

# House Bill 3574

Sponsored by Representative J SMITH; Representatives BOONE, KENNEMER, WITT

## 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 use alternative contracting method to award energy savings performance contract. Specifies methods contracting agency must use.

Becomes operative 91 days after effective date of Act.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to energy savings performance contracts; creating new provisions; amending ORS 279A.010  
3 and 279C.335; and declaring an emergency.

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

5 **SECTION 1. Section 2 of this 2011 Act is added to and made a part of ORS chapter 279C.**

6 **SECTION 2. (1) A contracting agency in soliciting and awarding an energy savings per-**  
7 **formance contract shall use an alternative contracting method that conforms with the re-**  
8 **quirements of this section. The requirements of this section do not relieve the contracting**  
9 **agency of the duty to comply with ORS 279A.140, other law that applies to state contracting**  
10 **agencies or other applicable city or county charter provisions.**

11 **(2) A contracting agency shall evaluate a proposal that a proposer listed on the registry**  
12 **described in subsection (8) of this section submits in response to a solicitation for an energy**  
13 **savings performance contract on the basis of the proposer's qualifications to perform the**  
14 **work specified in the request for proposals and shall issue a notice of intent to award the**  
15 **energy savings performance contract to a proposer on the basis of the proposer's qualifica-**  
16 **tions. The contracting agency may evaluate the contract price included in the proposal and**  
17 **may use other pricing information to determine the contract price for the energy savings**  
18 **performance contract only after issuing the notice of intent to award the energy savings**  
19 **performance contract.**

20 **(3) Subject to subsection (2) of this section, a contracting agency may devise an alter-**  
21 **native contracting method for the contracting agency to use to evaluate proposals for an**  
22 **energy savings performance contract, and to award the contract, in a manner that achieves**  
23 **the contracting agency's objectives for the scope, schedule and budget for the procurement.**

24 **(4) Subject to subsections (2) and (3) of this section, a contracting agency may evaluate**  
25 **a proposal for an energy savings performance contract on the basis of the following criteria:**

26 **(a) The proposer's specialized experience, capabilities and technical competence. The**  
27 **contracting agency may evaluate these criteria on the basis of the approach and methodology**  
28 **the proposal suggests for meeting the specifications set forth in the request for proposals.**

29 **(b) The proposer's available resources, including an ability to provide specialized services**  
30 **and the proportion of the proposer's time that the proposer can devote within applicable time**

**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 **limits to performing the work specified in the request for proposals.**

2 (c) **The proposer’s record of past performance, including, but not limited to:**

3 (A) **Contract price information from previous contracts of a similar nature;**

4 (B) **Quality of work; and**

5 (C) **Ability to meet schedules, control costs and administer contracts.**

6 (d) **The proposer’s ownership structure and financial stability.**

7 (e) **The proposer’s employment practices and the proposer’s subcontracting practices**  
 8 **with respect to disadvantaged, minority, women, or emerging small business enterprises.**

9 (f) **The proposer’s distance from, and likely availability at, the location for the work**  
 10 **specified in the request for proposals.**

11 (g) **The proposer’s methods and techniques for project management.**

12 (5) **If the contracting agency determines on the basis of the criteria and requirements**  
 13 **set forth in this section that two or more proposers are equally qualified for the energy**  
 14 **savings performance contract, the contracting agency may use any method or process for**  
 15 **choosing among the qualified contractors that the contracting agency specifies in a policy**  
 16 **determination.**

17 (6) **The contracting agency and the proposer to which the contracting agency issues a**  
 18 **notice of intent to award the energy savings performance contract shall negotiate the scope**  
 19 **of the work, the contract price, the schedule, performance standards and expectations, and**  
 20 **other conditions that will constitute the terms of the energy savings performance contract.**  
 21 **The contracting agency shall pay a contract price for the work that the contracting agency**  
 22 **determines is reasonable and fair to the contracting agency. The provisions of this sub-**  
 23 **section do not supersede or otherwise affect the provisions of ORS 279A.140 or 279C.520.**

