

Enrolled
House Bill 3316

Sponsored by COMMITTEE ON BUSINESS AND LABOR

CHAPTER

AN ACT

Relating to certain professional services procured under the Public Contracting Code; creating new provisions; amending ORS 276.915, 279A.010, 279A.020, 279A.065, 279A.140, 279B.060, 279C.100, 279C.105, 279C.107, 279C.110, 279C.115 and 279C.125; and declaring an emergency.

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

SECTION 1. ORS 279C.100 is amended to read:
279C.100. As used in ORS 279C.100 to 279C.125:

(1) "Architect" means a person who is registered and holds a valid certificate in the practice of architecture in the State of Oregon, as provided under ORS 671.010 to 671.220, and includes without limitation the terms "architect," "licensed architect" and "registered architect."

(2) "Architectural, engineering, **photogrammetric mapping, transportation planning or [and] land surveying services**" means professional services that are required to be performed by an architect, engineer, **photogrammetrist, transportation planner** or land surveyor.

(3) "Engineer" means a person who is registered and holds a valid certificate in the practice of engineering in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002 (2).

(4) "Land surveyor" means a person who is registered and holds a valid certificate in the practice of land surveying in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002 (5).

(5) "Personal services" means the services of a person or persons that are designated by a state contracting agency with procurement authority under ORS 279A.050 or a local [*contract review board*] **contracting agency** as personal services. "Personal services" includes architectural, engineering, **photogrammetric mapping, transportation planning or [and] land surveying services** procured under ORS 279C.105 or 279C.110 and related services procured under ORS 279C.120.

[(6) "*Related services*" means *personal services, other than architectural, engineering and land surveying services, that are related to the planning, design, engineering or oversight of public improvement projects or components thereof, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, environmental impact studies, hazardous substances or hazardous waste or toxic substances testing services, wetland delineation studies, wetland mitigation studies, Native American studies, historical research services, endangered species studies, rare plant studies, biological services, archaeological services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner's representative services or land-use planning services.*]

(6) "Photogrammetric mapping" has the meaning given that term in ORS 672.002.

(7) "Photogrammetrist" has the meaning given that term in ORS 672.002.

(8) "Related services" means personal services, other than architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, that are related to planning, designing, engineering or overseeing public improvement projects or components of public improvement projects, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, hazardous substances or hazardous waste or toxic substances testing services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner's representation services or land-use planning services.

(9) "Transportation planning services" means transportation planning services for projects that require compliance with the National Environmental Policy Act, 42 U.S.C. 4321 et seq.

SECTION 2. ORS 279C.105 is amended to read:

279C.105. (1) Except as provided in ORS 279A.140, a contracting [agencies] **agency** may enter into [contracts] a **contract** for architectural, engineering, **photogrammetric mapping, transportation planning or** [and] land surveying services and related services. The Oregon Department of Administrative Services shall enter into [contracts] a **contract** for architectural, engineering, **photogrammetric mapping, transportation planning or** [and] land surveying services and related services on behalf of a state contracting [agencies] **agency** that [are] **is** subject to ORS 279A.140. The provisions of this section do not relieve the contracting agency of the duty to comply with ORS 279A.140, [any] other law applicable to **the** state contracting [agencies,] **agency** or [any] applicable city or county charter provisions. [Each] **A** contracting agency **that is** authorized to enter into [contracts] a **contract** for architectural, engineering, **photogrammetric mapping, transportation planning or** [and] land surveying services and related services shall adopt procedures [for the screening and selection of] **to screen and select** persons to perform [those] **architectural, engineering, photogrammetric mapping, transportation planning or land surveying services and related services** under ORS 279C.110 or 279C.120.

(2) **A state contracting agency with procurement authority under ORS 279A.050 or a local contract review board by ordinance, resolution, administrative rule or other regulation may, consistent with the provisions of ORS 279C.100 to 279C.125, designate certain personal services contracts or classes of personal service contracts as contracts for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or related services.**

[(2) A state contracting agency with procurement authority under ORS 279A.050 or a local contract review board by ordinance, resolution, administrative rule or other regulation may designate certain personal services contracts or classes of personal services contracts as contracts for architectural, engineering and land surveying services or related services.]

SECTION 3. ORS 279C.107 is amended to read:

279C.107. (1) Notwithstanding the public records law, ORS 192.410 to 192.505, if a contracting agency solicits a contract for architectural, engineering, **photogrammetric mapping, transportation planning or** land surveying services or related services by a competitive proposal:

(a) **The contracting agency may open** proposals [may be opened] so as to avoid [disclosure of] **disclosing** contents to competing proposers during, when applicable, the process of negotiation.

