

# House Bill 2867

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 **as introduced**.

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

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

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

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

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

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

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to public contracting; creating new provisions; amending ORS 279B.110, 279B.120, 279B.125,  
3 279B.145, 279C.375 and 279C.430; and declaring an emergency.

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

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

7 **SECTION 2. (1) Before entering into a public contract, a contracting agency shall estab-**  
8 **lish measurable standards for assessing the quality of the goods or services, personal ser-**  
9 **vices, personal property, public improvements or public works, alterations, repairs or**  
10 **maintenance that a contractor will provide or perform under the contract. The contracting**  
11 **agency may develop the quality standards applicable to the public contract in cooperation**  
12 **with or as a result of negotiations with the contractor to which the contracting agency has**  
13 **awarded the public contract. Unless the contracting agency for good cause specifies other-**  
14 **wise, the quality standards may not be less than the highest standards prevalent in the in-**  
15 **dustry or business most closely involved in providing the appropriate goods or services,**  
16 **personal services, personal property, public improvements, public works, alterations, repairs**  
17 **or maintenance.**

18 **(2) The contracting agency, in the terms and conditions of a public contract into which**  
19 **the contracting agency enters, shall specify clear consequences for a contractor's failure to**  
20 **meet the established quality standards. The consequences may include, but are not limited**  
21 **to:**

22 **(a) Reducing or withholding payment;**

23 **(b) Requiring the contractor to perform, at the contractor's expense, additional work**  
24 **necessary to meet the established quality standards; or**

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

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

3 (3) Before executing a public contract, the contracting agency shall obtain the contrac-  
 4 tor's agreement to abide by the contract terms specified in this section.

5 (4) A contracting agency may not make a payment under the public contract until the  
 6 contracting agency has established the quality standards described in this section and has  
 7 obtained the contractor's agreement to abide by the quality standards.

8 **SECTION 3.** Except as provided in this chapter or in ORS chapters 279B and 279C and  
 9 unless otherwise subject to exemption under a provision of ORS 192.410 to 192.505, a public  
 10 contract is a public record.

11 **SECTION 4.** (1) The Secretary of State has authority to audit a contractor's performance  
 12 under a public contract into which a state contracting agency enters. The audit shall use  
 13 generally accepted accounting principles and may:

14 (a) Examine the contractor's books, papers, correspondence and other records related to  
 15 the public contract;

16 (b) Assess whether the contractor has met the quality standards set forth in the public  
 17 contract under section 2 of this 2009 Act;

18 (c) Determine whether the contractor has met commercial standards of good faith and  
 19 fair dealing in the contractor's course of dealing with the contracting agency; and

20 (d) Examine other issues that the Secretary of State deems germane to assessing the  
 21 contractor's performance under the public contract.

22 (2) A state contracting agency may request the Secretary of State to audit a contractor's  
 23 performance under a public contract for any reason and at any point during which the public  
 24 contract is in effect or for a period of six years after the date on which the public contract  
 25 terminates.

26 (3) The terms of a public contract shall require a contractor to keep books, papers and  
 27 other records and to document the contractor's performance under the terms of the public  
 28 contract, with particular reference to the contractor's compliance with the quality standards  
 29 set forth in the public contract, in as much detail as will enable the Secretary of State to  
 30 conduct an audit under this section. The contractor shall keep the records described in this  
 31 subsection for a minimum period of six years after the date on which the public contract  
 32 terminates.

33 (4) A local contracting agency shall designate a person that will have the authority to  
 34 audit contractor performance under a public contract into which the local contracting  
 35 agency enters. The person the local contracting agency authorizes to conduct the audit shall  
 36 do so in accordance with the standards prescribed in this section and shall follow as closely  
 37 as practicable the procedures employed by the Secretary of State.

