

# Senate Bill 254

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## 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.

Specifies conditions under which contracting agency may use alternative contracting method to award public improvement contract for construction manager/general contractor services. Requires Attorney General to adopt model rules to specify procedures for procuring construction manager/general contractor services.

Provides that contracting agency must procure construction manager/general contractor services in accordance with model rules.

Becomes operative July 1, 2014.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to requirements for alternative contracting methods; creating new provisions; amending  
3 ORS 279A.065, 279A.070, 279C.307, 279C.330, 279C.335 and 279C.380; and declaring an emer-  
4 gency.

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

6 **SECTION 1.** Section 2 of this 2013 Act is added to and made a part of ORS chapter 279C.

7 **SECTION 2.** (1) As used in this section:

8 (a) **“Construction manager/general contractor” or “CM/GC” means an a—alternative**  
**contracting, project delivery method for a construction project, where the contractor provides CM/GC**  
**person that provides con-**  
9 **struction manager/general contractor services to a contracting agency under a public**  
**im-provement contract which is the resulting contract of a procurement process that is not based**  
**on low-bid competitive bidding and which requires an exemption from the competitive bidding**  
**requirements, pursuant to ORS 279C.335 and for a guaranteed maximum price.**

**(b) “CM/GC contractor” means the contractor that provides CM/GC services to a contracting agency under a**  
**public improvement contract.**

11 **(c) “Construction manager/general contractor CM/GC services” means a project**  
**management**

12 **process for a public improvement construction-related services that:**

**(A) Will include the following:**

**(i) Functioning as a member of a project team that includes the contracting agency, the architect or**  
**engineer that is designing the public improvement under a separate public contract with the contracting**  
**agency, and other contractors and consultants; and**

**(ii) Reviewing and analyzing a design for a public improvement in order to:**

**(AA) Suggest changes in the design that minimize potential errors, delays, unexpected costs and**  
**other problems during construction;**

**(BB) Recommend means by which the contracting agency may achieve the functions of the public**  
**improvement or a component of the public improvement safely, reliably, efficiently and at the lowest overall**  
**cost;**

**(CC) Improve the value and quality of the public improvement; and**

**(DD) Reduce the time necessary to complete the public improvement.**

**(B) May include, but are not limited to, the following, depending on the specific terms of the**  
**public im-provement contract resulting from the CM/GC procurement and depending on whether the**  
**agency elects to proceed with the project after the development of the project design, budget and**  
**scope; may include:**

14 **(A) Assisting with a contracting agency’s design for a public improvement;\_**

- 15 ~~(B) Reviewing and analyzing a design for a public improvement in order to:~~  
16 ~~(i) Suggest changes in the design that minimize potential errors, delays, unexpected costs~~  
17 ~~and other problems during construction;~~  
18 ~~(ii) Recommend means by which the contracting agency may achieve the functions of the~~  
19 ~~public improvement or a component of the public improvement safely, reliably, efficiently and~~  
20 ~~at the lowest overall cost;~~  
21 ~~(iii) Improve the value and quality of the public improvement; and~~  
22 ~~(iv) Reduce the time necessary to complete the public improvement;\_~~  
23 **(iC) Devising a schedule for constructing the public improvement;**  
24 **(iiD) Estimating construction, materials, labor and other costs for the public improve-**  
25 **ment;**  
26 **(iiiE) Establishing a guaranteed maximum price, fixed price or other maximum not-to-**  
27 **exceed price for the work;**  
**(ivF) Constructing portions of the public improvement and subcontracting portions to**

**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.

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1 other contractors;

2 ~~(vG)~~ Coordinating and overseeing the construction process; and

3 ~~(H) Functioning as a member of a project team that includes the contracting agency, the~~  
 4 ~~architect or engineer that designed the public improvement under a separate public contract,~~  
 5 ~~and other contractors and consultants; and~~

6 ~~(vii)~~ Performing other construction-related services in accordance with the terms of the public im-provement contract.

