and local contracting agency to audit public contracts. Establishes certain standards for audit.]

[Prohibits contracting agency from contracting for contract administration, except for consultant to train contracting agency employees in skills necessary for administration.]

[Prohibits employee of contracting agency to seek or obtain employment with contractor in certain circumstances. Requires contractor to offer employment to employee of contracting agency if public contract displaces employee.]

[Requires contracting agency to demonstrate with cost analysis or by other means that cost of providing goods or performing service with contracting agency's own personnel or resources is greater than cost of procuring goods or services from contractor.]

[Specifies additional criteria for contracting agency to use in determining contractor's responsibility and for prequalifying contractor.]

Requires contracting agency, before conducting procurement for services that exceed specified amount, to demonstrate by specified means that performing services with contracting agency's own personnel and services is not feasible or to demonstrate by means of written cost analysis that contracting agency would incur less cost in procuring services than in performing services with agency's own personnel and resources. Applies requirement to local contracting agency that authorizes certain entities to procure services. Creates exceptions. Specifies method by which contracting agency must perform cost analysis.

Directs Oregon Department of Administrative Services to consult with contracting agencies and evaluate new requirements. Directs department to report results of consultation and evaluation to Legislative Assembly on January 10, 2011.

Modifies information that contracting agency must include in invitation to bid and request for proposals. Modifies and creates other provisions related to public contracting.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to public contracting; creating new provisions; amending ORS 279B.055, 279B.060, 279B.110,
3 279B.145, 279B.420 and 279C.375; and declaring an emergency.

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

5 **SECTION 1. Sections 2, 3 and 4 of this 2009 Act are added to and made a part of ORS**
6 **chapter 279B.**

7 **SECTION 2. (1) Except as provided in section 4 of this 2009 Act, before conducting a**
8 **procurement for services with an estimated contract price that exceeds \$250,000, a con-**
9 **tracting agency shall:**

10 **(a) Demonstrate, by means of a written cost analysis in accordance with section 3 of this**
11 **2009 Act, that the contracting agency would incur less cost in conducting the procurement**
12 **than in performing the services with the contracting agency's own personnel and resources;**
13 **or**

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 (b) Demonstrate, in accordance with section 4 of this 2009 Act, that performing the ser-
2 vices with the contracting agency's own personnel and resources is not feasible.

3 (2) If a local contracting agency authorizes a department, bureau, office or other subdi-
4 vision of the local contracting agency to conduct a procurement on behalf of another de-
5 partment, bureau, office or subdivision of the local contracting agency, the department,
6 bureau, office or subdivision on whose behalf the procurement is conducted shall comply with
7 the requirement set forth in subsection (1) of this section.

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

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

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

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

15 (d) The Port of Portland; or

16 (e) Procurements for client services, as defined in OAR 125-246-0110.

17 **SECTION 3.** (1) In the cost analysis required under section 2 of this 2009 Act, a con-
18 tracting agency shall:

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

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

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

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

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

34 (b) Estimate the cost a potential contractor would incur in performing the services, in-
35 cluding:

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

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

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

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

44 (C) Miscellaneous costs related to performing the services, including but not limited to
45 reasonably foreseeable fluctuations in the costs for the items identified in this subsection

1 over the expected duration of the procurement.

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

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

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

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

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

33 (3) A cost analysis, record, documentation or determination made under this section is
34 a public record.

35 **SECTION 4.** (1) Notwithstanding the provisions of section 3 (2)(a) of this 2009 Act, a
36 contracting agency may proceed with a procurement if the contracting agency reasonably
37 determines in writing that using the contracting agency's own personnel or resources to
38 perform the services that the contracting agency intends to procure is not feasible. The
39 contracting agency may make the determination described in this subsection without con-
40 ducting a cost analysis under section 3 of this 2009 Act if the contracting agency finds that:

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

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

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

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

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

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

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

16 (F) The procurement is for services, the need for which is so urgent, temporary or oc-
17 casional that attempting to perform the services with the contracting agency's own person-
18 nel or resources would cause a delay that would frustrate the purpose for obtaining the
19 services; or

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

22 (2) A finding or determination and supporting documentation for a finding or determi-
23 nation made under this section is a public record.

24 **SECTION 4a.** (1) The Oregon Department of Administrative Services, in consultation with
25 contracting agencies and representatives of employees of contracting agencies that are sub-
26 ject to sections 2, 3 and 4 of this 2009 Act, shall evaluate the extent to which the provisions
27 of sections 2, 3 and 4 of this 2009 Act aided the contracting agency in making a determination
28 as to whether to procure services or to perform services with the contracting agency's own
29 personnel and resources.

30 (2) The department shall report the results of the consultation and evaluation to the
31 Legislative Assembly on January 10, 2011.