24 (7) **If the contracting agency and the proposer to which the contracting agency has is-**  
 25 **sued a notice of intent to award an energy savings performance contract cannot successfully**  
 26 **conclude negotiations with respect to the terms specified in subsection (6) of this section at**  
 27 **a contract price that is reasonable and fair to the contracting agency, the contracting agency**  
 28 **shall formally terminate negotiations with an oral or written notice and may negotiate with**  
 29 **another proposer as provided in this section. The contracting agency may continue negoti-**  
 30 **ations in this manner until the contracting agency executes an energy savings performance**  
 31 **contract or until the contracting agency terminates the procurement.**

32 (8) **The State Department of Energy shall maintain a registry of contractors that:**

33 (a) **The department or contracting agencies have prequalified to enter into an energy**  
 34 **savings performance contract; and**

35 (b) **The department recognizes, under rules the department adopts, as capable of per-**  
 36 **forming an energy savings performance contract.**

37 **SECTION 3.** ORS 279A.010 is amended to read:

38 279A.010. (1) As used in the Public Contracting Code, unless the context or a specifically ap-  
 39 plicable definition requires otherwise:

40 (a) “Bidder” means a person that submits a bid in response to an invitation to bid.

41 (b)(A) “Contracting agency” means a public body authorized by law to conduct a  
 42 procurement[. “Contracting agency” includes] **including**, but [is] not limited to, the Director of the  
 43 Oregon Department of Administrative Services [and any] **or a person [authorized by a] that a con-**  
 44 **tracting agency authorizes** to conduct a procurement on the contracting agency’s behalf.

45 (B) “Contracting agency” does not include the judicial department or the legislative department.

1 (c) “Days” means calendar days.

2 [(d) “Department” means the Oregon Department of Administrative Services.]

3 [(e) “Director” means the Director of the Oregon Department of Administrative Services or a person  
4 designated by the director to carry out the authority of the director under the Public Contracting  
5 Code.]

6 [(f)] (d) “Emergency” means circumstances that:

7 (A) Could not have been reasonably foreseen;

8 (B) Create a substantial risk of loss, damage or interruption of services or a substantial threat  
9 to property, public health, welfare or safety; and

10 (C) Require prompt execution of a contract to remedy the condition.

11 [(g)] (e) “Energy savings performance contract” means a [public contract between a contracting  
12 agency and a qualified energy service company for the identification, evaluation, recommendation, de-  
13 sign and construction of energy conservation measures, including a design-build contract, that guar-  
14 antee energy savings or performance.] **public improvement contract, including a design-build  
15 contract, in which:**

16 (A) **The statement of work for the contract:**

17 (i) **Requires the contractor to reduce the amount of, and the costs related to, energy and  
18 water consumption and waste generation and disposal in an existing building or structure;  
19 and**

20 (ii) **Encompasses all phases of work necessary to accomplish the reductions specified in  
21 sub-subparagraph (i) of this subparagraph, including identifying and evaluating the con-  
22 tracting agency’s needs and recommending, designing and constructing measures to reduce  
23 energy and water consumption and waste generation and disposal.**

24 (B) **The contract terms:**

25 (i) **Specify that the contracting agency’s payment obligations during each year in which  
26 the contract is in effect, including the year in which the contractor completes the work un-  
27 der the contract, are a percentage of the cost savings attributable to the work the contrac-  
28 tor performed under the contract or are guaranteed by the contractor to be less than the  
29 cost savings attributable to the work the contractor performed under the contract.**

30 (ii) **Specify or incorporate a performance guarantee under which the contractor’s work,  
31 not later than 20 years after completion, achieves cost savings in energy and water con-  
32 sumption and waste generation and disposal that are equivalent to or more than the contract  
33 price.**

34 (iii) **Specify remedies the contracting agency has available if the contractor’s work does  
35 not achieve the reductions and savings specified in the performance guarantee described in  
36 sub-subparagraph (ii) of this subparagraph.**

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

38 [(i)] (g) “Goods” [includes] **means** supplies, equipment, materials, personal property[, including  
39 any] **or other** tangible, intangible and intellectual property and rights and licenses in relation  
40 [thereto, and] **to the property, or** combinations of [any of] the items identified in this paragraph.

41 [(j)] (h) “Goods and services” or “goods or services” [includes] **means** combinations of [any of  
42 the] items identified in the definitions of “goods” and “services.”