(C) Will not include services to be performed by a contractor under one of the following public improvement contract types, even if those public improvement contracts include some services ordinarily performed or optionally included under a CM/GC contract;

(i) Low-bid, competitively bid public improvement contracts, which do not require an exemption from competitive bidding under ORS 279C.335;

(ii) Design-build contracts that require an exemption from competitive bidding under ORS 279C.335, resulting from a design-build procurement as defined in administrative rules the Attorney General or a contracting agency adopts under ORS 279A.065;

(iii) Energy savings performance contracts;

(iv) Public improvement contracts for transportation projects that require an exemption from competitive bidding under ORS 279C.335, which are awarded by the contracting agency based on an evaluation of the contractor's qualifications, the contractor's price to perform the work and the amount of time the contractor will require to perform the work, but otherwise requiring the contractor to construct the project according to plans and specifications provided by a design professional under a direct contract with the contracting agency and without significant participation in the design process by the contractor, sometimes referred to as "A+B contracts";

(v) Public improvement contracts for transportation projects that require an exemption from competitive bidding under ORS 279C.335, which are awarded by the contracting agency based on an evaluation of the contractor's qualifications, the contractor's past experience with similar projects, the contractor's planned approach to the current project and the contractor's price to perform the work, but otherwise requiring the contractor to construct the project according to plans and specifications provided by a design professional under a direct contract with the contracting agency and without significant participation in the design process by the contractor, sometimes referred to as "A+C+D contracts"; or

(vi) Other alternative delivery method public improvement contracts that require an exemption from competitive bidding under ORS 279C.335.

8 ~~(de)~~ "Guaranteed maximum price" means the total price at which a ~~construction~~  
 9 ~~manager/general~~CM/GC contractor agrees to provide construction manager/general contractor services to a contracting agency in accordance with the terms and conditions and scope of work for a specific public improvement contract and within which are:

12 (A) All costs the contracting agency agrees to reimburse and all fees the contracting  
 13 agency agrees to pay for completing the public improvement; and

14 (B) Any contingent costs, fees or other charges specifically identified in the public im-  
 15 provement contract.

16 ~~(2) A contracting agency that intends to procure construction services that are sub-~~  
 17 ~~stantially equivalent to construction manager/general contractor services shall procure the~~  
 18 ~~construction services in accordance with model rules the Attorney General adopts under~~  
 19 ~~ORS 279A.065 (3). A procurement for construction services is substantially equivalent to a~~

20 ~~procurement for construction manager/general contractor services if~~ If the specifications  
 for a the procurement include pre-construction services, construction services and other  
~~construction-related services, so that the services meet the definition of identified as construction-~~  
~~manager/general contractor~~CM/GC services in subsection (1)(b) of this section, the contracting  
agency shall procure those services in accordance with the Model Rules the Attorney General adopts  
under ORS 279A.065 (3), even if the specifications also include

23 ~~construction services that a contracting agency may procure using a different procurement~~  
 24 ~~method.~~

25 (3) A contracting agency shall, in documents the contracting agency uses to procure

26 ~~construction manager/general contractor~~CM/GC services:

27 (a) Describe the criteria the contracting agency will use to evaluate proposals for the  
28 ~~construction manager/general contractor~~CM/GC services the contracting agency seeks, ~~—~~  
~~how the~~

29 ~~contracting agency will assess a proposal's compliance with the criteria~~ and what weight the  
30 contracting agency will give each criterion in the evaluation process;

31 (b) Describe the criteria the contracting agency will use to evaluate interviews or  
otherwise describe how the interviews will be used in the procurement, if the

32 contracting agency uses interviews in the procurement;

33 (c) Describe any other criteria the contracting agency may consider in selecting a ~~con-~~  
34 ~~struction manager/general~~CM/GC contractor;

35 (d) Describe how the contracting agency will combine scoring from the interviews, from  
36 evaluating the proposals and from other criteria specified in accordance with paragraph (c)  
37 of this subsection to arrive at a proposer's final score and ranking;

38 (e) State that any savings the ~~construction manager/general~~CM/GC contractor realizes  
in performing the public improvement contract will accrue to the contracting agency, unless the  
40 public improvement contract provides otherwise;