(b) **The contracting agency need not open** proposals [are not required to be open] for public inspection until after the [notice of intent to award a contract is issued] **contracting agency executes a contract.**

(2) Notwithstanding any requirement to [make] **open** proposals [open] to public inspection after the contracting [agency's issuance of notice of intent to award] **agency executes** a contract, a contracting agency [may] **shall** 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 proposal. [The fact that proposals are opened] **Opening a proposal** at a public

meeting, as defined in ORS 192.610, does not make *[their]* **the contents of the proposal** subject to disclosure, regardless of whether the public body *[opening]* **that opens** the *[proposals]* **proposal** fails to give notice of or provide for an executive session for the purpose of opening proposals. If a request for proposals is canceled after proposals are received, the contracting agency *[may]* **shall, subject to ORS 192.501 and 192.502,** return a proposal **and all copies of the proposal** to the proposer that made the proposal. The contracting agency shall keep a list of returned proposals in the file for the solicitation.

SECTION 4. ORS 279C.110 is amended to read:

279C.110. (1) A *[state]* contracting agency shall select consultants to provide architectural, engineering, **photogrammetric mapping, transportation planning** or land surveying services on the basis of **the consultant's** qualifications for the type of professional service required. A *[state]* contracting agency may solicit or use pricing policies and proposals or other pricing information, **including the number of hours proposed for the service required, expenses, hourly rates and overhead,** to determine consultant compensation only after the **contracting** agency has selected a candidate pursuant to subsection *[(3)]* **(2)** of this section.

[(2) This section applies only if the architectural, engineering or land surveying services contract is issued by a state contracting agency and does not apply to any such contract issued by a local contracting agency unless the following conditions apply:]

[(a) The local contracting agency receives moneys from the State Highway Fund under ORS 366.762 or 366.800 or a grant or loan from the state that will be used to pay for any portion of the design and construction of the project;]

[(b) The total amount of any grants, loans or moneys from the State Highway Fund and from the state for the project exceeds 10 percent of the value of the project; and]

[(c) The value of the project exceeds \$900,000.]

[(3) Subject to the requirements of subsections (1) and (2) of this section, the procedures that a contracting agency creates for the screening and selection of consultants and the selection of a candidate under this section shall be within the sole discretion of the contracting agency and may be adjusted to accommodate the contracting agency's scope, schedule and budget objectives for a particular project. Adjustments to accommodate a contracting agency's objectives may include provision for the direct appointment of a consultant if the value of the project does not exceed a threshold amount as determined by the contracting agency. Screening and selection procedures may include a consideration of each candidate's:]

(2) Subject to the requirements of subsection (1) of this section, the procedures that a contracting agency creates to screen and select consultants and to select a candidate under this section are at the contracting agency's sole discretion. The contracting agency may adjust the procedures to accommodate the contracting agency's scope, schedule or objectives for a particular project if the estimated cost of the architectural, engineering, photogrammetric mapping, transportation planning or land surveying services for the project do not exceed \$250,000.

(3) A contracting agency's screening and selection procedures under this section, regardless of the estimated cost of the architectural, engineering, photogrammetric mapping, transportation planning or land surveying services for a project, may include considering each candidate's:

(a) Specialized experience, capabilities and technical competence, **which the candidate may demonstrate** *[that may be demonstrated by]* **with the candidate's** proposed approach and methodology to meet the project requirements;

(b) Resources *[available]* **committed** to perform the work and the proportion of the *[candidate staff's]* time that **the candidate's staff** would *[be spent]* **spend** on the project, including *[any]* **time for** specialized services, within the applicable time limits;

(c) Record of past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control and contract administration;

(d) Ownership status and employment practices regarding minority, women and emerging small businesses or historically underutilized businesses;

(e) Availability to the project locale;

(f) Familiarity with the project locale; and

(g) Proposed project management techniques.

(4) If the screening and selection procedures [*created by*] a contracting agency **creates** under subsection [(3)] (2) of this section result in the [*determination by the*] contracting [*agency*] **agency's determination** that two or more candidates are equally qualified, the contracting agency may select a candidate through any process [*adopted by*] the contracting agency **adopts that is not based on the candidate's pricing policies, proposals or other pricing information.**

(5) The contracting agency and the selected candidate shall mutually discuss and refine the scope of services for the project and shall negotiate conditions, including but not limited to compensation level and performance schedule, based on the scope of services. The compensation level paid must be reasonable and fair to the contracting agency as determined solely by the contracting agency. Authority to negotiate a contract under this section does not supersede any provision of ORS 279A.140 or 279C.520.

(6) If the contracting agency and the selected candidate are unable for any reason to negotiate a contract at a compensation level that is reasonable and fair to the contracting agency, the contracting agency shall, either orally or in writing, formally terminate negotiations with the selected candidate. The contracting agency may then negotiate with [*another candidate*] **the next most qualified candidate.** The negotiation process may continue in this manner through successive candidates until an agreement is reached or the contracting agency terminates the consultant contracting process.

(7) It is the goal of this state to promote a sustainable economy in the rural areas of the state. In order to monitor progress toward this goal, a state contracting agency [*to which this section applies*] shall keep a record of the locations [*for*] **in which** [*the*] architectural, engineering, **photogrammetric mapping, transportation planning or** [*and*] land surveying services contracts and related services contracts [*to be*] **are** performed throughout the state, the locations of the selected consultants and the direct expenses on each contract. This record [*shall*] **must** include the total number of contracts [*over a 10-year period for*] **awarded to** each consultant firm **over a 10-year period.** The record of direct expenses [*shall*] **must** include all personnel travel expenses as a separate and identifiable expense on the contract. Upon request, the state contracting agency shall make these records available to the public.