43 [(k)] (i)(A) “Grant” means:

44 (i) An agreement under which a contracting agency receives **from a grantor** moneys, property  
45 or other assistance, including but not limited to federal assistance that [is characterized as a grant

1 by] federal law or regulations **characterize as a grant**, loans, loan guarantees, credit enhance-  
 2 ments, gifts, bequests, commodities or other assets, [*from a grantor*] for the purpose of supporting  
 3 or stimulating a program or activity of the contracting agency and in which [*no substantial in-*  
 4 *volvement by*] the grantor is **not anticipated to be substantially involved** in the program or activity  
 5 other than [*involvement associated with monitoring*] **to monitor** compliance with the grant condi-  
 6 tions; or

7 (ii) An agreement under which a contracting agency provides **to a recipient** moneys, property  
 8 or other assistance, including but not limited to federal assistance that [*is characterized as a grant*  
 9 by] federal law or regulations **characterize as a grant**, loans, loan guarantees, credit enhance-  
 10 ments, gifts, bequests, commodities or other assets, [*to a recipient*] for the purpose of supporting or  
 11 stimulating a program or activity of the recipient and in which [*no substantial involvement by*] the  
 12 contracting agency is **not anticipated to be substantially** in the program or activity other than  
 13 [*involvement associated with monitoring*] **to monitor** compliance with the grant conditions.

14 (B) “Grant” does not include a public contract for a public improvement, for public works, as  
 15 defined in ORS 279C.800, or for emergency work, minor alterations or ordinary repair or mainte-  
 16 nance necessary to preserve a public improvement, [*when under the public contract a contracting*  
 17 *agency pays, in consideration for contract performance intended to realize or to support the realization*  
 18 *of the purposes for which grant funds were provided to the contracting agency, moneys that the con-*  
 19 *tracting agency has received under a grant*] **if a contracting agency pays moneys the contracting**  
 20 **agency received under a grant as consideration for a contractor’s performing a public con-**  
 21 **tract that is intended to realize or support the purposes for which the grant was provided**  
 22 **to the contracting agency.**

23 [(L)] (j) “Industrial oil” means [*any*] compressor, turbine or bearing oil, hydraulic oil, metal-  
 24 working oil or refrigeration oil.

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

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

27 [(o)] (m) “Local contract review board” means a local contract review board described in ORS  
 28 279A.060.

29 [(p)] (n) “Local contracting agency” means a local government or special government body au-  
 30 thorized by law to conduct a procurement, [*“Local contracting agency” includes any*] **or a person**  
 31 **that a** [*authorized by a*] local contracting agency **authorizes** to conduct a procurement on **the local**  
 32 **contracting agency’s** behalf [*of the local contracting agency*].

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

34 [(r)] (p) “Lowest responsible bidder” means the lowest bidder who:

35 (A) [*Has substantially complied with all*] **Complies substantially with** prescribed public con-  
 36 tracting procedures and requirements;

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

38 (C) [*Has not been*] **Is not** debarred or disqualified by the contracting agency under ORS 279B.130  
 39 or 279C.440; and

40 (D) [*If the advertised contract is a public improvement contract,*] Is not on the list [*created by*] the  
 41 Construction Contractors Board **creates** under ORS 701.227 **if the advertised contract is a public**  
 42 **improvement contract.**

43 [(s)] (q) “Lubricating oil” means [*any*] oil intended for use in an internal combustion crankcase,  
 44 transmission, gearbox or differential or an automobile, bus, truck, vessel, plane, train, heavy equip-  
 45 ment or machinery powered by an internal combustion engine.

1        [(t)] (r) “Person” means a natural person capable of being legally bound, a sole proprietorship,  
 2 a corporation, a partnership, a limited liability company or partnership, a limited partnership, a  
 3 for-profit or nonprofit unincorporated association, a business trust, two or more persons having a  
 4 joint or common economic interest, **a public body or** any other person with legal capacity to con-  
 5 tract [or a public body].

6        (s) **“PETE” means polyethylene terephthalate material.**

7        [(u)] (t)(A) “Post-consumer waste” means a finished material that **has completed a life cycle**  
 8 **as a consumer item and** would normally be disposed of as solid waste[, *having completed its life*  
 9 *cycle as a consumer item*].

10        (B) “Post-consumer waste” does not include manufacturing waste.

11        [(v)] (u) “Price agreement” means a public contract for [*the procurement of*] **procuring** goods  
 12 or services at a set price with:

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

14        (B) An initial order or minimum purchase combined with [*a continuing contractor*] **an obligation**  
 15 **for a contractor to continue** to provide goods or services [*in which*] **but no corresponding obli-**  
 16 **gation for** the contracting agency [*does not*] **to** guarantee a minimum or maximum additional pur-  
 17 chase.