41 (f) Specify terms and conditions that govern how the guaranteed maximum price, if any,  
will be determined and whether the guaranteed maximum price includes or is based on unit  
pricing or allows for work that is constructed in phases;

44 (g) State that the contracting agency will not pay any amount that exceeds the guaran-  
45 teed maximum price, the fixed price or any other maximum not-to-exceed price for the work, unless  
the amount results from material changes to the scope of work

1 set forth in the public improvement contract;

2 (h) State that the contracting agency will conduct the procurement in accordance with  
3 model rules the Attorney General adopts under ORS 279A.065 (3); ~~and~~

4 (i) Specify deadlines and time periods for the procurement that allow prospective con-  
5 tractors a reasonable opportunity to submit proposals, including but not limited to:

6 (A) The date and time by which the contracting agency must receive proposals;

7 (B) The dates on which or the time periods during which the contracting agency will  
8 conduct interviews, if the contracting agency will conduct interviews for the procurement;

9 (C) The date by which the contracting agency plans to ~~will~~ indicate an intent to award the  
10 public

improvement contract; and

11 (D) The time period during which the contracting agency will meet with proposers that  
12 the contracting agency did not select for the public improvement contract, if a proposer re-  
13 quests a meeting to discuss the procurement.

14 (4) By the earlier of the date on which a contracting agency and a ~~construction~~  
15 ~~manager/general~~CM/GC contractor agree on a guaranteed maximum price, fixed price or  
other maximum not-to-exceed price for the construction work, or the date on which the

16 ~~construction manager/general~~CM/GC contractor begins to solicit offers for construction  
services from subcontractors, the public improvement contract that the contracting agency  
negotiates with the ~~construction manager/general~~CM/GC contractor must:

19 (a) Describe the methods the ~~construction manager/general~~CM/GC contractor will use to  
20 qualify

and ~~competitively, in a competitive process~~, select subcontractors to perform construction  
~~works~~services in connection with the public improvement contract. These methods should provide  
prospective subcontractors with a reasonable opportunity to participate in  
the ~~construction~~

23 ~~manager/general contractor's~~ CM/GC contractor's subcontractor qualification and selection  
process.

24 (b) Identify the portions of the construction work under the public improvement contract  
25 for which the ~~construction manager/general~~CM/GC contractor may waive the ~~competitive-~~  
~~process~~qualification and selection methods described in paragraph (a) of this subsection and  
describe:

27 (A) How the ~~construction manager/general~~CM/GC contractor may determine the portions  
of the construction work that will not be subject to the qualification and selection  
~~methods~~process described in paragraph (a) of this subsection; and

30 (B) The process the ~~construction manager/general~~CM/GC contractor will use to qualify  
and select prospective subcontractors for the portions of the construction work that are not sub-  
32 ject to the process described in paragraph (a) of this subsection.

33 (c) Identify the conditions under which the ~~construction manager/general~~CM/GC  
contractor or an affiliate or subsidiary of the CM/GC construction manager/general contractor  
may perform or compete with other prospective subcontractors to perform construction work  
under the public improvement contract and describe the methods the CM/GC construction-  
~~manager/general~~ contractor will use to qualify and select an affiliate or subsidiary to perform the  
construction work.

39 (d) Describe how the CM/GC construction manager/general contractor will announce  
which prospective subcontractors the CM/GC construction manager/general contractor has  
selected to perform construction services in connection with the public improvement contract.

42 (e) Describe the conditions under which the ~~construction manager/general~~CM/GC  
contractor will discuss the selection process for the subcontract with a prospective subcontractor  
that the ~~construction manager/general~~CM/GC contractor did not select for a subcontract, if the  
non-selected subcontractor requests information about the selection process from the CM/GC  
contractor.