38 (5) The contracting agency and the contractor shall cooperate with the auditing agency  
 39 in all respects and shall permit full access to all information that the auditing agency deems  
 40 necessary for a true and complete review. Information that the auditing agency obtains or  
 41 receives in the course of the audit is subject to the same limitations on public inspection of  
 42 records as are provided for the contracting agency or for the contractor under ORS 192.410  
 43 to 192.505.

44 **SECTION 5.** (1) Except as provided in subsection (2) of this section, a contracting agency  
 45 may not enter into a public contract for the purpose of administering, managing or over-

1 seeing another public contract.

2 (2) To the extent that administering, managing or overseeing a public contract requires  
3 technical or other expertise the contracting agency does not possess, the contracting agency  
4 may contract with a consultant or other contractor for the purpose of training the con-  
5 tracting agency's personnel in the skills necessary to administer, manage or oversee the  
6 public contract.

7 **SECTION 6.** (1) Except as provided in subsection (2) of this section, an employee of a  
8 contracting agency who separates from the contracting agency for any reason except re-  
9 tirement may not, for a period of one year following the employee's separation, seek or gain  
10 employment with a contractor with which the contracting agency entered into a public con-  
11 tract if:

12 (a) The employee worked directly on matters related to the public contract or in a field  
13 closely related to the subject of the public contract; or

14 (b) The employee's duties for the contractor would involve work related to the public  
15 contract.

16 (2) If a contracting agency enters into a public contract for services that an employee  
17 of the contracting agency performs and, as a result of entering into the public contract, the  
18 contracting agency no longer employs the employee, the contracting agency shall require in  
19 the terms of the public contract that the contractor offer to employ the employee to provide  
20 services under the public contract. The contractor shall offer the employee employment  
21 terms similar to the employment terms under which the employee was employed with the  
22 contracting agency.

23 **SECTION 7.** Sections 8, 9 and 10 of this 2009 Act are added to and made a part of ORS  
24 chapter 279B.

25 **SECTION 8.** (1) Before conducting a procurement for goods or services with an estimated  
26 contract price that exceeds \$25,000, a contracting agency shall:

27 (a) Demonstrate, by means of a written cost analysis in accordance with section 9 of this  
28 2009 Act, that the contracting agency would incur less cost in conducting the procurement  
29 than in providing the goods or performing the services with the contracting agency's own  
30 personnel and resources; or

31 (b) Demonstrate, in accordance with section 10 of this 2009 Act, that providing the goods  
32 or performing the services with the contracting agency's own personnel and resources is not  
33 feasible.

34 (2) If a contracting agency has previously conducted a procurement for goods or services  
35 that the contracting agency intends to provide or perform with the contracting agency's own  
36 personnel and resources, the contracting agency shall first conduct a cost analysis in ac-  
37 cordance with section 9 of this 2009 Act and determine that providing the goods or per-  
38 forming the services with the contracting agency's own personnel and resources would cost  
39 the contracting agency less.

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

42 (a) Estimate the contracting agency's cost of providing the goods or performing the  
43 services, including:

44 (A) Salary or wage and benefit costs for contracting agency employees who are directly  
45 involved in providing the goods or performing the services, including employees who inspect,

1 supervise or monitor the provision of the goods or the performance of the services;

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

4 (C) Opportunity costs the contracting agency incurs by using personnel and resources  
5 that the contracting agency might otherwise dedicate to other tasks to provide the goods or  
6 perform the services;

7 (D) Costs incurred for planning, training, starting up, manufacturing or implementing,  
8 transporting and delivering the goods or services and costs related to stopping and disman-  
9 tling a project or operation because the contracting agency intends to procure a limited  
10 quantity of goods or services or procure the goods or services within a defined or limited  
11 period of time; and

12 (E) Miscellaneous costs related to providing the goods or performing the services.

