

Enrolled
House Bill 2867

Sponsored by COMMITTEE ON BUSINESS AND LABOR

CHAPTER

AN ACT

Relating to public contracting; creating new provisions; amending ORS 279B.055, 279B.060, 279B.110, 279B.145, 279B.420 and 279C.375 and section 3, chapter 368, Oregon Laws 2009 (Enrolled House Bill 2953); repealing section 2, chapter 368, Oregon Laws 2009 (Enrolled House Bill 2953); and declaring an emergency.

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

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

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

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

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

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

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

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

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

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

(d) The Port of Portland; or

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

SECTION 3. (1) In the cost analysis required under section 2 of this 2009 Act, a contracting agency shall:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[*(c) A procurement description;*]

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

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

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

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

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

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

(A) Reducing or withholding payment;

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

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

(3) The request for proposals also may:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[(d)] **(10)** After the opening of proposals, a contracting agency may issue or electronically post an addendum to the request for proposals that modifies the criteria, rating process and procedure for any tier of competition before the start of the tier to which the addendum applies. The contracting agency shall send an addendum that is issued by a method other than electronic posting to all proposers who are eligible to compete under the addendum. The contracting agency shall issue or post the addendum at least five days before the start of the subject tier of competition or as **the contracting agency** otherwise [determined by the contracting agency to be] **determines is** adequate

to allow eligible proposers to prepare for the competition in accordance with rules adopted under ORS 279A.065.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) The alleged violation deprived the person [seeking judicial review] of the award of the contract or deprived the person of the opportunity to compete for the award of the contract;

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

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

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

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

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

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

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

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

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

(6) **If a person gives** the notice required under subsection (3)(e) of this section *[is given]* and timely **seeks** judicial review *[is sought]* under this section, the contracting agency may not *[proceed with contract execution]* **execute the contract** unless the contracting agency determines that *[there is]* a compelling governmental interest **exists** in proceeding or that the goods and services are urgently needed. *[If the]* **A contracting agency that** makes such a determination¹, *the contracting agency]* shall set forth in writing the reasons for the determination and immediately provide *[them]* **the reasons** to the person who filed the challenge. Thereafter, after joining the prospective contractor as a party to the litigation and upon motion by the person *[filing]* **who filed** the challenge, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination *[of the existence of]* **that** a compelling governmental interest **exists** in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a manifest abuse of discretion. In granting a stay, the court may require the person *[seeking]* **who sought** the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with a delay in contract performance.

(7) In *[its]* a review, the circuit court shall give due deference to any factual contracting decision *[made by]* the contracting agency **made** and may not substitute *[its]* **the court's** judgment for *[that of]* the contracting *[agency]* **agency's judgment.**², *but]* **The court** shall review all questions of law de novo. Thereafter:

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

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

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

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

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

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

(3) In determining the lowest responsible bidder, a contracting agency shall do all of the following:

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

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

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

(B) **Completed previous contracts of a similar nature with** a satisfactory record of performance. **For purposes of this subparagraph, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the bidder's control, the bidder stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner.** The contracting agency shall document the **bidder's** record of performance [*of a bidder*] if the contracting agency finds **under this subparagraph that** the bidder is not [*to be*] responsible [*under this subparagraph*].

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

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

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

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

RESPONSIBILITY DETERMINATION FORM

Project Name: _____

Bid Number: _____

Business Entity Name: _____

CCB License Number: _____

Form Submitted By (Contracting Agency): _____

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

Title: _____

Date: _____

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

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

- Checked the list created by the Construction Contractors Board under ORS 701.227 for bidders who are not qualified to hold a public improvement contract.
- Determined whether the bidder has met the standards of responsibility. In so doing, the contracting agency has considered whether the bidder:
 - Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.
 - Has a satisfactory record of performance.
 - Has a satisfactory record of integrity.
 - Is qualified legally to contract with the contracting agency.
 - Has supplied all necessary information in connection with the inquiry concerning responsibility.
- Determined the bidder to be (check one of the following):
 - Responsible under ORS 279C.375 (3)(a) and (b).
 - Not responsible under ORS 279C.375 (3)(a) and (b).

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

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

(4) The successful bidder shall:

- (a) Promptly execute a formal contract; and
- (b) Execute and deliver to the contracting agency a performance bond and a payment bond when required under ORS 279C.380.

