

**MINUTES
REGULAR COMMISSION MEETING
THE PORT OF PORTLAND
November 10, 2010**

In response to due notice, the regular meeting of the Commissioners of the Port of Portland was held at 9:30 a.m. in the Chinook conference room of the Port's administrative offices located at 7200 NE Airport Way.

QUORUM

Commissioners present were Judi Johansen, President, presiding; Ken Allen; Jim Carter; Steve Corey; Diana Daggett and Mary Olson. Also present were Steve Schreiber, Aviation Director; participating staff members; and members of the public.

Commissioner Johansen noted the agenda had been revised; an item to request approval of an intergovernmental agreement with the State of Oregon Office of Governor-Elect was added to the agenda.

LEAVE OF ABSENCE

Commissioner Johansen called for a motion to grant a leave of absence to Commissioners Bragdon, Holte and Rosenbaum, all whom were out of town. Commissioner Allen moved to grant the leave of absence. Commissioner Daggett seconded the motion, which was put to a voice vote. Commissioners Allen, Carter, Corey, Daggett, Johansen and Olson voted in favor of the motion.

MINUTES

Commissioner Johansen called for a motion to approve the minutes of the Regular Commission Meeting of October 13, 2010. Commissioner Allen moved to approve the minutes. Commissioner Carter seconded the motion, which was put to a voice vote. Commissioners Allen, Carter, Corey, Daggett, Johansen and Olson voted in favor of the motion.

EXECUTIVE DIRECTOR'S REPORT

Steve Schreiber noted Bill Wyatt is traveling in China with Sam Ruda this week. They are in Guangzhou attending the World Shipping Summit. Prior to that Mr. Wyatt joined Commissioner Daggett on a trade mission to Israel with Governor Kulongoski.

Mr. Schreiber congratulated FedEx Ground for a successful grand opening event in Troutdale on October 28. He said the new \$129-million, state-of-the-art package sortation hub at the Port's Troutdale Reynolds Industrial Park (TRIP) employs 750 people with plans to grow that number to 950. He said now that FedEx Ground is up and running, we are actively marketing the other available lots at TRIP and planning for Phase II of development. Mr. Schreiber thanked FedEx Ground, the Cities of Troutdale and Fairview, Business Oregon and all of the Port staff who worked together to make this development possible. He said it is of great benefit for both the Port and the community.

Mr. Schreiber said November 8 was a landmark anniversary for the Port: it was the 100-year anniversary of the creation of the Commission of Public Docks. He said this was the first commission that gave birth to the public marine terminals in Portland. That commission later became part of the Port of Portland in 1971.

Mr. Schreiber said another huge moment for the Port and the region was a celebration over 20 years in the making for the completion of the Channel Deepening Project. Mr. Schreiber said the Project involved deepening the 103-miles-long navigation channel from the Pacific Ocean to the ports of Portland and Vancouver. He said many attributed the success of the project to a large coalition from different states involving different political parties and industry groups that worked together. Mr. Schreiber acknowledged Dianne Perry, a key part of the coalition team, for her key role in advancing the project over the years.

Mr. Schreiber thanked Commissioner Carter for braving the snow and cold in Saskatoon, Canada last month. Commissioner Carter joined the MID team for an annual business meeting with Canpotex as well as a tour of their potash mine.

Mr. Schreiber said there is good news on the Aviation side of business: passenger traffic was up 5.5 percent in October. This is the strongest growth we have seen in at least two years.

Mr. Schreiber said we celebrated the completion of the North Runway Extension Project on October 28. He said that the work enables us to be able to close the South Runway to do the reconstruction work without impacting operations at PDX.

Mr. Schreiber said our baggage handling system has gone into the “go live” mode. We started with Frontier and JetBlue, and then added Southwest followed by Alaska and Horizon. So far things are going well.

Mr. Schreiber noted that Alaska Airlines will launch new nonstop service to Kona. He said the seasonal service will operate four days a week and will augment Alaska’s existing Hawaii service to Honolulu and Maui.

Mr. Schreiber said the Port received favorable pricing on the PDX Series 20 bonds during the week of October 18. He said the average in interest cost for the entire 30-year issuance was about four percent and resulted in refunding savings of \$7.8 million. He said we closed the bonds successfully on November 2.

Mr. Schreiber then described three awards the Port received recently. Mr. Schreiber said the Port was recently honored by the Daily Journal of Commerce with the Disadvantaged, Minority, Women, Emerging Small Business award during the Minority Top Projects dinner held on October 28. He said the Port was nominated by Hoffman Construction and the award was in recognition of the mentorship provided to small businesses by the Port.

Mr. Schreiber said the Port received a 2010 Green Power Leadership Award from the U.S. Environmental Protection Agency. He said the annual awards recognize the country’s leading green power purchasers for their commitment and contribution to helping advance the development of the nation’s voluntary green power market.

Mr. Schreiber said the Port was selected as one of three national winners in the Smart Environments competition that ZGF entered for the HQ building. Sponsored by the International Interior Design Association and Metropolis Magazine, this prestigious award will result in a multi-page story in the February issue of Metropolis Magazine.

Commissioner Johansen called for a motion to approve the Executive Director’s Report. Commissioner Daggett moved to approve the Executive Director’s Report. Commissioner Allen seconded the motion, which was put to a voice vote. Commissioners Allen, Carter, Corey, Daggett, Johansen and Olson voted in favor of the motion.

GENERAL DISCUSSION

External Audit Results

Vince Granato, Chief Financial Officer, presented a high-level overview of the financial performance of the General Fund. He said the largest single revenue driver for the General Fund is the number of containers moving across the docks at Terminal 6 (T-6). He said in FY2010, we had budgeted revenue of \$69 million and we came in at \$66 million; the variance came from a land sale of \$5 million that did not materialize. Mr. Granato said on the expense side, the budget was \$75 million and we came in at \$66 million. He said there were a number of drivers for the variance; due to the delayed land sales, there was no "cost of land sold," lower fuel expenses and the environmental expenses related to the Lower Willamette were less than budgeted due to timing.

Mr. Granato said the bottom line is the General Fund had a \$22.4 million net loss in FY2010, which represents a decrease over our original budget of a \$16.9 million net loss. He said traditionally our General Fund net income has hovered around the breakeven level. He said the ongoing challenges with the Port's General Fund make it clear why programs like Connect Oregon and efforts like the T-6 lease are critical to help fund future capital needs.

Mr. Granato said on the Aviation side, passenger traffic is the single largest business driver for revenue at PDX, and for FY2010, we had 12.9 million passengers, a decrease of 0.4 million from FY2009. He said the operating revenues at PDX decreased from \$170 million in FY2009 to \$166 million this past year; the budget for FY2010 was \$171 million. Mr. Granato said compared to budget, FY2010 parking revenue was nearly \$3 million below budget and airline revenues were over \$1 million below budget. Mr. Granato noted PDX operating expenses decreased about \$7 million over the prior year. This decrease was largely attributable to decreased personal services costs resulting from cost-control measures such as furloughs and a reduction in force. He said as a result of these decreases, we also came in \$3 million under the FY2010 budget of \$88 million.

Mr. Granato noted that while the overall net income for PDX was down from the prior year, it came in as budgeted for FY2010.

External Audit

Vince Granato introduced the Port's auditors from PricewaterhouseCoopers (PWC): Mike MacBryde and Ann Rustrum.

Mr. MacBryde said the audit was clean and there were no material weaknesses, so we have a strong control environment, which is notable given the complexity of the organization.

Mr. MacBryde discussed the audit procedures in place to ensure the areas that present the most financial risk are given the right level of attention. He said the control environment was good and they did not find any indication of fraud or irregularities.

Ms. Rustrum reviewed the audit-required communications. She said PWC issued a clean opinion on the financial statements and the audit was performed under generally accepted auditing standards. Ms. Rustrum said PWC did not take exceptions to the Port's accounting policies during the year. Ms. Rustrum reported a clean audit.

Mr. MacBryde said to summarize the results of the audit, there were no audit adjustments, no unbooked adjustments, no control deficiencies and no significant findings. He said the Port has excellent processes in place.

CONSENT AGENDA

No presentation was made of the following agenda item, which was brought before the Commission as part of the Consent Agenda. Commissioner Johansen read the title of the agenda item and called for a motion to approve the item.

Agenda Item No. 1

PORT OF PORTLAND CONTRACTING RULES REVISIONS

BE IT RESOLVED, That the Commission adopts the revised Port of Portland Contracting Rules set forth on the attached Exhibit A-2 as the Port of Portland's official Contracting Rules; and

BE IT FURTHER RESOLVED, That Exhibits A-1 and A-2 be attached to the minutes of this meeting.

Following the reading of the title of the Consent Agenda by Commissioner Johansen, Commissioner Allen moved that the Executive Director's recommendations be approved and Commissioner Corey seconded the motion. The motion was put to a voice vote. Commissioners Allen, Carter, Corey, Daggett, Johansen and Olson voted in favor of the motion.

ACTION ITEMS

Agenda Item No. 2

CONSTRUCTION CONTRACT AMENDMENT – IN-LINE BAGGAGE SCREENING IMPROVEMENTS PROJECT – PORTLAND INTERNATIONAL AIRPORT

This agenda item requested approval to amend two contracts related to the In-Line Baggage Screening Improvements Project at Portland International Airport:

- Amend the PGAL Architecture, LLC, personal services contract for project design to add to the scope and increase the contract amount by a sum not to exceed \$1,350,000; and
- Amend the Hoffman Construction Company Construction Management/ General Contractor construction contract to add scope, extend the schedule for performance and increase the contract cost by an amount not to exceed \$3,200,000.

Stan Snyder presented the Executive Director's recommendations as follows:

BE IT RESOLVED, That approval is given to amend the existing contract with PGAL Architecture, LLC, for the In-line Baggage Screening Improvements Project, consistent with the terms presented to the Commission; and

BE IT FURTHER RESOLVED, That approval is given to amend the existing construction contract with Hoffman Construction Company for the In-Line Baggage Screening Improvements Project, consistent with the terms presented to the Commission; and

BE IT FURTHER RESOLVED, That the Executive Director or his designee is authorized to execute the necessary documents on behalf of the Port of Portland Commission in a form approved by counsel.

Commissioner Johansen said it would be a fair summary to say that when the contract amendments were presented in November of 2009, when we were scoping the project, that we thought we would have the high-speed scanners and it was scoped accordingly, and that the complications and extension of time is because the high-speed scanners were not certified and we had to move in a different direction. Commissioner Johansen asked for the benefit of hindsight what could have been done to better scope the cost of the project. Mr. Snyder said the lesson learned is that when you are talking about high-tech and electrical projects, there are so many unknowns and it is difficult to know what you are getting into, so we should have started with a higher contingency.

Commissioner Johansen said during her tenure on the Commission she does not recall there being a pattern of contract amendments like we have had with this project. She said she appreciates the complexity of the project and credits Port staff for being good at value engineering and keeping things within the scope.

Commissioner Allen moved that the Executive Director's recommendations be approved. Commissioner Olson seconded the motion, which was put to a roll call vote. Commissioners Allen, Carter, Corey, Daggett, Johansen and Olson voted in favor of the motion.

Agenda Item No. 3

MASTER DEVELOPMENT AGREEMENT AMENDMENT AND GROUND LEASE WITH OPTION – 19.29 ACRES TO MEPT RIVERGATE IV LLC – RIVERGATE INDUSTRIAL DISTRICT

This agenda item requested approval to amend the Master Development Agreement (MDA) with MEPT Rivergate III LLC (MEPT III) to adjust the lease rate and option terms for a ground lease for approximately 12.44 acres of land, with an option to lease an additional 6.85 acres of land (total of 19.29 acres), located on North Lombard Street in Rivergate Industrial District, to MEPT Rivergate IV LLC (MEPT IV), a Delaware limited liability company. This lease represents the second lease of property under the MDA signed by the Port of Portland and MEPT III in July 2007.

Joe Mollusky presented the Executive Director's recommendations as follows:

BE IT RESOLVED, That approval is given to amend the Master Development Agreement with MEPT III to provide for lease of approximately 12.44 acres of land, with an option to lease an additional 6.85 acres of land (total of 19.29 acres), located on North Lombard Street in Rivergate Industrial District, to MEPT Rivergate IV LLC, for development of a distribution facility, consistent with the terms presented to the Port of Portland Commission; and

BE IT FURTHER RESOLVED, That the Executive Director or his designee is authorized to execute the necessary documents on behalf of the Port of Portland Commission in a form approved by counsel.

Commissioner Daggett moved that the Executive Director's recommendations be approved. Commissioner Olson seconded the motion, which was put to a voice vote. Commissioners Allen, Carter, Corey, Daggett, Johansen and Olson voted in favor of the motion.

Commissioner Corey declared a potential but not actual conflict with Agenda Item No. 4. He said he has interests in family corporations that produce wheat that is shipped by barge on the Columbia River, but not by container. To the best of his knowledge, he will not be affected by this program. He also has representative interests through his law practice with producers, but to his knowledge, he has no conflicts with those producers. Commissioner Corey said he would participate in the discussion and vote.

Agenda Item No. 4

COLUMBIA/SNAKE RIVER SYSTEM LOCK CLOSURE – SHIPPER SUPPORT PROGRAM – MARINE & INDUSTRIAL DEVELOPMENT

This agenda item requested approval to establish and fund a program in support of up-river export cargo interests during the lock closure (Shipper Support Program). The Port would provide funds, not to exceed \$800,000, would be used to financially support export shippers, in order to maintain containerized cargo flow through Terminal 6 (T-6) during the unprecedented 16-week extended lock closure, between December 2010 and March 2011, on the Columbia/Snake River lock system. The program will conclude with the earlier of the reopening of the locks or depletion of the program funds.

Dan Pippenger presented the Executive Director's recommendations as follows:

BE IT RESOLVED, That to promote continuity and market access through the Port of Portland's Terminal 6 for the duration of the December 2010-March 2011 extended lock closure, approval is given for the Port of Portland to provide up to \$800,000 for the Shipper Support Program on the terms presented to the Commission; and

BE IT FURTHER RESOLVED, That the Executive Director or his designee is authorized to execute the necessary documents on behalf of the Port of Portland Commission in a form approved by counsel.

Commissioner Johansen said this feels very similar to what we did for Delta Air Lines, an investment that was paid back in so many positive ways. She commended staff for doing this and personally thinks this is the kind of thing the Port has to step up and do, especially in this tough situation, to help the viability of T-6 as well as the region.

Commissioner Carter asked if we are comfortable with the \$800,000 program fund amount. Mr. Pippenger said we are comfortable with the amount. He said we looked back at the last couple of years and we know that some shippers will either hold their cargo or ship early to avoid the lock closure. Mr. Pippenger said \$800,000 is a solid figure to achieve our goal.

Commissioner Allen said he thinks this is a creative solution that shows our commitment to the region.

Jeff Smith, President of International Longshore and Warehouse Union Local 8, said the shipper program is important to the jobs that are in jeopardy with the lock closure. He said the biggest worry for the ILWU is that if the shippers go to Seattle or Tacoma, we will not get them back in Portland.

Commissioner Allen moved that the Executive Director's recommendations be approved. Commissioner Olson seconded the motion, which was put to a voice vote. Commissioners Allen, Carter, Corey, Daggett, Johansen and Olson voted in favor of the motion.

Agenda Item No. 5

APPROVAL OF INTERGOVERNMENTAL AGREEMENT WITH STATE OF OREGON OFFICE OF GOVERNOR-ELECT CONCERNING TOM IMESON

The Port of Portland’s (Port) Director of Public Affairs, Tom Imeson, has been asked by Governor-elect Kitzhaber to assist on a temporary and part-time basis in coordinating the Governor-elect’s transition team. The assignment will be for a period of not more than 90 days. Mr. Imeson would continue to fulfill his responsibilities to the Port during this time period. This arrangement is covered by Port Ordinance No. 413 Section 2, which by its terms permits such an arrangement with Commission consent and an intergovernmental agreement. Staff believes this assignment will further the Port’s statutory mission.

Carla Kelley presented the Executive Director’s recommendations as follows:

BE IT RESOLVED, That approval is given to enter into an intergovernmental agreement with the State of Oregon under which Tom Imeson, Director of Public Affairs, would provide assistance to Governor-elect Kitzhaber’s transition team on a temporary and part-time basis, consistent with the terms presented to the Commission; and

BE IT FURTHER RESOLVED, That the Executive Director or his designee is authorized to execute the necessary documents on behalf of the Port of Portland Commission in a form approved by counsel.

Commissioner Olson moved that the Executive Director’s recommendations be approved. Commissioner Corey seconded the motion, which was put to a voice vote. Commissioners Allen, Carter, Corey, Daggett, Johansen and Olson voted in favor of the motion.

The meeting adjourned at 11:20 a.m.

President

Assistant Secretary

Date Signed

A complete audio recording of these proceedings and the full Commission agenda is available by contacting the Port of Portland administrative offices, 7200 N.E. Airport Way, Portland, Oregon 97218.

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PORT OF PORTLAND CONTRACTING RULES

INTRODUCTION

Adoption and Authority

These Contracting Rules were adopted by the Port of Portland Board of Commissioners on February 9, 2005, and revised on March 8, 2006, ~~and~~ July 9, 2008, and November 10, 2010, pursuant to the authority granted by ORS 279A.065(5).

Effective Date

These Contracting Rules became effective on ~~July 9, 2008~~ November 10, 2010 with respect to contracts entered into or advertised on or after that date.

Repeal of Rules

The contracting rules adopted by the Port of Portland Board of Commissioners on October 13, 1999, corrected on November 10, 1999, and amended on November 12, 2003, were repealed as of March 1, 2005.

Format

Those sections of the Public Contracting Code (ORS 279A, 279B, and 279C) applicable to Port of Portland contracting are set forth in full (sections, subsections, paragraphs, etc. applicable only to state agencies have been excluded; deleted subsections, paragraphs, etc. are denoted by “* * *”; compiler’s notes generally have been omitted). The Contracting Rule implementing or otherwise related to a particular statutory section appears immediately after the statutory section. This format has been selected to facilitate the integrated application of statutory requirements and rule requirements to Port of Portland contracting.

Contract Review Board Rules Published Separately

These Contracting Rules do NOT include the Port of Portland’s Contract Review Board Rules. The Contract Review Board Rules are published separately.

DIVISION A
PUBLIC CONTRACTING - GENERAL PROVISIONS

Contents

General Provisions

- 279A.005 Short title
[no rule]
- 279A.010 Definitions for Public Contracting Code
Port Rule A.010 Definition of Disaster
- 279A.015 Policy
Port Rule A.015 Policy
- 279A.020 Organization of Public Contracting Code
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- 279A.030 Federal law prevails in case of conflict
[no rule]

Authority

- 279A.050 Procurement authority
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- 279A.055 Personal services contracts
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- 279A.060 Local contract review boards
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- 279A.065 Model rules generally; applicability to contracting agencies
Port Rule A.065

279A.070 Rules

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[no rule]

Minorities, Women and Emerging Small Businesses

279A.100 Affirmative action; limited competition permitted

Port Rule A.100

279A.105 Subcontracting to emerging small businesses

Port Rule A.105

279A.110 Discrimination in subcontracting prohibited; remedies

[no rule]

Contract Preferences

279A.120 Preference for Oregon goods and services; nonresident bidders

Port Rule A.120

279A.125 Preference for recycled materials

[no rule]

279A.128 Preference for agricultural product produced and transported within state.

[no rule]

State Procurement

* * *

Intergovernmental Relations

Generally

279A.180 Purchases through federal programs

Port Rule A.180

279A.185 Local contracting agency arrangements for use or disposition of

personal property authorized

Port Rule A.185 Sale of Surplus Personal Property

279A.190 Transfers of fire protection equipment between fire departments
[no rule]

Cooperative Procurement

279A.200 Definitions for ORS 279A.200 to 279A.225
[no rule]

279A.205 Cooperative procurements authorized
[no rule]

279A.210 Joint cooperative procurements
[no rule]

279A.215 Permissive cooperative procurements
[no rule]

279A.220 Interstate cooperative procurements
[no rule]

279A.225 Protests and disputes
[no rule]

State Surplus Property

* * *

Penalties

279A.990 Penalties
[no rule]

Relevant Statutes with Rules

General Provisions

279A.005 Short title. ORS chapters 279A, 279B and 279C may be cited as the Public Contracting Code. [2003 c.794 §1]

[no rule]

279A.010 Definitions for Public Contracting Code. (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 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

[2003 c.794 §2; 2003 c.794 §2a; 2005 c.22 §199; 2005 c.103 §1a; 2005 c.153 §2; 2005 c.360 §13; 2007 c.764 §1]

Rule A.010 Definition of Disaster

As used in the Port’s Contracting Rules, unless the context clearly requires a different meaning: "Disaster" means a severe storm, volcanic eruption, landslide, mudslide, drought, fire, earthquake, explosion, war, acts of terrorism, civil disturbance, or other catastrophe that causes or may cause substantial damage or injury to persons or property within the Port of Portland's boundaries or area of jurisdiction.

279A.015 Policy. It is the policy of the State of Oregon, in enacting the Public Contracting Code, that a sound and responsive public contracting system should:

- (1) Simplify, clarify and modernize procurement practices so that they reflect the market place and industry standards.
- (2) Instill public confidence through ethical and fair dealing, honesty and good faith on the part of government officials and those who do business with the government.
- (3) Promote efficient use of state and local government resources, maximizing the economic investment in public contracting within this state.
- (4) Clearly identify rules and policies that implement each of the legislatively mandated socioeconomic programs that overlay public contracting and accompany the expenditure of public funds.
- (5) Allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement. In public procurement, as set out in ORS chapter 279B, meaningful competition may be obtained by evaluation of performance factors and other aspects of service and product quality, as well as pricing, in arriving at best value.
- (6) Provide a public contracting structure that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competitive bidding as the standard for public improvement contracts unless otherwise exempted. [2003 c.794 §3]

Rule A.015 Policy

The Port's Contracting Rules are intended to fully implement the Public Contracting Code, maximize the Port's flexibility in adjusting its contracting procedure to the specific circumstances of each procurement, and to ensure that the Port receives the maximum benefit from the public funds expended on public contracts.

279A.020 Organization of Public Contracting Code. (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, 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. [2003 c.794 §4; 2005 c.103 §2]

Note: *Although the Port's Contracting Rules generally follow the order of the sections in the Public Contracting Code, the Port's rules regarding public contracting involving architects, engineers, land surveyors and related services appear in Division B, and not in Division C.*

[no rule]

279A.025 Application of Public Contracting Code. (1) Except as provided in subsections (2) to (4) of this section, the Public Contracting Code applies to all public contracting.