13 (b) Estimate the cost a potential contractor would incur in providing the goods or per-  
14 forming the services, including:

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

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

18 (ii) Would be necessary and directly involved in providing the goods or performing the  
19 services or who would inspect, supervise or monitor the provision of the goods or the per-  
20 formance of the services;

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

23 (C) Costs incurred for planning, training, starting up, manufacturing or implementing,  
24 transporting and delivering specialized goods or services or goods or services required within  
25 a defined or limited period of time;

26 (D) Costs related to financing, taxes, insurance, bonding legal services and other ex-  
27 penses required to comply with ORS chapters 279A, 279B and 279C and other applicable pro-  
28 visions of law; and

29 (E) Miscellaneous costs related to providing the goods or performing the services, in-  
30 cluding reasonably foreseeable fluctuations in the costs for the items identified in this sub-  
31 section over the expected duration of the procurement.

32 (2) After comparing the difference between the costs estimated as provided in subsection  
33 (1)(a) of this section with the costs estimated as provided in subsection (1)(b) of this section,  
34 the contracting agency may proceed with the procurement only if the contracting agency  
35 would incur more cost in providing the goods or performing the services with the contracting  
36 agency's own personnel and resources than the contracting agency would incur in procuring  
37 the goods or services from a contractor.

38 (3) A cost analysis, all supporting documentation and a determination made under this  
39 section are public records.

40 **SECTION 10.** (1) Notwithstanding the provisions of section 9 (2) of this 2009 Act, a con-  
41 tracting agency may proceed with a procurement if the contracting agency reasonably de-  
42 termines in writing that providing the goods or performing the services that the contracting  
43 agency intends to procure with the contracting agency's own personnel or resources is  
44 clearly not feasible. In determining feasibility, a contracting agency may:

45 (a) Take into account and compare the contracting agency's experience or expertise in

1 the field most closely involved in providing the goods or performing the services with a po-  
 2 tential contractor's experience and expertise in the same or a similar field;

3 (b) Assess how the level of experience or expertise that the contracting agency has or  
 4 that a potential contractor could bring would affect the quality, efficiency or utility of the  
 5 goods or services or the advantage the goods or services would provide to the contracting  
 6 agency;

7 (c) Assess the degree of technical expertise or specialization necessary to provide the  
 8 goods or perform the services and compare the capabilities of the contracting agency's per-  
 9 sonnel and resources with the capabilities of a potential contractor; or

10 (d) Find that special circumstances require the contracting agency to procure the goods  
 11 or services by contract. Special circumstances may include, but are not limited to, circum-  
 12 stances in which:

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

16 (B) Other state or federal law requires the contracting agency to procure goods or ser-  
 17 vices through an independent contractor;

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

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

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

27 (F) The procurement is for goods or services, the need for which is so urgent, temporary  
 28 or occasional that attempting to provide the goods or perform the services with the con-  
 29 tracting agency's own personnel or resources would cause a delay that would frustrate the  
 30 purpose for obtaining the goods or services.

31 (2) An analysis, assessment or finding and all supporting documentation for a determi-  
 32 nation made under this section are public records.

33 **SECTION 11.** ORS 279B.110 is amended to read:

34 279B.110. (1) *[The]* A contracting agency shall prepare a written determination of nonresponsi-  
 35 bility *[of]* **for** a bidder or proposer if the bidder or proposer *[does not meet the standards of respon-*  
 36 *sibility]* **is not responsible.**

37 (2) *[In determining whether]* A **responsible** bidder or proposer *[has met the standards of respon-*  
 38 *sibility,]* **must demonstrate to** the contracting agency *[shall consider whether a]* **that the** bidder  
 39 or proposer *[has]:*

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

43 (b) **Has** a satisfactory record of performance. The contracting agency shall document the **bid-**  
 44 **der's or proposer's** record of performance *[of a bidder or proposer]* if the contracting agency finds  
 45 **under this paragraph that** the bidder or proposer *[nonresponsible under this paragraph;]* **is not**