45 SECTION 3. ORS 279A.065 is amended to read:

1 279A.065. (1) The Attorney General shall prepare and maintain model rules [of procedure] **that**  
 2 **specify procedures for public contracting under the Public Contracting Code and that are**  
 3 appropriate for [use by] all contracting agencies [governing public contracting under the Public Con-  
 4 tracting Code and] **to use. The Attorney General** may devise and publish forms for use  
 5 [therewith] **with the model rules.** The Attorney General shall adopt the model rules in [the manner  
 6 provided by] **accordance with** ORS chapter 183. Before adopting or amending a model rule, the  
 7 Attorney General shall consult with the Director of the Oregon Department of Administrative Ser-  
 8 vices, the Director of Transportation, representatives of county governments, representatives of city  
 9 governments, representatives of school boards and other knowledgeable persons.

10 (2) The Attorney General shall adopt model rules [appropriate for use by all contracting agencies  
 11 to govern the] **that specify** procedures [for entering] **for all contracting agencies to use to enter in**  
 12 **entering** into energy savings performance contracts. Before adopting or amending a rule under this  
 13 sub-section, the Attorney General shall consult with the Oregon Department of Administrative Services,  
 14 the State Department of Energy, the Oregon University System, local contracting agencies and other  
 15 knowledgeable persons. The Attorney General may develop standard contract forms for use with  
 16 energy savings performance contracts.

17 (3)(a) **The Attorney General shall adopt model rules that specify procedures for all con-**  
 18 **tracting agencies to use to procure in procuring construction manager/general CM/GC**  
 19 **contractor services, as defined in section 2 of this 2013 Act. Before adopting or amending a rule**  
 20 **under this sub-section, the Attorney General shall consult with with the Department of**  
 21 **Administrative Services, the Department of Transportation, local contracting agencies, construction**  
 22 **contractors, construction subcontractors, representatives of contracting agencies that procure**  
 23 **construction manager/general contractor services, construction contractors and subcontractors,**  
 24 **architects, engineers and project managers that participate in providing construction**  
 25 **manager/general contractor services and other knowledgeable persons.**

24 (b) **Notwithstanding subsection (6) of this section, a contracting agency may not adopt**  
 25 **the contracting agency's own rules for procuring construction manager/general**  
 26 **contractor CM/GC services.**

27 [(3)] (4) After each legislative session, the Attorney General shall review all laws [passed by] the  
 28 Legislative Assembly **passed** that affect public contracting to determine if the **Attorney General**  
 29 **should amend or repeal a** model [rules] **rule** prepared under this section [should be modified by the  
 30 adoption of] **or adopt** a new rule [or by the amendment or repeal of an existing rule]. If the Attorney  
 31 General determines that a modification of the model rules is necessary, the Attorney General shall  
 32 prepare the modification within such time as to allow the modification to take effect no later than  
 33 120 days after the effective date of the legislation that caused the **Attorney General to modify the**  
 34 rule. [to be modified. However,] The Attorney General may prepare a modification to take effect 121  
 35 or more days after the effective date of the legislation if the Attorney General [provides notice des-  
 36 ignating the time period within which the modification will take effect to], **in a notice to** the state  
 37 agencies and persons listed in subsection (1) of this section, **specifies when the modification will**  
 38 **take effect.**

39 [(4)] (5) A contracting agency that has not adopted [its] **the contracting agency's own rules**  
 40 of procedure in accordance with subsection [(5)] (6) of this section is subject to the model rules  
 41 [adopted by] the Attorney General **adopts** under this section, including all modifications to the  
 42 model rules that the Attorney General may adopt.

43 [(5)(a)] (6)(a) A contracting agency may adopt [its] **the contracting agency's own rules of**  
 44 procedure for public contracts that:

45 (A) Specifically state that the model rules [adopted by] the Attorney General **adopts** under this



1 section do not apply to the contracting agency; and

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

4 (b) A contracting agency that adopts rules under this [section] **subsection** shall review the rules  
 5 each time the Attorney General modifies the model rules under this section to determine whether  
 6 the contracting agency should modify [its] **the contracting agency's** rules to ensure compliance  
 7 with statutory changes.