(2) The Public Contracting Code does not apply to:

(a) Contracts between a contracting agency and:

(A) Another contracting agency;

(B) The Oregon Health and Science University;

(C) The Oregon State Bar;

(D) A governmental body of another state;

(E) The federal government;

(F) An American Indian tribe or an agency of an American Indian tribe;

(G) A nation, or a governmental body in a nation, other than the United States; or

(H) An intergovernmental entity formed between or among:

(i) Governmental bodies of this or another state;

(ii) The federal government;

(iii) An American Indian tribe or an agency of an American Indian tribe;

(iv) A nation other than the United States; or

(v) A governmental body in a nation other than the United States.

(b) Agreements authorized by ORS chapter 190 or by a statute, charter provision, ordinance or other authority for establishing agreements between or among governmental bodies or agencies or tribal governing bodies or agencies;

(c) Insurance and service contracts as provided for under ORS 414.115, 414.125, 414.135 and 414.145 for purposes of source selection;

- (d) Grants;
- (e) Contracts for professional or expert witnesses or consultants to provide services or testimony relating to existing or potential litigation or legal matters in which a public body is or may become interested;
- (f) Acquisitions or disposals of real property or interest in real property;
- (g) Sole-source expenditures when rates are set by law or ordinance for purposes of source selection;

* * *

- (i) Procurements by a contracting agency from an Oregon Corrections Enterprises program;

* * *

(q) Contracts, agreements or other documents entered into, issued or established in connection with:

(A) The issuance of obligations, as defined in ORS 286A.100 and 287A.310, of a public body;

(B) The making of program loans and similar extensions or advances of funds, aid or assistance by a public body to a public or private body for the purpose of carrying out, promoting or sustaining activities or programs authorized by law; or

(C) The investment of funds by a public body as authorized by law, and other financial transactions of a public body that by their character cannot practically be established under the competitive contractor selection procedures of ORS 279B.050 to 279B.085;

(r) Contracts for employee benefit plans as provided in ORS 243.105 (1), 243.125 (4), 243.221, 243.275, 243.291, 243.303 and 243.565;

(s) Contracts for employee benefit plans as provided in ORS 243.860 to 243.886; or

(t) Any other public contracting of a public body specifically exempted from the code by another provision of law.

* * *

(4) ORS 279A.200 to 279A.225 and 279B.050 to 279B.085 do not apply to contracts made with qualified nonprofit agencies providing employment opportunities for individuals with disabilities under ORS 279.835 to 279.855. [2003 c.794 §5; 2003 c.794 §5a; 2005 c.22 §200; 2005 c.103 §3; 2005 c.109 §3; 2005 c.297 §3; 2005 c.748 §12; 2005 c.777 §15; 2007 c.7 §19; 2007 c.70 §67; 2007 c.71 §81; 2007 c.764 §2; 2007 c.783 §91]

[no rule]

Note: ORS 279.835 to 279.855, and the related Department of Administrative Services rules, are set forth below for the convenience of the user in applying ORS 279A.025(4).:

279.835 Definitions for ORS 279.835 to 279.855. As used in ORS 279.835 to 279.855:

(1) **“Department” means the Oregon Department of Administrative Services.**

(2) **“Direct labor” includes all work required for preparation, processing and packing, but not supervision, administration, inspection and shipping.**

(3) **“Individual with a disability” means an individual who, because of the nature of disabilities, is not able to participate fully in competitive employment, and for whom specialized employment opportunities must be provided.**

(4) **“Public agency” or “public contracting agency” means any agency of the State of Oregon or any political subdivision thereof authorized by law to enter into public contracts and any public body created by intergovernmental agreement.**

(5) **“Qualified nonprofit agency for individuals with disabilities” means a nonprofit activity center or rehabilitation facility:**

(a) **Organized under the laws of the United States or of this state and operated in the interest of individuals with disabilities, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual;**

(b) **That complies with any applicable occupational health and safety standard required by the laws of the United States or of this state; and**

(c) **That in the manufacture of products and in the provision of services, whether or not the products or services are procured under ORS 279.835 to 279.855, during the fiscal year employs individuals with disabilities for not less than 75 percent of the work hours of direct labor required for the manufacture or provision of the products or services. [1977 c.304 §3; 1983 c.690 §17; 1989 c.224 §42; 1991 c.93 §1; 1993 c.500 §34; 2001 c.104 §96; 2003 c.794 §229b; 2007 c.70 §62]**

279.840 Purpose. The purpose of ORS 279.835 to 279.855, 279A.025 (4) and 279C.335 is to further the policy of this state to encourage and assist individuals with disabilities to achieve maximum personal independence through useful and productive gainful employment by assuring an expanded and constant market for sheltered workshop and activity center products and services, thereby enhancing their dignity and capacity for self-support and minimizing their dependence on welfare and need for costly institutionalization. [1977 c.304 §2; 1989 c.224 §43; 2003 c.794 §229c; 2007 c.70 §63]

279.845 Duties of Oregon Department of Administrative Services; prices for products and services of nonprofit agency for individuals with disabilities; sources of products and services; rules. (1) It is the duty of the Oregon Department of Administrative Services to:

(a) **Determine the price of all products manufactured and services**

offered for sale to the various public agencies by any qualified nonprofit agency for individuals with disabilities. The price shall recover for the workshops the cost of raw materials, labor, overhead, delivery costs and a margin held in reserve for inventory and equipment replacement;

(b) To revise such prices from time to time in accordance with changing cost factors; and

(c) To make such rules regarding specifications, time of delivery and other relevant matters of procedure as shall be necessary to carry out the purposes of ORS 279.835 to 279.855, 279A.025 (4) and 279C.335.

(2) The department shall establish and publish a list of sources or potential sources of products produced by any qualified nonprofit agency for individuals with disabilities and the services provided by any such agency, which the department determines are suitable for procurement by public agencies pursuant to ORS 279.835 to 279.855, 279A.025 (4) and 279C.335. This procurement list and revisions thereof shall be distributed to all public purchasing officers.

(3) The department may not delegate any duty imposed under this section to any person or public agency outside of the department. [1977 c.304 §4; 1989 c.224 §44; 2003 c.794 §229d; 2007 c.70 §64]

279.850 Procurement of product or service; agreements for procurement. (1) If any public agency intends to procure any product or service on the procurement list, that public agency shall, in accordance with rules of the Oregon Department of Administrative Services, procure such product or service, at the price established by the department, from a qualified nonprofit agency for individuals with disabilities, provided the product or service is of the appropriate specifications and is available within the period required by that public agency.

(2) In furthering the purposes of ORS 279.835 to 279.855, 279A.025 (4) and 279C.335, it is the intent of the Legislative Assembly that there be close cooperation between the department, public contracting agencies and qualified nonprofit agencies for individuals with disabilities. The department on behalf of public contracting agencies and qualified nonprofit agencies for individuals with disabilities is authorized to enter into such contractual agreements, cooperative working relationships or other arrangements as may be determined to be necessary for effective coordination and efficient realization of the objectives of ORS 279.835 to 279.855, 279A.025 (4) and 279C.335 and any other law requiring procurement of products or services. [1977 c.304 §5; 1989 c.224 §45; 2003 c.794 §229e; 2007 c.70 §65]

279.855 Entities that may obtain goods and services through Oregon Department of Administrative Services. The following may purchase equipment, materials, supplies and services through the Oregon Department of Administrative Services in the same manner as state agencies as provided in ORS 279A.140 to 279A.155 and 279A.250 to 279A.290:

(1) Qualified nonprofit agencies for individuals with disabilities participating in the program set forth in ORS 279.835 to 279.855, 279A.025 (4) and 279C.335.

(2) Residential programs when under contract with the Department of Human Services to provide services to youth in the custody of the state.

(3) Public benefit corporations, as defined in ORS 65.001, that provide public services either under contract with a state agency, as defined in ORS 171.133, or under contract with a unit of local government, as defined in ORS 190.003, that funds the contract, in whole or in part, with state funds. [1977 c.304 §7; 1989 c.224 §46; 1991 c.419 §1; 2001 c.900 §51; 2003 c.794 §229f; 2007 c.70 §66]

279A.030 Federal law prevails in case of conflict. Except as otherwise expressly provided in ORS 279C.800 to 279C.870, and notwithstanding ORS 279C.005 to 279C.670 and this chapter and ORS chapter 279B, applicable federal statutes and regulations govern when federal funds are involved and the federal statutes or regulations conflict with any provision of ORS 279C.005 to 279C.670 or this chapter or ORS chapter 279B, or require additional conditions in public contracts not authorized by ORS 279C.005 to 279C.670 or this chapter or ORS chapter 279B. [2003 c.794 §6]

[no rule]

Authority

279A.050 Procurement authority. (1)(a) Except as otherwise provided in the Public Contracting Code, a contracting agency shall exercise all ~~rights, powers and procurement~~ authority in accordance with the provisions of the Public Contracting Code.

** * **

~~— (b) When a contracting agency has authority under this section to carry out functions described in this section, or has authority to make procurements under a provision of law other than the Public Contracting Code, the contracting agency is not required to exercise that authority in accordance with the provisions of the code if, under ORS 279A.025, the code does not apply to the contract or contracting authority.~~

~~** * **~~

~~[2003 c.794 §7; 2005 c.625 §61; 2007 c.70 §68; 2007 c.197 §1; 2007 c.764 §3; 2009 c.397 §2; 2009 c.828 §13]~~

[no rule]

279A.055 Personal services contracts. (1) Except as provided in ORS 279A.140, a contracting agency may enter into personal services contracts. The provisions of this section do not relieve a contracting agency of the duty to comply with ORS 279A.140, any other law applicable to state agencies or applicable city or county charter provisions.

(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 service contracts or classes of service contracts as personal services contracts. [2003 c.794 §8; 2005 c.103 §4]

[no rule; see Port of Portland Contract Review Board Rules for designation of personal service contracts; see also Port Rule B.500]

279A.060 Local contract review boards. If the governing body of a local contracting agency takes no action to provide otherwise, the governing body is the local contract review board of that local contracting agency. However, the governing body of a local contracting agency may, by charter, ordinance or other local legislation, authorize a body, board or commission other than the governing body to serve as the local contract review board of the local contracting agency. The governing body of a local contracting agency also may enter into intergovernmental agreements under ORS chapter 190 to permit the local contract review board of another local contracting agency or the Director of the Oregon Department of Administrative Services to exercise authority under ORS 279B.085. [2003 c.794 §9]

[no rule]

279A.065 Model rules generally; applicability to contracting agencies.

* * *

(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. [2003 c.794 §10; 2003 c.794 §10a]

Rule A.065

The model rules adopted by the Attorney General under ORS 279A.065 do not apply to the Port of Portland.

279A.070 Rules. In addition to rules adopted under ORS 279A.065 (5), a contracting agency may, in the exercise of authority granted under ORS 279A.050, adopt rules necessary to carry out the provisions of the Public Contracting Code, including but not limited to rules for the procurement, management, disposal and control of goods, services, personal services and public improvements under the Public Contracting Code. Each contracting agency authorized to enter into personal services contracts shall create procedures for the screening and selection of persons to perform personal services. [2003 c.794 §11; 2003 c.794 §11a]

[no rule; see specific rules]

279A.075 Delegation. (1) Unless otherwise provided in the Public Contracting Code, the exercise of all authorities in the code may be delegated and subdelegated in whole or in part. Notwithstanding delegations of authority under this section, a person's or agency's exercise of the delegated authority is governed by the code and rules adopted under the code.

** * **

** * ** [2003 c.794 §12]

[no rule]

Minorities, Women And Emerging Small Businesses

279A.100 Affirmative action; limited competition permitted. (1) As used in this section, “affirmative:

(a) “Affirmative action” means a program designed to ensure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age or physical or mental disability or a policy to give a preference in awarding public contracts to disabled veterans.

— (b) “Disabled veteran” has the meaning given that term in ORS 408.225.

(2) The provisions of the Public Contracting Code may not be construed to prohibit a contracting agency from engaging in public contracting practices designed to promote affirmative action goals, policies or programs for disadvantaged or minority groups or to give a preference in awarding public contracts to disabled veterans.

— (3) In carrying out the policy of an affirmative action, goal, policy or program, a contracting agency by appropriate ordinance, resolution or rule, a contracting agency may limit competition for a public contract for goods and services, or for any other public contract estimated to cost \$50,000 or less, to contracting entities owned or controlled by persons described in subsection (1) of this section. [2003 c.794 §13; 2009 c.235 §1]

Rule A.100

The Port may exercise its authority under ORS 279A.100(3) if the Port's legal counsel determines that the exercise of authority would be legally permissible, and if the Port determines that the exercise of authority would be desirable under the particular circumstances.

279A.105 Subcontracting to emerging small businesses: or businesses owned or controlled by disabled veterans. (1) A contracting agency may require a contractor to subcontract some part of a contract to, or to obtain materials to be used in performing the contract from, a business enterprise that is certified under ORS 200.055 as an emerging small business or a business enterprise that is owned or controlled by a disabled veteran, as defined in ORS 408.225.

— (2) A contracting agency may require a contractor to subcontract some part of a contract to, or to obtain materials to be used in performing the contract from, a business enterprise that is certified under ORS 200.055 as an emerging small business and that, as identified by the contracting agency, is located in or draws ~~the~~ the business enterprise's workforce from economically ~~depressed~~-distressed areas, as designated by the Economic and Community Oregon Business Development Department.

— (3) A contracting agency may require that a public contract be awarded to a responsible bidder, as defined in ORS 200.005, who the contracting agency determines has made good faith efforts as prescribed in ORS 200.045 (3). For purposes of this subsection, "responsible bidder" includes a responsible proposer that has made good faith efforts as prescribed in ORS 200.045 (3). [2003 c.794 §14; 2005 c.103 §5; 2009 c.235 §2]

Note: ORS 200.005, 200.045, 200.065 and 200.075 are set forth below for the convenience of the user in applying ORS 279A.105.

200.005 Definitions for ORS 200.005 to 200.075, 200.160 to 200.200 and 279A.105. As used in ORS 200.005 to 200.075, 200.160 to 200.200 and 279A.105:

* * *

(6) "Responsible bidder" means a bidder who, as determined by the Advocate for Minority, Women and Emerging Small Business, has undertaken both a policy and practice of actively pursuing participation by minority or women business enterprises in all bids, both public and private, submitted by the bidder.

* * *

[1987 c.893 §2; 1989 c.1043 §1; 1991 c.517 §9; 2001 c.104 §71; 2003 c.794 §213; 2005 c.22 §§150,151; 2005 c.683 §§4, 5]

200.045.

200.045 Standards for good faith efforts to meet contract requirements;

standards for establishing bidder's responsibility. (1) To determine whether a bidder that has failed to meet emerging small business enterprise contract requirements may be awarded the contract, the public contracting agency must decide whether the bidder's efforts to obtain participation by emerging small business enterprises were good faith efforts to meet the requirements.

_____ (2) Performing all of the following actions by a bidder constitutes a rebuttable presumption that the bidder has made a good faith effort to satisfy the subcontracting requirement for emerging small businesses. It shall be a rebuttable presumption that the bidder has not made a good faith effort if the bidder has not acted consistently with such actions. Efforts that are merely superficial are not good faith efforts:

_____ (a) The bidder attended any presolicitation or prebid meetings that were scheduled by the contracting agency to inform emerging small business enterprises of contracting and subcontracting or material supply opportunities available on the project;

_____ (b) The bidder identified and selected specific economically feasible units of the project to be performed by emerging small business enterprises in order to increase the likelihood of participation by such enterprises;

_____ (c) The bidder advertised in general circulation, trade association, minority and trade oriented, women-focus publications, if any, concerning the subcontracting or material supply opportunities;

_____ (d) The bidder provided written notice to a reasonable number of specific emerging small business enterprises, identified from a list of certified emerging small business enterprises provided or maintained by the **Oregon Business Development** ~~Department of Consumer and Business Services~~ for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;

_____ (e) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested;

_____ (f) The bidder provided interested emerging small business enterprises with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;

_____ (g) The bidder negotiated in good faith with the enterprises, and did not without justifiable reason reject as unsatisfactory bids prepared by any emerging small business enterprises;

_____ (h) Where applicable, the bidder advised and made efforts to assist interested emerging small business enterprises in obtaining bonding, lines of credit or insurance required by the contracting agency or contractor;

_____ (i) The bidder's efforts to obtain emerging small business enterprise participation were reasonably expected to produce a level of participation sufficient to meet the goals or requirement of the public contracting agency; and

_____ (j) The bidder used the services of minority community organizations, minority contractor groups, local, state and federal minority

business assistance offices and other organizations identified by the Advocate for Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of emerging small business enterprises.

_____ (3) To determine whether a bidder is a responsible bidder, the performance of all the following actions constitutes a rebuttable presumption that the bidder is responsible. It shall be a rebuttable presumption that the bidder is not responsible if the bidder has not acted consistently with the actions described in this subsection. Efforts that are merely superficial are not good faith efforts.

_____ (a) The bidder attended any presolicitation or prebid meetings that were scheduled by the contracting agency to inform minority or women business enterprises of contracting and subcontracting or material supply opportunities available on the project;

_____ (b) The bidder identified and selected specific economically feasible units of the project to be performed by minority or women business enterprises in order to increase the likelihood of participation by such enterprises;

_____ (c) The bidder advertised in general circulation, trade association, minority and trade oriented, women-focus publications, if any, concerning the subcontracting or material supply opportunities;

_____ (d) The bidder provided written notice to a reasonable number of specific minority or women business enterprises, identified from a list of certified minority or women business enterprises provided or maintained by the [Oregon Business Development Department of Consumer and Business Services](#) for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;

_____ (e) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested;

_____ (f) The bidder provided interested minority or women business enterprises with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;

_____ (g) The bidder negotiated in good faith with interested, capable and competitive minority or women business enterprises submitting bids;

_____ (h) Where applicable, the bidder advised and made efforts to assist interested minority or women business enterprises in obtaining bonding, lines of credit or insurance required by the contracting agency or contractor;

_____ (i) The bidder's efforts to obtain minority or women business enterprise participation were reasonably expected to produce a level of participation sufficient to meet the goals of the public contracting agency; and

_____ (j) The bidder used the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Advocate for Minority, Women and Emerging Small Business that provide assistance in

the recruitment and placement of disadvantaged, minority or women business enterprises. ~~[[1987 c.893 §7; 1989 c.1043 §8; 1997 c.145 §2; 2003 c.794 §215; 2009 c.830 §136]~~

200.065 Fraudulent conduct prohibited; sanctions. (1) It shall be unlawful for any person fraudulently to obtain or retain or attempt to obtain or retain or to aid another person fraudulently to obtain or retain or attempt to obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise.

_____ (2) It shall be unlawful knowingly to make a false claim that any person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a contract or subcontract or other benefit.

_____ (3) The public contracting agency may withhold payment, suspend or terminate the contract and may impose on any person a civil penalty not to exceed 10 percent of the contract or subcontract price or \$5,000, whichever is less, for each violation of subsection (1) or (2) of this section. The penalty shall be paid to the Office for Minority, Women and Emerging Small Business.

_____ (4) The ~~Oregon Business Development~~ Department ~~of Consumer and Business Services~~ or an affected public contracting agency shall investigate any complaint that a person has violated subsection (1) or (2) of this section. In investigating such a complaint, the department or an affected public contracting agency may require any additional information, administer oaths, take depositions and issue subpoenas to compel the attendance of witnesses and the production of books, papers, records, memoranda or other information necessary to carry out its duties. If any person fails to comply with any subpoena issued under this subsection or refuses to testify on any matter on which a person may lawfully be interrogated, the procedure provided in ORS 183.440 shall be followed to compel compliance.

_____ (5) An affected public contracting agency or the ~~Department of Consumer and Business Services~~ ~~may~~ department disqualify any person found to have violated subsection (1) or (2) of this section or who admits to such violation under oath during the course of an investigation from bidding or participating in any public contract for a period of time specified by the agency or department, not to exceed three years. Any contracting agency that has notice of the finding of the fraudulent certification may also disqualify the person from bidding on or participating in any public contract. [1987 c.893 §9; 1989 c.1043 §5; 1997 c.145 §4; 2009 c.830 §139]

_____ **200.075 Prohibited conduct; suspension of certification or right to participate in public contracts. (1) Any bidder or contractor or subcontractor on a public contract that knowingly commits any of the acts listed in paragraphs (a) to (c) of this subsection shall have its right to bid on or participate in any public contract suspended. The suspension shall occur only after notice and opportunity for hearing in such manner as the affected public contracting agency, by rule, shall provide. The suspension shall be for up to 90**

days for a first violation, up to one year for a second violation and up to five years for a third violation. Each violation shall remain on record for five years. After five years the violation shall no longer be considered in reviewing future violations. The following acts are prohibited:

_____ (a) Entering into any agreement representing that a disadvantaged, minority, women or emerging small business enterprise certified pursuant to ORS 200.055 will be performing work or supplying materials under the public improvement contract without the knowledge and consent of the disadvantaged, minority, women or emerging small business enterprise.

_____ (b) Exercising management and decision making control over the internal operations of any certified disadvantaged, minority, women or emerging small business enterprise. As used in this paragraph, “internal operations” does not include normal scheduling, coordination, execution or performance as a subcontractor on a public contract.

_____ (c) Using a disadvantaged, minority, women or emerging small business enterprise to perform a subcontract or supply material under a public improvement contract to meet an established goal or requirement when the disadvantaged, minority, women or emerging small business enterprise does not perform a commercially useful function in carrying out its responsibilities and obligations under the contract.

_____ (2) Any disadvantaged, minority, women or emerging small business enterprise certified under ORS 200.055 that allows or commits any of the acts listed in paragraphs (a) to (c) of this subsection shall have its certification suspended for up to 90 days for the first violation, up to one year for a second violation and up to five years for a third violation. Each violation shall remain on record for five years. After five years the violation shall no longer be considered in reviewing future violations. The following acts are prohibited:

_____ (a) Use of the firm’s name to meet a disadvantaged, minority, women or emerging small business enterprise goal or requirement on a public contract when the firm does not in fact intend to or does not actually perform the work under the subcontract or purchase and supply material to the project under a material supply contract.

_____ (b) Use of any personnel of an uncertified business to operate, manage or otherwise control the disadvantaged, minority, women or emerging small business enterprise.

_____ (c) Failure to perform a commercially useful function in carrying out its functions under a subcontract or a material supply contract entered into with a contractor or subcontractor on a public contract when represented as a certified business to meet an established goal or requirement.

