

B-Engrossed
House Bill 2867

Ordered by the House June 24
Including House Amendments dated May 29 and June 24

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, 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**

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

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

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

22 (a) **A local contracting agency or a local contract review board for a city that has a**

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 population of not more than 15,000 or a county that has a population of not more than 30,000;

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

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

6 (d) The Port of Portland; or

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

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

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

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

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

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

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

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

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

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

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

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

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

38 (2)(a) After comparing the difference between the costs estimated as provided in sub-
39 section (1)(a) of this section with the costs estimated as provided in subsection (1)(b) of this
40 section, except as provided in paragraph (b) of this subsection, the contracting agency may
41 proceed with the procurement only if the contracting agency would incur more cost in per-
42 forming the services with the contracting agency's own personnel and resources than the
43 contracting agency would incur in procuring the services from a contractor. The contracting
44 agency may not proceed with the procurement if the sole reason that the costs estimated in
45 subsection (1)(b) of this section are lower than the costs estimated in subsection (1)(a) of this

1 section is because the costs estimated in subsection (1)(b)(A) of this section are lower than
2 the costs estimated in subsection (1)(a)(A) of this section.

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

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

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

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

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

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

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

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

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

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

44 (C) The procurement is for services that are incidental to a contract for purchasing or
45 leasing real or personal property, including service and maintenance agreements for equip-

1 ment that is leased or rented;

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

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

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

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

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

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

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

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

24 279B.055. (1) A contracting agency may solicit and award a public contract for goods or ser-
25 vices, or may award multiple public contracts for goods or services when specified in the invitation
26 to bid, by competitive sealed bidding.

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

28 (a) **Specify** a time and date by which the bids must be received and a place at which the bids
29 must be submitted¹, *and may*,¹. **The contracting agency**, in the **contracting agency's** sole dis-
30 cretion *[of the contracting agency]*, **may receive bids by electronic means** or direct or permit *[the*
31 *submission]* **a bidder to submit** *[and receipt of]* bids by electronic means².

32 (b) **Specify** the name and title of the person designated *[for the receipt of]* **to receive** bids and
33 the person **the contracting agency designates** *[designated by the contracting agency]* as the contact
34 person for the procurement, if different³.

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

41 (d) **Specify** a time, date and place *[that]* **for** prequalification applications, if any, *[must]* **to be**
42 **filed and the classes of work, if any, for which bidders must be prequalified in accordance with ORS**
43 **279B.120**⁴.

44 (e) *[A statement]* **State** that the contracting agency may cancel the procurement or reject any
45 or all bids in accordance with ORS 279B.100⁵.

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

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

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

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

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

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

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

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

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

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

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

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

36 (d) In addition to the modes of publication authorized by paragraphs (b) and (c) of this sub-
37 section, the contracting agency may use any other medium reasonably calculated to reach prospec-
38 tive bidders or proposers.

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

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

43 (5)(a) The contracting agency shall open bids publicly at the time, date and place designated in
44 the invitation to bid. When authorized by, and in accordance with, rules adopted under ORS
45 279A.065, bids may be submitted, received and opened through electronic means.

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

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

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

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

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

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

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

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

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

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

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

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

45 (11) The successful bidder shall promptly execute a contract. The successful bidder's duty to

1 promptly execute a contract includes the duty to take all action that is necessary to [the formation
2 of] **form** a contract in accordance with the invitation to bid, including [the] posting [of] performance
3 security, [and the submission of] **submitting** proof of insurance when [required by] the invitation to
4 bid **requires the submission and agreeing to perform the scope of work and meet the per-**
5 **formance standards set forth in the invitation to bid.**

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

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

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

16 279B.060. (1) A contracting agency may solicit and award a public contract for goods or ser-
17 vices, or may award multiple public contracts for goods or services when specified in the request
18 for proposals, by requesting and evaluating competitive sealed proposals.