18        [(w)] (v) “Procurement” means the act of purchasing, leasing, renting or otherwise acquiring  
 19 goods or services[. *“Procurement” includes*] **and** each function and procedure [*undertaken or re-*  
 20 *quired to be undertaken by*] a contracting agency **undertakes or must undertake** to enter into a  
 21 public contract, administer a public contract and obtain the performance of a public contract under  
 22 the Public Contracting Code.

23        [(x)] (w) “Proposer” means a person that submits a proposal in response to a request for pro-  
 24 posals.

25        [(y)] (x) “Public body” has the meaning given that term in ORS 174.109.

26        [(z)] (y)(A) “Public contract” means a **contracting agency’s** sale or other disposal[, *or a*] **or**  
 27 purchase, lease, rental or other acquisition[, *by a contracting agency*] of:

28        (i) Personal property[.];

29        (ii) Services, including personal services[.];

30        (iii) Public improvements[.];

31        (iv) Public works[.]; **or**

32        (v) Minor alterations, [*or*] ordinary repair or maintenance necessary to preserve a public im-  
 33 provement.

34        (B) “Public contract” does not include [*grants*] **a grant.**

35        [(aa)] (z) “Public contracting” means procurement activities described in the Public Contracting  
 36 Code [*relating*] **that are related** to obtaining, modifying or administering public contracts or price  
 37 agreements.

38        [(bb)] (aa) “Public Contracting Code” or “code” means ORS chapters 279A, 279B and 279C.

39        [(cc)] (bb)(A) “Public improvement” means a project for construction, reconstruction or major  
 40 renovation on real property by or for a contracting agency.

41        (B) “Public improvement” does not include:

42        [(A)] (i) Projects for which [*no*] funds of a contracting agency are **not** directly or indirectly used,  
 43 except for participation that is incidental or related primarily to project design or inspection; or

44        [(B)] (ii) Emergency work, minor alteration, ordinary repair or maintenance necessary to pre-  
 45 serve a public improvement.

- 1       [(*dd*)] (**cc**)(A) “Public improvement contract” means a public contract for a public improvement.
- 2       (**B**) “Public improvement contract” does not include a public contract for emergency work, mi-  
3 nor alterations, [*or*] ordinary repair or maintenance necessary to preserve a public improvement.
- 4       [(*ee*)] (**dd**) “Recycled material” means [*any*] material that would otherwise be [*a*] useless, un-  
5 wanted or discarded [*material except for the fact*] **except** that the material still has useful physical  
6 or chemical properties after serving a specific purpose and can, therefore, be reused or recycled.
- 7       [(*ff*)] (**ee**) “Recycled oil” means used oil that has been prepared for reuse as a petroleum product  
8 by refining, rerefining, reclaiming, reprocessing or other means, provided that the preparation or  
9 use is operationally safe, environmentally sound and complies with all laws and regulations.
- 10       [(*gg*)] (**ff**) “Recycled paper” means a paper product [*with*] **in which** not less than:
- 11       (A) Fifty percent of [*its*] **the** fiber weight [*consisting*] **of the paper product consists** of sec-  
12 ondary waste materials; or
- 13       (B) Twenty-five percent of [*its*] **the** fiber weight [*consisting*] **of the paper product consists** of  
14 post-consumer waste.
- 15       [(*hh*)] (**gg**) “Recycled PETE” means post-consumer polyethylene terephthalate material.
- 16       [(*ii*)] (**hh**) “Recycled product” means [*all*] materials, goods and supplies[, ] **of which** not less than  
17 50 percent of the total weight [*of which*] consists of secondary and post-consumer waste [*with*] **and**  
18 not less than 10 percent of [*its*] **the** total weight [*consisting*] **consists** of post-consumer waste[.  
19 “*Recycled product*” includes] **and** any product that **has completed the product’s life cycle as a**  
20 **consumer item and** could have been disposed of as solid waste[, *having completed its life cycle as*  
21 *a consumer item, but otherwise*] **but** is refurbished for reuse without [*substantial alteration of*] **sub-**  
22 **stantially altering** the product’s form.
- 23       [(*jj*)] (**ii**)(A) “Secondary waste materials” means fragments of products or finished products of a  
24 manufacturing process that has converted a virgin resource into a commodity of real economic  
25 value[. “*Secondary waste materials*” includes] **and** post-consumer waste.
- 26       (**B**) “Secondary waste materials” does not include excess virgin resources of the manufacturing  
27 process[. *For paper, “secondary waste materials” does not include*] **or** fibrous waste generated [*during*  
28 *the manufacturing process*] **in manufacturing paper**, such as fibers recovered from waste water or  
29 trimmings of paper machine rolls, mill broke, wood slabs, chips, sawdust or other wood residue from  
30 a manufacturing process.
- 31       [(*kk*)] (**jj**) “Services” [*mean*] **means** services other than personal services designated under ORS  
32 279A.055, except that, for state contracting agencies with procurement authority under ORS  
33 279A.050 or 279A.140, “services” includes personal services as designated by the state contracting  
34 agencies.
- 35       [(*LL*)] (**kk**) “Special government body” has the meaning given that term in ORS 174.117.
- 36       [(*mm*)] (**LL**) “State agency” means the executive department, except the Secretary of State and  
37 the State Treasurer in [*the performance of*] **performing** the duties of [*their*] **the** constitutional offices  
38 **of the Secretary of State and the State Treasurer**.
- 39       [(*nn*)] (**mm**) “State contracting agency” means an executive department entity authorized by law  
40 to conduct a procurement.
- 41       [(*oo*)] (**nn**) “State government” has the meaning given that term in ORS 174.111.
- 42       [(*pp*)] (**oo**) “Used oil” has the meaning given that term in ORS 459A.555.
- 43       [(*qq*)] (**pp**) “Virgin oil” means oil that has been refined from crude oil and that has not been used  
44 or contaminated with impurities.
- 45       (2) Other definitions appearing in the Public Contracting Code and the sections in which they