1 **responsible.**

2 (c) **Has** a satisfactory record of integrity. The contracting agency shall document the **bidder's**  
3 **or proposer's** record of integrity *[of a bidder or proposer]* if the contracting agency finds **under this**  
4 **paragraph that** the bidder or proposer *[nonresponsible under this paragraph;]* **is not responsible.**

5 (d) **Provides adequate wages and affordable benefits to the bidder's or proposer's em-**  
6 **ployees and families.**

7 (e) **Is not in litigation, subject to an administrative enforcement action or otherwise in**  
8 **a legal dispute with another contracting agency or a public agency in another state.**

9 (f) **Complies with all applicable state and federal laws related to the subject of the pro-**  
10 **urement, including but not limited to labor law and environmental law.**

11 (g) **Has a record of completing previous public contracts successfully, without significant**  
12 **complaints concerning the quality of the bidder's work, delays in completing contracts or**  
13 **cost overruns or, if the bidder has not previously bid for a public contract, has a record of**  
14 **completing other contracts with similar success.**

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

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

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

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

28 **SECTION 12.** ORS 279B.120 is amended to read:

29 279B.120. (1) A contracting agency may prequalify prospective bidders or proposers to submit  
30 bids or proposals for public contracts to provide particular types of goods or services. **Unless the**  
31 **Oregon Department of Administrative Services by rule, or a local contract review board by**  
32 **resolution, ordinance or other regulation, prescribes otherwise, the contracting agency shall**  
33 **determine how and with what forms and information a bidder or proposer must apply for**  
34 **prequalification.** *[The method of submitting prequalification applications, the information required in*  
35 *order to be prequalified and the forms to be used for submitting prequalification information shall be*  
36 *determined by the contracting agency unless otherwise prescribed by rule adopted by the Director of*  
37 *the Oregon Department of Administrative Services or the local contract review board.]*

38 (2)(a) The contracting agency shall, *[in response to the receipt of a]* **respond to a** prequalification  
39 application submitted under subsection (1) of this section, *[notify]* **by:**

40 (A) **Notifying** the prospective bidder or proposer whether the prospective bidder or proposer is  
41 qualified based on the standards of responsibility listed in ORS 279B.110 *[(2),]*; **and**

42 (B) **Identifying** the type and nature of contracts *[that]* **for which** the prospective bidder or  
43 proposer is qualified to compete *[for]* and the time period for which the prequalification is valid.

44 (b) If the contracting agency does not prequalify a prospective bidder or proposer *[as to any*  
45 *contracts covered by]* **for a contract subject to** the prequalification process, the *[notice must*

1 *specify*] **contracting agency must notify the bidder or proposer and specify** which of the stan-  
 2 dards of responsibility listed in ORS 279B.110 (2) the prospective bidder or proposer failed to meet.  
 3 Unless the **contracting agency specifies the** reasons [*are specified*] **why the bidder or proposer**  
 4 **failed to prequalify**, the prospective bidder or proposer [*shall be deemed to have been*] is prequali-  
 5 fied [*in accordance with*] **on the basis of the information that appears in and for the type and**  
 6 **nature of contracts identified in** the application.

7 (3) **A contracting agency shall review the bidder's or proposer's eligibility for prequali-**  
 8 **fication three years after the contracting agency's initial decision to prequalify the bidder**  
 9 **or proposer and at the end of each subsequent three-year period in which the bidder or**  
 10 **proposer continues to submit bids or proposals for public contracts. In the review, the con-**  
 11 **tracting agency shall verify that the bidder or proposer is responsible as provided in ORS**  
 12 **279B.110.**

13 [(3)] (4) If a contracting agency [*subsequently*] discovers that a prospective bidder or proposer  
 14 that **the contracting agency** prequalified under subsections (1) and (2) of this section is no longer  
 15 [*qualified*] **eligible for prequalification**, the agency may revoke the prequalification upon reasonable  
 16 notice to the prospective bidder or proposer, except that a revocation is invalid [*as to any*] **for a**  
 17 **contract for which the contracting agency has issued** an advertisement for bids or proposals [*has*  
 18 *already been issued*].