32 **SECTION 5.** ORS 279B.055 is amended to read:

33 279B.055. (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 invitation
35 to bid, by competitive sealed bidding.

36 (2) The contracting agency shall issue an invitation to bid, which must *[include]*:

37 (a) **Specify** a time and date by which the bids must be received and a place at which the bids
38 must be submitted¹, *and may*,. **The contracting agency**, in the **contracting agency's** sole dis-
39 cretion *[of the contracting agency]*, **may receive bids by electronic means** or direct or permit *[the*
40 *submission]* **a bidder to submit** *[and receipt of]* bids by electronic means²;

41 (b) **Specify** the name and title of the person designated *[for the receipt of]* **to receive** bids and
42 the person **the contracting agency designates** *[designated by the contracting agency]* as the contact
43 person for the procurement, if different³;

44 (c) **[A]** **Describe** the procurement *[description]*; **In the description, the contracting agency**
45 **shall identify the scope of work included within the procurement, outline the contractor's**

1 **anticipated duties and set expectations for the contractor's performance. Unless the con-**
2 **tracting agency for good cause specifies otherwise, the scope of work shall require the con-**
3 **tractor to meet the highest standards prevalent in the industry or business most closely**
4 **involved in providing the appropriate goods or services.**

5 (d) **Specify** a time, date and place *[that]* **for** prequalification applications, if any, *[must]* **to** be
6 filed and the classes of work, if any, for which bidders must be prequalified in accordance with ORS
7 279B.120[;].

8 (e) *[A statement]* **State** that the contracting agency may cancel the procurement or reject any
9 or all bids in accordance with ORS 279B.100[;].

10 (f) *[A statement]* **State** that "Contractors shall use recyclable products to the maximum extent
11 economically feasible in the performance of the contract work set forth in this document." if a **state**
12 **contracting agency issues** the invitation to bid. *[is issued by a state contracting agency;]*

13 (g) *[A statement that requires]* **Require** the contractor or subcontractor to possess an asbestos
14 abatement license, if required under ORS 468A.710[; and].

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

19 **(A) Reducing or withholding payment;**

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

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

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

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

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

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

38 (b) A public notice must be published at least once in at least one newspaper of general circu-
39 lation in the area where the contract is to be performed and in as many additional issues and pub-
40 lications as the contracting agency may determine.

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

45 (d) In addition to the modes of publication authorized by paragraphs (b) and (c) of this sub-

1 section, the contracting agency may use any other medium reasonably calculated to reach prospec-
2 tive bidders or proposers.

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

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

7 (5)(a) The contracting agency shall open bids publicly at the time, date and place designated in
8 the invitation to bid. When authorized by, and in accordance with, rules adopted under ORS
9 279A.065, bids may be submitted, received and opened through electronic means.

10 (b) The **contracting agency shall record the** amount of a bid, the name of the bidder and other
11 relevant information [*as may be*] specified by rule adopted under ORS 279A.065 [*shall be recorded*
12 *by the contracting agency*]. The record shall be open to public inspection.

13 (c) Notwithstanding [*any*] a requirement to make bids open to public inspection after the con-
14 tracting [*agency's issuance of*] **agency issues** notice of intent to award a contract, a contracting
15 agency may withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and
16 information submitted to a public body in confidence, as described in ORS 192.502, that are con-
17 tained in a bid.

18 (6)(a) The contracting agency shall evaluate all bids that are received before the time and date
19 indicated for bid opening in the invitation to bid. The contracting agency shall evaluate the bids
20 based on the requirements set forth in the invitation to bid. The requirements may include, in ad-
21 dition to the information described in subsection (2) of this section, criteria to determine minimum
22 acceptability, such as inspection, testing, quality and suitability for intended use or purpose. Criteria
23 that will affect the bid price and will be considered in evaluation for award including, but not lim-
24 ited to, discounts, transportation costs and total costs of ownership or operation of a product over
25 [*its*] **the life of the product must** [*shall*] be objectively measurable. The invitation to bid [*shall*]
26 **must** set forth the evaluation criteria to be used. No criteria may be used in a bid evaluation that
27 are not set forth in the invitation to bid or in a qualified products list maintained under ORS
28 279B.115. The contracting agency may not consider for award bids received after the time and date
29 indicated for bid opening in the invitation to bid. The contracting agency may retain bids or copies
30 of bids received after the bid time and date indicated in the invitation to bid.