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

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

SECTION 9a. If House Bill 2953 becomes law, section 2, chapter 368, Oregon Laws 2009 (Enrolled House Bill 2953) (amending ORS 279C.375), is repealed and ORS 279C.375, as amended by section 9 of this 2009 Act, is amended to read:

279C.375. (1) After a contracting agency has opened bids and determined that the contracting agency will award a public improvement contract, the contracting agency shall award the contract to the lowest responsible bidder.

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

(3) In determining the lowest responsible bidder, a contracting agency shall do all of the following:

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

(b) Determine whether the bidder **is responsible. A responsible bidder must demonstrate to the contracting agency that the bidder:** *[has met the standards of responsibility. In making the determination, the contracting agency shall consider whether a bidder:]*

(A) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or **has** the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.

(B) Holds current licenses that businesses or service professionals operating in this state must hold in order to undertake or perform the work specified in the contract.

(C) Is covered by liability insurance and other insurance in amounts the contracting agency requires in the solicitation documents.

(D) Qualifies as a carrier-insured employer or a self-insured employer under ORS 656.407 or has elected coverage under ORS 656.128.

(E) Has made the disclosure required under ORS 279C.370.

[(B)] (F) Completed previous contracts of a similar nature with a satisfactory record of performance. For purposes of this subparagraph, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the bidder's control, the bidder stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. The contracting agency shall document the bidder's record of performance if the contracting agency finds under this subparagraph that the bidder is not responsible.

[(C)] (G) Has a satisfactory record of integrity. The contracting agency in evaluating the bidder's record of integrity may consider, among other things, whether the bidder has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the bidder's performance of a contract or subcontract. The contracting agency shall document the bidder's record of integrity if the contracting agency finds under this subparagraph that the bidder is not responsible.

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

[(E)] (I) Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder fails to promptly supply information concerning responsibility that the contracting agency requests, the contracting agency shall determine the bidder's responsibility based on available information, or may find that the bidder is not responsible.

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

RESPONSIBILITY DETERMINATION FORM

Project Name: _____
Bid Number: _____
Business Entity Name: _____
CCB License Number: _____
Form Submitted By (Contracting Agency): _____
Form Submitted By (Contracting Agency Representative's Name): _____
Title: _____
Date: _____

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

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

- Checked the list created by the Construction Contractors Board under ORS 701.227 for bidders who are not qualified to hold a public improvement contract.
- Determined whether the bidder has met the standards of responsibility. In so doing, the contracting agency has [*considered whether*] **found that** the bidder **demonstrated that the bidder:**
 - Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.
 - Holds current licenses that businesses or service professionals operating in this state must hold in order to undertake or perform the work specified in the contract.**
 - Is covered by liability insurance and other insurance in amounts required in the solicitation documents.**
 - Qualifies as a carrier-insured employer or a self-insured employer under ORS 656.407 or has elected coverage under ORS 656.128.**
 - Has disclosed the bidder's first-tier subcontractors in accordance with ORS 279C.370.**
 - Has a satisfactory record of performance.
 - Has a satisfactory record of integrity.
 - Is **legally** qualified [*legally*] to contract with the contracting agency.
 - Has supplied all necessary information in connection with

the inquiry concerning
responsibility.

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

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

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

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

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

(4) The successful bidder shall:

(a) Promptly execute a formal contract; and

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

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

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

SECTION 9b. If House Bill 2953 becomes law, section 3, chapter 368, Oregon Laws 2009 (Enrolled House Bill 2953), is amended to read:

Sec. 3. The amendments to ORS 279C.365 and 279C.375 [by sections 1 and 2 of this 2009 Act] by section 1, chapter 368, Oregon Laws 2009 (Enrolled House Bill 2953), and section 9a of this 2009 Act apply to public improvement contracts first advertised or otherwise solicited on or after the effective date of chapter 368, Oregon Laws 2009 (Enrolled House Bill 2953) [this 2009 Act].

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

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

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

(b) Procure the personal services through the public contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the personal services.

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

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

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

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

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

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

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

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

Passed by House June 25, 2009

Received by Governor:

Repassed by House June 29, 2009

.....M.,....., 2009

Approved:

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Chief Clerk of House

.....M.,....., 2009

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Speaker of House

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Governor

Passed by Senate June 29, 2009

Filed in Office of Secretary of State:

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President of Senate

.....M.,....., 2009

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Secretary of State