19 **SECTION 13.** ORS 279B.125 is amended to read:

20 279B.125. (1) [*When*] **If a contracting agency by rule, resolution, ordinance or other regu-**  
 21 **lation** permits or requires [*prequalification of*] bidders or proposers **to prequalify**, a prospective  
 22 bidder or proposer who wishes to prequalify shall submit a prequalification application to the con-  
 23 tracting agency on a form prescribed under ORS 279B.120 (1). Upon [*receipt of*] **receiving** a pre-  
 24 qualification application, the contracting agency shall **require the applicant to make the**  
 25 **demonstrations required under ORS 279B.110 and shall** investigate the prospective bidder or  
 26 proposer as necessary to determine whether the prospective bidder or proposer is [*qualified*] **eligible**  
 27 **for prequalification**. The **contracting agency shall make the** determination [*shall be made*] in less  
 28 than 30 days, if practicable, if the prospective bidder or proposer requests an early decision to allow  
 29 the prospective bidder or proposer as much time as possible to prepare a bid or proposal for a  
 30 contract that has been advertised. In [*making its determination*] **determining whether an applicant**  
 31 **is eligible for prequalification**, the contracting agency shall consider only [*the applicable standards*  
 32 *of responsibility listed in ORS 279B.110 (2)*] **whether the applicant is responsible as provided in**  
 33 **ORS 279B.110**. The contracting agency shall promptly notify the prospective bidder or proposer  
 34 whether the prospective bidder or proposer is [*qualified*] **eligible for prequalification**.

35 (2) If the contracting agency finds that a prospective bidder or proposer is [*qualified*] **eligible**  
 36 **for prequalification**, the notice must state the type and nature of contracts [*that*] **for which** the  
 37 prospective bidder or proposer is qualified to compete [*for*] and the period of time for which the  
 38 prequalification is valid. If the **contracting agency** [*finds that the*] **does not prequalify a prospec-**  
 39 **tive bidder or proposer** [*is not qualified as to any contracts*] **for a contract that is subject to**  
 40 **prequalification under** [*covered by*] the rule, resolution, ordinance or other regulation, the notice  
 41 must specify **which of the standards of responsibility described in ORS 279B.110 the prospec-**  
 42 **ive bidder or proposer failed to meet** [*the reasons given under ORS 279B.120 for not prequalifying*  
 43 *the prospective bidder or proposer*] and inform the prospective bidder or proposer of the right to a  
 44 hearing under ORS 279B.425. To be entitled to a hearing under ORS 279B.425, a prospective bidder  
 45 or proposer shall, within three business days after [*receipt of*] **receiving** the notice, notify the con-

1 tracting agency that the prospective bidder or proposer demands a hearing under ORS 279B.425.

2 (3) If a contracting agency has reasonable cause to believe that *[there has been]* a substantial  
 3 change in *[the]* conditions *[of]* **has caused** a prequalified prospective bidder or proposer *[and that*  
 4 *the prospective bidder or proposer is no longer qualified or is]* **to become less qualified or ineligible**  
 5 **for prequalification**, the contracting agency may revoke or may revise and reissue the prequali-  
 6 fication after reasonable notice to the prequalified prospective bidder or proposer. The notice must  
 7 **specify which of the standards of responsibility described under ORS 279B.110 the prequalified**  
 8 **prospective bidder or proposer no longer meets or the reasons the contracting agency must**  
 9 **revise the prequalified prospective bidder’s or proposer’s eligibility for prequalification** *[specify*  
 10 *the reasons given under ORS 279B.120 for revocation or revision of the prequalification of the pro-*  
 11 *spective bidder or proposer]* and inform the prospective bidder or proposer of the right to a hearing  
 12 under ORS 279B.425. To be entitled to a hearing under ORS 279B.425, a prospective bidder or  
 13 proposer shall, within three business days after *[receipt of]* **receiving** the notice, notify the con-  
 14 tracting agency that the prospective bidder or proposer demands a hearing under ORS 279B.425. A  
 15 revocation or revision does not apply to *[any]* a contract for which **the contracting agency ad-**  
 16 **vertised** *[an advertisement]* for bids or proposals *[was issued]* before the date **the prequalified**  
 17 **prospective bidder or proposer received** the notice of revocation or revision *[was received by the*  
 18 *prequalified prospective bidder or proposer]*.