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

33 (7) Rules adopted under ORS 279A.065 [*shall*] **must** provide for and regulate the correction and
34 withdrawal of bids before and after bid opening and the cancellation of awards or contracts based
35 on bid mistakes. After bid opening, changes in bids prejudicial to the interests of the public or fair
36 competition are not permitted. [*All decisions to permit*] **A contracting agency that permits a bid-**
37 **der to correct or withdraw a bid or that cancels** [*the correction or withdrawal of bids, or to*
38 *cancel*] an award or a contract based on bid mistakes, shall [*be supported by*] **support the decision**
39 **with** a written determination [*by the contracting agency*] that states the reasons for the action taken.

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

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

44 (10) If a **contracting agency awards** a contract [*is awarded*], the contracting agency shall
45 award the contract:

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

4 (b) [When] **If** the invitation to bid specifies or authorizes the award of multiple contracts, to the
5 responsible bidders:

6 (A) Whose bids substantially comply with the requirements and criteria set forth in the invita-
7 tion to bid and with all prescribed public procurement procedures and requirements; and

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

9 (11) The successful bidder shall promptly execute a contract. The successful bidder's duty to
10 promptly execute a contract includes the duty to take all action that is necessary to [the formation
11 of] **form** a contract in accordance with the invitation to bid, including [the] posting [of] performance
12 security, [and the submission of] **submitting** proof of insurance when [required by] the invitation to
13 bid **requires the submission and agreeing to perform the scope of work and meet the per-**
14 **formance standards set forth in the invitation to bid.**

15 (12) [When the] **If** a contracting agency [considers it impractical to initially prepare] **determines**
16 **that preparing** a procurement description to support an award based on price **is impractical**, the
17 contracting agency may issue a multistep invitation to bid [requesting the submission of] **that re-**
18 **quests bidders to submit** unpriced submittals, and then later issue an invitation to bid limited to
19 the bidders [whom] **that** the contracting agency officer has determined [to be] **are** eligible to submit
20 a priced bid under the criteria set forth in the initial solicitation of unpriced submittals.

21 (13) The contracting agency may issue a request for information, a request for interest or other
22 preliminary documents to obtain information useful in [the preparation of] **preparing** an invitation
23 to bid.

24 **SECTION 6.** ORS 279B.060 is amended to read:

25 279B.060. (1) A contracting agency may solicit and award a public contract for goods or ser-
26 vices, or may award multiple public contracts for goods or services when specified in the request
27 for proposals, by requesting and evaluating competitive sealed proposals.

28 (2) The request for proposals must [include]:

29 (a) **Specify** a time and date by which sealed proposals must be received, and a place at which
30 the proposals must be submitted[, and may,]. **The contracting agency**, in the **contracting agency's**
31 sole discretion, [of the contracting agency,] **may receive proposals by electronic means or may**
32 direct or permit [the submission and receipt of] **proposers to submit** proposals by electronic
33 means[;].

34 (b) **Specify** the name and title of the person designated [for receipt of] **to receive** proposals and
35 the person [designated by] the contracting agency **designates** as the contact person for the pro-
36 curement, if different[;].

37 (c) [A] **Describe** the procurement [description;]. **In the description, the contracting agency**
38 **shall identify the scope of work included within the procurement, outline the contractor's**
39 **anticipated duties and set expectations for the contractor's performance. Unless the con-**
40 **tracting agency for good cause specifies otherwise, the scope of work shall require the con-**
41 **tractor to meet the highest standards prevalent in the industry or business most closely**
42 **involved in providing the appropriate goods or services.**

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

1 (e) [A *statement*] **State** that the contracting agency may cancel the procurement or reject any
2 or all proposals in accordance with ORS 279B.100[;].

3 (f) [A *statement*] **State** that “Contractors shall use recyclable products to the maximum extent
4 economically feasible in the performance of the contract work set forth in this document.” if a **state**
5 **contracting agency issues** the request for proposals. [*is issued by a state contracting agency;*]

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

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

12 (A) **Reducing or withholding payment;**

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

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

18 (3) The request for proposals also may:

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

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

23 [(C)] (c) Contain or incorporate the form and content of the contract that the contracting
24 agency will accept, or [*suggested*] **suggest** contract terms and conditions that nevertheless may be
25 the subject of negotiations with proposers;

26 [(D)] (d) Announce the method [*of contractor selection*] **the contracting agency will use to se-**
27 **lect the contractor, which** [*that*] may include, but is not limited to, [*negotiation*] **negotiating**
28 the highest ranked proposer, competitive negotiations, a multiple-tiered competition **that is** designed
29 to identify a class of proposers that fall within a competitive range or to otherwise eliminate from
30 consideration a class of lower ranked proposers[, or [*any*] a combination of methods, as authorized
31 or prescribed by rules adopted under ORS 279A.065; and

32 [(E)] (e) [*Contain a description of*] **Describe** the manner in which **the contracting agency will**
33 **evaluate** proposals, [*will be evaluated, including*] **identifying** the relative importance of price and
34 [*any*] other [*evaluation*] factors **the contracting agency will use** [*used*] to **evaluate and** rate the
35 proposals in the first tier of competition[, *and*]. If **the contracting agency uses** more than one tier
36 of competitive evaluation [*may be used*], **the request for proposals must describe** [*a description*
37 *of*] the process **the contracting agency will use to evaluate proposals** [*under which the proposals*
38 *will be evaluated*] in the subsequent tiers.