_____ (3) For the purpose of this section “commercially useful function” means the actual performance of a function or service by the business for which there is a demand in the marketplace, and for which the business receives payment not disproportionate to the work performed or in conformance with industry standards. Acting as a broker to provide for the performance of work by others does not constitute a “commercially useful function.” [1987 c.893

Rule A.105

(1) A subcontractor certified under ORS 200.055 as an emerging small business is located in or draws its workforce from economically distressed areas if:

(a) Its principal place of business is located in an area designated as economically distressed by the Oregon [Economic and Community Business](#) Development Department; or

(b) The contractor certifies in writing to the Port that a substantial number of the subcontractor's employees or subcontractors who will manufacture the goods or complete the services under the contract reside in an area designated as economically distressed by the Oregon [Economic and Community Business](#) Development Department. For the purposes of making the foregoing determination, the Port will determine in each particular instance what proportion of a contractor's subcontractor's employees or subcontractors constitute a substantial number.

(2) Disqualification for Violation of DBE Statute.

(a) The Port may disqualify a person from consideration for award of a contract under ORS 200.065(5), or suspend a person's right to bid on or participate in any public contract pursuant to ORS 200.075(1), after providing the person with notice and a reasonable opportunity to be heard in accordance with [sections/subsections](#) (d) and (e) of this section.

(b) As provided in ORS 200.065 and 200.075, the Port may disqualify or suspend a [Person's/person's](#) right to submit an [Offer/offer](#) or to participate in a [Contract/contract](#) (e.g. act as a subcontractor) as follows:

(A) For a DBE [Disqualification/disqualification](#) under ORS 200.065, the [Contracting Agency/Port](#) may disqualify a [Person/person](#) upon finding that the [Person/person](#) engaged in any of the activities made unlawful by ORS 200.065(1) or (2), or if the [Person/person](#) has been disqualified by another [Contracting Agency/contracting agency](#) pursuant to ORS 200.065.

(B) For a DBE [Disqualification/disqualification](#) under ORS 200.075, the [Contracting Agency/Port](#) may suspend a [Person/person](#) upon finding that the [Person/person](#) engaged in any of the acts prohibited by ORS 200.075(a) through (c).

(c) [A Contracting Agency/The Port](#) may disqualify or suspend a [Person's/person's](#) right to submit [Offers/offers](#) or participate in [Public Contracts/public contracts](#) only for the length of time permitted by ORS 200.065 or ORS 200.075, as applicable.

(d) The [Contracting Agency/Port](#) shall notify the [Person/person](#) in [Writing/writing](#) of a proposed DBE [Disqualification/disqualification](#) pursuant to this section, served personally or by registered or certified mail, return receipt requested. This notice shall:

(A) State that the [Contracting Agency/Port](#) intends to disqualify or suspend the [Person; person;](#)

(B) Set forth the reasons for the DBE [Disqualification; disqualification;](#)

(C) Include a statement of the ~~Person's~~ person's right to a hearing if requested in ~~Writing~~ writing within the time stated in the notice and that if the ~~Contracting Agency~~ Port does not receive the ~~Person's Written~~ person's written request for a hearing within the time stated, the ~~Person~~ person shall have waived its right to a hearing;

(D) Include a statement of the authority and jurisdiction under which the hearing will be held;

(E) Include a reference to the particular sections of the statutes and rules involved;

(F) State the proposed DBE Disqualification period; and

(G) State that the ~~Person~~ person may be represented by legal counsel.

(e) The ~~Contracting Agency~~ Port shall schedule a hearing upon the ~~Contracting Agency's~~ Port's receipt of the ~~Person's~~ person's timely request. The ~~Contracting Agency~~ Port shall notify the ~~Person~~ person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing prior to hearing.

(f) Notice of DBE Disqualification. The ~~Contracting Agency~~ Port will notify the ~~Person~~ person in ~~Writing~~ writing of its DBE ~~Disqualification~~ disqualification, served personally or by registered or certified mail, return receipt requested. The notice shall contain:

(A) The effective date and period of DBE ~~Disqualification~~ disqualification;

(B) The grounds for DBE ~~Disqualification~~ disqualification; and

(C) A statement of the ~~Person's~~ person's appeal rights and applicable appeal deadlines.

279A.110 Discrimination in subcontracting prohibited; remedies. (1) A bidder or proposer who competes for or is awarded a public contract may not discriminate against a subcontractor in ~~the~~ awarding of a subcontract because the subcontractor is a minority, women or emerging small business enterprise certified under ORS 200.055 or a business enterprise that is owned or controlled by or that employs a disabled veteran, as defined in ORS 408.225.

— (2) A contracting agency may debar or disqualify, under ORS 279B.130 or 279C.440, as appropriate, a bidder or proposer if the contracting agency finds that the bidder or proposer has violated subsection (1) of this section in ~~the~~ awarding of a subcontract in connection with a contract advertised by the contracting agency or a contract between the contracting agency and the bidder or proposer. A debarred or disqualified bidder or proposer may appeal the debarment or disqualification under ORS 279B.425 or ORS 279C.445 and 279C.450, as appropriate.

— (3) A contracting agency may not allege an occurrence of discrimination in subcontracting as a basis for debarring or disqualifying a bidder or proposer under subsection (2) of this section more than three years after the alleged discriminatory conduct occurred or more than three years after the contracting agency, in the exercise of reasonable diligence, should have discovered the conduct, whichever is later.

— (4) A bidder or proposer shall certify in the documents accompanying the bidder's or proposer's offer to enter into a public contract that the bidder or proposer has not discriminated and will not discriminate, in violation of subsection (1) of this section, against any minority, women or emerging small business enterprise in obtaining any or against a business enterprise that is owned or controlled by or that employs a disabled veteran in obtaining a required subcontract.

— (5) After a contractor is awarded a public contract, if the contractor violates the certification made under subsection (4) of this section, the contracting agency may regard the violation as a breach of contract that permits the contracting agency to:

— (a) ~~Termination of~~ Terminate the contract; or
— (b) ~~The contracting agency to exercise any~~ Exercise any of the remedies for breach of contract that are reserved in the contract. [2003 c.794 §15; 2009 c.235 §3]

[no rule]

Contract Preferences

279A.120 Preference for Oregon goods and services; nonresident bidders. (1) As used in this section:

(a) “Nonresident bidder” means a bidder who is not a resident bidder.

(b) “Resident bidder” means a bidder that has paid unemployment taxes or income taxes in this state during the 12 calendar months immediately preceding submission of the bid, has a business address in this state and has stated in the bid whether the bidder is a “resident bidder” under this paragraph.

(2) For the purposes of awarding a public contract, a contracting agency shall:

(a) Give preference to goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal; and

(b) Add a percent increase to the bid of a nonresident bidder equal to the percent, if any, of the preference given to the bidder in the state in which the bidder resides.

(3) When a public contract is awarded to a nonresident bidder and the contract price exceeds \$10,000, the bidder shall promptly report to the Department of Revenue on forms to be provided by the department the total contract price, terms of payment, length of contract and such other information as the department may require before the bidder may receive final payment on the public contract. The contracting agency shall satisfy itself that the requirement of this subsection has been complied with before the contracting agency issues a final payment on a public contract.

(4) The Oregon Department of Administrative Services on or before January 1 of each year shall publish a list of states that give preference to in-state bidders with the percent increase applied in each state. A contracting agency may rely on the names of states and percentages so published in determining the lowest responsible bidder without incurring any liability to any bidder. [2003 c.794 §16]

Rule A.120

If low bids or quotations are tied, the price, fitness, availability, and quality of the goods or services offered by the tied offerors are otherwise equal, and one of the tied offerors offers goods or services manufactured or produced in Oregon, then the contract shall be awarded to the offeror whose goods or services are manufactured or produced in Oregon. If two or more of the tied offerors offer goods or services manufactured or produced in Oregon, then the contract shall be awarded by drawing lots among those offering goods or services manufactured or produced in Oregon. If none or all of the tied offerors offer goods or services manufactured or produced in Oregon, the contract shall be awarded by drawing lots among the tied offerors.

279A.125 Preference for recycled materials. (1) Notwithstanding provisions of law requiring a contracting agency to award a contract to the lowest responsible bidder or best

proposer or provider of a quotation and subject to subsection (2) of this section, a contracting agency charged with the procurement of goods for any public use shall give preference to the procurement of goods manufactured from recycled materials.

(2) A contracting agency shall give preference to goods that are certified to be made from recycled materials if:

- (a) The recycled product is available;
- (b) The recycled product meets applicable standards;
- (c) The recycled product can be substituted for a comparable nonrecycled product; and
- (d) The recycled product's costs do not exceed the costs of nonrecycled products by more than five percent, or a higher percentage if a written determination is made by the contracting agency. [2003 c.794 §17]

[no rule]

279A.128 Preference for agricultural product produced and transported within state. Notwithstanding provisions of law requiring a contracting agency to award a contract to the lowest responsible bidder or best proposer or provider of a quotation, a contracting agency that uses public funds to procure goods for a public use may give preference to procuring an agricultural product that is produced and transported entirely within this state if the agricultural product costs not more than 10 percent more than an agricultural product that is not produced and transported entirely within this state. The contracting agency may set a higher percentage by order if the contracting agency, in a written determination to support the order, finds good cause to set the higher percentage and explains the contracting agency's reasons and evidence for the finding. [2009 c.214 §2]

[no rule]

State Procurement

* * *

Intergovernmental Relations

Generally

279A.180 Purchases through federal programs. Notwithstanding any other provision of the Public Contracting Code, a procurement may be made without competitive sealed bidding, competitive sealed proposals or other competition required under ORS 279B.050 to 279B.085 provided that:

(1) The procurement is made in accordance with rules adopted by the contracting agency for procurements under this section; and

(2) The procurement is made under 10 U.S.C. 381, the Electronic Government Act of 2002 (P.L. 107-347) or other federal law that is, as determined by the Director of the Oregon Department of Administrative Services or a local contract review board, similar to 10 U.S.C. 381 or section 211 of the Electronic Government Act of 2002 in effectuating or promoting transfers of property to contracting agencies. [2003 c.794 §22]

Rule A.180

The Port may procure goods or services through agencies of the federal government, either directly or through the State of Oregon, and from vendors to agencies of the federal government if the Executive Director or the Manager of Contracts and Procurement determines that the procurement would be in the best interest of the Port. Procurements under this section are permitted only if expressly permitted by federal law, and shall be made in accordance with procedures established by the responsible federal agencies. If the procurement is also through the State of Oregon, the procurement also shall comply with procedures established by the State of Oregon. The procurements authorized by this section include without limitation: (1) procurements under 10 U.S.C. 381 through the State of Oregon and the Department of Defense of law enforcement equipment suitable for counter-drug activities; and (2) procurements under P.L. 107-347, section 211, through General Services Administration supply schedules of automated data processing equipment (including firmware), software, supplies, support equipment, and services (as contained in federal supply classification code group 70).

279A.185 Local contracting agency arrangements for use or disposition of personal property authorized. (1) Notwithstanding the competitive procurement requirements of ORS chapters 279B and 279C, a local contracting agency may sell, transfer or dispose of personal property in accordance with rules adopted under ORS 279A.070.

(2) Notwithstanding the competitive procurement requirements of ORS chapters 279B and 279C, a local contracting agency may negotiate with one or more private or public entities to establish contracts, agreements and other cooperative arrangements for the use, operation, maintenance or ultimate lawful disposition of personal property owned by or under the control of the local contracting agency, including property acquired under ORS 279A.260. Before approving such a contract, agreement or arrangement, the governing body of the local contracting agency must make a finding that the contract, agreement or arrangement will promote the economic development of the local contracting agency, of the geographical area in which the local contracting agency is situated or of other public bodies that perform similar functions. [2003 c.794 §23]

Rule A.185 Sale of Surplus Personal Property

(1) *The Port may sell personal property no longer required for Port purposes. If the Port elects to sell personal property, the sale shall be by sealed, competitive bid or by auction unless the Manager of Contracts and Procurement determines that another method of sale will better serve the Port's interests. Alternative methods of sale include without limitation sale through the State of Oregon's surplus property program and sale via an electronic auction, such as e-Bay.*

(2) *The Port may transfer personal property no longer required for Port purposes to another public or private entity if the Manager of Contracts and Procurement determines that the transfer will promote the maritime, shipping, aviation, commercial, or industrial interests of the Port, and that the value to the Port of the resulting promotion exceeds the amount the Port would be likely to realize if the personal property were sold.*

(3) *The Port may dispose of personal property no longer required for Port purposes by depositing it in a land fill, or otherwise disposing of it without a sale or transfer under sections (1) and (2) of this Rule if the Manager of Contracts and Procurement determines that such disposal results in the least net cost to the Port.*

(4) *The Port may dispose of personal property no longer required for Port purposes by transferring it to a public entity or a charitable organization if the Manager of Contracts and Procurement determines that such a transfer results in a net cost to the Port less than if the Port were to dispose of the property under section (3) of this Rule. Preference among charitable organizations shall be given to those whose activities tend to promote the maritime, shipping, aviation, commercial, or industrial interests of the Port.*

279A.190 Transfers of fire protection equipment between fire departments. (1) As used in this section:

- (a) “Fire protection equipment” has the meaning given that term in ORS 476.005.
- (b) “Public contract” includes a sale at no cost.
- (c) “Regularly organized fire department” has the meaning given that term in ORS 652.050.

(2) Notwithstanding any other provision of the Public Contracting Code, transfers of fire protection equipment under public contracts between regularly organized fire departments may be made without competitive sealed bidding, competitive sealed proposals or other competition required in ORS 279B.050 to 279B.085, provided:

- (a) The recipient regularly organized fire department makes a written request for the fire protection equipment to the transferor regularly organized fire department;
- (b) The fire protection equipment is surplus to or unusable by the transferor;
- (c) The total fair market value of fire protection equipment received by the recipient does not exceed \$50,000 per calendar year; and
- (d) The transferor holds a public hearing, with hearing notice published in at least one trade newspaper of general statewide circulation a minimum of 14 days before the hearing, and finds that the public contract is in the public’s interest. [2003 c.794 §24]

[no rule]

Cooperative Procurement

279A.200 Definitions for ORS 279A.200 to 279A.225. (1) As used in ORS 279A.200 to 279A.225:

- (a) “Administering contracting agency” means a governmental body in this state or in another jurisdiction that solicits and establishes the original contract for the procurement of goods, services or public improvements in a cooperative procurement.
- (b) “Cooperative procurement” means a procurement conducted on behalf of more than one governmental body. “Cooperative procurement” includes but is not limited to multiagency contracts and price agreements. “Cooperative procurement” does not include an agreement formed among only governmental bodies under ORS chapter 190 or by a statute, charter provision, ordinance or other authority for establishing agreements between or among governmental bodies or agencies or tribal governing bodies or agencies.

(c) “Cooperative procurement group” means a group of governmental bodies joined through an intergovernmental agreement for the purpose of facilitating cooperative procurements.

(d) “Interstate cooperative procurement” means a permissive cooperative procurement in which the administering contracting agency is a governmental body, domestic or foreign, that is authorized under the governmental body’s laws, rules or regulations to enter into public contracts and in which one or more of the participating governmental bodies are located outside this state.

(e) “Joint cooperative procurement” means a cooperative procurement in which the participating governmental bodies or the cooperative procurement group and the bodies’ or group’s contract requirements or estimated contract requirements for price agreements are identified.

(f) “Original contract” means the initial contract or price agreement solicited and awarded during a cooperative procurement by an administering contracting agency.

(g) “Permissive cooperative procurement” means a cooperative procurement in which the purchasing contracting agencies are not identified.

(h) “Purchasing contracting agency” means a governmental body that procures goods, services or public improvements from a contractor based on the original contract established by an administering contracting agency.

(2) As used in ORS 279A.210 (1)(a), 279A.215 (1)(a) and 279A.220 (1)(a), an administering contracting agency’s solicitation and award process uses source selection methods “substantially equivalent” to those identified in ORS 279B.055, 279B.060 or 279B.085 if the solicitation and award process:

(a) Calls for award of a contract on the basis of a lowest responsible bidder or a lowest and best bidder determination in the case of competitive bids, or on the basis of a determination of the proposer whose proposal is most advantageous based on evaluation factors set forth in the request for proposals in the case of competitive proposals;

(b) Does not permit the application of any geographic preference that is more favorable to bidders or proposers who reside in the jurisdiction or locality favored by the preference than the preferences provided in ORS 279A.120 (2); and

(c) Uses reasonably clear and precise specifications that promote suitability for the purposes intended and that reasonably encourage competition. [2003 c.794 §25; 2007 c.764 §4]

[no rule]

279A.205 Cooperative procurements authorized. (1) A contracting agency may participate in, sponsor, conduct or administer a cooperative procurement for the procurement of any goods, services or public improvements.

(2) A contracting agency may participate in, sponsor, conduct or administer a permissive or interstate cooperative procurement for the procurement of any goods or services, but not public improvements. [2003 c.794 §26; 2005 c.103 §6]

[no rule]

279A.210 Joint cooperative procurements. (1) A joint cooperative procurement is valid only if:

(a) The administering contracting agency's solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055, 279B.060 or 279B.085 or uses a competitive bidding process substantially equivalent to the competitive bidding process in ORS chapter 279C;

(b) The administering contracting agency's solicitation and the original contract or price agreement identifies the cooperative procurement group or each participating purchasing contracting agency and specifies the estimated contract requirements; and

(c) No material change is made in the terms, conditions or prices of the contract between the contractor and the purchasing contracting agency from the terms, conditions and prices of the original contract between the contractor and the administering contracting agency.

(2) A joint cooperative procurement may not be a permissive cooperative procurement. [2003 c.794 §27]

[no rule]

279A.215 Permissive cooperative procurements. (1) A contracting agency may establish a contract or price agreement through a permissive cooperative procurement only if:

(a) The administering contracting agency's solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055 or 279B.060;

(b) The administering contracting agency's solicitation and the original contract allow other contracting agencies to establish contracts or price agreements under the terms, conditions and prices of the original contract;

(c) The contractor agrees to extend the terms, conditions and prices of the original contract to the purchasing contracting agency; and

(d) No material change is made in the terms, conditions or prices of the contract or price agreement between the contractor and the purchasing contracting agency from the terms, conditions and prices of the original contract between the contractor and the administering contracting agency.

(2)(a) A purchasing contracting agency shall provide public notice of intent to establish a contract or price agreement through a permissive cooperative procurement if the estimated amount of the procurement exceeds \$250,000.

(b) The notice of intent must include:

(A) A description of the procurement;

(B) An estimated amount of the procurement;

(C) The name of the administering contracting agency; and

(D) A time, place and date by which comments must be submitted to the purchasing contracting agency regarding the intent to establish a contract or price agreement through a permissive cooperative procurement.

(c) Public notice of the intent to establish a contract or price agreement through a permissive cooperative procurement must be given in the same manner as provided in ORS 279B.055 (4)(b) and (c).

(d) Unless otherwise specified in rules adopted under ORS 279A.070, the purchasing contracting agency shall give public notice at least seven days before the deadline for submission

of comments regarding the intent to establish a contract or price agreement through a permissive cooperative procurement.

(3) If a purchasing contracting agency is required to provide notice of intent to establish a contract or price agreement through a permissive cooperative procurement under subsection (2) of this section:

(a) The purchasing contracting agency shall provide vendors who would otherwise be prospective bidders or proposers on the contract or price agreement, if the procurement were competitively procured under ORS chapter 279B, an opportunity to comment on the intent to establish a contract or price agreement through a permissive cooperative procurement.

(b) Vendors must submit comments within seven days after the notice of intent is published.

(c) And if the purchasing contracting agency receives comments on the intent to establish a contract or price agreement through a permissive cooperative procurement, before the purchasing contracting agency may establish a contract or price agreement through the permissive cooperative procurement, the purchasing contracting agency shall make a written determination that establishing a contract or price agreement through a permissive cooperative procurement is in the best interest of the purchasing contracting agency. The purchasing contracting agency shall provide a copy of the written determination to any vendor that submitted comments. [2003 c.794 §28]

[no rule]

279A.220 Interstate cooperative procurements. (1) A contracting agency may establish a contract or price agreement through an interstate cooperative procurement only if:

(a) The administering contracting agency's solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055 or 279B.060;

(b) The administering contracting agency's solicitation and the original contract allows other governmental bodies to establish contracts or price agreements under the terms, conditions and prices of the original contract; and

(c) The administering contracting agency permits the contractor to extend the use of the terms, conditions and prices of the original contract to the purchasing contracting agency.

(2) In addition to the requirements in subsection (1) of this section:

(a) The purchasing contracting agency, or the cooperative procurement group of which the purchasing contracting agency is a member, must be listed in the solicitation of the administering contracting agency as a party that may establish contracts or price agreements under the terms, conditions and prices of the original contract, and the solicitation must be advertised in Oregon; or

(b)(A) The purchasing contracting agency, or the cooperative procurement group of which the purchasing contracting agency is a member, shall advertise a notice of intent to establish a contract or price agreement through an interstate cooperative procurement.

(B) The notice of intent must include:

(i) A description of the procurement;

(ii) An estimated amount of the procurement;

(iii) The name of the administering contracting agency; and

(iv) A time, place and date by which comments must be submitted to the purchasing contracting agency regarding the intent to establish a contract or price agreement through an interstate cooperative procurement.

(C) Public notice of the intent to establish a contract or price agreement through an interstate cooperative procurement must be given in the same manner as provided in ORS 279B.055 (4)(b) and (c).

(D) Unless otherwise specified in rules adopted under ORS 279A.070, the purchasing contracting agency shall give public notice at least seven days before the deadline for submission of comments regarding the intent to establish a contract or price agreement through an interstate cooperative procurement.

(3) If a purchasing contracting agency is required to provide notice of intent to establish a contract or price agreement through an interstate cooperative procurement under subsection (2) of this section:

(a) The purchasing contracting agency shall provide vendors who would otherwise be prospective bidders or proposers on the contract or price agreement, if the procurement were competitively procured under ORS chapter 279B, an opportunity to comment on the intent to establish a contract or price agreement through an interstate cooperative procurement.

(b) Vendors must submit comments within seven days after the notice of intent is published.

(c) And if the purchasing contracting agency receives comments on the intent to establish a contract or price agreement through an interstate cooperative procurement, before the purchasing contracting agency may establish a contract or price agreement through the interstate cooperative procurement, the purchasing contracting agency shall make a written determination that establishing a contract or price agreement through an interstate cooperative procurement is in the best interest of the purchasing contracting agency. The purchasing contracting agency shall provide a copy of the written determination to any vendor that submitted comments.

(4) For purposes of this section, an administering contracting agency may be any governmental body, domestic or foreign, authorized under its laws, rules or regulations to enter into contracts for the procurement of goods and services for use by a governmental body. [2003 c.794 §29]

[no rule]

279A.225 Protests and disputes. (1) A protest regarding the procurement process, the contents of solicitation documents or the award or proposed award of an original contract may be directed only to the administering contracting agency. The protest must be in accordance with the provisions of ORS 279B.400 to 279B.425.

(2) A protest regarding the use of a cooperative procurement by a purchasing contracting agency after the execution of an original contract may be directed only to the purchasing contracting agency. The protest must be in accordance with the provisions of ORS 279B.400 to 279B.425 and is limited in scope to the purchasing contracting agency's authority to enter into a cooperative procurement contract.