(8) **Notwithstanding the provisions of subsection (1) of this section, a contracting agency may directly appoint a consultant if the estimated cost of the architectural, engineering, photogrammetric mapping, transportation planning or land surveying services for the project do not exceed \$100,000.**

(9) **Notwithstanding the provisions of subsections (1) and (8) of this section, a contracting agency may directly appoint a consultant for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services in an emergency.**

SECTION 5. ORS 279C.115 is amended to read:

279C.115. (1) As used in this section, "consultant" means an architect, engineer, **photogrammetrist, transportation planner** or land surveyor.

(2) A [*local*] contracting agency may enter into [*an*] **a contract for** architectural, engineering, **photogrammetric mapping, transportation planning** or land surveying services [*contract*] **or related services** directly with a consultant if the project described in the contract consists of work that has been substantially described, planned or otherwise previously studied or rendered in an earlier contract with the consultant that was awarded under rules adopted under ORS 279A.065 and the new contract is a continuation of [*that*] **the** project.

(3) A [*local*] contracting agency may adopt criteria for determining when this section applies to [*an*] **a contract for** architectural, engineering, **photogrammetric mapping, transportation planning** or land surveying services [*contract*] **or related services.**

SECTION 6. ORS 279C.125 is amended to read:

279C.125. (1) The Department of Transportation, the Oregon Department of Administrative Services or any other state contracting agency shall adopt rules establishing a two-tiered selection process for contracts with architects, engineers, **photogrammetrists, transportation planners** and land surveyors to perform personal services contracts. The selection process shall apply only if:

(a) A public improvement is owned and maintained by a local government; and

(b) The Department of Transportation, the Oregon Department of Administrative Services or another state contracting agency will serve as the lead state contracting agency and will execute personal services contracts with architects, engineers, **photogrammetrists, transportation planners** and land surveyors for work on the public improvement project.

(2) The selection process required by subsection (1) of this section must require the lead state contracting agency to select no fewer than the three most qualified consultants when feasible in accordance with ORS 279C.110.

(3) The local government is responsible for the final selection of the consultant from the list of qualified consultants selected by the lead state contracting agency or through an alternative process adopted by the local government.

(4) Nothing in this section applies to the selection process used by a local contracting agency when the contracting agency executes a contract directly with architects, engineers, **photogrammetrists, transportation planners** or land surveyors.

SECTION 7. ORS 276.915 is amended to read:

276.915. (1) An authorized state agency may construct or renovate a facility only if the authorized state agency determines that the design incorporates all reasonable cost-effective energy conservation measures and alternative energy systems. The determination by the authorized state agency shall include consideration of indoor air quality issues and operation and maintenance costs.

(2) Whenever an authorized state agency determines that a major facility is to be constructed or renovated, the authorized state agency shall cause to be included in the design phase of the construction or renovation a provision that requires an energy consumption analysis to be prepared for the facility under the direction of a professional engineer or licensed architect or under the direction of a person that is prequalified in accordance with this section. The authorized state agency and the State Department of Energy shall agree to the list of energy conservation measures and alternative energy systems that the energy consumption analysis will include. The energy consumption analysis and facility design shall be delivered to the State Department of Energy during the design development phase of the facility design. The State Department of Energy shall review the energy consumption analysis and forward its findings to the authorized state agency within 10 working days after receiving the energy consumption analysis, if practicable.

(3) The State Department of Energy, in consultation with authorized state agencies, shall adopt rules to carry out the provisions of ORS 276.900 to 276.915. These rules shall:

(a) Include a simplified and usable method for determining which energy conservation measures and alternative energy systems are cost-effective. The method shall reflect the energy costs of the utility serving the facility.

(b) Prescribe procedures for determining if a facility design incorporates all reasonable cost-effective energy conservation measures and alternative energy systems.

(c) Establish fees through which an authorized state agency will reimburse the State Department of Energy for the department's review of energy consumption analyses and facility designs and the department's reporting tasks. The fees imposed may not exceed 0.2 percent of the capital construction cost of the facility and must be included in the energy consumption analysis required in subsection (2) of this section. The State Department of Energy may provide for a waiver of fees and reviews if the authorized state agency demonstrates that the facility will be designed and constructed in a manner that incorporates only cost-effective energy conservation measures or in a manner that exceeds the energy conservation provisions of the state building code by 20 percent or more.

(d) Periodically define highly efficient facilities. A facility constructed or renovated after June 30, 2001, shall exceed the energy conservation provisions of the state building code by 20 percent or more, unless otherwise required by rules adopted under this section.

(e) Establish guidelines for implementing subsection (4) of this section.

(f) Establish guidelines for incorporating energy efficiency requirements into lease agreements of 10 or more years to be phased in as current lease agreements expire or as new lease agreements are entered into, allowing reasonable time for the owner to implement the requirements of this section.

(g) Establish criteria by which the State Department of Energy determines that a person is prequalified to perform work in accordance with this section.