39 [(3)(a)] (4)(a) The contracting agency may require proposal security in any form [*deemed prudent*
40 *by*] the contracting agency **deems prudent**. Proposal security shall serve the same function with
41 respect to requests for proposals as bid security serves with respect to invitations to bid under ORS
42 279B.055.

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

45 (c) The contracting agency shall retain the proposal security if a proposer who is awarded a

1 contract fails to promptly and properly execute the contract. For purposes of this paragraph, prompt
 2 and proper execution of the contract includes all action by a proposer that is necessary to [*the for-*
 3 *mation of*] **form** a contract in accordance with the request for proposals, including [*the*] posting
 4 [*of*] performance security and [*the submission of*] **submitting** proof of insurance when [*required by*]
 5 the request for proposals **requires the submission**. If contract negotiations or competitive negoti-
 6 ations are conducted, the failure, prior to award, of a contracting agency and a proposer to reach
 7 agreement does not constitute grounds for [*the retention of*] **retaining** proposal security.

8 [(4)] (5) Public notice of the request for proposals [*shall*] **must** be given in the same manner as
 9 provided for public notice of invitations to bid in ORS 279B.055 (4).

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

19 (b) Notwithstanding [*any*] **a** requirement to make proposals open to public inspection after the
 20 contracting [*agency's issuance of*] **agency issues** notice of intent to award a contract, a contracting
 21 agency may withhold from disclosure to the public materials included in a proposal that are exempt
 22 or conditionally exempt from disclosure under ORS 192.501 or 192.502.

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

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

34 [(b)] (8) For purposes of evaluation, when provided for in the request for proposals, the con-
 35 tracting agency may employ methods of contractor selection that include, but are not limited to:

36 [(A)] (a) An award or awards based solely on the ranking of proposals;

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

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

41 [(D)] (d) Serial negotiations, beginning with the highest ranked proposer;

42 [(E)] (e) Competitive simultaneous negotiations;

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

1 [(G)] (g) A multistep request for proposals requesting the submission of unpriced technical sub-
 2 mittals, and then later issuing a request for proposals limited to the proposers whose technical
 3 submittals the contracting agency had determined to be qualified under the criteria set forth in the
 4 initial request for proposals; or

5 [(H)] (h) [Any] A combination of methods described in this [paragraph] **subsection**, as author-
 6 ized or prescribed by rules adopted under ORS 279A.065.

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

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

18 [(7)] (11) The cancellation of requests for proposals and the rejection of proposals must be in
 19 accordance with ORS 279B.100.

20 [(8)] (12) In the request for proposals, the contracting agency shall describe the methods by
 21 which the agency will make the results of each tier of competitive evaluation available to the
 22 proposers who competed in the tier. The contracting agency shall include a description of the man-
 23 ner in which the proposers who are eliminated from further competition may protest or otherwise
 24 object to the contracting agency's decision.

25 [(9)] (13) The contracting agency shall issue or electronically post the notice of intent to award
 26 described in ORS 279B.135 to each proposer who was evaluated in the final competitive tier.

27 [(10)] (14) If **the contracting agency awards** a contract [is awarded], the contracting agency
 28 shall award the contract to the responsible proposer whose proposal the contracting agency deter-
 29 mines in writing [to be] **is** the most advantageous to the contracting agency based on the evaluation
 30 process and evaluation factors described in the request for proposals, [any] applicable preferences
 31 described in ORS 279A.120 and 279A.125 and, when applicable, the outcome of any negotiations au-
 32 thorized by the request for proposals. Other factors may not be used in the evaluation. When the
 33 request for proposals specifies or authorizes [the award of] **awarding** multiple public contracts, the
 34 contracting agency shall award public contracts to the responsible proposers who qualify for the
 35 award of a contract under the terms of the request for proposals.

36 [(11)] (15) The contracting agency may issue a request for information, a request for interest, a
 37 request for qualifications or other preliminary documents to obtain information useful in [the prep-
 38 aration of] **preparing** a request for proposals.