(3) The decision of a local contracting agency to use a cooperative procurement is reviewable in the circuit court of the county where the principal offices of the local contracting agency are located. The decision of a state contracting agency to use a cooperative procurement shall be reviewable by the Circuit Court for Marion County or the circuit court of the county where the principal offices of the state contracting agency are located.

(4) Disputes regarding contract performance between a purchasing contracting agency and a contractor may be resolved solely by the purchasing contracting agency and the contractor.
[2003 c.794 §30]

[no rule]

State Surplus Property

Penalties

279A.990 Penalties. (1) The provisions of ORS 291.990 apply to ORS 279A.140, 279A.280 and 279B.270. Any violation of ORS 279A.140, 279A.280 or 279B.270 shall be punished as described in ORS 291.990.

(2) Any contractor, subcontractor, agent or person in authority or in charge who violates any provision of ORS 279C.520 or 279C.540 as to hours of labor shall be fined not less than \$50 nor more than \$1,000 or imprisoned in the county jail for not less than five days nor more than one year, or both.

(3) Any contractor or subcontractor subject to ORS 279C.840 who fails to pay the prevailing rate of wage as required by ORS 279C.840 shall be punished by a fine of not more than \$1,000 or by imprisonment in the county jail for not more than six months, or both. [2003 c.794 §46]

[no rule]

[End of Division A]

DIVISION B

PUBLIC CONTRACTS FOR GOODS, SERVICES AND PERSONAL SERVICES

Format

Those sections of the Public Contracting Code (ORS 279A, 279B, and 279C) applicable to Port of Portland contracting are set forth in full (sections, subsections, paragraphs, etc. applicable only to state agencies have been excluded; deleted subsections, paragraphs, etc. are denoted by “* * *”; compiler’s notes generally have been omitted). The Contracting Rule implementing or otherwise related to a particular statutory section appears immediately after the statutory section. This format has been selected to facilitate the integrated application of statutory requirements and rule requirements to Port of Portland contracting.

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General Provisions

279B.200 Definitions for ORS 279B.200 to 279B.240

[no rule]

279B.205 Specifications to encourage reasonable competition

[no rule]

279B.210 Policy; development of specifications

[no rule]

- 279B.215 Brand name or equal specification; brand name specification
Port Rule B.215 Specification of Particular Products
- 279B.220 Conditions concerning payment, contributions, liens, withholding
[no rule]
- 279B.225 Condition concerning salvaging, recycling, composting or mulching yard waste material
[no rule]
- 279B.230 Condition concerning payment for medical care and providing workers' compensation
[no rule]
- 279B.235 Condition concerning hours of labor
[no rule]
- 279B.240 Exclusion of recycled oils prohibited
[no rule]

Specifications in State Contracts

* * *

Legal Remedies

- 279B.400 Protests and judicial review of approvals of special procurements
Port Rule B.400 Protests
- 279B.405 Protests and judicial review of solicitations
[no rule]
- 279B.410 Protests of contract award
[no rule]
- 279B.415 Judicial review of protests of contract award
[no rule]
- 279B.420 Judicial review of other violations
[no rule]

279B.425 Review of prequalification and debarment decisions

[no rule]

Port Rule B.500 Personal Service Contracts

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Relevant Statutes with Rules

General Provisions

279B.005 Definitions. (1) As used in this chapter, unless the context or a specifically applicable definition requires otherwise:

(a) “Invitation to bid” means all documents, whether attached or incorporated by reference, used for soliciting bids.

(b) “Procurement description” means the words used in a solicitation to describe the goods or services to be procured. “Procurement description” includes specifications attached to or made a part of the solicitation.

(c) “Request for proposals” means all documents, whether attached or incorporated by reference, used for soliciting proposals.

(d) “Responsible bidder” or “responsible proposer” means a person who meets the standards of responsibility described in ORS 279B.110.

(e) “Responsive bid” or “responsive proposal” means a bid or proposal that substantially complies with the invitation to bid or request for proposals and all prescribed procurement procedures and requirements.

(2) ORS 279A.010 contains general definitions applicable throughout this chapter. [2003 c.794 §47; 2005 c.103 §7; 2007 c.764 §5]

[no rule]

Note: “*Personal Services,*” as used in this [Chapter Division B](#), has the meaning given to it by the Port’s Contract Review Board Rule No. 5, restated here for the convenience of the user:

5. Personal Services Contracts

(a) *"Personal services" means services where the unique or unusual professional, analytical, creative, or artistic abilities of the individual providing the service are of paramount importance.*

(b) *Personal services include but are not limited to:*

(1) *Services performed as an independent contractor in a professional capacity, including, but not limited to, the services of an accountant, attorney, architectural or land use planning consultant, physician, dentist, registered professional engineer, appraiser, surveyor, or data processing consultant.*

(2) *Services as an artist in the performing or fine arts, including, but not limited to, persons identified as photographer, film maker, painter, weaver, or sculptor.*

(3) *Services of a specialized, creative or research-oriented nature.*

(4) *Services of a consultant.*

(5) *Services of an insurance agent of record.*

(c) *The following are **not** personal services:*

(1) *Services, even though in a professional capacity, if they result predominantly in a tangible product. For example, a landscape architect's designing of a garden is personal services, but designing a garden and supplying all the shrubs and trees results predominantly in a tangible product.*

(2) Labor that is of a type that generally can be done by any competent and trained worker, including without limitation janitorial, security guard, crop spraying, laundry, and landscape maintenance services.

(3) Trade-related activities that amount to the provision of labor or materials, even though a specific license may be required to engage in the activity. [\[Revised July 9, 2008\]](#)

279B.010 Policy. In addition to the policy stated in ORS 279A.015, it is the policy of the State of Oregon that public contracting activities should:

— (1) Provide effective outcomes that represent optimal value to the contracting agency and, to the greatest extent feasible, be consistent with market practices;

— (2) Seek consistency in procurement practices between contracting agencies covered under the Public Contracting Code while preserving each contracting agency's ability to adopt rules to maximize the contracting agency's effectiveness; and

— (3) Apply innovative practices while maintaining quality and integrity. [\[2003 c.794 §48\]](#)

[no rule]

279B.015 Applicability. As provided in ORS 279A.020 Except as provided in ORS 279C.320, public contracting under this chapter is subject to ORS chapter 279A, but not ORS chapter 279C. [\[2003 c.794 §48a; 2005 c.103 §8\]](#)

Rule B.015 Application

These Division B rules implement ORS chapter 279B, Public Procurements, and apply to the ~~Procurement~~ procurement of Goods, Services goods, services, and Personal Services personal services. These rules do not apply to the procurement of Public Works public works or Public Improvement public improvement contract awards. Rules for Public Works public works and Public Improvement public improvement contract awards are found in Division C of these rules.

279B.020 Maximum hours of labor on public contracts; holidays; exceptions; liability to workers; rules.

(1) When labor is employed by a contracting agency through a contractor, a person may not be required or permitted to labor more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity or emergency or when the public policy absolutely requires it, in which event, the person so employed for excessive hours shall receive at least time and a half pay:

(a)(A) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or

(B) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and

(b) For all work performed on Saturday and on the following legal holidays:

(A) Each Sunday.

(B) New Year's Day on January 1.

(C) Memorial Day on the last Monday in May.

(D) Independence Day on July 4.

- (E) Labor Day on the first Monday in September.
- (F) Thanksgiving Day on the fourth Thursday in November.
- (G) Christmas Day on December 25.

(2) An employer shall give notice in writing to employees who perform work under subsection (1) of this section, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that employees may be required to work.

(3) For the purpose of this section, each time a legal holiday, other than Sunday, listed in subsection (1) of this section falls on Sunday, the succeeding Monday shall be recognized as a legal holiday. Each time a legal holiday listed in subsection (1) of this section falls on Saturday, the preceding Friday shall be recognized as a legal holiday.

(4) When specifically agreed to under a written labor-management negotiated labor agreement, an employee may be paid at least time and a half pay for work performed on any legal holiday specified in ORS 187.010 and 187.020 that is not listed in subsection (1) of this section.

(5) This section does not apply to contracts for personal services designated under ORS 279A.055, provided that persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in subsection (1)(b)(B) to (G) of this section and for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(6) Subsections (1) and (2) of this section do not apply to contracts for services at a county fair or for other events authorized by a county fair board if persons employed under the contract receive at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week.

(7) Subsections (1) to (3) of this section do not apply to a contract for services if the contractor is a party to a collective bargaining agreement in effect with any labor organization.

(8)(a) Subsections (1) and (2) of this section do not apply to contracts for services. However, persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in subsection (1)(b)(B) to (G) of this section and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) An employer shall give notice in writing to employees who work on a contract for services, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

(9) Any contractor or subcontractor or contractor's or subcontractor's surety who violates subsection (1) or (2) that violates the provisions of this section is liable to the affected employees in the amount of their unpaid overtime wages and in an additional amount equal to the unpaid overtime wages as liquidated damages. If the violation resulted from willful falsification of payroll records, the contractor or subcontractor or contractor's or subcontractor's surety is liable to the affected employees in the amount of their unpaid overtime wages and in an additional amount equal to twice the unpaid overtime wages as liquidated damages.

(10) An action to enforce liability to employees under subsection (3) of this section may be brought as an action on the contractor's payment bond as provided for in ORS 279C.610.

(11) This section does not apply to:

(a) Financial institutions as defined in ORS 706.008.

(b) Labor performed in the prevention or suppression of fire under contracts and agreements made pursuant to the authority of the State Forester or the State Board of Forestry under ORS 477.406.

(c) Public contracts for goods or personal property.

(12) In accordance with any applicable provision of ORS chapter 183, the Commissioner of the Bureau of Labor and Industries may adopt rules to carry out the provisions of this section. [2003 c.794 §48b; 2005 c.103 §8a]

[no rule]

Note: The Bureau of Labor and Industries rules that carry out the provisions of section 279B.020 may be found in Oregon Administrative Rules Chapter 839 Division 020.

279B.025 Procurement practices regarding recyclable and reusable goods. All contracting agencies shall establish procurement practices that ensure, to the maximum extent economically feasible, the procurement of goods that may be recycled or reused when discarded. [2003 c.794 §49]

[no rule]

279B.030 Demonstration that procurement will cost less than performing service or that performing service is not feasible; exemptions. (1) * * * .

(2) * * * .

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

* * *

(d) The Port of Portland; or

* * * . [2009 c.880 §2]

279B.033 Contents of cost analysis; conditions under which procurement may proceed; exceptions. * * * [2009 c.880 §3]

279B.036 Determination of feasibility of procurement. * * * [2009 c.880 §4]

Note: * * * . [2009 c.880 §4a]

Source Selection

Methods of Source Selection

279B.050 Methods of source selection. (1) Except as provided in subsection (2) of this section, a contracting agency shall award a public contract for goods or services by competitive sealed bidding under ORS 279B.055 or competitive sealed proposals under ORS 279B.060.

(2) The requirements of subsection (1) of this section do not apply to public contracts established as provided in ORS 279B.065, 279B.070, 279B.075, 279B.080 or 279B.085.

(3) Notwithstanding the applicability of ORS 279B.065, 279B.070, 279B.075, 279B.080 or 279B.085 to a public contract, a contracting agency nevertheless may award the public contract under subsection (1) of this section.

(4) A local contracting agency may elect, by rule, charter, ordinance or other appropriate legislative action, to award contracts for personal services, as designated under ORS 279A.055, under the procedures of ORS 279B.050 to 279B.085.

(5) State contracting agencies shall solicit contracts for personal services in accordance with ORS 279B.050 to 279B.085. [2003 c.794 §50; 2007 c.764 §6]

Rule B.050 Procurement Methods

(1) *The Port shall award contracts for goods and services covered by these Rules using any method authorized by state law or Port Contracting Rules. Such different methods are called methods of “source selection.” Source selection methods include cooperative procurements, competitive sealed bidding, competitive sealed proposals, and small, intermediate, sole source, emergency and special procurements.*

(2) *State law requires the Port to use the Services of Qualified Rehabilitation Facilities (QRF's) in certain instances. When required, the Port shall use a QRF in accordance with the rules established for public agencies by the Department of Administrative Services, as restated in Port Contracting Rules Section Division A.*

(3) *Once the appropriate source selection method has been chosen the Port may consider the best means of selecting a contractor within the source selection method it has chosen, provided the method is amenable to such discretion.*

(4) *The Manager of Contracts and Procurement is authorized to waive any nonconformity with the rules of contractor selection if the Manager of Contracts & Procurement determines that the defect was minor and likely would not have had an effect on the outcome of the selection process.*

Note: Rules for the screening and selection of personal services providers begin at Port Rule B.500

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

— (2) The contracting agency shall issue an invitation to bid, which must ~~include~~:

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

— (b) The ~~Specify the~~ name and title of the person designated ~~for the receipt of to receive~~ bids and the person ~~designated by~~ the contracting agency designates as the contact person for the procurement, if different;

— (c) A procurement description;

— (c) Describe the procurement. In the description, the contracting agency shall identify the scope of work included within the procurement, outline the contractor’s anticipated duties and

set expectations for the contractor's performance. Unless the 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) A Specify a time, date and place thatfor prequalification applications, if any, mustto be filed and the classes of work, if any, for which bidders must be prequalified in accordance with ORS 279B.120;

___(e) A statementState that the contracting agency may cancel the procurement or reject any or all bids in accordance with ORS 279B.100;

___(f) A statementState 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 the invitation to bid is issued by a state contracting agency; issues the invitation to bid.

___(g) A statement that requiresRequire the contractor or subcontractor to possess an asbestos abatement license, if required under ORS 468A.710; and.

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

___(A) Reducing or withholding payment;

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

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

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

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

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

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

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

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

___(d) In addition to the modes of publication authorized by paragraphs (b) and (c) of this

subsection, the contracting agency may use any other medium reasonably calculated to reach prospective bidders or proposers.

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

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

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

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

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

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

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

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

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

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

— (10) If a contracting agency awards a contract ~~is awarded~~, the contracting agency shall

award the contract:

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

— ___ (b) ~~When~~If the invitation to bid specifies or authorizes the award of multiple contracts, to the responsible bidders:

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

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

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

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

— ___ (13) The contracting agency may issue a request for information, a request for interest or other preliminary documents to obtain information useful in ~~the preparation of~~preparing an invitation to bid. [2003 c.794 §51; 2009 c.880 §5]

Rule B.055 Competitive Sealed Bidding

(1) Advertisement:

(a) The Port shall advertise invitations to bid in the Oregonian or the Daily Journal of Commerce, and shall also Post all notices for invitations to bid on the Port's website. If the Executive Director or the Manager of Contracts and Procurement make a determination that limiting the posting of the notice for invitations to bid solely by electronic means is cost effective to the Port, then publishing the notice in a newspaper may be waived.

(b) The notice shall be posted at least 7 days prior to the date the invitations to bid are due, unless the Manager of Contracts and Procurement determines that a shorter time period is necessary and in the Port's best interest.

(2) Distribution of Solicitation Documents

The Port normally distributes solicitation documents by handing them to individuals who appear at the office of the Port's Contracts and Procurement Division or via U.S. Mail. The Port may distribute solicitation documents by any commercially reasonable means, including without limitation fax, other electronic means and express mail, if the Port determines in its sole discretion that other means are appropriate under the circumstances. The Port may, but is not

obligated to, deliver a solicitation document by other more costly means if a particular prospective offeror pays the additional cost.

(3) Prospective Bidders and Proposers Lists

A prospective bidder or proposer for a particular procurement is responsible for ensuring that its correct name, address, telephone number, and fax number have been effectively and accurately communicated to the Port's Contracts and Procurement Division for inclusion on the list of prospective bidders or proposers for that procurement. The Port's Contracts and Procurement Division endeavors to include on the list for a particular procurement each prospective bidder or proposer to which a solicitation document is issued by the Contracts and Procurement Division. Prospective bidders or proposers who obtain solicitation documents from other sources, such as plan centers, are not automatically added to the list, and must contact the Contracts and Procurement Division to be added. Listed prospective bidders and proposers are responsible for immediately notifying the Port's Contracts and Procurement Division in writing of any changes in name, address, telephone number, or fax number.

(4) Responsibility of Bidders

While the Port endeavors to provide all known solicitation holders with all the available information and documentation necessary to provide a responsive bid, through notice of document availability by mail or electronic means, the Port cannot guarantee that such notice will be delivered to or read by solicitation holders in a timely manner. Bidders are therefore responsible for ensuring they have received all necessary information to provide a responsive bid, including without limitation all bid documents, addenda, plans, attachments, exhibits, etc., prior to submitting a bid.

(5) Prebid and Proposal Conferences

(a) Generally.

The Port may hold a prebid or preproposal conference to allow a site inspection and to hear and respond to questions. If the time and place of a prebid or preproposal conference are not stated in the invitation to bid or request for proposal, all prospective bidders or proposers on the list maintained by the Port's Contracts and Procurement Division shall be notified of the time and place. Notification may be by telephone, fax or other electronic means, or in writing, at the Port's option.

(b) Mandatory.

The Port may require attendance at a prebid or preproposal conference as a condition precedent to the submission of a bid or proposal. The Port may refuse to open or may reject as nonresponsive a bid from a bidder who failed to attend a mandatory prebid conference, and may refuse to open or decline to evaluate a proposal from a proposer who failed to attend a mandatory preproposal conference. The Port may, but is not obligated to, arrange for a subsequent prebid or preproposal conference if requested by one or more prospective bidders or proposers who were unable to attend a scheduled, mandatory prebid or preproposal conference for a reason determined by the Port to be commercially reasonable under the circumstances. If a subsequent prebid or preproposal conference is arranged, all prospective bidders or proposers on the Contracts and Procurement Division's list shall be notified in advance and allowed to attend.

(c) Limited Effect.

Statements and other information from Port employees at a prebid or preproposal conference do not effect any change in the invitation to bid or the request for proposals, or the contracts that may arise from them. Changes in the invitation to bid or the request for proposals may be effected only by a written addendum issued by the Port. Bidders and proposers may rely only upon the invitation to bids or the request for proposals, with any changes made by addendum, to establish all of the procurement requirements and all contract provisions other than those established by the bid or proposal.

(d) Change Requests.

A prospective bidder or proposer who wants to propose a change to the invitation to bid or the request for proposals should submit a written request, even if the change was requested during a prebid or preproposal conference. The request should be submitted in accordance with any instructions in the invitation to bid or the request for proposals. If the Port fails to respond to a change request made during a prebid or preproposal conference, or to a written change request, the request shall be deemed denied. If the Port responds to a change request, the response may be in the form of an addendum issued to all prospective bidders or proposers, with no specific response to the requestor.

(6) Addenda

(a) Requirement

A solicitation document may be changed only by a written addendum issued by the Port. When an addendum is required, it shall be issued to all prospective bidders or proposers on the list maintained for the procurement in question by the Port's Contracts and Procurement Division.

(b) Acknowledgment Required

A bidder or proposer must timely acknowledge in writing receipt of all addenda issued by the Port. Failure to acknowledge receipt of an addendum may cause a bid to be rejected as nonresponsive, and may cause a proposal to be considered outside the competitive range or to be determined after evaluation to be inferior to other proposals that included acknowledgment of receipt of the addendum. Acknowledgment of receipt of an addendum most often will be part of the bid or proposal, but may be separate from the bid or proposal, and need not be sealed. The Port shall accept a written acknowledgment of receipt of an addendum by any commercially reasonable means, including but not limited to fax and email. Acknowledgment of receipt of an addendum to an invitation to bid is timely only if it is received in a manner and at a time that would make it timely if it were a bid.

(c) Distribution and Receipt

Addenda may be distributed by U.S. mail, fax or other electronic means, hand delivery, or other commercially reasonable means. Failure to receive an addendum to a solicitation does not excuse failure to acknowledge receipt of the addendum, even if the failure to receive was through no fault of the prospective bidder or proposer, and even if the failure to receive was the fault of the Port. The Port, in its sole discretion, may extend a bid opening to allow a bidder or proposer time to acknowledge receipt of an addendum.

(7) Method of Submitting Offers

(a) Generally

Bids must be submitted in writing on the form provided by the Port or a reasonable facsimile. Bids may not be submitted by fax or other electronic means unless expressly ~~allowed~~directed or permitted by the invitation to bid. A bid shall be considered timely submitted if it is delivered to the Manager of Contracts and Procurement or the Manager's designee by the deadline stated in the invitation to bid.

(b) Timeliness

Offerors are responsible for ensuring their offers are timely. The Port may decline to consider a late offer, even if the offer is late because of a delay in the Port's internal handling of mail or documents or because the Port's receiving equipment was unavailable.

(c) Completeness

Offerors are responsible for ensuring their offers are received by the Port in a complete, legible, ungarbled form. The Port may decline to consider an offer that is incomplete, illegible, or garbled, even if the problem is caused by the Port's hardware or software.

(d) Electronic Submission

Offers submitted electronically must bear a facsimile signature, provided that the requirement for a facsimile signature is excused when an electronic quotation is properly submitted in lieu of an oral quotation, or when the solicitation document expressly authorizes electronic data interchange, e-mail, or another electronic submission method by which facsimile signatures generally cannot be transmitted. A solicitation document expressly authorizing electronic submission of offers may specify methods for establishing the authenticity of offers.

(8) Bid Withdrawal

At any time before the deadline for receipt of bids, a bidder may withdraw its bid without consequence. The withdrawal must be by someone with the necessary authority, and must be a signed writing.

(9) Bid Modification

At any time before the deadline for receipt of bids, a bidder may modify its bid in writing. A bidder shall prepare and submit any modification to its bid to the Port in accordance with Port Contracting Rule B.055(7), unless otherwise specified in the solicitation document. Any modification must include the bidder's statement that the modification amends and supersedes the prior bid. The bidder shall mark the submitted modification as follows:

(a) Bid (or Proposal) Modification; and

(b) Solicitation Number (or Other Identification as specified in the Solicitation Document).

(10) Receipt and Recording of Offers; Confidentiality of Offers

The Port shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The Port shall not open the Offer or modification upon receipt, but shall maintain it as confidential and secure until Opening. If the Port inadvertently opens an Offer or a modification prior to the Opening, the Port shall return the Offer or modification to its secure and confidential state until Opening. The Port shall document the resealing for the

Procurement file (e.g. "Port inadvertently opened the Offer due to improper identification of the Offer").

(11) Bid Opening

(a) Generally

Bids shall be opened in a place designated by the Port that is open to the public at the time bids are opened. The place bids will be opened may be changed by the Port at any time. The time for opening bids may be postponed at any time for the Port's convenience or if the Port determines that postponement would be in the Port's best interest. A bid opening postponement or relocation shall be communicated orally or by a posted sign to anyone who appears at the previously designated time and place for the bid opening. If time permits, a bid opening postponement or relocation shall be communicated to all prospective bidders on the list maintained by the Port's Contracts and Procurement Division by mail, fax, email, or any other commercially reasonable means. A bid opening postponement or relocation need not be communicated by addendum.