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

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

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

28 [(c) A procurement description;]

29 (c) **Describe the procurement. In the description, the contracting agency shall identify**
30 **the scope of work included within the procurement, outline the contractor's anticipated du-**
31 **ties and set expectations for the contractor's performance. Unless the contractor is pro-**
32 **viding architectural, engineering and land surveying services or related services, both as**
33 **defined in ORS 279C.100, or unless the contracting agency for good cause specifies otherwise,**
34 **the scope of work shall require the contractor to meet the highest standards prevalent in**
35 **the industry or business most closely involved in providing the appropriate goods or services.**

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

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

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

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

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

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

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

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

11 (3) The request for proposals also may:

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

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

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

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

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

32 [(3)(a)] (4)(a) The contracting agency may require proposal security in any form *[deemed prudent*
33 *by]* the contracting agency **deems prudent**. Proposal security shall serve the same function with
34 respect to requests for proposals as bid security serves with respect to invitations to bid under ORS
35 279B.055.

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

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

1 [(4)] (5) Public notice of the request for proposals [*shall*] **must** be given in the same manner as
2 provided for public notice of invitations to bid in ORS 279B.055 (4).

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

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

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

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

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

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

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

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

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

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

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

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

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

45 [(c)] (9) Revisions of proposals may be permitted after the submission of proposals and before

1 award for the purpose of obtaining best offers or best and final offers.

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

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

13 [(8)] (12) In the request for proposals, the contracting agency shall describe the methods by
14 which the agency will make the results of each tier of competitive evaluation available to the
15 proposers who competed in the tier. The contracting agency shall include a description of the man-
16 ner in which the proposers who are eliminated from further competition may protest or otherwise
17 object to the contracting agency's decision.

18 [(9)] (13) The contracting agency shall issue or electronically post the notice of intent to award
19 described in ORS 279B.135 to each proposer who was evaluated in the final competitive tier.

20 [(10)] (14) If **the contracting agency awards** a contract [*is awarded*], the contracting agency
21 shall award the contract to the responsible proposer whose proposal the contracting agency deter-
22 mines in writing [*to be*] **is** the most advantageous to the contracting agency based on the evaluation
23 process and evaluation factors described in the request for proposals, [*any*] applicable preferences
24 described in ORS 279A.120 and 279A.125 and, when applicable, the outcome of any negotiations au-
25 thorized by the request for proposals. Other factors may not be used in the evaluation. When the
26 request for proposals specifies or authorizes [*the award of*] **awarding** multiple public contracts, the
27 contracting agency shall award public contracts to the responsible proposers who qualify for the
28 award of a contract under the terms of the request for proposals.

29 [(11)] (15) The contracting agency may issue a request for information, a request for interest, a
30 request for qualifications or other preliminary documents to obtain information useful in [*the prep-*
31 *aration of*] **preparing** a request for proposals.

32 **(16) Before executing a contract solicited under this section, a contracting agency shall**
33 **obtain the proposer's agreement to perform the scope of work and meet the performance**
34 **standards set forth in the final negotiated scope of work.**

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

36 279B.110. (1) [*The*] **A** contracting agency shall prepare a written determination of nonresponsi-
37 bility [*of*] **for** a bidder or proposer if the **contracting agency determines that the** bidder or
38 proposer does not meet the standards of responsibility.

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

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

44 (b) **Completed previous contracts of a similar nature with** a satisfactory record of perform-
45 **ance. For purposes of this paragraph, a satisfactory record of performance means that to the**

1 **extent that the costs associated with and time available to perform a previous contract re-**
 2 **mained within the bidder's or proposer's control, the bidder or proposer stayed within the**
 3 **time and budget allotted for the procurement and otherwise performed the contract in a**
 4 **satisfactory manner.** The contracting agency shall document the **bidder's or proposer's** record
 5 of performance [*of a bidder or proposer*] if the contracting agency finds **under this paragraph that**
 6 the bidder or proposer [*nonresponsible under this paragraph;*] **is not responsible.**

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

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

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

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

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

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

28 279B.145. The determinations under ORS 279B.055 (3) and (7), 279B.060 [(3) and (10)] (4) and
 29 (14), 279B.075, 279B.080, 279B.085 and 279B.110 [(1)] **and sections 2, 3 and 4 of this 2009 Act** are
 30 final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law.