39 **(16) Before executing a contract solicited under this section, a contracting agency shall**
 40 **obtain the proposer's agreement to perform the scope of work and meet the performance**
 41 **standards set forth in the request for proposals.**

42 **SECTION 7.** ORS 279B.110 is amended to read:

43 279B.110. (1) [The] A contracting agency shall prepare a written determination of nonresponsi-
 44 bility [of] **for** a bidder or proposer if the **contracting agency determines that the** bidder or
 45 proposer does not meet the standards of responsibility.

1 (2) In determining whether a bidder or proposer has met the standards of responsibility, the
2 contracting agency shall consider whether a bidder or proposer *[has]*:

3 (a) **Has** available the appropriate financial, material, equipment, facility and personnel resources
4 and expertise, or **has the** ability to obtain the resources and expertise, necessary to *[indicate the*
5 *capability of the bidder or proposer to]* meet all contractual responsibilities[;].

6 (b) **Completed previous contracts of a similar nature with** a satisfactory record of perform-
7 ance. **For purposes of this paragraph, a satisfactory record of performance means that to the**
8 **extent that the costs associated with and time available to perform a previous contract re-**
9 **mained within the bidder's or proposer's control, the bidder or proposer stayed within the**
10 **time and budget allotted for the procurement and otherwise performed the contract in a**
11 **satisfactory manner.** The contracting agency shall document the **bidder's or proposer's** record
12 of performance *[of a bidder or proposer]* if the contracting agency finds **under this paragraph that**
13 the bidder or proposer *[nonresponsible under this paragraph;]* **is not responsible.**

14 (c) **Has** a satisfactory record of integrity. **The contracting agency in evaluating the bidder's**
15 **or proposer's record of integrity may consider, among other things, whether the bidder or**
16 **proposer has previous criminal convictions for offenses related to obtaining or attempting**
17 **to obtain a contract or subcontract or in connection with the bidder's or proposer's per-**
18 **formance of a contract or subcontract.** The contracting agency shall document the **bidder's or**
19 **proposer's** record of integrity *[of a bidder or proposer]* if the contracting agency finds **under this**
20 **paragraph that** the bidder or proposer *[nonresponsible under this paragraph;]* **is not responsible.**

21 (d) **Is legally** qualified *[legally]* to contract with the contracting agency[;].

22 (e) Supplied all necessary information in connection with the inquiry concerning responsibility.
23 If a bidder or proposer fails to promptly supply information **concerning responsibility that** *[re-*
24 *quested by]* the contracting agency **requests,** *[concerning responsibility,]* the contracting agency
25 shall **determine the bidder's or proposer's** *[base the determination of]* responsibility *[upon any]*
26 **based on** available information or may find **that** the bidder or proposer *[nonresponsible]* **is not re-**
27 **sponsible.;** *and]*

28 (f) **Was** not *[been]* debarred by the contracting agency under ORS 279B.130.

29 (3) A contracting agency may refuse to disclose outside of the contracting agency confidential
30 information furnished by a bidder or proposer under this section when the bidder or proposer has
31 clearly identified in writing the information the bidder or proposer seeks to have treated as confi-
32 dential and the contracting agency has authority under ORS 192.410 to 192.505 to withhold the
33 identified information from disclosure.

34 **SECTION 8.** ORS 279B.145 is amended to read:

35 279B.145. The determinations under ORS 279B.055 (3) and (7), 279B.060 *[(3) and (10)]* **(4) and**
36 **(14), 279B.075, 279B.080, 279B.085 and 279B.110 [(1)] and sections 2, 3 and 4 of this 2009 Act** are
37 final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law.

38 **SECTION 8a.** ORS 279B.420 is amended to read:

39 279B.420. *[(1) Any violation of ORS chapter 279A by a contracting agency for which no judicial*
40 *remedy is otherwise provided by ORS chapter 279A, 279B or 279C is subject to judicial review only*
41 *as provided in this section.]*

42 *[(2) Any violation of this chapter, except ORS 279B.270, 279B.275, 279B.280 and 279B.400 to*
43 *279B.425, by a contracting agency for which no judicial remedy is otherwise provided by this chapter*
44 *or ORS chapter 279A is subject to judicial review only as provided in this section.]*

45 **(1) If a contracting agency allegedly violates a provision of ORS chapter 279A and a ju-**

1 **judicial remedy is not otherwise available under ORS chapter 279A, 279B or 279C, the alleged**
 2 **violation is subject to judicial review only as provided in this section.**

3 **(2) If a contracting agency allegedly violates a provision of this chapter, except a pro-**
 4 **vision of ORS 279B.270, 279B.275, 279B.280, 279B.400 to 279B.425 or section 2, 3 or 4 of this**
 5 **2009 Act, and a judicial remedy is not otherwise provided in this chapter or ORS chapter**
 6 **279A, the alleged violation is subject to judicial review only as provided in this section.**