(4) Before June 30, 2015, an authorized state agency shall reduce the total amount of energy the authorized state agency uses in the authorized state agency's owned facilities by at least 20 percent from a baseline amount the State Department of Energy determines by rule based on usage in calendar year 2000.

(5) An authorized state agency shall report annually to the State Department of Energy concerning energy use in the authorized state agency's facilities. The State Department of Energy shall specify by rule the form and content of and deadlines for the reports.

(6) An authorized state agency that fails to achieve and maintain a 20 percent reduction in energy use on and after June 30, 2015, shall submit biennial energy conservation plans to the State Department of Energy. The State Department of Energy shall specify by rule the form and content of and deadlines for the energy conservation plans.

(7) The State Department of Energy by rule may require mandatory prequalification as a condition for a person to submit a bid or proposal to perform the following work for an authorized state agency:

(a) Direct an energy consumption analysis for an authorized state agency under subsection (2) of this section, unless the person is a professional engineer or architect;

(b) Enter into an energy savings performance contract; or

(c) Perform energy audits, building commissioning, monitoring and verification services and other services related to the operation and management of a facility's energy systems, except for architectural, engineering [*and*], **photogrammetric mapping, transportation planning or** land surveying services as defined in ORS 279C.100.

(8) The State Department of Energy may recover from authorized state agencies the costs associated with administering the provisions of this section, including costs associated with adopting rules, maintaining a state energy use database and prequalifying a person under this section.

(9) The State Department of Energy, the Oregon Department of Administrative Services and the Oregon University System shall jointly prepare a biennial report summarizing the progress toward achieving the goals of this section. The biennial report shall be made available to the public.

SECTION 8. ORS 279A.010 is amended to read:

279A.010. (1) As used in the Public Contracting Code, unless the context or a specifically applicable definition requires otherwise:

(a) "Bidder" means a person that submits a bid in response to an invitation to bid.

(b) "Contracting agency" means a public body authorized by law to conduct a procurement. "Contracting agency" includes, but is not limited to, the Director of the Oregon Department of Administrative Services and any person authorized by a contracting agency to conduct a procurement on the contracting agency's behalf. "Contracting agency" does not include the judicial department or the legislative department.

(c) "Days" means calendar days.

(d) "Department" means the Oregon Department of Administrative Services.

(e) "Director" means the Director of the Oregon Department of Administrative Services or a person designated by the director to carry out the authority of the director under the Public Contracting Code.

(f) "Emergency" means circumstances that:

- (A) Could not have been reasonably foreseen;
- (B) Create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and
- (C) Require prompt execution of a contract to remedy the condition.

(g) “Energy savings performance contract” means a public contract between a contracting agency and a qualified energy service company for the identification, evaluation, recommendation, design and construction of energy conservation measures, including a design-build contract, that guarantee energy savings or performance.

(h) “Executive department” has the meaning given that term in ORS 174.112.

(i) “Goods” includes supplies, equipment, materials, personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, and combinations of any of the items identified in this paragraph.

(j) “Goods and services” or “goods or services” includes combinations of any of the items identified in the definitions of “goods” and “services.”

(k)(A) “Grant” means:

(i) An agreement under which a contracting agency receives moneys, property or other assistance, including but not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, from a grantor for the purpose of supporting or stimulating a program or activity of the contracting agency and in which no substantial involvement by the grantor is anticipated in the program or activity other than involvement associated with monitoring compliance with the grant conditions; or

(ii) An agreement under which a contracting agency provides moneys, property or other assistance, including but not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, to a recipient for the purpose of supporting or stimulating a program or activity of the recipient and in which no substantial involvement by the contracting agency is anticipated in the program or activity other than involvement associated with monitoring compliance with the grant conditions.

(B) “Grant” does not include a public contract for a public improvement, for public works, as defined in ORS 279C.800, or for emergency work, minor alterations or ordinary repair or maintenance necessary to preserve a public improvement, when under the public contract a contracting agency pays, in consideration for contract performance intended to realize or to support the realization of the purposes for which grant funds were provided to the contracting agency, moneys that the contracting agency has received under a grant.

(L) “Industrial oil” means any compressor, turbine or bearing oil, hydraulic oil, metal-working oil or refrigeration oil.

(m) “Judicial department” has the meaning given that term in ORS 174.113.

(n) “Legislative department” has the meaning given that term in ORS 174.114.

(o) “Local contract review board” means a local contract review board described in ORS 279A.060.

(p) “Local contracting agency” means a local government or special government body authorized by law to conduct a procurement. “Local contracting agency” includes any person authorized by a local contracting agency to conduct a procurement on behalf of the local contracting agency.

(q) “Local government” has the meaning given that term in ORS 174.116.

(r) “Lowest responsible bidder” means the lowest bidder who:

(A) Has substantially complied with all prescribed public contracting procedures and requirements;

(B) Has met the standards of responsibility set forth in ORS 279B.110 or 279C.375;

(C) Has not been debarred or disqualified by the contracting agency under ORS 279B.130 or 279C.440; and

(D) If the advertised contract is a public improvement contract, is not on the list created by the Construction Contractors Board under ORS 701.227.