(b) Availability for inspection

Subject to any exemptions under Oregon public records statutes, bids shall be available for public inspection only after the Port has finished evaluating them for responsiveness.

(12) Bid Evaluation

Opened bids shall be evaluated in accordance with applicable statutes and these Rules. When a bid is determined to be unresponsive to the invitation to bid, it will not be evaluated further. Bidders who submit responsive bids shall be evaluated for responsibility under applicable statutes, these Rules, and the invitation to bid.

(13) Bid Errors

(a) Errors of Judgment

A bid may not be corrected or withdrawn for an error in judgment. If a bidder is awarded a public contract and refuses to promptly and properly execute the public contract because of an error in judgment, the bidder's bid security must be forfeited under ORS 279B.055(3)(c).

(b) Minor Informalities

The Port may waive or permit a bidder to correct a minor informality. A minor informality is either a matter of form rather than substance that is evident on the face of the bid, or an insignificant mistake that can be waived without prejudice to other bidders. For example, failure to sign the bid in the designated block on the bid form is a minor informality if a signature appears on the bid bond or somewhere else in the bid evidencing an intent to be bound by the bid.

(c) Clerical Errors

A clerical error is an error in drafting the bid, and may include without limitation typographical errors, arithmetic errors, and transposition and other errors in transferring numbers from work sheets to the bid form. If a clerical error is apparent on the face of the bid and the correction also is apparent on the face of the bid, the Port shall correct the error before evaluating bids. A discrepancy between a unit price and an extended bid item price is a clerical error and shall be

corrected by giving precedence to the unit price. If an error not apparent on the face of the bid is brought to the Port's attention, the bidder may submit evidence to establish that the error is a clerical error. If it is clear from the face of the bid or from evidence submitted by the bidder that an error is a clerical error, rather than an error in judgment, but the correction of the error is not apparent on the face of the bid, the bidder may either withdraw its bid without forfeiting its bid security under ORS 279B.055(3)(c), or agree to proceed with the public contract as bid, without correcting the error. If the bidder takes neither of those actions, the Port shall reject the bid as non responsive. A bidder may not correct a clerical error if the correction is not apparent on the face of the bid.

(14) Irrevocability of Offers

(a) Generally

All bids received by the Port for a particular public contract become binding offers when the deadline for receipt of bids passes, and remain irrevocable for 30 calendar days after opening unless a different period is specified in the invitation to bid.

(b) Extensions and Reinstatements

An offeror may extend the period of irrevocability of its offer by giving the Port a written extension specifying a new period of irrevocability. An offeror may reinstate an offer (unchanged) after the expiration of the period of irrevocability by giving the Port a written reinstatement specifying a new period of irrevocability. An offeror may not "extend" or "reinstate" an offer that differs in any material respect from the original; a purported extension or reinstatement of a materially differing offer amounts to a new offer.

(15) Tied Low Bids or Quotations

(a) Generally

If (1) low bids or quotations are tied, (2) the price, fitness, availability, and quality of the goods or services offered by the tied offerors are otherwise equal, and (3) one of the tied offerors offers goods or services manufactured or produced in Oregon, the contract shall be awarded to that offeror in accordance with ORS 279A.120. If two or more of the tied offerors offer goods or services manufactured or produced in Oregon, the contract shall be awarded to one with principal offices or headquarters in Oregon. If two or more of the tied offerors offer goods or services manufactured or produced in Oregon, and none has principal offices or headquarters in Oregon, or if two or more of them have principal offices or headquarters in Oregon, the contract shall be awarded by drawing lots. If none or all of the tied offerors offer goods or services manufactured or produced in Oregon, the contract shall be awarded by drawing lots.

(b) Unequal Quality

If the fitness, availability, and quality of the goods or services offered by tied offerors are not otherwise equal, the contract shall be awarded to the offeror determined by the Port to offer the superior goods or services.

(16) Rejection of Bids for Good Cause in the Public Interest

The Port may reject any or all bids in accordance with ORS 279B.100 for good cause upon a finding that rejection is in the public interest. Situations where good cause is sufficient to warrant rejection of all bids include but are not limited to: (1) competition is unnecessarily

restricted because of the content of or an error in the solicitation document or the solicitation process; (2) all offered prices are too high or all offered performance is insufficient to meet the Port's needs; (3) ambiguous or misleading provisions in the solicitation document, or misconduct or error, threaten the fairness and integrity of the competitive process; and (4) events other than legitimate market forces threaten the integrity of the competitive procurement process.

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

— (2) The request for proposals must ~~include~~:

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

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

— (c) ~~A procurement description;~~

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

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

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

— (f) ~~A statement State~~ 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 ~~the request for proposals is issued by~~ a state contracting agency; issues the request for proposals.

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

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

— (A) Reducing or withholding payment;

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

or

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

(3) The request for proposals also may:

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

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

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

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

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

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

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

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

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

~~—(5)~~ (6)(a) Notwithstanding ORS 192.410 to 192.505, proposals may be opened in a manner to avoid ~~disclosure of~~disclosing contents to competing proposers during, when applicable, the process of negotiation, but the contracting agency shall record and make available the identity of all proposers as part of the contracting agency's public records ~~from and~~ after the ~~opening of the~~ proposals are opened. Notwithstanding ORS 192.410 to 192.505, proposals are not required to

be open for public inspection until after the notice of intent to award a contract is issued. The fact that proposals are opened at a meeting, as defined in ORS 192.610, does not make ~~their~~the contents of the proposals subject to disclosure, regardless of whether the public body opening the proposals fails to give notice of or provide for an executive session for the purpose of opening proposals.

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

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

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

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

— ~~(A)~~ (a) An award or awards based solely on the ranking of proposals;

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

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

— ~~(D)~~ (d) Serial negotiations, beginning with the highest ranked proposer;

— ~~(E)~~ (e) Competitive simultaneous negotiations;

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

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

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

— ~~(e)~~ (9) Revisions of proposals may be permitted after the submission of proposals and before award for the purpose of obtaining best offers or best and final offers.

— ~~(d)~~ (10) After the opening of proposals, a contracting agency may issue or electronically post an addendum to the request for proposals that modifies the criteria, rating process and procedure for any tier of competition before the start of the tier to which the addendum applies. The contracting agency shall send an addendum that is issued by a method other than electronic posting to all proposers who are eligible to compete under the addendum. The contracting

agency shall issue or post the addendum at least five days before the start of the subject tier of competition or as ~~otherwise determined by~~ the contracting agency ~~to be~~ otherwise determines is adequate to allow eligible proposers to prepare for the competition in accordance with rules adopted under ORS 279A.065.

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

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

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

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

~~—(11__ (15)~~ The contracting agency may issue a request for information, a request for interest, a request for qualifications or other preliminary documents to obtain information useful in ~~the preparation of preparing~~ a request for proposals. ~~[2003 c.794 §52]~~

(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. [2003 c.794 §52; 2009 c.880 §6]

Rule B.060 Competitive Sealed Proposals

(1) Applicability of Rule B.055 to Competitive Proposals

The Rules stated in Section B.055 generally apply also to Competitive Proposals, with the following exceptions: (Note: The term "proposal" may be substituted for the word "bid" when a rule from Section B.055 is applied to Competitive Proposals)

(a) Rather than apply Rule B.055.11, Bid Opening, the following rule applies:

Proposal Opening

The Port may open proposals at any time. There is no requirement for proposals to be opened in public. Subject to any exemptions under Oregon public records statutes, proposals shall be available for public inspection only after the Port has finished evaluating them.

(b) Rather than apply Rule B.055.12, Bid Evaluation, the following rule applies:

Proposal Evaluation

Proposals shall be evaluated based upon the evaluation criteria established by the request for proposals. Changes in evaluation criteria shall be communicated to all proposers or prospective proposers by addendum. If evaluation criteria are changed after proposals have been submitted, all proposers shall have an opportunity to supplement their proposals or submit best and final offers after receipt of the addendum changing the evaluation criteria.

(c) Rather than apply Rule B.055.13, Bid Errors, the following rule applies:

Proposal Errors

Unless there is limiting language in the request for proposals, errors in proposals may be corrected at any time prior to the deadline for the Port's receipt of best and final offers, or, if best and final offers are not invited or allowed, the beginning of the Port's final evaluation of proposals.

(d) Rather than apply Rule B.055.14, Irrevocability of Offers, the following rule applies:

Proposal Modification

The proposer may not modify its proposal without the prior written consent of the Port.

(2) Competitive Range

The Port shall have discretion in the manner in which a competitive range is defined for a specific procurement. Generally, the competitive range will be defined as a natural "break" in evaluation scores between a higher scoring group of proposers and a lower scoring group of proposers. The number of proposers within a competitive range may not be defined prior to evaluation of proposals.

(3) Selection Method

(a) The Port shall have discretion in the method used to select the most advantageous contractor, including, but not necessarily limited to, negotiation with the highest ranked proposer, competitive, simultaneous negotiations, ~~multiple~~ with one or more proposers, multi-tiered competition designed to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower-ranked proposers, or any combination of methods.

(b) The Request for ~~Proposal~~ Proposals may, but is not required to, define the selection method to be used for the specific procurement or class of procurements.

(4) Addenda Issued after Proposal Opening

(a) If the Port issues an addendum after proposals are opened, the Port shall provide sufficient time for proposers to supplement their proposals, if necessary, based on the changes provided in the addendum. Less than five days may be allowed for proposal supplementation if the changes made by the addendum do not require extensive analysis or action on the part of the affected proposers.

279B.065 Small procurements. (1) Any procurement of goods or services not exceeding \$5,000 may be awarded in any manner deemed practical or convenient by the contracting agency, including by direct selection or award. A contract awarded under this section may be amended to exceed \$5,000 only in accordance with rules adopted under ORS 279A.065.

(2) A procurement may not be artificially divided or fragmented so as to constitute a small

procurement under this section. [2003 c.794 §53; 2005 c.103 §8b; 2005 c.64 §1]

Rule B.065 Small Procurements

The Port shall follow procedures established by the Manager of Contracts and Procurement when procuring goods or services not exceeding \$5,000. Contracts awarded under this section may be amended in accordance with the Port's Contract Review Board Rules.

279B.070 Intermediate procurements. (1) Any procurement of goods or services exceeding \$5,000 but not exceeding \$150,000 may be awarded in accordance with intermediate procurement procedures. A contract awarded under this section may be amended to exceed \$150,000 only in accordance with rules adopted under ORS 279A.065.

(2) A procurement may not be artificially divided or fragmented so as to constitute an intermediate procurement under this section.

(3) When conducting an intermediate procurement, a contracting agency shall seek at least three informally solicited competitive price quotes or competitive proposals from prospective contractors. The contracting agency shall keep a written record of the sources of the quotes or proposals received. If three quotes or proposals are not reasonably available, fewer will suffice, but the contracting agency shall make a written record of the effort made to obtain the quotes or proposals.

(4) If a contract is awarded, the contracting agency shall award the contract to the offeror whose quote or proposal will best serve the interests of the contracting agency, taking into account price as well as considerations including, but not limited to, experience, expertise, product functionality, suitability for a particular purpose and contractor responsibility under ORS 279B.110. [2003 c.794 §54]

Rule B.070 Intermediate procurements

The Port shall follow the requirements of ORS 279B.070, and the procedures established by the Manager of Contracts and Procurement for the award of contracts less than or equal to \$100,000. Award of Contracts greater than \$100,000 shall be made under the requirements set forth in ORS 279B.055 and .060.

279B.075 Sole-source procurements. (1) A contracting agency may award a contract for goods or services without competition when the Director of the Oregon Department of Administrative Services, the local contract review board or a state contracting agency, if it has procurement authority under ORS 279A.050, or a person designated in writing by the director, or board or state contracting agency with procurement authority under ORS 279A.050, determines in writing, in accordance with rules adopted under ORS 279A.065, that the goods or services, or class of goods or services, are available from only one source.

(2) The determination of a sole source must be based on written findings that may include:

(a) That the efficient utilization of existing goods requires the acquisition of compatible goods or services;

(b) That the goods or services required for the exchange of software or data with other public or private agencies are available from only one source;

(c) That the goods or services are for use in a pilot or an experimental project; or

(d) Other findings that support the conclusion that the goods or services are available from only one source.

(3) To the extent reasonably practical, the contracting agency shall negotiate with the sole source to obtain contract terms advantageous to the contracting agency. [2003 c.794 §55; 2005 c.103 §8c]

Rule B.075 Sole-Source Procurements

Determination of sole source procurement applicability shall be made in writing by the Executive Director or the Manager of Contracts and Procurement, as applicable in accordance with Port Contract Review Board Rules.

279B.080 Emergency procurements. (1) The head of a contracting agency, or a person designated under ORS 279A.075, may make or authorize others to make emergency procurements of goods or services in an emergency. The contracting agency shall document the nature of the emergency and describe the method used for the selection of the particular contractor.

(2) For an emergency procurement of construction services that are not public improvements, the contracting agency shall ensure competition for a contract for the emergency work that is reasonable and appropriate under the emergency circumstances. In conducting the procurement, the contracting agency shall set a solicitation time period that the contracting agency determines to be reasonable under the emergency circumstances and may issue written or oral requests for offers or make direct appointments without competition in cases of extreme necessity. [2003 c.794 §56; 2007 c.764 §6a]

Rule B.080 Emergency Procurements

(a) Award of a public contract under emergency procurement conditions as described in ORS 279A.010 shall be authorized in writing by Executive Director, except that the Manager of Contracts and Procurement may authorize in writing an emergency procurement up to the Manager's level of delegated authority.

(b) Award of a public contract under conditions of a disaster as described in Port Contracting Rule A.010 may be made by any Port Personnel designated by the Manager of Contracts and Procurement or by the Emergency Operations Center Chief, if active.

(c) A public contract exempt from competitive bidding because of an emergency or disaster may be awarded by any commercially reasonable means under the circumstances.

279B.085 Special procurements. (1) As used in this section and ORS 279B.400:

(a) "Class special procurement" means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of entering into a series of contracts over time or for multiple projects.

(b) "Contract-specific special procurement" means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of entering into a single contract or a number of related contracts on a one-time basis or for a single project.

(c) "Special procurement" means, unless the context requires otherwise, a class special

procurement, a contract-specific special procurement or both.

(2) Except as provided in subsection (3) of this section, to seek approval of a special procurement, a contracting agency shall submit a written request to the Director of the Oregon Department of Administrative Services or the local contract review board, as applicable, that describes the contracting procedure, the goods or services or the class of goods or services that are the subject of the special procurement and the circumstances that justify the use of a special procurement under the standards set forth in subsection (4) of this section.

(3) When the contracting agency is the office of the Secretary of State or the office of the State Treasurer, to seek approval of a special procurement, the contracting agency shall submit a written request to the Secretary of State or the State Treasurer, as applicable, that describes the contracting procedure, the goods or services or the class of goods or services that are the subject of the special procurement and the circumstances that justify the use of a special procurement under the standards set forth in subsection (4) of this section.

(4) The director, a local contract review board, the Secretary of State or the State Treasurer may approve a special procurement if the director, board, Secretary of State or State Treasurer finds that a written request submitted under subsection (2) or (3) of this section demonstrates that the use of a special procurement as described in the request, or an alternative procedure prescribed by the director, board, Secretary of State or State Treasurer:

(a) Is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts; and

(b)(A) Is reasonably expected to result in substantial cost savings to the contracting agency or to the public; or

(B) Otherwise substantially promotes the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under ORS 279B.055, 279B.060, 279B.065 or 279B.070 or under any rules adopted thereunder.

(5) Public notice of the approval of a special procurement must be given in the same manner as provided in ORS 279B.055 (4).

(6) If a contracting agency intends to award a contract through a special procurement that calls for competition among prospective contractors, the contracting agency shall award the contract to the offeror the contracting agency determines to be the most advantageous to the contracting agency.

(7) When the director, a local contract review board, the Secretary of State or the State Treasurer approves a class special procurement under this section, the contracting agency may award contracts to acquire goods or services within the class of goods or services in accordance with the terms of the approval without making a subsequent request for a special procurement. [2003 c.794 §57; 2005 c.103 §8d; 2007 c.764 §7]

[Note: * * * \[2009 c.627 §8\]](#)

Rule B.085 Special Procurements

When the Port determines that there is a need to award a contract or class of contracts by means other than the rules provided for competitive sealed bids, competitive sealed proposals, small procurements, or intermediate procurements, and when the rules for sole source, emergency, or cooperative procurements do not apply, approval must first be sought from the Port Contract Review Board following the procedures set forth in ORS 279.B.085. Class special procurements that are approved by the Contract Review Board shall be incorporated into the Contract Review

Cancellation, Rejection and Delay of Invitations for Bids or Requests for Proposals

279B.100 Cancellation, rejection, delay of invitations for bids or requests for proposals.

(1) Any solicitation or procurement described in a solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part, when the cancellation or rejection is in the best interest of the contracting agency as determined by the contracting agency. The reasons for the cancellation or rejection must be made part of the solicitation file. A contracting agency is not liable to any bidder or proposer for any loss or expense caused by or resulting from the cancellation or rejection of a solicitation, bid, proposal or award.

(2) Any solicitation or procurement described in a solicitation may be delayed or suspended when the delay or suspension is in the best interest of the contracting agency as determined by the contracting agency. The contracting agency shall make the reasons for the delay or suspension part of the solicitation file. A contracting agency is not liable to any bidder or proposer for any loss or expense caused by or resulting from the delay or suspension of a solicitation, bid, proposal or award. [2003 c.794 §58]

[no rule]

Qualifications

279B.110 Responsibility of bidders and proposers. (1) ~~The~~A contracting agency shall prepare a written determination of nonresponsibility ~~effor~~ a bidder or proposer if the contracting agency determines that the bidder or proposer does not meet the standards of responsibility.

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

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

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

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

- ~~___~~ (d) ~~Qualified~~Is legally qualified to contract with the contracting agency;
- ~~___~~ (e) Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder or proposer fails to promptly supply information ~~requested by the contracting agency~~ concerning responsibility that the contracting agency requests, the contracting agency shall ~~base~~determine the ~~determination of bidder's or proposer's~~ responsibility ~~upon any~~based on available information or may find that the bidder or proposer ~~nonresponsible;~~ and is not responsible.
- ~~___~~ (f) ~~Not been~~Was not debarred by the contracting agency under ORS 279B.130.
- ~~___~~ (3) A contracting agency may refuse to disclose outside of the contracting agency confidential information furnished by a bidder or proposer under this section when the bidder or proposer has clearly identified in writing the information the bidder or proposer seeks to have treated as confidential and the contracting agency has authority under ORS 192.410 to 192.505 to withhold the identified information from disclosure. [2003 c.794 §59; 2009 c.880 §7]

[no rule]

279B.115 Qualified products lists. (1) A contracting agency may develop and maintain a qualified products list in instances in which the testing or examination of goods before initiating a procurement is necessary or desirable in order to best satisfy the requirements of the contracting agency. For purposes of this section, “goods” includes products that have associated or incidental service components, such as supplier warranty obligations or maintenance service programs.

(2) In the initial development of any qualified products list, a contracting agency shall give public notice, in accordance with ORS 279B.055 (4), of the opportunity for potential contractors, sellers or suppliers to submit goods for testing and examination to determine their acceptability for inclusion on the list and may solicit in writing representative groups of potential contractors, sellers or suppliers to submit goods for the testing and examination. Any potential contractor, seller or supplier, even though not solicited, may offer its goods for consideration.

(3) A contracting agency’s inclusion of goods on a qualified products list shall be based on the results of tests or examinations. Notwithstanding any provision of ORS 192.410 to 192.505, a contracting agency may make the test or examination results public in a manner that protects the identity of the potential contractor, seller or supplier that offered the goods for testing or examination, including by using only numerical designations. Notwithstanding any provision of ORS 192.410 to 192.505, a contracting agency may keep confidential trade secrets, test data and similar information provided by a potential contractor, seller or supplier if so requested in writing by the potential contractor, seller or supplier.

(4) The inclusion of goods on a qualified products list does not constitute and may not be construed as a prequalification under ORS 279B.120 and 279B.125 of any prospective contractor, seller or supplier of goods on the qualified products list. [2003 c.794 §60]

[no rule]

279B.120 Prequalification of prospective bidders and proposers. (1) A contracting agency may prequalify prospective bidders or proposers to submit bids or proposals for public contracts to provide particular types of goods or services. The method of submitting

prequalification applications, the information required in order to be prequalified and the forms to be used for submitting prequalification information shall be determined by the contracting agency unless otherwise prescribed by rule adopted by the Director of the Oregon Department of Administrative Services or the local contract review board.

(2) The contracting agency shall, in response to the receipt of a prequalification application submitted under subsection (1) of this section, notify the prospective bidder or proposer whether the prospective bidder or proposer is qualified based on the standards of responsibility listed in ORS 279B.110 (2), the type and nature of contracts that the prospective bidder or proposer is qualified to compete for and the time period for which the prequalification is valid. If the contracting agency does not prequalify a prospective bidder or proposer as to any contracts covered by the prequalification process, the notice must specify which of the standards of responsibility listed in ORS 279B.110 (2) the prospective bidder or proposer failed to meet. Unless the reasons are specified, the prospective bidder or proposer shall be deemed to have been prequalified in accordance with the application.

(3) If a contracting agency subsequently discovers that a prospective bidder or proposer that prequalified under subsections (1) and (2) of this section is no longer qualified, the agency may revoke the prequalification upon reasonable notice to the prospective bidder or proposer, except that a revocation is invalid as to any contract for which an advertisement for bids or proposals has already been issued. [2003 c.794 §61]

Rule B.120 Prequalification

(a) Generally

The Port, in its sole discretion, may require bidders or proposers to prequalify before being eligible to submit bids or proposals for a class of public contracts or for a particular public contract. If prequalification is required, the opportunity to prequalify shall be advertised in the same manner as a solicitation document for the class of public contracts or the particular public contract would be advertised under applicable statutes and these Rules. The method of submitting prequalification applications, the information required in order to be prequalified and the forms to be used for submitting prequalification information shall be provided either in the advertisement or in the solicitation document.

(b) Disqualification

Disqualification of a previously prequalified bidder or proposer shall be in accordance with these Rules and the provisions of the Public Contracting Code regarding prequalification and disqualification.

(c) Additional Advertising Not Required

Bids or proposals may be solicited for a particular contract from bidders or proposers prequalified for that particular contract, or for a class of contracts including that particular contract, without additional advertising.