1 appear are:

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- (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 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

- 1 (dd) “Labor dispute” .....ORS 279C.650
- 2 (ee) “Land surveyor” .....ORS 279C.100
- 3 (ff) “Legally flawed” .....ORS 279B.405
- 4 (gg) “Locality” .....ORS 279C.800
- 5 (hh) “Nonprofit
- 6 organization” .....ORS 279C.810
- 7 (ii) “Nonresident bidder” .....ORS 279A.120
- 8 (jj) “Not-for-profit
- 9 organization” .....ORS 279A.250
- 10 (kk) “Original contract” .....ORS 279A.200
- 11 (LL) “Permissive cooperative
- 12 procurement” .....ORS 279A.200
- 13 (mm) “Person” .....ORS 279C.500
- 14 .....and 279C.815
- 15 (nn) “Personal services” .....ORS 279C.100
- 16 (oo) “Prevailing rate of
- 17 wage” .....ORS 279C.800
- 18 (pp) “Procurement
- 19 description” .....ORS 279B.005
- 20 (qq) “Property” .....ORS 279A.250
- 21 (rr) “Public agency” .....ORS 279C.800
- 22 (ss) “Public contract” .....ORS 279A.190
- 23 (tt) “Public works” .....ORS 279C.800
- 24 (uu) “Purchasing contracting
- 25 agency” .....ORS 279A.200
- 26 (vv) “Regularly organized fire
- 27 department” .....ORS 279A.190
- 28 (ww) “Related services” .....ORS 279C.100
- 29 (xx) “Request for proposals” ..ORS 279B.005
- 30 (yy) “Resident bidder” .....ORS 279A.120
- 31 (zz) “Responsible bidder” .....ORS 279A.105
- 32 .....and 279B.005
- 33 (aaa) “Responsible proposer” ....ORS 279B.005
- 34 (bbb) “Responsive bid” .....ORS 279B.005
- 35 (ccc) “Responsive proposal” ....ORS 279B.005
- 36 (ddd) “Retainage” .....ORS 279C.550
- 37 (eee) “Special procurement” ....ORS 279B.085
- 38 (fff) “Specification” .....ORS 279B.200
- 39 (ggg) “State agency” .....ORS 279A.250
- 40 (hhh) “Substantial
- 41 completion” .....ORS 279C.465
- 42 (iii) “Surplus property” .....ORS 279A.250
- 43 (jjj) “Unnecessarily
- 44 restrictive” .....ORS 279B.405

45 **SECTION 4.** ORS 279C.335 is amended to read:



1 279C.335. [(1) All public improvement contracts shall be based upon competitive bids except:]

2 (1) **A contracting agency shall use a competitive bidding process as the basis for awarding**  
3 **a public improvement contract, except for:**

4 (a) [Contracts made] **A contract** with a qualified nonprofit [agencies providing] **agency that**  
5 **provides** employment opportunities for individuals with disabilities under ORS 279.835 to 279.855.