19 **SECTION 14.** ORS 279B.145 is amended to read:

20 279B.145. The determinations under ORS 279B.055 (3) and (7), 279B.060 (3) and (10), 279B.075,  
 21 279B.080, 279B.085 and 279B.110 (1) **and sections 8, 9 and 10 of this 2009 Act** are final and con-  
 22 clusive unless they are clearly erroneous, arbitrary, capricious or contrary to law.

23 **SECTION 15.** ORS 279C.375 is amended to read:

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

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

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

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

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

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

45 (B) **Has** a satisfactory record of performance. The contracting agency shall document the **bid-**



1 **der's** record of performance [*of a bidder*] if the contracting agency finds **under this paragraph that**  
2 the bidder **is** not [*to be*] responsible [*under this subparagraph*].

3 (C) **Has** a satisfactory record of integrity. The contracting agency shall document the **bidder's**  
4 record of integrity [*of a bidder*] if the contracting agency finds **under this paragraph that** the  
5 bidder **is** not [*to be*] responsible [*under this subparagraph*].

6 (D) **Is not in litigation, subject to an administrative enforcement action or otherwise in**  
7 **a legal dispute with another contracting agency or a public agency in another state.**

8 (E) **Has not previously been subject to an administrative or other proceeding because the**  
9 **bidder failed to pay a prevailing rate of wage.**

10 (F) **Complies with all applicable state and federal laws related to the subject of the pro-**  
11 **urement, including but not limited to labor law and environmental law.**

12 (G) **Has a record of completing previous public contracts successfully, without significant**  
13 **complaints concerning the quality of the bidder's work, delays in completing contracts or**  
14 **cost overruns or, if the bidder has not previously bid for a public contract, has a record of**  
15 **completing other contracts with similar success.**

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

17 [(E)] (I) **Has** supplied all necessary information in connection with the inquiry concerning re-  
18 sponsibility. If a bidder fails to promptly supply information **concerning responsibility that** [*re-*  
19 *quested by*] the contracting agency [*concerning responsibility*] **requests**, the contracting agency shall  
20 [*base the determination of*] **determine the bidder's** responsibility [*upon any*] **based on** available in-  
21 formation, or may find **that** the bidder **is** not [*to be*] responsible.

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

24 \_\_\_\_\_  
25  
26 RESPONSIBILITY DETERMINATION FORM

27  
28 Project Name: \_\_\_\_\_

29 Bid Number: \_\_\_\_\_

30 Business Entity Name: \_\_\_\_\_

31 CCB License Number: \_\_\_\_\_

32 Form Submitted By (Contracting Agency): \_\_\_\_\_

33 Form Submitted By (Contracting Agency Representative's Name): \_\_\_\_\_

34 Title: \_\_\_\_\_

35 Date: \_\_\_\_\_

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

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

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

- 44 [ ] Determined whether the bidder has  
45 met the standards of responsibility.