8 **SECTION 4.** ORS 279A.070 is amended to read:

9 279A.070. In addition to rules adopted under ORS 279A.065 [(5)] **(6)**, a contracting agency may,  
 10 in [the exercise of] **exercising** authority granted under ORS 279A.050, adopt rules necessary to carry  
 11 out the provisions of the Public Contracting Code, including but not limited to rules for [the pro-  
 12 curement, management, disposal and control of] **procuring, managing, disposing of and controlling**  
 13 goods, services, personal services and public improvements under the Public Contracting Code. Each  
 14 contracting agency authorized to enter into personal services contracts shall create procedures [for  
 15 the screening and selection of] **to screen and select** persons to perform personal services.

16 **SECTION 5.** ORS 279C.307 is amended to read:

17 279C.307. (1) Except as provided in subsection (2) of this section, a contracting agency that  
 18 procures personal services for the purpose of administering, managing, monitoring, inspecting, evalu-  
 19 ating compliance with or otherwise overseeing a public contract that is subject to this chapter may  
 20 not:

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

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

26 (2) Subsection (1) of this section does not apply to a procurement [that qualifies as a construction  
 27 manager/general contractor procurement or a design-build procurement, both as defined in OAR  
 28 125-249-0610 or 137-049-0610] ~~for construction manager/general contractor~~ **CM/GC services, as**  
**defined in section 2 of this 2013 Act, or to a design-build procurement, as defined in rules the**  
**Attorney General or a contracting agency adopts under ORS 279A.065.**

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

34 **SECTION 6.** ORS 279C.330 is amended to read:

35 279C.330. **(1)** As used in ORS [279C.335,] 279C.345 and 279C.350, "findings" means the justifica-  
 36 tion for a contracting agency conclusion that includes, but is not limited to, information regarding:

- 37 [(1)] **(a)** Operational, budget and financial data;
- 38 [(2)] **(b)** Public benefits;
- 39 [(3)] **(c)** Value engineering;
- 40 [(4)] **(d)** Specialized expertise required;
- 41 [(5)] **(e)** Public safety;
- 42 [(6)] **(f)** Market conditions;
- 43 [(7)] **(g)** Technical complexity; and
- 44 [(8)] **(h)** Funding sources.

45 **(2) As used in ORS 279C.335, "findings" means the justification for a conclusion that a**

1 contracting agency or state agency, in seeking an exemption from the competitive bidding  
 2 requirement of ORS 279C.335 (1), reaches based on the considerations set forth in ORS  
 3 279C.335 (2).

4 **SECTION 7.** ORS 279C.335 is amended to read:

5 279C.335. ~~(1) All public improvement contracts shall be based upon competitive bids except: (1) All public improvement contracts shall be based upon competitive bids except:~~

6 ~~(1) A contracting agency shall use a competitive bidding process as the basis for awarding~~  
 7 ~~a public improvement contract, except for:~~

8 (a) [Contracts made] A **public improvement contract** with a qualified nonprofit [agencies  
 providing] **agency that**

9 **provides** employment opportunities for individuals with disabilities under ORS 279.835 to 279.855.

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

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

12 (d) A **public improvement** contract [not to] **with a contract price that does not** exceed  
 \$100,000 made under pro-

13 cedures for competitive quotes in ORS 279C.412 and 279C.414.

14 (e) [Contracts for] A **contract to** repair, [maintenance, improvement or protection of] **maintain,**  
 15 **improve or protect** property [obtained by] the Department of Veterans' Affairs **obtains** under ORS  
 16 407.135 and 407.145 (1).

17 (f) An energy savings performance [contracts entered] **contract that a contracting agency**  
 18 **enters** into in accordance with rules of procedure adopted under ORS 279A.065.

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

27 (a) [It is unlikely that] The exemption [will] **is unlikely to** encourage favoritism in [the] awarding  
 28 [of] public improvement contracts or substantially diminish competition for public improvement  
 29 contracts.