6 (b) A public improvement contract **that is** exempt under subsection (2) of this section.

7 (c) A public improvement contract with a value of less than \$5,000.

8 (d) A contract [not to] **with a contract price that does not** exceed \$100,000 made under pro-  
9 cedures for competitive quotes in ORS 279C.412 and 279C.414.

10 (e) [Contracts for] **A contract to** repair, [maintenance, improvement or protection of] **maintain,**  
11 **improve or protect** property [obtained by] the Department of Veterans' Affairs **obtains** under ORS  
12 407.135 and 407.145 (1).

13 (f) **An** energy savings performance [contracts entered] **contract that a contracting agency**  
14 **enters** into in accordance with **section 2 of this 2011 Act and** rules of procedure adopted under  
15 ORS 279A.065.

16 (2) Subject to subsection (4)(b) of this section, the Director of the Oregon Department of Ad-  
17 ministrative Services, a local contract review board or, for contracts described in ORS 279A.050  
18 (3)(b), the Director of Transportation may exempt a public improvement contract or a class of public  
19 improvement contracts from the competitive bidding requirements of subsection (1) of this section  
20 [upon approval of] **after the director or the local contract review board approves** the following  
21 findings submitted by the contracting agency or, if a state agency is not the contracting agency, the  
22 state agency [seeking] **that seeks** the exemption:

23 (a) [It is unlikely that] The exemption [will] **is unlikely to** encourage favoritism in [the awarding  
24 of] **awarding** public improvement contracts or substantially diminish competition for public im-  
25 provement contracts.

26 (b) [The awarding of] **Awarding a** public improvement [contracts] **contract** under the exemption  
27 will likely result in substantial cost savings to the contracting agency, to the state agency based  
28 upon the justification and information described in ORS 279C.330 or, if the [contracts are] **contract**  
29 **is for a public** [improvements] **improvement** described in ORS 279A.050 (3)(b), to the contracting  
30 agency or the public. In [making] **approving** the finding, the Director of the Oregon Department of  
31 Administrative Services, the Director of Transportation or the local contract review board may  
32 consider the type, cost and amount of the contract, the number of persons available to bid and  
33 [such] other **appropriate** factors [as may be deemed appropriate].

34 (c) As an alternative to the finding described in paragraph (b) of this subsection, [when] **if** a  
35 contracting agency or state agency seeks an exemption that would allow the [use of an alternate]  
36 **the agency to use an alternative** contracting method that the agency has not previously used, the  
37 agency may make a finding that identifies the project as a pilot project for which the agency intends  
38 to determine whether the use of the [alternate] **alternative** contracting method actually results in  
39 substantial cost savings to the contracting agency, to the state agency or, if the contract is for a  
40 public improvement described in ORS 279A.050 (3)(b), to the contracting agency or the public. The  
41 agency shall include an analysis and conclusion regarding actual cost savings, if any, in the evalu-  
42 ation required under ORS 279C.355.

43 (3) In making findings to support an exemption for a class of public improvement contracts, the  
44 contracting agency or state agency shall clearly identify the class using the class's defining char-  
45 acteristics. [Those] **The** characteristics [shall] **must** include [some] **a** combination of project de-

1 descriptions or locations, time periods, contract values, methods of procurement or other factors that  
 2 distinguish the limited and related class of public improvement contracts from the agency's overall  
 3 construction program. The agency may not identify a class solely by funding source, such as a par-  
 4 ticular bond fund, or by the method of procurement, but shall identify the class using characteristics  
 5 that reasonably relate to the exemption criteria set forth in subsection (2) of this section.

6 (4) In granting exemptions under subsection (2) of this section, the Director of the Oregon De-  
 7 partment of Administrative Services, the Director of Transportation or the local contract review  
 8 board shall:

9 (a) [When] **If** appropriate, direct the use of [alternate] **alternative** contracting methods that take  
 10 account of market realities and modern practices and are consistent with the public policy of en-  
 11 couraging competition.