7 **(3) A person may seek** judicial review [*is available*] under this section **for a violation de-**
 8 **scribed in subsection (1) or (2) of this section** only if:

9 (a) A public contract is about to be awarded or has been awarded;

10 (b) [*An*] **The** alleged violation of a **provision** of this chapter or ORS chapter 279A, except a
 11 **provision** of ORS 279B.270, 279B.275, 279B.280 and 279B.400 to 279B.425 **or section 2, 3 or 4 of this**
 12 **2009 Act**, occurred in the procurement process for the public contract and [*that*] **the alleged** vio-
 13 lation resulted in or will result in [*the*] **an** unlawful award of a contract or [*the*] **an** unlawful failure
 14 to award the contract;

15 (c) The alleged violation deprived the person [*seeking judicial review*] of the award of the con-
 16 tract or deprived the person of the opportunity to compete for the award of the contract;

17 (d) The person [*seeking judicial review would have been*] **was** qualified to receive the award of
 18 the contract under ORS 279B.110;

19 (e) The person [*seeking judicial review*] gave written notice [*describing*] **that described** the al-
 20 leged violation to the contracting agency [*no*] **not** later than 10 days after the date on which the
 21 alleged violation occurred and, [*in no event more*] **regardless of when the alleged violation oc-**
 22 **curred, not later** than 10 days after the date of execution of the contract;

23 (f) The person [*seeking judicial review*] has exhausted all administrative remedies [*provided by*]
 24 the contracting agency **provides**; and

25 [*(g)(A) In the case of an alleged violation of ORS chapter 279A, the alleged violation is one for*
 26 *which no judicial review is provided by any other section of ORS chapter 279A, 279B or 279C; or]*

27 [*(B) In the case of an alleged violation of this chapter, except ORS 279B.270, 279B.275, 279B.280*
 28 *and 279B.400 to 279B.425, the alleged violation is one for which no judicial review is provided by any*
 29 *other section of this chapter or ORS chapter 279A.]*

30 **(g)(A) The alleged violation is a violation of a provision of ORS chapter 279A and no other**
 31 **section of ORS chapter 279A, 279B or 279C provides judicial review; or**

32 **(B) The alleged violation is a violation of a provision of this chapter, except a provision**
 33 **of ORS 279B.270, 279B.275, 279B.280, 279B.400 to 279B.425 or section 2, 3 or 4 of this 2009 Act,**
 34 **and no other section of this chapter or ORS chapter 279A provides judicial review.**

35 (4) [*An alleged violation committed by*] **If** a state contracting agency **allegedly commits a vio-**
 36 **lation**, [*is reviewable under ORS 183.484 by*] the Circuit Court for Marion County or the circuit
 37 court for the county in which the principal offices of the state contracting agency are located **may**
 38 **review the alleged violation under ORS 183.484.**

39 (5) [*An alleged violation committed by*] **If** a local contracting agency **allegedly commits a vio-**
 40 **lation**, [*is reviewable through a writ of review under ORS chapter 34 by*] the circuit court for the
 41 county in which the principal offices of the local contracting agency are located **may review the**
 42 **alleged violation by means of a writ of review under ORS chapter 34.**

43 (6) **If a person gives** the notice required under subsection (3)(e) of this section [*is given*] and
 44 **timely seeks** judicial review [*is sought*] under this section, the contracting agency may not [*proceed*
 45 *with contract execution*] **execute the contract** unless the contracting agency determines that [*there*

1 is] a compelling governmental interest **exists** in proceeding or that the goods and services are ur-
 2 gently needed. [If the] **A** contracting agency **that** makes such a determination[, *the contracting*
 3 *agency*] shall set forth in writing the reasons for the determination and immediately provide [*them*]
 4 **the reasons** to the person who filed the challenge. Thereafter, after joining the prospective con-
 5 tractor as a party to the litigation and upon motion by the person [*filing*] **who filed** the challenge,
 6 the court may nonetheless stay the performance of the contract if the court finds that the con-
 7 tracting agency's determination [*of the existence of*] **that** a compelling governmental interest **exists**
 8 in proceeding with contract execution, or the contracting agency's determination that the goods or
 9 services were urgently needed, was not supported by substantial evidence or constituted a manifest
 10 abuse of discretion. In granting a stay, the court may require the person [*seeking*] **who sought** the
 11 stay to post a bond in an amount sufficient to protect the contracting agency and the public from
 12 costs associated with a delay in contract performance.

13 (7) In [*its*] **a** review, the circuit court shall give due deference to any factual contracting deci-
 14 sion [*made by*] the contracting agency **made** and may not substitute [*its*] **the court's** judgment for
 15 [*that of*] the contracting [*agency*] **agency's judgment**.[, *but*] **The court** shall review all questions
 16 of law de novo. Thereafter:

17 (a) If a contract has not been executed and the court rules in favor of the person that sought
 18 judicial review, and if the violation could have affected the award of the contract, the court shall
 19 remand the procurement to the contracting agency for a determination whether to continue with the
 20 procurement process in light of the court's decision.