- 1 In so doing, the contracting agency  
 2 has [*considered whether*]  
 3 **found that** the bidder  
 4 **demonstrated that the bidder:**  
 5 [ ] Has available the appropriate  
 6 financial, material, equipment,  
 7 facility and personnel resources  
 8 and expertise, or the ability to  
 9 obtain the resources and  
 10 expertise, necessary to meet  
 11 all contractual responsibilities.  
 12 [ ] Has a satisfactory record of  
 13 performance.  
 14 [ ] Has a satisfactory record of  
 15 integrity.  
 16 [ ] **Is not in litigation,**  
 17 **subject to an administrative**  
 18 **enforcement action or otherwise**  
 19 **in a legal dispute with another**  
 20 **contracting agency or a public**  
 21 **agency in another state.**  
 22 [ ] **Has not previously been**  
 23 **subject to an administrative**  
 24 **or other proceeding because**  
 25 **the bidder failed to pay a**  
 26 **prevailing rate of wage.**  
 27 [ ] **Complies with all applicable**  
 28 **state and federal laws related**  
 29 **to the subject of the**  
 30 **procurement.**  
 31 [ ] **Has a record of completing**  
 32 **previous public contracts**  
 33 **successfully, without significant**  
 34 **complaints concerning the**  
 35 **quality of the bidder's work,**  
 36 **delays in completing contracts**  
 37 **or cost overruns or, if the**  
 38 **bidder has not previously bid**  
 39 **for a public contract, has a**  
 40 **record of completing other**  
 41 **contracts with similar success.**  
 42 [ ] Is [*qualified*] legally **qualified** to contract  
 43 with the contracting agency.  
 44 [ ] Has supplied all necessary  
 45 information in connection with

1 the inquiry concerning  
 2 responsibility.

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

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

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

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

10  
 11

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

15 (4) The successful bidder shall:

16 (a) Promptly execute a formal contract; and

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

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

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

25 **SECTION 16.** ORS 279C.430 is amended to read:

26 279C.430. (1) A contracting agency may adopt a rule, resolution, ordinance or other regulation  
 27 *[requiring mandatory prequalification for all persons desiring to bid for public improvement contracts*  
 28 *that are to be let by the agency]* **to require a person to prequalify in order to bid for a contract**  
 29 **the contracting agency intends to let.** The rule, resolution, ordinance or other regulation au-  
 30 thorized by this section must *[include the time for submitting]* **specify when a person must submit**  
 31 **an application for** prequalification *[applications and a general description of]* **and describe** the type  
 32 and nature of the contracts *[that may be]* **the contracting agency may let.** The prequalification  
 33 application must be in writing on a standard form prescribed under the authority of ORS 279A.050.

34 (2) When a contracting agency permits or requires *[prequalification of]* bidders **to prequalify**, a  
 35 person who wishes to prequalify shall submit a prequalification application to the contracting  
 36 agency on a standard form prescribed under subsection (1) of this section. Within 30 days after *[re-*  
 37 *ceipt of]* **receiving** a prequalification application, the contracting agency shall **require the appli-**  
 38 **cant to make the demonstrations required under ORS 279C.375 and** investigate the applicant  
 39 as necessary to determine if the applicant is *[qualified]* **eligible for prequalification.** The **con-**  
 40 **tracting agency shall make the** determination *[shall be made]* in less than 30 days, if practicable,  
 41 if the applicant requests an early decision to allow the applicant as much time as possible to prepare  
 42 a bid on a contract that has been advertised. In *[making its determination,]* **determining whether**  
 43 **an applicant is eligible for prequalification,** the contracting agency shall consider only *[the ap-*  
 44 *plicable standards of responsibility listed in ORS 279C.375 (3)(b).]* **whether the applicant is re-**  
 45 **sponsible as provided in ORS 279C.375.** The agency shall promptly notify the applicant whether

1 or not the applicant is *[qualified]* **eligible for prequalification.**

2 (3) If the contracting agency finds that the applicant is *[qualified]* **eligible for**  
 3 **prequalification**, the notice must state the nature and type of contracts *[that the person is*  
 4 *qualified]* **for which the applicant is prequalified** to bid *[on]* and the period of time for which the  
 5 *[qualification]* **prequalification** is valid under the contracting agency's rule, resolution, ordinance  
 6 or other regulation. If the contracting agency *[finds the applicant is not qualified as to any contracts*  
 7 *covered by]* **does not prequalify an applicant for a contract that is subject to prequalification**  
 8 **under** the rule, resolution, ordinance or other regulation, the notice must specify **which of the**  
 9 **standards of responsibility described in ORS 279C.375 the applicant failed to meet** *[the reasons*  
 10 *found under ORS 279C.375 (3)(b) for not prequalifying the applicant]* and inform the applicant of the  
 11 right to a hearing under ORS 279C.445 and 279C.450.