12 (b) Require and approve or disapprove written findings by the contracting agency or state  
 13 agency that support [the awarding of] **awarding** a particular public improvement contract or a class  
 14 of public improvement contracts, without the competitive bidding requirement of subsection (1) of  
 15 this section. The findings must show that the exemption of a contract or class of contracts complies  
 16 with the requirements of subsection (2) of this section.

17 (5)(a) **A contracting agency or state agency shall hold a public hearing** before [final adoption  
 18 of] **finally adopting** the findings required by subsection (2) of this section **and** exempting a public  
 19 improvement contract or a class of public improvement contracts from the requirement of competi-  
 20 tive bidding[, a contracting agency or state agency shall hold a public hearing].

21 (b) Notification of the public hearing [shall] **must** be published in at least one trade newspaper  
 22 of general statewide circulation a minimum of 14 days before the hearing.

23 (c) The notice [shall] **must** state that the public hearing is for the purpose of taking comments  
 24 on the draft findings for an exemption from the competitive bidding requirement. At the time of the  
 25 notice, copies of the draft findings [shall] **must** be made available to the public. At the option of the  
 26 contracting agency or state agency, the notice may describe the process by which the findings are  
 27 finally adopted and may indicate the opportunity for [any] further public comment.

28 (d) At the public hearing, the contracting agency or state agency shall offer an opportunity for  
 29 any interested party to appear and present comment.

30 (e) If a contracting agency or state agency [is required to] **must** act promptly [due to] **because**  
 31 **of** circumstances beyond the agency's control that do not constitute an emergency, notification of  
 32 the public hearing may be published simultaneously with the agency's solicitation of contractors for  
 33 the alternative [public] contracting method, as long as responses to the solicitation are due at least  
 34 five days after the [meeting] **hearing** and approval of the findings.

35 (6) The purpose of an exemption is to exempt one or more public improvement contracts from  
 36 competitive bidding requirements. The representations in and the accuracy of the findings, including  
 37 [any] a general description of the resulting public improvement contract, are the bases for approving  
 38 the findings and granting the [exception] **exemption**. The findings may describe anticipated features  
 39 of the resulting public improvement contract, but the final parameters of the contract are those  
 40 characteristics or specifics announced in the solicitation document.

41 (7) A public improvement contract awarded under the competitive bidding requirement of sub-  
 42 section (1) of this section may be amended only in accordance with rules adopted under ORS  
 43 279A.065.

44 (8) **A** public improvement [contracts] **contract that is** excepted from competitive [bid] **bidding**  
 45 requirements under subsection (1)(a), (c), (d), (e) or (f) of this section [are] **is** not subject to the ex-

1 exemption requirements of subsection (2) of this section.

2       **SECTION 5.** Section 2 of this 2011 Act and the amendments to ORS 279A.010 and 279C.335  
3 by sections 3 and 4 of this 2011 Act apply to a contract that a contracting agency first ad-  
4 vertises or otherwise solicits on or after the operative date set forth in section 6 of this 2011  
5 Act or, if the contracting agency does not advertise or solicit the contract, to a contract that  
6 the contracting agency enters into on or after the operative date set forth in section 6 of this  
7 2011 Act.

8       **SECTION 6.** (1) Section 2 of this 2011 Act and the amendments to ORS 279A.010 and  
9 279C.335 by sections 3 and 4 of this 2011 Act become operative 91 days after the effective date  
10 of this 2011 Act.

11       (2) The Director of the Oregon Department of Administrative Services, the Attorney  
12 General or a contracting agency that adopts rules under ORS 279A.065 may take any action  
13 before the operative date specified in subsection (1) of this section that is necessary to enable  
14 the director, the Attorney General or the contracting agency to exercise, on and after the  
15 operative date specified in subsection (1) of this section, all of the duties, functions and  
16 powers conferred on the director, the Attorney General or the contracting agency by section  
17 2 of this 2011 Act and the amendments to ORS 279A.010 and 279C.335 by sections 3 and 4 of  
18 this 2011 Act.

19       **SECTION 7.** This 2011 Act being necessary for the immediate preservation of the public  
20 peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect  
21 on its passage.

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