30 (b)(A) [The] Awarding a [of] public improvement [contracts] **contract** under the exemption will  
 31 likely result in substantial cost savings **and other substantial benefits** to the contracting agency  
 32 **or the state agency that seeks the exemption**[, to the state agency based upon the justification and  
 33 information described in ORS 279C.330] or, if the [contracts are] **contract is** for a public [improve-  
 34 ments] **improvement** described in ORS 279A.050 (3)(b), to the contracting agency or the public. In  
 35 [making the] **approving** a finding ~~under this paragraph~~**under this section (2)(b)**, the Director of the  
 Oregon Department

36 of Administrative Services, the Director of **the Oregon Department of** Transportation or the  
 local contract review board [may] **shall** consider the type, cost and amount of the contract, **the number**  
**of persons available to submit an offer**[,] **and, to the extent appropriate**

38 ~~for the particular public improvement contract, whether exempting the public improvement~~  
 39 ~~contract or the class of public improvement contracts from the competitive bidding re-~~  
 40 ~~quirement of subsection (1) of this section applicable to the particular public improvement~~  
**contract or class of public improvement contracts, the following factors will:**

41 ~~(i) Change the number of persons available to bid; [and such other factors as may be deemed~~  
 42 ~~appropriate.]~~

43 ~~(iii) Affect the~~**The** construction budget and the projected operating costs for the



completed

44 public improvement;

45 ~~(iii) Provide Any~~ public benefits likely to be obtained by granting the requested exemption;

1 ~~(iiiv) Enable or allow a contractor to use~~The impact of any value engineering techniques to decrease the cost

2 of the public improvement;

3 ~~(ivv) The cost and availability of any~~Require specialized expertise that will be needed to complete the project described in the findings for which the contracting agency, the director or the

4 ~~local contract review board must determine availability and cost;~~

5 ~~(vvi) Increase~~Any likely increases in public safety;

6 ~~(vii) Reduce~~Any likely reductions in project risk to the contracting agency, the state agency, seeking the exemption or the public;

(vii) The extent to which the contracting agency or the agency seeking the exemption can demonstrate that it has qualified agency staff or consultants that it will use to assist in procuring, developing, negotiating, administering and enforcing any resulting contract;

(viii) The extent to which the contracting agency or the agency seeking the exemption can demonstrate that it has qualified in-house legal counsel or other legal counsel under contract that it will use to procure, develop, negotiate, administer and enforce any resulting contract;

7 ~~(ixviii) Aid in controlling the impact that market conditions may have on the cost of and~~

8 ~~time necessary to complete the public improvement~~The extent to which the impact of market conditions on the cost and duration of any resulting contract can more effectively be controlled if the exemption from the competitive bidding requirement is granted;

(x) Whether the project's size and technical complexity can more effectively be addressed if the exemption from the competitive bidding requirements is granted;;

(xi) The effect of the exemption from the competitive bidding requirement on sources of funding for the public improvement;

(xii) Whether the public improvement will involve new construction, or the renovation or remodeling of an existing structure;

~~;~~or (xiii) Whether the public improvement will be occupied or unoccupied during performance of construction work; or

(xiv) Whether the public improvement will involve a single phase of construction work or multiple phases of construction work to address project conditions.

9 ~~(ix) Affect sources of funding for the public improvement.~~

10 ~~(B) In evaluating whether using an alternative contracting method to award a public~~  
 11 ~~improvement contract will better enable the contracting agency or state agency that seeks~~  
 12 ~~an exemption from the competitive bidding requirement of subsection (1) of this section to~~  
 13 ~~complete the public improvement in accordance with the requirements of this subsection, the~~  
 14 ~~Director of the Oregon Department of Administrative Services, the Director of Transporta-~~  
 15 ~~tion or the local contract review board shall consider whether:~~

16 ~~(i) The size and technical complexity of the public improvement merit using an alterna-~~  
 17 ~~tive contracting method;~~

18 ~~(ii) The public improvement involves new construction or renovates or remodels an ex-~~  
 19 ~~isting structure;~~

20 ~~(iii) The public improvement will be occupied or unoccupied during construction; and~~

21 ~~(iv) The public improvement will require a single phase of construction work or multiple~~  
 22 ~~phases of construction work to address specific project conditions.~~