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

32 279B.420. [(1) Any violation of ORS chapter 279A by a contracting agency for which no judicial
 33 remedy is otherwise provided by ORS chapter 279A, 279B or 279C is subject to judicial review only
 34 as provided in this section.]

35 [(2) Any violation of this chapter, except ORS 279B.270, 279B.275, 279B.280 and 279B.400 to
 36 279B.425, by a contracting agency for which no judicial remedy is otherwise provided by this chapter
 37 or ORS chapter 279A is subject to judicial review only as provided in this section.]

38 (1) **If a contracting agency allegedly violates a provision of ORS chapter 279A and a ju-**
 39 **dicial remedy is not otherwise available under ORS chapter 279A, 279B or 279C, the alleged**
 40 **violation is subject to judicial review only as provided in this section.**

41 (2) **If a contracting agency allegedly violates a provision of this chapter, except a pro-**
 42 **vision of ORS 279B.270, 279B.275, 279B.280, 279B.400 to 279B.425 or section 2, 3 or 4 of this**
 43 **2009 Act, and a judicial remedy is not otherwise provided in this chapter or ORS chapter**
 44 **279A, the alleged violation is subject to judicial review only as provided in this section.**

45 (3) **A person may seek** judicial review [*is available*] under this section **for a violation de-**

1 **scribed in subsection (1) or (2) of this section** only if:

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

3 (b) **[An] The** alleged violation of a **provision of** this chapter or ORS chapter 279A, except a
4 **provision of** ORS 279B.270, 279B.275, 279B.280 and 279B.400 to 279B.425 **or section 2, 3 or 4 of this**
5 **2009 Act**, occurred in the procurement process for the public contract and *[that]* **the alleged** vio-
6 lation resulted in or will result in *[the]* **an** unlawful award of a contract or *[the]* **an** unlawful failure
7 to award the contract;

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

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

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

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

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

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

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

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

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

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

36 (6) **If a person gives** the notice required under subsection (3)(e) of this section *[is given]* and
37 **timely seeks** judicial review *[is sought]* under this section, the contracting agency may not *[proceed*
38 *with contract execution]* **execute the contract** unless the contracting agency determines that *[there*
39 *is]* a compelling governmental interest **exists** in proceeding or that the goods and services are ur-
40 gently needed. *[If the]* **A** contracting agency **that** makes such a determination, *[the contracting*
41 *agency]* shall set forth in writing the reasons for the determination and immediately provide *[them]*
42 **the reasons** to the person who filed the challenge. Thereafter, after joining the prospective con-
43 tractor as a party to the litigation and upon motion by the person *[filing]* **who filed** the challenge,
44 the court may nonetheless stay the performance of the contract if the court finds that the con-
45 tracting agency's determination *[of the existence of]* **that** a compelling governmental interest **exists**

1 in proceeding with contract execution, or the contracting agency's determination that the goods or
2 services were urgently needed, was not supported by substantial evidence or constituted a manifest
3 abuse of discretion. In granting a stay, the court may require the person [*seeking*] **who sought** the
4 stay to post a bond in an amount sufficient to protect the contracting agency and the public from
5 costs associated with a delay in contract performance.

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

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

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

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

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

23 279C.375. (1) After **a contracting agency has opened** bids [*are opened and a determination is*
24 *made that*] **and determined that the contracting agency will award** a public improvement con-
25 tract [*is to be awarded*], the contracting agency shall award the contract to the lowest responsible
26 bidder.