279B.125 Application for prequalification. (1) When a contracting agency permits or requires prequalification of bidders or proposers, a prospective bidder or proposer who wishes to prequalify shall submit a prequalification application to the contracting agency on a form prescribed under ORS 279B.120 (1). Upon receipt of a prequalification application, the

contracting agency shall investigate the prospective bidder or proposer as necessary to determine whether the prospective bidder or proposer is qualified. The determination shall be made in less than 30 days, if practicable, if the prospective bidder or proposer requests an early decision to allow the prospective bidder or proposer as much time as possible to prepare a bid or proposal for a contract that has been advertised. In making its determination, the contracting agency shall consider only the applicable standards of responsibility listed in ORS 279B.110 (2). The contracting agency shall promptly notify the prospective bidder or proposer whether the prospective bidder or proposer is qualified.

(2) If the contracting agency finds that a prospective bidder or proposer is qualified, the notice must state the type and nature of contracts that the prospective bidder or proposer is qualified to compete for and the period of time for which the prequalification is valid. If the agency finds that the prospective bidder or proposer is not qualified as to any contracts covered by the rule, resolution, ordinance or other regulation, the notice must specify the reasons given under ORS 279B.120 for not prequalifying the prospective bidder or proposer and inform the prospective bidder or proposer of the right to a hearing under ORS 279B.425. To be entitled to a hearing under ORS 279B.425, a prospective bidder or proposer shall, within three business days after receipt of the notice, notify the contracting agency that the prospective bidder or proposer demands a hearing under ORS 279B.425.

(3) If a contracting agency has reasonable cause to believe that there has been a substantial change in the conditions of a prequalified prospective bidder or proposer and that the prospective bidder or proposer is no longer qualified or is less qualified, the contracting agency may revoke or may revise and reissue the prequalification after reasonable notice to the prequalified prospective bidder or proposer. The notice must specify the reasons given under ORS 279B.120 for revocation or revision of the prequalification of the prospective bidder or proposer and inform the prospective bidder or proposer of the right to a hearing under ORS 279B.425. To be entitled to a hearing under ORS 279B.425, a prospective bidder or proposer shall, within three business days after receipt of the notice, notify the contracting agency that the prospective bidder or proposer demands a hearing under ORS 279B.425. A revocation or revision does not apply to any contract for which an advertisement for bids or proposals was issued before the date the notice of revocation or revision was received by the prequalified prospective bidder or proposer. [2003 c.794 §62]

[no rule]

279B.130 Debarment of prospective bidders and proposers. (1)(a) A contracting agency may debar a prospective bidder or proposer from consideration for award of the contracting agency's contracts for the reasons listed in subsection (2) of this section after providing the prospective bidder or proposer with notice and a reasonable opportunity to be heard.

(b) A contracting agency may not debar a prospective bidder or proposer under this section for more than three years.

(2) A prospective bidder or proposer may be debarred from consideration for award of a contracting agency's contracts if:

(a) The prospective bidder or proposer has been convicted of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract or in the performance of a public or private contract or subcontract.

(b) The prospective bidder or proposer has been convicted under state or federal statutes of

embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the prospective bidder's or proposer's responsibility as a contractor.

(c) The prospective bidder or proposer has been convicted under state or federal antitrust statutes.

(d) The prospective bidder or proposer has committed a violation of a contract provision that is regarded by the contracting agency or the Construction Contractors Board to be so serious as to justify disqualification. A violation may include but is not limited to a failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a failure to perform or an unsatisfactory performance caused by acts beyond the control of the contractor may not be considered to be a basis for debarment.

(e) The prospective bidder or proposer does not carry workers' compensation or unemployment insurance as required by statute.

(3) A contracting agency shall issue a written decision to debar a prospective bidder or proposer under this section. The decision must:

(a) State the reasons for the action taken; and

(b) Inform the debarred prospective bidder or proposer of the appeal rights of the prospective bidder or proposer under ORS 279B.425.

(4) A copy of the decision issued under subsection (3) of this section must be mailed or otherwise furnished immediately to the debarred prospective bidder or proposer.

(5) A prospective bidder or proposer that wishes to appeal debarment shall, within three business days after receipt of notice of debarment, notify the contracting agency that the prospective bidder or proposer appeals the debarment as provided in ORS 279B.425. [2003 c.794 §63; 2007 c.764 §8]

[no rule]

Notice of Intent to Award

279B.135 Notice of intent to award. At least seven days before the award of a public contract, unless the contracting agency determines that seven days is impractical under rules adopted under ORS 279A.065, the contracting agency shall post or provide to each bidder or proposer notice of the contracting agency's intent to award a contract. This section does not apply to a contract awarded as a small procurement under ORS 279B.065, an intermediate procurement under ORS 279B.070, a sole-source procurement under ORS 279B.075, an emergency procurement under ORS 279B.080 or a special procurement under ORS 279B.085. The notice and its manner of posting or issuance must conform to rules adopted under ORS 279A.065. [2003 c.794 §64]

Rule B.135 Notice of Intent to Award

(a) The Port shall post any notice of intent to award pursuant to ORS 279B.135 on its public website, or alternatively, send the notice of award via mail, fax or other electronic means to all solicitation holders of record.

(b) Until the notice of intent to award has been posted, bidders or proposers shall not have the opportunity to protest the award in accordance with ORS 279B.410 and Port Contracting Rule B.400.

(c) The Port may proceed with the contract execution process during the seven day intent to award period if it is determined that failure to do so may result in a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety.

Price Agreements

279B.140 Price agreements. (1) A price agreement constitutes a firm offer by the contractor regardless of whether any order or purchase has been made or any performance has been tendered under the price agreement. Unless the price agreement otherwise provides, a price agreement is enforceable for the period stated in the price agreement and, notwithstanding ORS 72.2050, obligations thereunder are not revocable by the contractor.

(2) Under a price agreement, no quantity unreasonably disproportionate to any stated estimate or, in the absence of a stated estimate, to any normal or otherwise comparable prior requirements may be demanded unless otherwise expressly provided in the price agreement. However, a contracting agency may amend or terminate a price agreement or an order under a price agreement under any of the following circumstances:

(a) Any failure of the contracting agency to receive funding, appropriations, limitations, allotments or other expenditure authority, including the continuation of program operating authority sufficient, as determined in the discretion of the contracting agency, to sustain purchases at the levels contemplated at the time of contracting; or

(b) Any change in law or program termination that makes purchases under the price agreement no longer authorized or appropriate for the contracting agency's use.

(3) A price agreement does not constitute an exclusive dealing commitment on the part of the contracting agency or the contractor unless the price agreement expressly so provides. [2003 c.794 §68]

[no rule]

Determinations

279B.145 Finality of determinations. The determinations under ORS 279B.[030](#), [279B.033](#), [279B.036](#), [279B.055](#) (3) and (7), [279B.060](#) (~~34~~) and (~~4014~~), [279B.075](#), [279B.080](#), [279B.085](#) and [279B.110](#) (~~4~~) are final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law. [2003 c.794 §71; [2009 c.880 §8](#)]

[no rule]

Specifications

General Provisions

279B.200 Definitions for ORS 279B.200 to 279B.240. As used in ORS 279B.200 to 279B.240:

(1) “Brand name or equal specification” means a specification that uses one or more manufacturers’ names, makes, catalog numbers or similar identifying characteristics to describe the standard of quality, performance, functionality or other characteristics needed to meet the contracting agency’s requirements and that authorizes bidders or proposers to offer goods or services that are equivalent or superior to those named or described in the specification.

(2) “Brand name specification” means a specification limited to one or more products, brand names, makes, manufacturer’s names, catalog numbers or similar identifying characteristics.

(3) “Specification” means any description of the physical or functional characteristics of, or of the nature of, goods or services to be procured by a contracting agency. “Specification” may include a description of any requirement for inspecting, testing or preparing goods or services for delivery. When a solicitation required or authorized by ORS 279B.050 (4) or (5) to be conducted under ORS 279B.055 or 279B.060 calls in whole or in part for the performance of personal services as designated under ORS 279A.055, “specification” also includes any description of the characteristics or nature of the personal services. [2003 c.794 §72; 2007 c.764 §9]

[no rule]

279B.205 Specifications to encourage reasonable competition. Consistent with ORS 279A.015, specifications must seek to promote optimal value and suitability for the purposes intended and to reasonably encourage competition in satisfying a contracting agency’s needs. Subject to ORS 279B.405, the specification content must be determined in the sole discretion of the contracting agency. [2003 c.794 §74]

[no rule]

279B.210 Policy; development of specifications. It is the policy of the State of Oregon to encourage the development of clear, precise and accurate specifications in solicitations for public contracts. To that end, in developing specifications, contracting agencies may consult, under contract or otherwise, with technical experts, suppliers, prospective contractors and representatives of the industries with which the contracting agencies contract. However, a contracting agency shall take reasonable measures to ensure that no person who prepares or assists in the preparation of solicitation documents, specifications, plans or scopes of work, and no business with which the person is associated, realizes a material competitive advantage in a procurement that arises from the agency’s use of the solicitation documents, specifications, plans or scopes of work. The policy against the realization of a material competitive advantage from the character of the specifications developed in conjunction with persons outside the contracting agency does not proscribe advantages that result incidentally from a contracting agency’s specification of the characteristics of a product or work to meet the contracting agency’s needs. [2003 c.794 §75]

[no rule]

279B.215 Brand name or equal specification; brand name specification. (1)(a) A brand name or equal specification may be used when the use of a brand name or equal specification is

advantageous to the contracting agency, because the brand name describes the standard of quality, performance, functionality and other characteristics of the product needed by the contracting agency.

(b) The contracting agency is entitled to determine what constitutes a product that is equal or superior to the product specified, and any such determination is final.

(c) Nothing in this subsection may be construed as prohibiting a contracting agency from specifying one or more comparable products as examples of the quality, performance, functionality or other characteristics of the product needed by the contracting agency.

(2) A brand name specification may be prepared and used only if the contracting agency determines for a solicitation or a class of solicitations that only the identified brand name specification will meet the needs of the contracting agency based on one or more of the following written determinations:

(a) That use of a brand name specification is unlikely to encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts;

(b) That use of a brand name specification would result in substantial cost savings to the contracting agency;

(c) That there is only one manufacturer or seller of the product of the quality, performance or functionality required; or

(d) That efficient utilization of existing goods requires the acquisition of compatible goods or services.

(3) A contracting agency's use of a brand name specification may be subject to review only as provided in ORS 279B.405. [2003 c.794 §76; 2005 c.103 §8e]

Rule B.215 Specification of Particular Products

(a) Generally

The Port may expressly or implicitly require a particular product by brand name, trade name, manufacturer, or seller as an abbreviated means of specifying the Port's needs, in which case offerors may substitute equivalent products. The invitation to bid or request for proposals may require substitutions to be approved by the Port prior to the submission of offers; otherwise substitutions are allowed after contract award, if they are approved by the Port. The Port shall approve a substitution if the substitute product has all of the salient features of the expressly or implicitly required product. This provision does not apply to products or classes of products that are exempt under ORS 279.B.215(2).

(b) Brand Name Exemptions

The Port may expressly or implicitly require a particular product by brand name, trade name, manufacturer or seller and disallow any substitution of named product when a determination has been made by the Manager of Contracts and Procurement that doing so meets the requirements of ORS 279.B.215(2). Brand Name Exemptions shall be effective only for the period of time designated by the Manager of Contracts and Procurement, whereupon a new determination of applicability of this rule must be made. Determinations of exemptions under ORS 279.215(2) shall be available for public inspection upon request.

279B.220 Conditions concerning payment, contributions, liens, withholding. Every public contract shall contain a condition that the contractor shall:

(1) Make payment promptly, as due, to all persons supplying to the contractor labor or material for the performance of the work provided for in the contract.

(2) Pay all contributions or amounts due the Industrial Accident Fund from the contractor or subcontractor incurred in the performance of the contract.

(3) Not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished.

(4) Pay to the Department of Revenue all sums withheld from employees under ORS 316.167. [2003 c.794 §76a]

[no rule]

279B.225 Condition concerning salvaging, recycling, composting or mulching yard waste material. Every public contract for lawn and landscape maintenance shall contain a condition requiring the contractor to salvage, recycle, compost or mulch yard waste material at an approved site, if feasible and cost-effective. [2003 c.794 §76b]

[no rule]

279B.230 Condition concerning payment for medical care and providing workers' compensation. (1) Every public contract shall contain a condition that the contractor shall promptly, as due, make payment to any person, copartnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the contractor, of all sums that the contractor agrees to pay for the services and all moneys and sums that the contractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services.

(2) Every public contract shall contain a clause or condition that all subject employers working under the contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126. [2003 c.794 §76c]

[no rule]

279B.235 Condition concerning hours of labor. (1) Except as provided in subsections (3) to (6) of this section, every public contract subject to this chapter must contain a condition that a person may not be employed for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency or when the public policy absolutely requires it, and in such cases, except in cases of contracts for personal services designated under ORS 279A.055, the employee shall be paid at least time and a half pay:

(a)(A) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or

(B) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and

(b) For all work performed on Saturday and on any legal holiday specified in ORS 279B.020.

(2) An employer must give notice in writing to employees who work on a public contract, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

(3) In the case of contracts for personal services as described in ORS 279A.055, the contract shall contain a provision that the employee shall be paid at least time and a half for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(4) In the case of a contract for services at a county fair or for other events authorized by a county fair board, the contract must contain a provision that employees must be paid at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week. An employer shall give notice in writing to employees who work on such a contract, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that employees may be required to work.

(5)(a) Except as provided in subsection (4) of this section, contracts for services must contain a provision that requires that persons employed under the contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in ORS 279B.020 (1)(b)(B) to (G) and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) An employer shall give notice in writing to employees who work on a contract for services, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

(6) This section does not apply to public contracts:

(a) With financial institutions as defined in ORS 706.008.

(b) Made pursuant to the authority of the State Forester or the State Board of Forestry under ORS 477.406 for labor performed in the prevention or suppression of fire.

(c) For goods or personal property. [2003 c.794 §77; 2005 c.103 §8f]

[no rule]

279B.240 Exclusion of recycled oils prohibited. Every contracting agency shall revise its procedures and specifications for the procurement of lubricating oil and industrial oil to eliminate any exclusion of recycled oils and any requirement that oils be manufactured from virgin materials. [2003 c.794 §78]

[no rule]

Specifications in State Contracts

* * *

Legal Remedies

279B.400 Protests and judicial review of approvals of special procurements. (1) Before seeking judicial review of the approval of a special procurement, a person must file a protest, in accordance with the rules adopted under ORS 279A.065, with the Director of the Oregon Department of Administrative Services or the local contracting agency, as applicable, and exhaust all available nonjudicial remedies. The rules adopted under ORS 279A.065 shall provide a reasonable time and manner for affected persons to protest a contracting agency's request for the approval of a special procurement under ORS 279B.085.

(2) The approval of a class special procurement by the director under ORS 279B.085 constitutes rulemaking and not a contested case under ORS chapter 183. Any affected person, except the state contracting agency that requested the approval or anyone representing the state contracting agency, may petition the Court of Appeals in the manner provided in ORS 183.400 to test the validity of a class special procurement approved by the director. A proceeding under ORS 183.400 does not affect the validity of a contract executed pursuant to a class special procurement before the petition is filed. Notwithstanding ORS 183.400 (1), before seeking judicial review under this subsection, a person must file a protest with the director as described in subsection (1) of this section.

(3)(a) The approval of a contract-specific special procurement by the director is reviewable under ORS 183.484, but only if judicial review is sought before the contract is awarded. Otherwise, a contract awarded pursuant to the contract-specific special procurement is conclusively presumed valid and may not, in any future judicial or administrative proceeding, be challenged on the ground that the contract was awarded under an invalid special procurement.

(b) Judicial review may be sought from the Circuit Court for Marion County or the circuit court for the county in which the principal offices of the state contracting agency that requested the approval are located. The circuit court shall give priority on its docket and expedited review to proceedings under this subsection.

(4)(a) The approval of a special procurement by a local contract review board may be challenged by filing a writ of review under ORS chapter 34, provided that all available nonjudicial remedies first have been exhausted, including protests as described in subsection (1) of this section. Notwithstanding the 60-day filing period prescribed by ORS 34.030, the approval of a special procurement is not subject to a writ of review proceeding more than 10 days after the board approves the use of the special procurement.

(b) The writ of review may be filed with and is reviewable by the circuit court for the county in which the principal offices of the local contracting agency that requested the approval are located. The circuit court shall give priority on its docket and expedited review to proceedings under this subsection.

(5) If timely judicial review is sought regarding the approval of a special procurement under ORS 279B.085, the contracting agency may not proceed with contract execution unless the contracting agency determines that there is a compelling governmental interest in proceeding or that the goods or services are urgently needed. If the contracting agency makes such a determination, the contracting agency shall set forth the reasons for the determination in writing and immediately provide them to the person who filed the challenge. Thereafter, after joining the prospective contractor as a party to the litigation and upon motion by the person filing the challenge, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination of the existence of a compelling governmental interest in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a

manifest abuse of discretion. In granting a stay, the court may require the person seeking the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in contract performance.

(6) In its review, the circuit court shall give due deference to any factual contracting decision made by the contracting agency and may not substitute its judgment for that of the contracting agency, but shall review all questions of law de novo. Thereafter:

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

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

(c) The court may award costs and attorney fees to the prevailing party. [2003 c.794 §83; 2005 c.103 §8g]

Rule B.400 Protests

(a) Applicability

This rule applies to protests of special procurements, protests of solicitations, and protests of contract award.

(b) Written Protest Required

If an offeror or prospective offeror wishes to object to any aspect of a Port procurement, the offeror or prospective offeror ("protester") may file a written protest with the Port's Manager of Contracts and Procurement. The protest must include all grounds for the protest, and all supporting evidence, in the form of physical evidence, documents, or affidavits.

(c) Timeliness

A protest must be filed promptly as soon as the protester knows of the grounds for the protest. If the grounds for a protest were apparent on the face of the solicitation document, the Port may decline to consider a protest filed later than five business days before the date by which bids or proposals must be submitted. If the grounds for a protest were not apparent until contract award, the Port may decline to consider a protest filed later than five business days after the protester knew or should have known of the Port's intent to award the contract.

(d) Written Decision

The Port's Manager of Contracts and Procurement shall issue a written decision in response to a protest.

(e) Discretionary Meeting

The Manager of Contracts and Procurement may, but is not required to, schedule a meeting with the protester prior to issuing a written decision. The Manager of Contracts and Procurement may invite other Port staff to the meeting, and, in the case of a procurement involving a Port evaluation team, may invite one or more members of the evaluation team to the meeting.

(f) Appeal and Final Administrative Action

If the protester disagrees with the written decision issued by the Port's Manager of Contracts and Procurement, the protester may appeal in writing to the Port's Executive Director. The written appeal must be received by the Executive Director's office within five business days after the protester's receipt of the written decision by the Port's Manager of Contracts and Procurement. The Executive Director may decline to consider a late appeal. The written appeal must include all legal arguments and all evidence, in the form of physical evidence, documents, or affidavits. The Executive Director shall issue a written decision in response to the appeal, and that written decision shall be the Port's final administrative action with respect to the protest. The Executive Director's written decision shall be the Port's final action with respect to the protest.

(g) Port not required to delay process during protest

Subject to ORS 279B.405(9) and ORS 279B.415(4), the Port may proceed with the procurement after denial of protest or denial of appeal, including without limitation, award and execution of the contract.

279B.405 Protests and judicial review of solicitations. (1) As used in this section:

(a) "Brand name" means a brand name specification as defined in ORS 279B.200.

(b) "Legally flawed" means that a solicitation document contains terms or conditions that are contrary to law.

(c) "Unnecessarily restrictive" means that specifications limit competition arbitrarily, without reasonably promoting the fulfillment of the procurement needs of a contracting agency.

(2) A prospective bidder, proposer or offeror for a public contract solicited under ORS 279B.055, 279B.060 or 279B.085 may file a protest with the contracting agency if the prospective bidder, proposer or offeror believes that the procurement process is contrary to law or that a solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand name. If a prospective bidder, proposer or offeror fails to timely file such a protest, the prospective bidder, proposer or offeror may not challenge the contract on grounds under this subsection in any future legal or administrative proceeding.

(3) The contracting agency, pursuant to rules adopted under ORS 279A.065, shall notify prospective bidders, proposers or offerors of the time and manner in which a protest under this section may be filed and considered. Before seeking judicial review, a prospective bidder, proposer or offeror must file a protest with the contracting agency and exhaust all available administrative remedies.

(4) The contracting agency shall consider the protest if the protest is timely filed and contains the following:

(a) Sufficient information to identify the solicitation that is the subject of the protest;

(b) The grounds that demonstrate how the procurement process is contrary to law or how the solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand name;

(c) Evidence or supporting documentation that supports the grounds on which the protest is based; and

(d) The relief sought.

(5) If the protest meets the requirements of subsection (4) of this section, the contracting agency shall consider the protest and issue a decision in writing. Otherwise, the contracting agency shall promptly notify the prospective bidder, proposer or offeror that the protest is untimely or that the protest failed to meet the requirements of subsection (4) of this section and give the reasons for the failure.

(6) The contracting agency shall issue a decision on the protest in accordance with rules adopted under ORS 279A.065 no fewer than three business days before bids, proposals or offers are due, unless a written determination is made by the agency that circumstances exist that justify a shorter time limit.

(7) A decision of a contracting agency on a protest under this section, including a protest of a special procurement, is subject to judicial review only if the action or writ of review is filed before the opening of bids, proposals or offers.

(8)(a) A decision of a state contracting agency on a protest under this section is reviewable by the Circuit Court for Marion County or the circuit court for the county in which the principal offices of the state contracting agency are located.

(b) A decision of a local contracting agency on a protest under this section is reviewable by the circuit court for the county in which the principal offices of the local contracting agency are located.

(9) If judicial review of a contracting agency's decision on a protest under this section is sought, the contracting agency may not proceed with contract execution unless the contracting agency determines that there is a compelling governmental interest in proceeding or that the goods and services are urgently needed. If the contracting agency makes such a determination, the contracting agency shall set forth the reasons for the determination in writing and immediately provide them to the prospective bidder, proposer or offeror that filed the protest. Thereafter, after joining the contractor as a party to the litigation and upon motion from the person filing the protest, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination of the existence of a compelling governmental interest in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a manifest abuse of discretion. In granting a stay, the court may require the person seeking the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in contract performance.

(10) In its review, the court shall give due deference to any factual decision made by the contracting agency and may not substitute its judgment for that of the contracting agency, but shall review all questions of law de novo. Thereafter:

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

(b) In addition to the relief provided for in paragraph (a) of this subsection, if a contract has been executed, the court shall include in its order a determination whether the party that signed the contract with the contracting agency is entitled to reimbursement under the conditions of, and calculated in the same manner as provided in, ORS 279C.470. Notwithstanding that ORS

279C.470 otherwise applies only to public improvement contracts, under this paragraph the court shall apply ORS 279C.470 to both public improvement contracts and other public contracts of contracting agencies.