(s) "Lubricating oil" means any oil intended for use in an internal combustion crankcase, transmission, gearbox or differential or an automobile, bus, truck, vessel, plane, train, heavy equipment or machinery powered by an internal combustion engine.

(t) "Person" means a natural person capable of being legally bound, a sole proprietorship, a corporation, a partnership, a limited liability company or partnership, a limited partnership, a for-profit or nonprofit unincorporated association, a business trust, two or more persons having a joint or common economic interest, any other person with legal capacity to contract or a public body.

(u) "Post-consumer waste" means a finished material that would normally be disposed of as solid waste, having completed its life cycle as a consumer item. "Post-consumer waste" does not include manufacturing waste.

(v) "Price agreement" means a public contract for the procurement of goods or services at a set price with:

(A) No guarantee of a minimum or maximum purchase; or

(B) An initial order or minimum purchase combined with a continuing contractor obligation to provide goods or services in which the contracting agency does not guarantee a minimum or maximum additional purchase.

(w) "Procurement" means the act of purchasing, leasing, renting or otherwise acquiring goods or services. "Procurement" includes each function and procedure undertaken or required to be undertaken by a contracting agency to enter into a public contract, administer a public contract and obtain the performance of a public contract under the Public Contracting Code.

(x) "Proposer" means a person that submits a proposal in response to a request for proposals.

(y) "Public body" has the meaning given that term in ORS 174.109.

(z) "Public contract" means a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. "Public contract" does not include grants.

(aa) "Public contracting" means procurement activities described in the Public Contracting Code relating to obtaining, modifying or administering public contracts or price agreements.

(bb) "Public Contracting Code" or "code" means ORS chapters 279A, 279B and 279C.

(cc) "Public improvement" means a project for construction, reconstruction or major renovation on real property by or for a contracting agency. "Public improvement" does not include:

(A) Projects for which no funds of a contracting agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or

(B) Emergency work, minor alteration, ordinary repair or maintenance necessary to preserve a public improvement.

(dd) "Public improvement contract" means a public contract for a public improvement. "Public improvement contract" does not include a public contract for emergency work, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement.

(ee) "Recycled material" means any material that would otherwise be a useless, unwanted or discarded material except for the fact that the material still has useful physical or chemical properties after serving a specific purpose and can, therefore, be reused or recycled.

(ff) "Recycled oil" means used oil that has been prepared for reuse as a petroleum product by refining, rerefining, reclaiming, reprocessing or other means, provided that the preparation or use is operationally safe, environmentally sound and complies with all laws and regulations.

(gg) "Recycled paper" means a paper product with not less than:

(A) Fifty percent of its fiber weight consisting of secondary waste materials; or

(B) Twenty-five percent of its fiber weight consisting of post-consumer waste.

(hh) "Recycled PETE" means post-consumer polyethylene terephthalate material.

(ii) "Recycled product" means all materials, goods and supplies, not less than 50 percent of the total weight of which consists of secondary and post-consumer waste with not less than 10 percent

of its total weight consisting of post-consumer waste. "Recycled product" includes any product that could have been disposed of as solid waste, having completed its life cycle as a consumer item, but otherwise is refurbished for reuse without substantial alteration of the product's form.

(jj) "Secondary waste materials" means fragments of products or finished products of a manufacturing process that has converted a virgin resource into a commodity of real economic value. "Secondary waste materials" includes post-consumer waste. "Secondary waste materials" does not include excess virgin resources of the manufacturing process. For paper, "secondary waste materials" does not include fibrous waste generated during the manufacturing process such as fibers recovered from waste water or trimmings of paper machine rolls, mill broke, wood slabs, chips, sawdust or other wood residue from a manufacturing process.

(kk) "Services" mean services other than personal services designated under ORS 279A.055, except that, for state contracting agencies with procurement authority under ORS 279A.050 or 279A.140, "services" includes personal services as designated by the state contracting agencies.

(LL) "Special government body" has the meaning given that term in ORS 174.117.

(mm) "State agency" means the executive department, except the Secretary of State and the State Treasurer in the performance of the duties of their constitutional offices.

(nn) "State contracting agency" means an executive department entity authorized by law to conduct a procurement.

(oo) "State government" has the meaning given that term in ORS 174.111.

(pp) "Used oil" has the meaning given that term in ORS 459A.555.

(qq) "Virgin oil" means oil that has been refined from crude oil and that has not been used or contaminated with impurities.