21 (b) In addition to the relief provided for in paragraph (a) of this subsection, if a contract has
 22 been executed and the court rules in favor of the person that sought judicial review, the court shall
 23 include in [*its*] **the court's** order a determination whether the party that signed the contract with
 24 the contracting agency is entitled to reimbursement under the conditions of, and calculated in the
 25 same manner as provided in, ORS 279C.470. Notwithstanding that ORS 279C.470 otherwise applies
 26 only to public improvement contracts, under this paragraph the court shall apply ORS 279C.470 to
 27 both public improvement contracts and other public contracts of contracting agencies.

28 (c) The court may award costs and attorney fees to the prevailing party.

29 **SECTION 9.** ORS 279C.375 is amended to read:

30 279C.375. (1) After **a contracting agency has opened** bids [*are opened and a determination is*
 31 *made that*] **and determined that the contracting agency will award** a public improvement con-
 32 tract [*is to be awarded*], the contracting agency shall award the contract to the lowest responsible
 33 bidder.

34 (2) At least seven days before [*the award of*] **awarding** a public improvement contract, unless
 35 the contracting agency determines that seven days is impractical under rules adopted under ORS
 36 279A.065, the contracting agency shall issue to each bidder or post, electronically or otherwise, a
 37 notice of the contracting agency's intent to award a contract. This subsection does not apply to a
 38 contract [*excepted or exempted from*] **to which** competitive bidding **does not apply** under ORS
 39 279C.335 (1)(c) or (d). The notice and [*its*] **the manner** [*of posting or issuance*] **in which the notice**
 40 **is posted or issued** must conform to rules adopted under ORS 279A.065.

41 (3) In determining the lowest responsible bidder, a contracting agency shall do all of the fol-
 42 lowing:

43 (a) Check the list created by the Construction Contractors Board under ORS 701.227 for bidders
 44 who are not qualified to hold a public improvement contract.

45 (b) Determine whether the bidder has met the standards of responsibility. In making the deter-

1 mination, the contracting agency shall consider whether a bidder *[has]*:

2 (A) **Has** available the appropriate financial, material, equipment, facility and personnel re-
3 sources and expertise, or the ability to obtain the resources and expertise, necessary to meet all
4 contractual responsibilities.

5 (B) **Completed previous contracts of a similar nature with** a satisfactory record of perform-
6 ance. **For purposes of this subparagraph, a satisfactory record of performance means that**
7 **to the extent that the costs associated with and time available to perform a previous con-**
8 **tract remained within the bidder’s control, the bidder stayed within the time and budget al-**
9 **lotted for the procurement and otherwise performed the contract in a satisfactory manner.**
10 The contracting agency shall document the **bidder’s** record of performance *[of a bidder]* if the con-
11 tracting agency finds **under this subparagraph that** the bidder is not *[to be]* responsible *[under this*
12 *subparagraph]*.

13 (C) **Has** a satisfactory record of integrity. **The contracting agency in evaluating the bidder’s**
14 **record of integrity may consider, among other things, whether the bidder has previous**
15 **criminal convictions for offenses related to obtaining or attempting to obtain a contract or**
16 **subcontract or in connection with the bidder’s performance of a contract or subcontract.** The
17 contracting agency shall document the **bidder’s** record of integrity *[of a bidder]* if the contracting
18 agency finds **under this subparagraph that** the bidder is not *[to be]* responsible *[under this sub-*
19 *paragraph]*.

20 (D) **Is legally** qualified *[legally]* to contract with the contracting agency.

21 (E) Supplied all necessary information in connection with the inquiry concerning responsibility.
22 If a bidder fails to promptly supply information **concerning responsibility that** *[requested by]* the
23 contracting agency *[concerning responsibility]* **requests**, the contracting agency shall *[base the de-*
24 *termination of]* **determine the bidder’s** responsibility *[upon any]* **based on** available information, or
25 may find **that** the bidder is not *[to be]* responsible.

26 (c) Document the contracting agency’s compliance with the requirements of paragraphs (a) and
27 (b) of this subsection in substantially the following form:

28 _____
29
30 RESPONSIBILITY DETERMINATION FORM

31
32 Project Name: _____

33 Bid Number: _____

34 Business Entity Name: _____

35 CCB License Number: _____

36 Form Submitted By (Contracting Agency): _____

37 Form Submitted By (Contracting Agency Representative’s Name): _____

38 Title: _____

39 Date: _____

40 (The contracting agency must submit this form with attachments, if any, to the
41 Construction Contractors Board within 30 days after the date of contract award.)