12 (4) **A contracting agency shall review a bidder's eligibility for prequalification three years**  
 13 **after the contracting agency's initial decision to prequalify the bidder and at the end of each**  
 14 **subsequent three-year period in which the bidder continues to submit bids for public con-**  
 15 **tracts. In the review, the contracting agency shall verify that the bidder is responsible as**  
 16 **provided in ORS 279C.375.**

17 *[(4)]* (5) If a contracting agency has reasonable cause to believe that *[there has been]* a sub-  
 18 stantial change in *[the]* conditions **has caused** *[of]* a prequalified person *[and that the person is no*  
 19 *longer qualified or is]* **to become less qualified or to become ineligible for prequalification**, the  
 20 agency may revoke or may revise and reissue the prequalification after reasonable notice to the  
 21 prequalified person. The notice *[shall state the reasons found under ORS 279C.375 (3)(b) for revoca-*  
 22 *tion or revision]* **must specify which of the standards of responsibility described under ORS**  
 23 **279C.375 the prequalified person no longer meets or the reasons the contracting agency must**  
 24 **revise the prequalified person's eligibility for prequalification** *[of the prequalification of the per-*  
 25 *son]* and inform the person of the right to a hearing under ORS 279C.445 and 279C.450. A revocation  
 26 or revision does not apply to *[any]* a public improvement contract for which *[publication of an ad-*  
 27 *vertisement,]* **the contracting agency advertised for bids** in accordance with ORS 279C.360, *com-*  
 28 *menced]* before the date **on which the prequalified person received** the notice of revocation or  
 29 revision *[was received by the prequalified person].*

30 **SECTION 17. Sections 2, 3, 4, 5, 6, 8, 9 and 10 of this 2009 Act and the amendments to**  
 31 **ORS 279B.110, 279B.120, 279B.125, 279B.145, 279C.375 and 279C.430 by sections 11 to 16 of this**  
 32 **2009 Act apply to:**

33 (1) **Public contracts first advertised or otherwise solicited or, if not advertised or solici-**  
 34 **ted, entered into on or after January 1, 2010; and**

35 (2) **Public contracts renewed on or after January 1, 2010, irrespective of whether the**  
 36 **contract is renewed with an existing contractor or a new contractor.**

37 **SECTION 18. (1) Sections 2, 3, 4, 5, 6, 8, 9 and 10 of this 2009 Act and the amendments**  
 38 **to ORS 279B.110, 279B.120, 279B.125, 279B.145, 279C.375 and 279C.430 by sections 11 to 16 of**  
 39 **this 2009 Act become operative January 1, 2010.**

40 (2) **The Secretary of State, the Attorney General, the Director of the Oregon Department**  
 41 **of Administrative Services and a contracting agency that has adopted rules under ORS**  
 42 **279A.065 may adopt rules and take related actions before January 1, 2010, that are necessary**  
 43 **to enable the Secretary of State, the Attorney General, the director and the contracting**  
 44 **agency to exercise, on and after January 1, 2010, all the duties, functions and powers con-**  
 45 **ferred on the Secretary of State, Attorney General, director and contracting agency by**

1 sections 2, 3, 4, 5, 6, 8, 9 and 10 of this 2009 Act and the amendments to ORS 279B.110,  
2 279B.120, 279B.125, 279B.145, 279C.375 and 279C.430 by sections 11 to 16 of this 2009 Act.

3 **SECTION 19.** This 2009 Act being necessary for the immediate preservation of the public  
4 peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect  
5 on its passage.

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