(c) The court may award costs and attorney fees to the prevailing party. [2003 c.794 §84; 2007 c.764 §11]

[no rule]

Note: Refer to rule B.400 for the Port's rules for protest of solicitations.

279B.410 Protests of contract award. (1) A bidder or proposer may protest the award of a public contract or a notice of intent to award a public contract, whichever occurs first, if:

(a) The bidder or proposer is adversely affected because the bidder or proposer would be eligible to be awarded the public contract in the event that the protest were successful; and

(b) The reason for the protest is that:

(A) All lower bids or higher ranked proposals are nonresponsive;

(B) The contracting agency has failed to conduct the evaluation of proposals in accordance with the criteria or processes described in the solicitation materials;

(C) The contracting agency has abused its discretion in rejecting the protestor's bid or proposal as nonresponsive; or

(D) The contracting agency's evaluation of bids or proposals or the contracting agency's subsequent determination of award is otherwise in violation of this chapter or ORS chapter 279A.

(2) The bidder or proposer shall submit the protest to the contracting agency in writing and shall specify the grounds for the protest to be considered by the contracting agency.

(3) The rules adopted under ORS 279A.065 shall establish a reasonable time and manner for protests to be submitted. The contracting agency may not consider late protests.

(4) The contracting agency shall consider and respond in writing to a protest in a timely manner. After the contracting agency issues the response, the bidder or proposer may seek judicial review in the manner provided in ORS 279B.415. [2003 c.794 §85]

[no rule]

Note: Refer to rule B.400 for the Port's rules for protests of contract award.

279B.415 Judicial review of protests of contract award. (1) As used in this section, "bidder" includes a person who submits a proposal to a public contracting agency pursuant to a request for proposals.

(2) A decision by a state contracting agency on a protest of a contract award is reviewable by the Circuit Court for Marion County or the circuit court for the county in which the principal offices of the state contracting agency are located. A decision by a local contracting agency on a protest of a contract award is reviewable by the circuit court for the county in which the principal offices of the local contracting agency are located.

(3) To obtain review, a complainant must commence an action before the contract that is the subject of the protest is approved by the Attorney General, if required by ORS 291.047, and executed by the contracting agency. In the complaint, the complainant shall state the nature of

the complainant's interest, the facts showing how the complainant is adversely affected or aggrieved by the contracting agency's decision and the basis upon which the decision should be reversed or remanded. The complainant shall join as parties all bidders that would be in line for an award of the contract ahead of the complainant. If injunctive relief is sought, the court may require the person seeking a stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in execution of the contract.

(4) When judicial review is sought, the contracting agency may not proceed with contract execution unless the contracting agency determines that there is a compelling governmental interest in proceeding or that the goods and services are urgently needed. If the contracting agency makes such a determination, the contracting agency shall set forth the reasons for the determination in writing and immediately provide them to the complainant. Thereafter, upon motion from the complainant, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination of the existence of a compelling governmental interest in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a manifest abuse of discretion. In granting a stay, the court may require the person seeking the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in contract performance.

(5) The court shall review the matter without a jury and shall consider only those grounds the complainant raised in the protest to the contracting agency.

(6) The court shall remand the matter to the contracting agency for a further decision if:

(a) Substantial evidence does not exist to support the contracting agency's decision.

Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding;

(b) The contracting agency's decision was outside the range of discretion delegated to the contracting agency by law;

(c) The decision was inconsistent with a contracting agency rule, an officially stated contracting agency position or an officially stated prior contracting agency practice, if the inconsistency is not explained by the contracting agency; or

(d) The decision was in violation of a constitutional or statutory provision.

(7)(a) In addition to remanding the decision to the contracting agency, the court may order such ancillary relief, such as the cost of bid preparation, as the court finds necessary to redress the effects of official action wrongfully taken or withheld. Ancillary relief does not include the award of a contract to the complainant or the award of lost profits or other damages.

(b) If a contract has not been executed and the court rules in favor of the complainant, the court shall remand the matter to the contracting agency for a determination whether to continue with the procurement process in light of the court's decision.

(c) If a contract has been executed, in addition to the relief provided for in paragraph (a) of this subsection, the court shall include in its order a determination whether the party that signed the contract with the contracting agency is entitled to reimbursement under the conditions of, and calculated in the same manner as provided in, ORS 279C.470. Notwithstanding that ORS 279C.470 otherwise applies only to public improvement contracts, under this paragraph the court shall apply ORS 279C.470 to both public improvement contracts and other public contracts of contracting agencies.

(d) The court may award costs and attorney fees to the prevailing party. [2003 c.794 §86; 2007 c.764 §12]

[no rule]

279B.420 Judicial review of other violations. (1) ~~Any violation of ORS chapter 279A by~~ If a contracting agency ~~for which no~~ allegedly violates a provision of ORS chapter 279A and a judicial remedy is not otherwise ~~provided by~~ available under ORS chapter 279A, 279B or 279C, the alleged violation is subject to judicial review only as provided in this section.

— (2) ~~Any violation~~ If a contracting agency allegedly violates a provision of this chapter, except a provision of ORS 279B.030, 279B.033, 279B.036, 279B.270, 279B.275, 279B.280 ~~and or~~ 279B.400 to 279B.425, ~~by a contracting agency for which no~~ and a judicial remedy is not otherwise provided ~~by~~ in this chapter or ORS chapter 279A, the alleged violation is subject to judicial review only as provided in this section.

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

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

— (b) ~~An~~ The alleged violation of a provision of this chapter or ORS chapter 279A, except ~~OR~~ a provision of ORS 279B.030, 279B.033 or 279B.036 or 279B.270, 279B.275, 279B.280 and 279B.400 to 279B.425, occurred in the procurement process for the public contract and ~~that~~ the alleged violation resulted in or will result in ~~the an~~ unlawful award of a contract or ~~the an~~ unlawful failure to award the contract;

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

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

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

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

— (g) (A) ~~In the case of an alleged violation of ORS chapter 279A, the~~ The alleged violation is ~~one for which no judicial review is provided by any~~ a violation of a provision of ORS chapter 279A and no other section of ORS chapter 279A, 279B or 279C provides judicial review; or

— (B) ~~In the case of an~~ The alleged violation is a violation of a provision of this chapter, except a provision of ORS 279B.030, 279B.033, 279B.036, 279B.270, 279B.275, 279B.280 ~~and or~~ 279B.400 to 279B.425, ~~the alleged violation is one for which no judicial review is provided by any~~ and no other section of this chapter or ORS chapter 279A provides judicial review.

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

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

— (6) If a person gives the notice required under subsection (3)(e) of this section ~~is given~~

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

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

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

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

— (c) The court may award costs and attorney fees to the prevailing party. [2003 c.794 §86a; 2009 c.880 §8a]

[no rule]

279B.425 Review of prequalification and debarment decisions. (1) The procedure for appeal from the denial, revocation or revision of a prequalification under ORS 279B.125, or from a debarment under ORS 279B.130, shall be in accordance with this section and is not subject to ORS chapter 183 except when specifically provided by this section.

(2) Upon receipt of a notice from a contracting agency of a prequalification decision under ORS 279B.125 or of a decision to debar under ORS 279B.130, a prospective bidder or proposer that wishes to appeal the decision shall, within three business days after receipt of the notice, notify the contracting agency that the prospective bidder or proposer appeals the decision as provided in this section.

(3) Immediately upon receipt of the prospective bidder's or proposer's notice of appeal, the contracting agency shall:

(a) If the contracting agency is a state contracting agency, notify the Director of the Oregon Department of Administrative Services.

(b) If the contracting agency is a local contracting agency, notify the appropriate local contract review board.

(4) Upon the receipt of notice from the contracting agency under subsection (3) of this section, the director or board shall promptly notify the person appealing and the contracting agency of the time and place of the hearing. The director or board shall conduct the hearing and decide the appeal within 30 days after receiving the notice from the contracting agency. The director or board shall set forth in writing the reasons for the hearing decision.

(5) At the hearing the director or board shall consider de novo the notice of denial, revocation or revision of a prequalification or the notice of debarment, the standards of responsibility listed in ORS 279B.110 (2) on which the contracting agency based the denial, revocation or revision of the prequalification or the reasons listed in ORS 279B.130 (2) on which the contracting agency based the debarment, and any evidence provided by the parties. In all other respects, a hearing before the director shall be conducted in the same manner as a contested case under ORS 183.417 (1) to (4) and (7), 183.425, 183.440, 183.450 and 183.452. Hearings before a board shall be conducted under rules of procedure adopted by the board.

(6) The director or board may allocate the director's or board's costs for the hearing between the person appealing and the contracting agency whose prequalification or debarment decision is being appealed. The allocation shall be based upon facts found by the director or board and stated in the final order that, in the director's or board's opinion, warrant such allocation of costs. If the final order does not allocate the costs for the hearing, the costs shall be paid as follows:

(a) If the decision to deny, revoke or revise a prequalification of a person as a bidder or the decision to debar a person is upheld, the costs shall be paid by the person appealing the decision.

(b) If the decision to deny, revoke or revise a prequalification of a person as a bidder or the decision to debar a person is reversed, the costs shall be paid by the contracting agency whose prequalification or debarment decision is the subject of the appeal.

(7) A decision of the director or board may be reviewed only upon a petition, filed within 15 days after the date of the decision, in the circuit court of the county in which the director or board has its principal office. The circuit court shall reverse or modify the decision only if it finds:

(a) The decision was obtained through corruption, fraud or undue means;

(b) There was evident partiality or corruption that operated to the substantial prejudice of the petitioner on the part of the director or board or any of the board's members; or

(c) There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the decision, and the miscalculation or mistake operated to the substantial prejudice of the petitioner.

(8) The procedure provided in this section is the exclusive means of judicial review of the decision of the director or board. The judicial review provisions of ORS 183.480 and writs of review and mandamus as provided in ORS chapter 34, and other legal, declaratory and injunctive remedies, are not available.

(9) The circuit court may stay the letting of the contract that is the subject of the petition in the same manner as a suit in equity. When the court determines that there has been an improper debarment or denial, revocation or revision of a prequalification and the contract has been let, the court may proceed to take evidence to determine the damages, if any, suffered by the petitioner and may award such damages as the court may find as a judgment against the director

or board. The court may award costs and attorney fees to the prevailing party. [2003 c.794 §87; 2007 c.288 §12]

[no rule]

Note: Port Contract Review Board Rule 12, Disqualification and Appeal Procedure, sets forth the Port's Rules applicable to ORS 279B.425.

PERSONAL SERVICES

B.500 Personal Services Contracts

(1) Applicability

(a) Pursuant to ORS 279.A.070, the following rules shall constitute the procedures for the screening and selection of persons to perform personal services for the Port.

(b) These rules do not apply, and the requirements of ORS 279C.110 shall apply, when the Port intends to contract for personal services and the following conditions are evident:

(i) The process is being carried out for the selection of architectural, engineering, or land surveying services and related services, ~~and,~~

(ii) The Port will receive or has received money ~~from~~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, ~~and,~~

(iii) The total amount of any grants, loans, or moneys from the State Highway Fund ~~and/or~~ from the state for the project exceeds 35 percent of the value of the project, ~~;~~ and,

(iv) the value of the project exceeds \$400,000.

(2) Sufficient Quality and Fair and Reasonable Price

Regardless of the selection process used, the individual(s) in charge of selecting a personal services contractor on behalf of the Port shall ensure that the quality of the service offered by the personal services contractor is sufficient for the Port's particular needs under the circumstances, and that the cost to the Port for the services is fair and reasonable under the circumstances.

(3) Personal Services Contracts of \$5,000 or less

A personal services contractor may be selected without soliciting proposals from more than one qualified proposer if the total cost of the personal services contract is estimated to be \$5,000 or less, the quality of service offered by the personal services contractor is sufficient for the Port's particular needs under the circumstances, the cost to the Port is fair and reasonable under the circumstances, the award does not reflect favoritism, and the award is in all other respects in the Port's best interests.

(4) Personal Services Contracts Over \$5,000 But Not Over \$100,000

If the total cost of a personal services contract is estimated to be more than \$5,000 but not more than \$100,000, proposals may be solicited informally, either orally or in writing. If it is practicable, proposals shall be solicited from a sufficient number of qualified prospective proposers to ensure no fewer than two qualified proposers submit proposals. If fewer than two qualified proposers submit proposals, the efforts made to solicit proposals should be documented in the Port's files.

(5) Personal Services Contracts Over \$100,000

(A) When a nonexempt personal services contract is estimated to exceed \$100,000, written proposals shall be solicited by a written request for proposals and a contract shall be awarded based upon competitive negotiation.

(B) Solicitation of Proposals

(i) Elements

The written request for proposals for a personal services contract shall include at least the following elements:

- (a) A description of the criteria upon which proposals will be evaluated;*
- (b) The contractual terms and conditions required by the Port;*
- (c) A description of the work;*
- (d) The requirements that must be satisfied by written proposals; and*
- (e) A protest procedure.*

(C) Evaluation of Proposals

Written proposals for personal services contracts estimated to exceed \$100,000 shall be evaluated based upon evaluation criteria described in the written request for proposals. The evaluation criteria shall be presumed to have equal importance unless the request for proposals indicates otherwise. The evaluation criteria may be changed only by written addendum to the request for proposal. Except in the case of certain federally assisted architectural and engineering contracts, price may be included as one of the evaluation criteria. The Port may follow the selection procedure established by ORS 279C.110 for contracts for architectural, engineering, or land surveying services if the Port determines that selection procedure would be in the Port's best interest under the circumstances.

(6) Personal Services Contract Exemptions from Competitive Proposal Requirements

(A) Sole Source

If only one firm is qualified and available to perform a personal services contract, a contract may be awarded to that firm without soliciting proposals from others.

(B) Sensitive Contracts

A personal services contract may be awarded without soliciting proposals from others if the contract is of a sensitive nature such that the public interest would be best served if the matter were not disclosed or publicized at the time the contract is being awarded.

(C) Unique or Specialized Knowledge or Expertise

A personal services contract may be awarded without soliciting proposals from others if the contractor has unique or specialized knowledge or expertise required by the Port, and the Manager of Contracts and Procurement has determined that solicitation of proposals from others would not be in the Port's best interests.

(D) Emergency Contracts

A personal services contract may be awarded without soliciting proposal from others if prompt execution of a contract is necessary to remedy an emergency or in the event of a disaster.

[End of Division B]

DIVISION C

PUBLIC CONTRACTING – PUBLIC IMPROVEMENTS AND RELATED CONTRACTS FOR CONSTRUCTION SERVICES

Format

Those sections of the Public Contracting Code (ORS 279A, 279B, and 279C) applicable to Port of Portland contracting are set forth in full (sections, subsections, paragraphs, etc. applicable only to state agencies have been excluded; deleted subsections, paragraphs, etc. are denoted by “* * *”; compiler’s notes generally have been omitted). The Contracting Rule implementing or otherwise related to a particular statutory section appears immediately after the statutory section. This format has been selected to facilitate the integrated application of statutory requirements and rule requirements to Port of Portland contracting.

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279C.836 Public works bond; rules
[no rule]

279C.838 Applicability of state and federal rates of wage; determination of site of project; determination of applicability of wage to transportation workers; waiver
[no rule]

279C.840 Payment of prevailing rate of wage; posting of rates and fringe benefit plan provisions
[no rule]

279C.845 Certified statements regarding payment of prevailing rates of wage; retainage
[no rule]

279C.850 Inspection to determine whether prevailing rate of wage being paid; civil action for failure to pay prevailing rate of wage or

overtime

[no rule]

279C.855 Liability for violations

[no rule]

279C.860 Ineligibility for public works contracts for failure to pay or post notice of prevailing rates of wage; certified payroll reports to commissioner

[no rule]

279C.865 Civil penalties

[no rule]

279C.870 Civil action to enforce payment of prevailing rates of wage

[no rule]

Relevant Statutes with Rules

General Provisions

279C.005 Definitions. ORS 279A.010 (1) contains general definitions applicable throughout this chapter.

[no rule]

279C.010 Applicability. As provided in ORS 279A.020 Except as provided in ORS 279C.320, public contracting under this chapter is subject to ORS chapter 279A, but not ORS chapter 279B. [2003 c.794 §88a; 2005 c.103 §9]

Rule C.010 Application

These Division C rules implement ORS chapter 279C, Public Contracting – Public Procurements and Related Contracts Improvements, and apply to the procurement of ~~Public Works and Public Improvement contract awards~~ public works and public improvement contracts.

Architectural, Engineering, Land Surveying and Related Services

279C.100 Definitions for ORS 279C.100 to 279C.125. 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 and land surveying services” means professional services that are required to be performed by an architect, engineer 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 as personal services. “Personal services” includes architectural, engineering 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. [2003 c.794 §89; 2005 c.103 §10; 2005 c.445 §12]

[no rule]

279C.105 Contracts for architectural, engineering, land surveying and related services; procedures. (1) Except as provided in ORS 279A.140, contracting agencies may enter into contracts for architectural, engineering and land surveying services and related services. *** 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 state contracting agencies, or any applicable city or county charter provisions. Each contracting agency authorized to enter into contracts for architectural, engineering and land surveying services and related services shall adopt procedures for the screening and selection of persons to perform those 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 designate certain personal services contracts or classes of personal services contracts as contracts for architectural, engineering and land surveying services or related services. [2003 c.794 §90; 2005 c.103 §11]

[no rule]

279C.107 Public disclosure of contents of proposals for architectural, engineering or land surveying services; treatment of trade secrets and confidential information. (1)

Notwithstanding the public records law, ORS 192.410 to 192.505, if a contracting agency solicits a contract for architectural, engineering or land surveying services or related services by a competitive proposal:

(a) Proposals may be opened so as to avoid disclosure of contents to competing proposers during, when applicable, the process of negotiation.

(b) Proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued.

(2) Notwithstanding any requirement to make proposals open to public inspection after the contracting agency's issuance of notice of intent to award a contract, a contracting agency may withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a proposal. The fact that proposals are opened at a public meeting as defined in ORS 192.610 does not make their contents 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. If a request for proposals is canceled after proposals are received, 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. [2007 c.764 §41]

[no rule]

279C.110 Selection procedure for architects, engineers and land surveyors; compensation; applicability.

(1) A state contracting agency shall select consultants to provide architectural, engineering or land surveying services on the basis of qualifications for the type of professional service required. A state contracting agency may solicit or use pricing policies and proposals or other pricing information to determine consultant compensation only after the agency has selected a candidate pursuant to subsection (3) 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:

(a) Specialized experience, capabilities and technical competence that may be demonstrated by the proposed approach and methodology to meet the project requirements;

(b) Resources available to perform the work and the proportion of the candidate staff's time that would be spent on the project, including any 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 under subsection (3) of this section result in the determination by the contracting agency that two or more candidates are equally qualified, the contracting agency may select a candidate through any process adopted by the contracting agency.

(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 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 the architectural, engineering and land surveying services contracts and related services contracts to be performed throughout the state, the locations of the selected consultants and the direct expenses on each contract. This record shall include the total number of contracts over a 10-year period for each consultant firm. The record of direct expenses shall 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.

[2003 c.794 §91; 2005 c.509 §1]

[no rule]

Note: The Port awards Personal Services Contracts for architectural, engineering and land surveying services under Port Contracting Rule B.500.

279C.115 Direct contracts for services of architects, engineers and land surveyors. (1) As used in this section, “consultant” means an architect, engineer or land surveyor.

(2) A local contracting agency may enter into an architectural, engineering or land surveying services contract 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 project.

(3) A local contracting agency may adopt criteria for determining when this section applies to an architectural, engineering or land surveying services contract. [2003 c.794 §94]

[no rule]

279C.120 Selection procedure for related services. (1) A contracting agency may select consultants to perform related services:

(a) In accordance with screening and selection procedures adopted under ORS 279C.105;

(b) On the basis of the qualifications of the consultants for the types of related services required, under the requirements of ORS 279C.110; or

(c) On the basis of price competition, price and performance evaluations, an evaluation of the capabilities of bidders to perform the needed related services or an evaluation of the capabilities of the bidders to perform the needed related services followed by negotiations between the

parties on the price for those related services.

(2) Subject to the requirements of subsection (1) of this section, the procedures that a contracting agency adopts for the screening and selection of consultants and the selection of a candidate under this section is 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. [2003 c.794 §95]

[no rule]

279C.125 Architectural, engineering and land surveying services selection process for local government public improvements procured through state agency; rules.

(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 or land surveyors. [2003 c.794 §96]

[no rule]

Procurement of Construction Services

General Policies

279C.300 Policy on competition. It is the policy of the State of Oregon that public improvement contracts awarded under this chapter must be based on competitive bidding, except as otherwise specifically provided in ORS 279C.335 for exceptions and formal exemptions from competitive bidding requirements. [2003 c.794 §97]

[no rule]

279C.305 Least-cost policy for public improvements; costs estimates in budget process; use of agency forces; record of costs. (1) It is the policy of the State of Oregon that contracting agencies shall make every effort to construct public improvements at the least cost to the contracting agency.

(2) Not less than 30 days prior to adoption of the contracting agency's budget for the subsequent budget period, each contracting agency shall prepare and file with the Commissioner of the Bureau of Labor and Industries a list of every public improvement known to the contracting agency that the contracting agency plans to fund in the budget period, identifying each improvement by name and estimating the total on-site construction costs. The list shall also contain a statement as to whether the contracting agency intends to perform the construction through a private contractor. If the contracting agency intends to perform construction work using the contracting agency's own equipment and personnel on a project estimated to cost more

than \$125,000, the contracting agency shall also show that the contracting agency's decision conforms to the policy stated in subsection (1) of this section. The list is a public record and may be revised periodically by the agency.

(3) Before a contracting agency constructs a public improvement with its own equipment or personnel:

(a) If the estimated cost exceeds \$125,000, the contracting agency shall prepare adequate plans and specifications and the estimated unit cost of each classification of work. The estimated cost of the work must include a reasonable allowance for the cost, including investment cost, of any equipment used. As used in this paragraph, "adequate" means sufficient to control the performance of the work and to ensure satisfactory quality of construction by the contracting agency personnel.

(b) The contracting agency shall cause to be kept and preserved a full, true and accurate account of the costs of performing the work, including all engineering and administrative expenses and the cost, including investment costs, of any equipment used. The final account of the costs is a public record.

(4) Subsections (2) and (3) of this section do not apply to a contracting agency when the public improvement is to be used for the distribution or transmission of electric power.