23 ~~(C) In evaluating whether a contracting agency or a state agency that seeks an ex-~~  
 24 ~~emption from the competitive bidding requirement of subsection (1) of this section will ade-~~  
 25 ~~quately implement applicable policies set forth in ORS 279A.015 by using an alternative~~  
 26 ~~contracting method, the Director of the Oregon Department of Administrative Services, the~~  
 27 ~~Director of Transportation or the local contract review board shall consider whether the~~  
 28 ~~contracting agency or state agency has, or has retained under contract, and will use con-~~

~~29 contracting agency or state agency personnel, consultants and legal counsel that have necessary  
30 expertise and substantial experience in alternative contracting methods to:~~

~~31 (i) Assist in developing the alternative contracting method that the contracting agency  
32 or state agency will use to award the public improvement contract; and~~

~~33 (ii) Help negotiate, administer and enforce the terms of the public improvement contract.~~

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

44 (3) In making findings to support an exemption for a class of public improvement contracts, the  
45 contracting agency or state agency shall clearly identify the class using the class's defining char-

acteristics. [Those] **The** characteristics [shall] **must** include [some] **a** combination of project descriptions or locations, time periods, contract values, methods of procurement or other factors that distinguish the limited and related class of public improvement contracts from the agency's overall construction program. The agency may not identify a class solely by funding source, such as a particular bond fund, or by the method of procurement, but shall identify the class using characteristics that reasonably relate to the exemption criteria set forth in subsection (2) of this section.

(4) In granting exemptions under subsection (2) of this section, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board shall:

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

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

(c) **Require a contracting agency or state agency that procures ~~construction~~ ~~manager/general contractor~~ **CM/GC** services, as defined in section 2 of this 2013 Act, to conduct the procurement in accordance with model rules the Attorney General adopts under ORS 279A.065 (3).**

(5)(a) **A contracting agency or state agency shall hold a public hearing** before [final adoption of] **finally ~~approving~~ ~~adopting~~** the ~~findings~~ required by subsection (2) of this section [exempting] **and before the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board grants an exemption from the competitive bidding requirement for** a public improvement contract or a class of public improvement contracts. [from the requirement of competitive bidding, a contracting agency or state agency shall hold a public hearing.]

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

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

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

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

(6) The purpose of an exemption is to exempt one or more public improvement contracts from competitive bidding requirements. The representations in and the accuracy of the findings, including any general description of the resulting public improvement contract, are the bases for approving

1 the findings and granting the [exception] **exemption**. The findings may describe anticipated features  
 2 of the resulting public improvement contract, but the final parameters of the contract are those  
 3 characteristics or specifics announced in the solicitation document.

4 (7) A public improvement contract awarded under the competitive bidding requirement of sub-  
 5 section (1) of this section may be amended only in accordance with rules adopted ~~[rules adopted]-~~  
~~model rules the~~  
 6 ~~Attorney General adopts~~ under ORS 279A.065.

7 (8) A public improvement [contracts] **contract that is** excepted from **the** competitive [bid re-  
 8 quirements] **bidding requirement** under subsection (1)(a), (c), (d), (e) or (f) of this section [are] **is**  
 9 not subject to the exemption requirements of subsection (2) of this section.

10 **SECTION 8.** ORS 279C.380 is amended to read:

11 279C.380. (1) Except as provided in ORS 279C.390, a successful bidder for a public improvement  
 12 contract shall promptly execute and deliver to the contracting agency the following bonds:

13 (a) A performance bond in an amount equal to the full contract price conditioned on the faithful  
 14 performance of the contract in accordance with the plans, specifications and conditions of the con-  
 15 tract. The performance bond must be solely for the protection of the contracting agency that  
 16 awarded the contract and any public agency or agencies for whose benefit the contract was  
 17 awarded. If the public improvement contract is with a single person to provide both design and  
 18 construction of a public improvement, the obligation of the performance bond for the faithful per-  
 19 formance of the contract required by this paragraph must also be for the preparation and completion  
 20 of the design and related services covered under the contract. Notwithstanding when a cause of  
 21 action, claim or demand accrues or arises, the surety is not liable after final completion of the  
 22 contract, or longer if provided for in the contract, for damages of any nature, economic or otherwise  
 23 and including corrective work, attributable to the design aspect of a design-build project, or for the  
 24 costs of design revisions needed to implement corrective work. A contracting agency may waive the  
 25 requirement of a performance bond. A contracting agency may permit the successful bidder to sub-  
 26 mit a cashier's check or certified check in lieu of all or a portion of the required performance bond.