27 (2) At least seven days before [*the award of*] **awarding** a public improvement contract, unless
28 the contracting agency determines that seven days is impractical under rules adopted under ORS
29 279A.065, the contracting agency shall issue to each bidder or post, electronically or otherwise, a
30 notice of the contracting agency's intent to award a contract. This subsection does not apply to a
31 contract [*excepted or exempted from*] **to which** competitive bidding **does not apply** under ORS
32 279C.335 (1)(c) or (d). The notice and [*its*] **the manner** [*of posting or issuance*] **in which the notice**
33 **is posted or issued** must conform to rules adopted under ORS 279A.065.

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

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

38 (b) Determine whether the bidder has met the standards of responsibility. In making the deter-
39 mination, the contracting agency shall consider whether a bidder [*has*]:

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

43 (B) **Completed previous contracts of a similar nature with** a satisfactory record of perform-
44 ance. **For purposes of this subparagraph, a satisfactory record of performance means that**
45 **to the extent that the costs associated with and time available to perform a previous con-**

1 **tract remained within the bidder’s control, the bidder stayed within the time and budget al-**
2 **lotted for the procurement and otherwise performed the contract in a satisfactory manner.**

3 The contracting agency shall document the **bidder’s** record of performance [*of a bidder*] if the con-
4 tracting agency finds **under this subparagraph that** the bidder is not [*to be*] responsible [*under this*
5 *subparagraph*].

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

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

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

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

21 _____
22
23 RESPONSIBILITY DETERMINATION FORM
24

25 Project Name: _____

26 Bid Number: _____

27 Business Entity Name: _____

28 CCB License Number: _____

29 Form Submitted By (Contracting Agency): _____

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

31 Title: _____

32 Date: _____

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

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

36 [] Checked the list created by the
37 Construction Contractors Board
38 under ORS 701.227 for bidders who
39 are not qualified to hold a public
40 improvement contract.

41 [] Determined whether the bidder has
42 met the standards of responsibility.
43 In so doing, the contracting agency
44 has considered whether the bidder:

45 [] Has available the appropriate

1 financial, material, equipment,
2 facility and personnel resources
3 and expertise, or the ability to
4 obtain the resources and
5 expertise, necessary to meet
6 all contractual responsibilities.

7 [] Has a satisfactory record of
8 performance.

9 [] Has a satisfactory record of
10 integrity.

11 [] Is qualified legally to contract
12 with the contracting agency.

13 [] Has supplied all necessary
14 information in connection with
15 the inquiry concerning
16 responsibility.

17 [] Determined the bidder to be
18 (check one of the following):

19 [] Responsible under ORS 279C.375
20 (3)(a) and (b).

21 [] Not responsible under
22 ORS 279C.375 (3)(a) and (b).

23 (Attach documentation if the contracting agency finds the bidder not to be responsible.)
24

25

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

29 (4) The successful bidder shall:

30 (a) Promptly execute a formal contract; and

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

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

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

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

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

44 (a) Procure the personal services from a contractor or an affiliate of a contractor who
45 is a party to the public contract that is subject to administration, management, monitoring,

1 inspection, evaluation or oversight by means of the personal services; or

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

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

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

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

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

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

16 **SECTION 13.** (1) Sections 2, 3, 4, 4a and 11 of this 2009 Act and the amendments to ORS
17 279B.055, 279B.060, 279B.110, 279B.145, 279B.420 and 279C.375 by sections 5, 6, 7, 8, 8a and 9
18 of this 2009 Act become operative on January 1, 2010.

19 (2) The Secretary of State, the Attorney General, the Director of the Oregon Department
20 of Administrative Services and a contracting agency that has adopted rules under ORS
21 279A.065 may adopt rules and take related actions before January 1, 2010, that are necessary
22 to enable the secretary, the Attorney General, the director and the contracting agency to
23 exercise, on and after January 1, 2010, all the duties, functions and powers conferred on the
24 secretary, Attorney General, director and contracting agency by sections 2, 3, 4, 4a and 11
25 of this 2009 Act and the amendments to ORS 279B.055, 279B.060, 279B.110, 279B.145, 279B.420
26 and 279C.375 by sections 5, 6, 7, 8, 8a and 9 of this 2009 Act.

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