(2) Other definitions appearing in the Public Contracting Code and the sections in which they appear are:

- (a) "Adequate"ORS 279C.305
- (b) "Administering contracting agency"ORS 279A.200
- (c) "Affirmative action"ORS 279A.100
- (d) "Architect"ORS 279C.100
- (e) "Architectural, engineering [and], photogrammetric mapping, transportation planning or land surveying services"ORS 279C.100
- (f) "Bid documents"ORS 279C.400
- (g) "Bidder"ORS 279B.415
- (h) "Bids"ORS 279C.400
- (i) "Brand name"ORS 279B.405
- (j) "Brand name or equal specification"ORS 279B.200
- (k) "Brand name specification"ORS 279B.200
- (L) "Class special procurement"ORS 279B.085
- (m) "Consultant"ORS 279C.115
- (n) "Contract-specific special procurement"ORS 279B.085
- (o) "Cooperative procurement"ORS 279A.200
- (p) "Cooperative procurement group"ORS 279A.200

- (q) "Donee"ORS 279A.250
- (r) "Engineer"ORS 279C.100
- (s) "Findings"ORS 279C.330
- (t) "Fire protection
equipment"ORS 279A.190
- (u) "Fringe benefits"ORS 279C.800
- (v) "Funds of a public
agency"ORS 279C.810
- (w) "Good cause"ORS 279C.585
- (x) "Good faith dispute"ORS 279C.580
- (y) "Goods"ORS 279B.115
- (z) "Housing"ORS 279C.800
- (aa) "Interstate cooperative
procurement"ORS 279A.200
- (bb) "Invitation to bid"ORS 279B.005
.....and 279C.400
- (cc) "Joint cooperative
procurement"ORS 279A.200
- (dd) "Labor dispute"ORS 279C.650
- (ee) "Land surveyor"ORS 279C.100
- (ff) "Legally flawed"ORS 279B.405
- (gg) "Locality"ORS 279C.800
- (hh) "Nonprofit
organization"ORS 279C.810
- (ii) "Nonresident bidder"ORS 279A.120
- (jj) "Not-for-profit
organization"ORS 279A.250
- (kk) "Original contract"ORS 279A.200
- (LL) "Permissive cooperative
procurement"ORS 279A.200
- (mm) "Person"ORS 279C.500
.....and 279C.815
- (nn) "Personal services"ORS 279C.100
- [(oo) "Prevailing rate of
wage"ORS 279C.800
- (pp) "Procurement
description"ORS 279B.005
- (qq) "Property"ORS 279A.250
- (rr) "Public agency"ORS 279C.800
- (ss) "Public contract"ORS 279A.190
- (tt) "Public works"ORS 279C.800
- (uu) "Purchasing contracting
agency"ORS 279A.200
- (vv) "Regularly organized fire
department"ORS 279A.190
- (ww) "Related services"ORS 279C.100
- (xx) "Request for proposals" ...ORS 279B.005
- (yy) "Resident bidder"ORS 279A.120
- (zz) "Responsible bidder"ORS 279A.105
.....and 279B.005
- (aaa) "Responsible proposer"ORS 279B.005
- (bbb) "Responsive bid"ORS 279B.005

- (ccc) “Responsive proposal”ORS 279B.005
- (ddd) “Retainage”ORS 279C.550
- (eee) “Special procurement”ORS 279B.085
- (fff) “Specification”ORS 279B.200
- (ggg) “State agency”ORS 279A.250
- (hhh) “Substantial
completion”ORS 279C.465
- (iii) “Surplus property”ORS 279A.250
- (jjj) “Unnecessarily
restrictive”ORS 279B.405]
- (oo) “Photogrammetric
mapping”ORS 279C.100
- (pp) “Photogrammetrist”ORS 279C.100
- (qq) “Prevailing rate of
wage”ORS 279C.800
- (rr) “Procurement
description”ORS 279B.005
- (ss) “Property”ORS 279A.250
- (tt) “Public agency”ORS 279C.800
- (uu) “Public contract”ORS 279A.190
- (vv) “Public works”ORS 279C.800
- (ww) “Purchasing contracting
agency”ORS 279A.200
- (xx) “Regularly organized fire
department”ORS 279A.190
- (yy) “Related services”ORS 279C.100
- (zz) “Request for
proposals”ORS 279B.005
- (aaa) “Resident bidder”ORS 279A.120
- (bbb) “Responsible bidder” ...ORS 279A.105
.....and 279B.005
- (ccc) “Responsible
proposer”ORS 279B.005
- (ddd) “Responsive bid”ORS 279B.005
- (eee) “Responsive
proposal”ORS 279B.005
- (fff) “Retainage”ORS 279C.550
- (ggg) “Special
procurement”ORS 279B.085
- (hhh) “Specification”ORS 279B.200
- (iii) “State agency”ORS 279A.250
- (jjj) “Substantial
completion”ORS 279C.465
- (kkk) “Surplus property”ORS 279A.250
- (LLL) “Transportation
planning services”ORS 279C.100
- (mmm) “Unnecessarily
restrictive”ORS 279B.405

SECTION 9. ORS 279A.020 is amended to read:

279A.020. (1) Except as otherwise provided in the Public Contracting Code, all public contracting by a contracting agency is subject to this chapter.

(2) Except as provided in ORS 279C.320, public contracting involving public improvements and other construction services is subject to this chapter and ORS chapter 279C, but not ORS chapter 279B.

(3) Public contracting involving architects, engineers, **photogrammetrists, transportation planners**, land surveyors and related services is subject to this chapter and ORS chapter 279C, but not ORS chapter 279B.

(4) Except as provided in ORS 279C.320, all other public contracting is subject to this chapter and ORS 279B, but not ORS chapter 279C.