27 (b) A payment bond in an amount equal to the full contract price, solely for the protection of  
 28 claimants under ORS 279C.600.

29 (2) If the public improvement contract is with a single person to provide [construction manager  
 30 and general contractor services] ~~construction manager/general contractor~~ **CM/GC services as**  
**defined in section 2 of this 2013 Act or other maximum, not-to-exceed price**, in which a guaranteed  
 maximum price **as defined in section 2 of this 2013 Act or other maximum, not-to-exceed price** may be  
 established by an amendment authorizing construction period services following preconstruction period  
 services, the contractor shall provide the bonds required by subsection (1) of this section upon execution  
 of an amendment establishing the guaranteed maximum price. The contracting agency shall also require  
 the contractor to provide bonds equal to the value of construction services authorized by any early work  
 amendment in advance of the guaranteed maximum price **or other maximum, not-to-exceed price** amendment.  
 Such bonds must be provided before construction starts.

38 (3) Each performance bond and each payment bond must be executed solely by a surety company  
 39 or companies holding a certificate of authority to transact surety business in this state. The bonds  
 40 may not constitute the surety obligation of an individual or individuals. The performance and pay-  
 41 ment bonds must be payable to the contracting agency or to the public agency or agencies for whose  
 42 benefit the contract was awarded, as specified in the solicitation documents, and shall be in a form  
 43 approved by the contracting agency.

44 (4) In cases of emergency, or when the interest or property of the contracting agency or the  
 45 public agency or agencies for whose benefit the contract was awarded probably would suffer mate-

1 rial injury by delay or other cause, the requirement of furnishing a good and sufficient performance  
2 bond and a good and sufficient payment bond for the faithful performance of any public improvement  
3 contract may be excused, if a declaration of such emergency is made in accordance with rules  
4 adopted under ORS 279A.065.

5 (5) This section applies only to public improvement contracts with a value, estimated by the  
6 contracting agency, of more than \$100,000 or, in the case of contracts for highways, bridges and  
7 other transportation projects, more than \$50,000.

8 **SECTION 9.** (1) Section 2 of this 2013 Act and the amendments to ORS 279A.065, 279A.070,  
9 279C.307, 279C.330, 279C.335 and 279C.380 by sections 3 to 8 of this 2013 Act become operative  
10 July 1, 2014.

11 (2) The Director of the Oregon Department of Administrative Services, the Director of  
12 Transportation, the Attorney General or a contracting agency that adopts rules under ORS  
13 279A.065 may take any action before the operative date specified in subsection (1) of this  
14 section that is necessary to enable the director, the Attorney General or the contracting  
15 agency to exercise, on and after the operative date specified in subsection (1) of this section,  
16 the duties, functions and powers conferred on the director, the Attorney General or the  
17 contracting agency by section 2 of this 2013 Act and the amendments to ORS 279A.065,  
18 279A.070, 279C.307, 279C.330, 279C.335 and 279C.380 by sections 3 to 8 of this 2013 Act.

19 **SECTION 10.** Section 2 of this 2013 Act and the amendments to ORS 279A.065, 279A.070,  
20 279C.307, 279C.330, 279C.335 and 279C.380 by sections 3 to 8 of this 2013 Act apply to pro-  
21 curements for which a contracting agency or, if a state agency is not the contracting agency,  
22 a state agency, on or after the operative date specified in section 9 of this 2013 Act, takes  
23 any affirmative step to seek an exemption from competitive bidding requirements.

24 **SECTION 11.** This 2013 Act being necessary for the immediate preservation of the public  
25 peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect  
26 on its passage.

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