42 The contracting agency has (check all of the following):

43 [] Checked the list created by the

44 Construction Contractors Board

45 under ORS 701.227 for bidders who

1 are not qualified to hold a public
2 improvement contract.

3 Determined whether the bidder has
4 met the standards of responsibility.

5 In so doing, the contracting agency
6 has considered whether the bidder:

7 Has available the appropriate
8 financial, material, equipment,
9 facility and personnel resources
10 and expertise, or the ability to
11 obtain the resources and
12 expertise, necessary to meet
13 all contractual responsibilities.

14 Has a satisfactory record of
15 performance.

16 Has a satisfactory record of
17 integrity.

18 Is qualified legally to contract
19 with the contracting agency.

20 Has supplied all necessary
21 information in connection with
22 the inquiry concerning
23 responsibility.

24 Determined the bidder to be
25 (check one of the following):

26 Responsible under ORS 279C.375
27 (3)(a) and (b).

28 Not responsible under
29 ORS 279C.375 (3)(a) and (b).

30 (Attach documentation if the contracting agency finds the bidder not to be responsible.)
31

32
33 (d) Submit the form described in paragraph (c) of this subsection, with any attachments, to the
34 Construction Contractors Board within 30 days after the date the contracting agency awards the
35 contract.

36 (4) The successful bidder shall:

37 (a) Promptly execute a formal contract; and

38 (b) Execute and deliver to the contracting agency a performance bond and a payment bond when
39 required under ORS 279C.380.

40 (5) Based on competitive bids, a contracting agency may award a public improvement contract
41 or may award multiple public improvement contracts when specified in the invitation to bid.

42 (6) A contracting agency may not exclude a commercial contractor from competing for a public
43 contract on the basis that the license issued by the Construction Contractors Board is endorsed as
44 a level 1 or level 2 license. As used in this section, "commercial contractor" has the meaning given
45 that term in ORS 701.005.

1 **SECTION 10.** Section 11 of this 2009 Act is added to and made a part of ORS chapter 279C.

2 **SECTION 11.** (1) Except as provided in subsection (2) of this section, a contracting agency
3 that procures personal services for the purpose of administering, managing, monitoring, in-
4 specting, evaluating compliance with or otherwise overseeing a public contract that is sub-
5 ject to this chapter may not:

6 (a) Procure the personal services from a contractor or an affiliate of a contractor who
7 is a party to the public contract that is subject to administration, management, monitoring,
8 inspection, evaluation or oversight by means of the personal services; or

9 (b) Procure the personal services through the public contract that is subject to admin-
10 istration, management, monitoring, inspection, evaluation or oversight by means of the per-
11 sonal services.

12 (2) Subsection (1) of this section does not apply to a procurement that qualifies as a
13 construction manager/general contractor procurement or a design-build procurement, both
14 as defined in OAR 125-249-0610 or 137-049-0610.

15 (3) As used in this section, "affiliate" means a person that, directly or indirectly through
16 one or more intermediaries, controls, is controlled by or is under common control with the
17 contractor described in subsection (1)(a) of this section.

18 **SECTION 12.** Sections 2, 3, 4, 4a and 11 of this 2009 Act and the amendments to ORS
19 279B.055, 279B.060, 279B.110, 279B.145, 279B.420 and 279C.375 by sections 5, 6, 7, 8, 8a and 9
20 of this 2009 Act apply to:

21 (1) Procurements first advertised or otherwise solicited on or after January 1, 2010; and

22 (2) Public contracts entered into on or after January 1, 2010.

23 **SECTION 13.** (1) Sections 2, 3, 4, 4a and 11 of this 2009 Act and the amendments to ORS
24 279B.055, 279B.060, 279B.110, 279B.145, 279B.420 and 279C.375 by sections 5, 6, 7, 8, 8a and 9
25 of this 2009 Act become operative on January 1, 2010.

26 (2) The Secretary of State, the Attorney General, the Director of the Oregon Department
27 of Administrative Services and a contracting agency that has adopted rules under ORS
28 279A.065 may adopt rules and take related actions before January 1, 2010, that are necessary
29 to enable the secretary, the Attorney General, the director and the contracting agency to
30 exercise, on and after January 1, 2010, all the duties, functions and powers conferred on the
31 secretary, Attorney General, director and contracting agency by sections 2, 3, 4, 4a and 11
32 of this 2009 Act and the amendments to ORS 279B.055, 279B.060, 279B.110, 279B.145, 279B.420
33 and short

34 **SECTION 14.** This 2009 Act being necessary for the immediate preservation of the public
35 peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect
36 on its passage.

37