SECTION 10. ORS 279A.065 is amended to read:

279A.065. (1) The Attorney General shall prepare and maintain model rules of procedure appropriate for use by all contracting agencies governing public contracting under the Public Contracting Code and may devise and publish forms for use therewith. The Attorney General shall adopt the model rules in the manner provided by ORS chapter 183. Before adopting or amending a model rule, the Attorney General shall consult with the Director of the Oregon Department of Administrative Services, the Director of Transportation, representatives of county governments, representatives of city governments, representatives of school boards and other knowledgeable persons.

(2) The Attorney General shall adopt model rules appropriate for use by all contracting agencies to govern the procedures for entering into energy savings performance contracts. Before adopting or amending a rule under this subsection, the Attorney General shall consult with the Oregon Department of Administrative Services, the State Department of Energy, the Oregon University System, local contracting agencies and other knowledgeable persons. The Attorney General may develop standard contract forms for use with energy savings performance contracts.

(3) After each legislative session, the Attorney General shall review all laws passed by the Legislative Assembly that affect public contracting to determine if the model rules prepared under this section should be modified by the adoption of a new rule or by the amendment or repeal of an existing rule. If the Attorney General determines that a modification of the model rules is necessary, the Attorney General shall prepare the modification within such time as to allow the modification to take effect no later than 120 days after the effective date of the legislation that caused the rule to be modified. However, the Attorney General may prepare a modification to take effect 121 or more days after the effective date of the legislation if the Attorney General provides notice designating the time period within which the modification will take effect to the state agencies and persons listed in subsection (1) of this section.

(4) A contracting agency that has not adopted its own rules of procedure in accordance with subsection (5) of this section is subject to the model rules adopted by the Attorney General under this section, including all modifications to the model rules that the Attorney General may adopt. *[This subsection does not apply to personal services contracts of local contracting agencies except for contracts for architectural, engineering and land surveying services and related services.]*

(5)(a) A contracting agency may adopt its own rules of procedure for public contracts that:

(A) Specifically state that the model rules adopted by the Attorney General under this section do not apply to the contracting agency; and

(B) Prescribe the rules of procedure that the contracting agency will use for public contracts, which may include portions of the model rules adopted by the Attorney General.

(b) A contracting agency that adopts rules under this section shall review the rules each time the Attorney General modifies the model rules under this section to determine whether the contracting agency should modify its rules to ensure compliance with statutory changes.

SECTION 11. ORS 279A.140 is amended to read:

279A.140. (1) The Oregon Department of Administrative Services shall conduct all procurements and administer the contracting for goods, services and personal services, including architectural, engineering *[and]*, **photogrammetric mapping, transportation planning or** land surveying services and related services, for state agencies unless a state agency is specifically authorized by ORS 279A.050 or provisions of law other than the Public Contracting Code to enter into a contract. The

authority described in this subsection may be delegated in whole or in part in accordance with ORS 279A.075.

(2) The following requirements and procedures apply to all contracts of state agencies:

(a) A personal services contract is not valid or effective without the written approval of the department unless:

(A) The contract is authorized under ORS 279A.050; or

(B) The department has delegated authority to the contracting agency under ORS 279A.075 to make the personal services contract.

(b) Neither the department nor a state agency may approve a contract before the contract has been reviewed for legal sufficiency and approved by the Attorney General, if the review and approval are required under ORS 291.047 or 291.049.

(c) Unless otherwise provided by law, the department or a state agency may enter into a public contract for any period of time, provided that the term of the contract and conditions of renewal or extension are included in the solicitation. Contracting agencies may stipulate in contracts for goods or services that any payment and performance obligations for succeeding fiscal periods are subject to the availability and appropriation of funds for the obligations. A contract for goods or services subject to this section may not be construed as violating any applicable debt limitation or limitation on a contracting agency's expenditure authority.

(d) When funds are not appropriated or otherwise made available to support continuation of the department's or a state agency's performance of a contract in a subsequent fiscal period, the department or state agency may cancel the contract and reimburse the contractor for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the goods or services delivered under the contract. The department or state agency may pay the reimbursement only from any appropriations or funds then lawfully available for such purposes.

(e) Except as otherwise provided in this chapter, a contract of a state agency will be deemed by the department to have been executed only when all requisite approvals have been obtained.

(f) Any procurement or contract by the department for a state agency must, when required by rules adopted by the department under ORS 279A.070, be made on the basis of a requisition by the state agency.

(g) The department may use moneys from the Oregon Department of Administrative Services Operating Fund to procure goods, services and personal services for the purpose of supplying requirements of state agencies, the cost of which shall be reimbursed to the fund from charges paid by state agencies on the basis of actual usage. Administrative costs incurred in the operation of the fund may be paid from the fund and the amount of such costs shall be added to the cost of the goods, services and personal services as charged to the state agencies.

(h) The department shall adopt rules necessary to implement the provisions of this subsection, including but not limited to rules establishing:

(A) A reporting system for personal service contracts, including architectural, engineering [*and*], **photogrammetric mapping, transportation planning or** land surveying services contracts and related services contracts, that includes the following:

(i) A state agency shall submit to the department personal services contract information as directed by the department. A state agency shall file with the department a copy of each personal services contract entered into by the state agency, including appropriate documentation as required by the department. Whenever a state agency pays more in a calendar year under a personal services contract for services historically performed by state employees than the agency would have paid to the agency's employees performing the same work, the agency shall so report to the department and include in the report a statement of justification for the greater costs.

(ii) The department shall keep the copy of the contract and the department's documentation on file for three years, after which the department may destroy the file. The department shall maintain a system for filing copies of personal services contracts and documentation submitted to the department under this paragraph. The department shall submit a biennial report to the Legislative Assembly concerning the use of personal services contracts by state agencies. The report must

specify the name of each state agency, the amount paid under each personal services contract entered into by the agency, the name of the contractor, the duration of the contract and the contract's basic purpose. The report must also include the total dollar figure of all personal services contracts for each year of the preceding biennium.

(B) Procedures for the evaluation and award of personal services contracts when the department authorizes a state agency to contract directly for personal services, including architectural, engineering [*and*], **photogrammetric mapping, transportation planning or** land surveying services and related services, in accordance with ORS 279B.050 or 279C.100 to 279C.125.

(3) The department shall notify all state agencies of the requirements of this section.

SECTION 12. 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:

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

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

(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*], **photogrammetric mapping, transportation planning or** 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 for prequalification applications, if any, to be filed and the classes of work, if any, for which proposers must be prequalified in accordance with ORS 279B.120.

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

(f) 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.

(g) Require the contractor or subcontractor to possess an asbestos abatement license, if required under ORS 468A.710.

(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) Identify contractual terms or conditions that the contracting agency reserves, in the request for proposals, for negotiation with proposers;

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

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

(d) Announce the method the contracting agency will use to select the contractor, which may include, but is not limited to, 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 a combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065; and

(e) Describe the manner in which the contracting agency will evaluate proposals, identifying the relative importance of price and other factors the contracting agency will use to evaluate and rate the proposals in the first tier of competition. If the contracting agency uses more than one tier of competitive evaluation, the request for proposals must describe the process the contracting agency will use to evaluate proposals in the subsequent tiers.

(4)(a) The contracting agency may require proposal security in any form 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 form a contract in accordance with the request for proposals, including posting performance security and submitting proof of insurance when 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 retaining proposal security.

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

(6)(a) Notwithstanding ORS 192.410 to 192.505, proposals may be opened in a manner to avoid 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 after 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 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 a requirement to make proposals open to public inspection after the contracting 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.

(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.

(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) An award or awards based solely on the ranking of proposals;
- (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) Discussions leading to best and final offers, in which the contracting agency may not disclose information derived from proposals submitted by competing proposers;
- (d) Serial negotiations, beginning with the highest ranked proposer;
- (e) Competitive simultaneous negotiations;
- (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) 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) A combination of methods described in this subsection, as authorized or prescribed by rules adopted under ORS 279A.065.

(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.

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

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

(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.

(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.

(14) If the contracting agency awards a contract, the contracting agency shall award the contract to the responsible proposer whose proposal the contracting agency determines in writing is the most advantageous to the contracting agency based on the evaluation process and evaluation factors described in the request for proposals, 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 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.

(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 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 13. The amendments to ORS 276.915, 279A.010, 279A.020, 279A.065, 279A.140, 279B.060, 279C.100, 279C.105, 279C.107, 279C.110, 279C.115 and 279C.125 by sections 1 to 12 of this 2011 Act apply to contracts that a contracting agency first advertises or otherwise solicits on or after the effective date of this 2011 Act or, if the contracting agency does not advertise or solicit the contract, to contracts that the contracting agency first enters into on or after the effective date of this 2011 Act.

SECTION 14. (1) The amendments to ORS 276.915, 279A.010, 279A.020, 279A.065, 279A.140, 279B.060, 279C.100, 279C.105, 279C.107, 279C.110, 279C.115 and 279C.125 by sections 1 to 12 of this 2011 Act become operative on January 1, 2012.

(2) The Director of the Oregon Department of Administrative Services, the Attorney General and a contracting agency that adopts rules under ORS 279A.065 may take any action before the operative date specified in subsection (1) of this section that is necessary to enable the director, the Attorney General or the contracting agency to exercise, on and after the operative date specified in subsection (1) of this section, all the duties, functions and powers conferred by the amendments to ORS 276.915, 279A.010, 279A.020, 279A.065, 279A.140, 279B.060, 279C.100, 279C.105, 279C.107, 279C.110, 279C.115 and 279C.125 by sections 1 to 12 of this 2011 Act.

SECTION 15. This 2011 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect on its passage.

Passed by House April 28, 2011

Received by Governor:

Repassed by House June 7, 2011

.....M.,....., 2011

Approved:

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Ramona Kenady Line, Chief Clerk of House

.....M.,....., 2011

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Bruce Hanna, Speaker of House

.....
John Kitzhaber, Governor

.....
Arnie Roblan, Speaker of House

Filed in Office of Secretary of State:

.....M.,....., 2011

Passed by Senate June 2, 2011

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Peter Courtney, President of Senate

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Kate Brown, Secretary of State