(5) For purposes of this section, resurfacing of highways, roads or streets at a depth of two or more inches and at an estimated cost that exceeds \$125,000 is a public improvement. [2003 c.794 §98]

[no rule]

279C.307 Limitations in procurement of personal services; exception. (1) Except as provided in subsection (2) of this section, a contracting agency that procures personal services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a public contract that is subject to this chapter may not:

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

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

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

(3) As used in this section, "affiliate" means a person that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the contractor described in subsection (1)(a) of this section. [2009 c.880 §11]

- Note: 279C.307 was added to and made a part of ORS chapter 279C by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

[no rule]

279C.310 Limitation on contracting agency constructing public improvement. If a

contracting agency fails to adopt and apply a cost accounting system that substantially complies with the model cost accounting guidelines developed by the Oregon Department of Administrative Services pursuant to section 3, chapter 869, Oregon Laws 1979, as determined by an accountant qualified to perform audits required by ORS 297.210 and 297.405 to 297.555 (Municipal Audit Law), the contracting agency may not construct a public improvement with the contracting agency's own equipment or personnel if the cost exceeds \$5,000. [2003 c.794 §99]

[no rule]

279C.315 Waiver of damages for unreasonable delay by contracting agency against public policy. (1) Any clause in a public improvement contract that purports to waive, release or extinguish the rights of a contractor to damages or an equitable adjustment arising out of unreasonable delay in performing the contract, if the delay is caused by acts or omissions of the contracting agency or persons acting therefor, is against public policy and is void and unenforceable.

- (2) Subsection (1) of this section is not intended to render void any contract provision that:
- (a) Requires notice of any delay;
 - (b) Provides for arbitration or other procedures for settlement of contract disputes; or
 - (c) Provides for reasonable liquidated damages. [2003 c.794 §100]

[no rule]

279C.320 Contracts for construction other than public improvements. (1) Contracting agencies shall enter into contracts for emergency work, minor alteration, ordinary repair or maintenance of public improvements, as well as any other construction contract that is not defined as a public improvement under ORS 279A.010, in accordance with the provisions of ORS chapter 279B. Contracts for emergency work are regulated under ORS 279B.080.

(2) Nothing in this section relieves contracting agencies or contractors of any other relevant requirements under this chapter, including payment of prevailing wage rates when applicable.

(3) When construction services are not considered to be a public improvement under this chapter because no funds of a public agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection, the benefiting public body may nonetheless condition acceptance of the services on receipt of such protections as the public body considers to be in the public interest, including a performance bond, a payment bond and appropriate insurance. [2003 c.794 §101; 2007 c.764 §13]

Rule C.320 Emergency Procurements

Emergency contracts for construction services are not public improvement contracts and are regulated under ORS 279B.080 and Port Rule B.080.

279C.325 Limitation on contracting agency awarding contract to nonresident education service district. A contracting agency may not award a public improvement contract, a contract for a public works, as defined in ORS 279C.800, or a contract for personal services, as defined in ORS 279C.100, to a nonresident bidder, as defined in ORS 279A.120, that is an education service district. [2005 c.413 §2]

[no rule]

Competitive Bidding; Contract Specifications; Exceptions; Exemptions

279C.330 “Findings” defined. As used in ORS 279C.335, 279C.345 and 279C.350, “findings” means the justification for a contracting agency conclusion that includes, but is not limited to, information regarding:

- (1) Operational, budget and financial data;
- (2) Public benefits;
- (3) Value engineering;
- (4) Specialized expertise required;
- (5) Public safety;
- (6) Market conditions;
- (7) Technical complexity; and
- (8) Funding sources. [2003 c.794 §102]

[no rule]

279C.335 Competitive bidding; exceptions; exemptions. (1) All public improvement contracts shall be based upon competitive bids except:

- (a) Contracts made with qualified nonprofit agencies providing employment opportunities for individuals with disabilities under ORS 279.835 to 279.855.
- (b) A public improvement contract exempt under subsection (2) of this section.
- (c) A public improvement contract with a value of less than \$5,000.
- (d) A contract not to exceed \$100,000 made under procedures for competitive quotes in ORS 279C.412 and 279C.414.
- (e) Contracts for repair, maintenance, improvement or protection of property obtained by the Department of Veterans’ Affairs under ORS 407.135 and 407.145 (1).
- (f) Energy savings performance contracts entered into in accordance with rules of procedure adopted under ORS 279A.065.

(2) Subject to subsection (4)(b) of this section, the Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation may exempt a public improvement contract or a class of public improvement contracts from the competitive bidding requirements of subsection (1) of this section upon approval of the following findings submitted by the contracting agency or, if a state agency is not the contracting agency, the state agency seeking the exemption:

(a) It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts.

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

appropriate.

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

(3) In making findings to support an exemption for a class of public improvement contracts, the contracting agency or state agency shall clearly identify the class using the class's defining characteristics. Those characteristics shall include some 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 appropriate, direct the use of alternate 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.

(5)(a) Before final adoption of the findings required by subsection (2) of this section exempting 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 be published in at least one trade newspaper of general statewide circulation a minimum of 14 days before the hearing.

(c) The notice shall 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 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 act promptly due to 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 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 the findings and granting the exception. The findings may describe anticipated features of the resulting public improvement contract, but the final parameters of the contract are those characteristics or specifics announced in the solicitation document.

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

(8) Public improvement contracts excepted from competitive bid requirements under subsection (1)(a), (c), (d), (e) or (f) of this section are not subject to the exemption requirements of subsection (2) of this section. [2003 c.794 §103; 2003 c.794 §§104,105a; 2005 c.103 §§12,13,14; 2005 c.625 §§58,59,60; 2007 c.70 §§69,70,71; 2007 c.764 §§14,15,17]

[no rule]

Rule C.~~336~~335 *Contracts for Energy Savings Performance Projects*

Pursuant to ORS 279C.335 (1) (f), the Port may enter into energy savings performance contracts without following the competitive bidding requirements of ORS 279C. “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. The Port may award an energy savings performance contract through a method of contracting determined by the Manager of Contracts & Procurement, after an analysis of the proposed project and the likelihood of obtaining competitive proposals, to be most advantageous to the Port. The method of award may include without limitation a competitive proposal process, a competitive negotiation process, or direct negotiation with a qualified energy service company, provided that direct negotiation will not be used if there are two or more qualified energy service companies ready and willing to timely provide the particular goods and services required by the Port at a reasonable price. If the proposed energy savings performance project is a design-build project of which less than 50 percent of the project cost is estimated to be for a public improvement, the Port may enter into the contract under the rules governing personal service contracts described in Rule 279B.500. Nothing in this rule shall be deemed to preclude the Port from awarding an energy savings performance contract through competitive bidding if the Manager of Contracts & Procurement determines that competitive bidding would be most advantageous to the Port.

279C.340 Contract negotiations. If a public improvement contract is competitively bid and all responsive bids from responsible bidders exceed the contracting agency’s cost estimate, the contracting agency, in accordance with rules adopted by the contracting agency, may negotiate with the lowest responsive, responsible bidder, prior to awarding the contract, in order to solicit value engineering and other options to attempt to bring the contract within the contracting agency’s cost estimate. A negotiation with the lowest responsive, responsible bidder under this

section may not result in the award of the contract to that bidder if the scope of the project is significantly changed from the original bid proposal. Notwithstanding any other provision of law, the records of a bidder used in contract negotiation under this section are not subject to public inspection until after the negotiated contract has been awarded or the negotiation process has been terminated. [2003 c.794 §106]

Rule C.340 Negotiations When All Bids Exceed Estimate

Pursuant to ORS 279C.340, the Port may negotiate with the lowest responsible bidder submitting a responsive bid if all responsive bids from responsible bidders exceed the Port's cost estimate. If a written cost estimate was not prepared prior to bidding, the amount budgeted for the public contract shall be deemed the cost estimate for the purposes of this rule. The Port may negotiate under this rule only if the Port has determined that it would not be in the Port's best interest to cancel the procurement, revise the specifications.

279C.345 Specifications for contracts; exemptions. (1) Specifications for public improvement contracts may not expressly or implicitly require any product by any brand name or mark, nor the product of any particular manufacturer or seller unless the product is exempt under subsection (2) of this section.

(2) The Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation may exempt certain products or classes of products from subsection (1) of this section upon any of the following findings:

(a) It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts;

(b) The specification of a product by brand name or mark, or the product of a particular manufacturer or seller, would result in substantial cost savings to the contracting agency;

(c) There is only one manufacturer or seller of the product of the quality required; or

(d) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies. [2003 c.794 §107; 2007 c.764 §19]

Rule C.345 Specification of Particular Products

(a) *Generally*

The Port may expressly or implicitly require a particular product by brand name, trade name, manufacturer, or seller as an abbreviated means of specifying the Port's needs, in which case offerors may substitute equivalent products. The invitation to bid or request for proposals may require substitutions to be approved by the Port prior to the submission of offers; otherwise substitutions are allowed after contract award, if they are approved by the Port. The Port shall approve a substitution if the substitute product has all of the salient features of the expressly or implicitly required product. This provision does not apply to products or classes of products that are exempt under ORS 279C.345(2).

(b) Brand Name Exemptions

The Port may expressly or implicitly require a particular product by brand name, trade name, manufacturer or seller and disallow any substitution of named product when a determination has been made by the Manager of Contracts and Procurement that doing so meets the requirements of ORS 279C.345(2). Brand Name Exemptions shall be effective only for the period of time designated by the Manager of Contracts and Procurement, whereupon a new determination of applicability of this rule must be made. Determinations of exemptions under ORS 279C.345(2) shall be available for public inspection upon request.

279C.350 Exemption procedure; appeal.

(3) Any person except the contracting agency or anyone representing the contracting agency may bring an action for writ of review under ORS chapter 34 to test the validity of an exemption granted under ORS 279C.335 or 279C.345 by a local contract review board. [2003 c.794 §108; 2003 c.794 §109; 2007 c.764 §20]

[no rule]

279C.355 Evaluation of public improvement projects not contracted by competitive bidding. (1) Upon completion of and final payment for any public improvement contract, or class of public improvement contracts, in excess of \$100,000 for which the contracting agency did not use the competitive bidding process, the contracting agency shall prepare and deliver to the Director of the Oregon Department of Administrative Services, the local contract review board or, for public improvement contracts described in ORS 279A.050 (3)(b), the Director of Transportation an evaluation of the public improvement contract or the class of public improvement contracts.

(2) The evaluation must include but is not limited to the following matters:

(a) The actual project cost as compared with original project estimates;

(b) The amount of any guaranteed maximum price;

(c) The number of project change orders issued by the contracting agency;

(d) A narrative description of successes and failures during the design, engineering and construction of the project; and

(e) An objective assessment of the use of the alternative contracting process as compared to the findings required by ORS 279C.335.

(3) The evaluations required by this section:

(a) Must be made available for public inspection; and

(b) Must be completed within 30 days of the date the contracting agency accepts:

(A) The public improvement project; or

(B) The last public improvement project if the project falls within a class of public improvement contracts. [2003 c.794 §111; 2003 c.794 §112; 2007 c.764 §§22,23]

Rule C.355 Evaluation

The evaluation must be completed within 30 days of the date the Port grants “final acceptance” of the public improvement project, as defined in the applicable public improvement contract.

The evaluation must be delivered to the Port Commission at the next regularly-scheduled Commission meeting after the evaluation is completed. The evaluation may be included as part of the Executive Director's Report, or may be delivered to the Commission as otherwise deemed appropriate by the Executive Director.

Solicitation; Contract Award; Rejection

279C.360 Requirement for public improvement advertisements. (1) An advertisement for public improvement contracts must be published at least once in at least one newspaper of general circulation in the area where the contract is to be performed and in as many additional issues and publications as the contracting agency may determine. The Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation, by rule or order, may authorize advertisements for public improvement contracts to be published electronically instead of in a newspaper of general circulation if the director or board determines that electronic advertisements are likely to be cost-effective. If the public improvement contract has an estimated cost in excess of \$125,000, the advertisement must be published in at least one trade newspaper of general statewide circulation. The Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board may, by rule or order, require an advertisement to be published more than once or in one or more additional publications.

(2) All advertisements for public improvement contracts must state:

- (a) The public improvement project;
- (b) The office where the specifications for the project may be reviewed;
- (c) The date that prequalification applications must be filed under ORS 279C.430 and the class or classes of work for which bidders must be prequalified if prequalification is a requirement;
- (d) The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement;
- (e) The name and title of the person designated for receipt of bids;
- (f) The date, time and place that the contracting agency will publicly open the bids; and
- (g) If the contract is for a public works subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 et seq.). [2003 c.794 §114; 2005 c.103 §14a; 2007 c.844 §1]

Rule C.360 Competitive Sealed Bidding

(1) Advertisement

(a) The Port shall advertise invitations to bid in the Oregonian or the Daily Journal of Commerce, and shall also Post all notices for invitations to bid on the Port's website. If the Executive Director or the Manager of Contracts and Procurement make a determination that limiting the posting of the notice for invitations to bid solely by electronic means is cost effective to the Port, and the public improvement contract has an estimated cost of \$125,000 or less, then publishing the notice in a newspaper may be waived.

(b) The notice shall be posted at least 7 days prior to the date the invitations to bid are due, unless the Manager of Contracts and Procurement determines that a shorter time period is necessary and in the Port's best interest.

(2) Distribution of Solicitation Documents

The Port normally distributes solicitation documents by handing them to individuals who appear at the office of the Port's Contracts and Procurement Division or via U.S. Mail. The Port may distribute solicitation documents by any commercially reasonable means, including without limitation fax, other electronic means and express mail, if the Port determines in its sole discretion that other means are appropriate under the circumstances. The Port may, but is not obligated to, deliver a solicitation document by other more costly means if a particular prospective offeror pays the additional cost.

(3) Prospective Bidders and Proposers Lists

A prospective bidder or proposer for a particular procurement is responsible for ensuring that its correct name, address, telephone number, and fax number have been effectively and accurately communicated to the Port's Contracts and Procurement Division for inclusion on the list of prospective bidders or proposers for that procurement. The Port's Contracts and Procurement Division endeavors to include on the list for a particular procurement each prospective bidder or proposer to which a solicitation document is issued by the Contracts and Procurement Division. Prospective bidders or proposers who obtain solicitation documents from other sources, such as plan centers, are not automatically added to the list, and must contact the Contracts and Procurement Division to be added. Listed prospective bidders and proposers are responsible for immediately notifying the Port's Contracts and Procurement Division in writing of any changes in name, address, telephone number, or fax number.

(4) Responsibility of Bidders

While the Port endeavors to provide all known solicitation holders with all the available information and documentation necessary to provide a responsive bid, through notice of document availability by mail or electronic means, the Port cannot guarantee that such notice will be delivered to or read by solicitation holders in a timely manner. Bidders are therefore responsible for ensuring they have received all necessary information to provide a responsive bid, including without limitation all bid documents, addenda, plans, attachments, exhibits, etc., prior to submitting a bid.

279C.365 Requirements for solicitation documents and bids and proposals. (1) A contracting agency ~~preparing~~that prepares solicitation documents for a public improvement contract shall, at a minimum, include in the solicitation documents:

- (a) The A designation for or description of the public improvement project;
- (b) The office where the specifications for the project may be reviewed;
- (c) The date that prequalification applications must be filed under ORS 279C.430 and the class or classes of work for which bidders must be prequalified if prequalification is a requirement;
- (d) The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement, and may, in the sole discretion of

the contracting agency, direct or permit ~~the submission and receipt of~~ bidders to submit and the contracting agency to receive bids by electronic means;

— (e) The name and title of the person designated ~~for receipt of~~ to receive bids;

— (f) The date, ~~on which and the~~ time and place ~~that at which~~ the contracting agency will publicly open the bids;

— (g) A statement that, if the contract is for a public works project subject to the state prevailing rates of wage under ORS 279C.800 to 279C.870, the federal prevailing rates of wage under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) or both the state and federal prevailing rates of wage, ~~no bid will be received or considered by~~ the contracting agency will not receive or consider a bid unless the bid contains a statement by the bidder that the bidder will comply with ORS 279C.838 or 279C.840 or 40 U.S.C. 3141 et seq. will be complied with;

— (h) A statement that each bid must identify whether the bidder is a resident bidder, as defined in ORS 279A.120;

— (i) A statement that the contracting agency may reject ~~any~~ bid that does not in compliance comply with ~~all~~ prescribed public contracting procedures and requirements, including the requirement to demonstrate the bidder's responsibility under ORS 279C.375 (3)(b), and that the contracting agency may reject for good cause all bids upon after finding of the agency that it doing so is in the public interest ~~to do so~~;

— (j) Information addressing whether a contractor or subcontractor must be licensed under ORS 468A.720; and

— (k) A statement that the contracting agency may not receive or consider a bid for a public improvement contract ~~may not be received or considered by the contracting agency~~ unless the bidder is licensed by the Construction Contractors Board or the State Landscape Contractors Board.

— (2) A contracting agency may provide solicitation documents by electronic means.

— (3) ~~All bids~~ A bid made to the contracting agency under ORS 279C.335 or 279C.400 must be:

— (a) In writing;

— (b) Filed with the person ~~designated for receipt of bids by~~ the contracting agency designates to receive bids; and

— (c) Opened publicly by the contracting agency immediately after the deadline for ~~submission of~~ submitting bids.

— (4) After ~~having been opened,~~ the contracting agency opens the bids, the contracting agency shall make the bids ~~must be made~~ available for public inspection.

— ~~(5) A~~ (5) A bidder shall submit or post a surety bond, irrevocable letter of credit issued by an insured institution as defined in ORS 706.008, cashier's check or certified check ~~of each bidder shall be submitted with or posted~~ for all bids as bid security unless the contracting agency has exempted the contract for which the bidder submits a bid ~~is submitted has been exempted~~ from this requirement under ORS 279C.390. The security may not exceed 10 percent of the amount bid for the contract.

— (6) Subsection (5) of this section applies only to public improvement contracts with a value, estimated by the contracting agency, of more than \$100,000 or, in the case of contracts for highways, bridges and other transportation projects, more than \$50,000. [2003 c.794 §115; 2005 c.103 §15; 2007 c.764 §25; 2007 c.844 §2; 2009 c.368 §1]

Rule C.365 Competitive Bidding

(1) Prebid and Proposal Conferences

(a) Generally

The Port may hold a prebid or preproposal conference to allow a site inspection and to hear and respond to questions. If the time and place of a prebid or preproposal conference are not stated in the invitation to bid or request for proposal, all prospective bidders or proposers on the list maintained by the Port's Contracts and Procurement Division shall be notified of the time and place. Notification may be by telephone, fax or other electronic means, or in writing, at the Port's option.

(b) Mandatory

The Port may require attendance at a prebid or preproposal conference as a condition precedent to the submission of a bid or proposal. The Port may refuse to open or may reject as nonresponsive a bid from a bidder who failed to attend a mandatory prebid conference, and may refuse to open or decline to evaluate a proposal from a proposer who failed to attend a mandatory preproposal conference. The Port may, but is not obligated to, arrange for a subsequent prebid or preproposal conference if requested by one or more prospective bidders or proposers who were unable to attend a scheduled, mandatory prebid or preproposal conference for a reason determined by the Port to be commercially reasonable under the circumstances. If a subsequent prebid or preproposal conference is arranged, all prospective bidders or proposers on the Contracts and Procurement Division's list shall be notified in advance and allowed to attend.

(c) Limited Effect

Statements and other information from Port employees at a prebid or preproposal conference do not effect any change in the invitation to bid or the request for proposals, or the contracts that may arise from them. Changes in the invitation to bid or the request for proposals may be effected only by a written addendum issued by the Port. Bidders and proposers may rely only upon the invitation to bids or the request for proposals, with any changes made by addendum, to establish all of the procurement requirements and all contract provisions other than those established by the bid or proposal.

(d) Change Requests

A prospective bidder or proposer who wants to propose a change to the invitation to bid or the request for proposals should submit a written request, even if the change was requested during a prebid or preproposal conference. The request should be submitted in accordance with any instructions in the invitation to bid or the request for proposals. If the Port fails to respond to a change request made during a prebid or preproposal conference, or to a written change request, the request shall be deemed denied. If the Port responds to a change request, the response may be in the form of an addendum issued to all prospective bidders or proposers, with no specific response to the requestor.

(2) Addenda

(a) Requirement

A solicitation document may be changed only by a written addendum issued by the Port. When an addendum is required, it shall be issued to all prospective bidders or proposers on the list maintained for the procurement in question by the Port's Contracts and Procurement Division.

(b) Acknowledgment Required

A bidder or proposer must timely acknowledge in writing receipt of all addenda issued by the Port. Failure to acknowledge receipt of an addendum may cause a bid to be rejected as nonresponsive, and may cause a proposal to be considered outside the competitive range or to be determined after evaluation to be inferior to other proposals that included acknowledgment of receipt of the addendum. Acknowledgment of receipt of an addendum most often will be part of the bid or proposal, but may be separate from the bid or proposal, and need not be sealed. The Port shall accept a written acknowledgment of receipt of an addendum by any commercially reasonable means, including but not limited to fax and email. Acknowledgment of receipt of an addendum to an invitation to bid is timely only if it is received in a manner and at a time that would make it timely if it were a bid.

(c) Distribution and Receipt

Addenda may be distributed by U.S. mail, fax or other electronic means, hand delivery, or other commercially reasonable means. Failure to receive an addendum to a solicitation does not excuse failure to acknowledge receipt of the addendum, even if the failure to receive was through no fault of the prospective bidder or proposer, and even if the failure to receive was the fault of the Port. The Port, in its sole discretion, may extend a bid opening to allow a bidder or proposer time to acknowledge receipt of an addendum.

(3) Method of Submitting Offers

(a) Generally

Bids must be submitted in writing on the form provided by the Port or a reasonable facsimile. Bids may not be submitted by fax or other electronic means unless expressly ~~allowed~~directed or permitted by the invitation to bid. A bid shall be considered timely submitted if it is delivered to the Manager of Contracts and Procurement or the Manager's designee by the deadline stated in the invitation to bid.

(b) Timeliness

Offerors are responsible for ensuring their offers are timely. The Port may decline to consider a late offer, even if the offer is late because of a delay in the Port's internal handling of mail or documents or because the Port's receiving equipment was unavailable.

(c) Completeness

Offerors are responsible for ensuring their offers are received by the Port in a complete, legible, ungarbled form. The Port may decline to consider an offer that is incomplete, illegible, or garbled, even if the problem is caused by the Port's hardware or software.

(d) Electronic Submission

Offers submitted electronically must bear a facsimile signature, provided that the requirement for a facsimile signature is excused when an electronic quotation is properly submitted in lieu of an oral quotation, or when the solicitation document expressly authorizes electronic data interchange, e-mail, or another electronic submission method by which facsimile signatures generally cannot be transmitted. A solicitation document expressly authorizing electronic submission of offers may specify methods for establishing the authenticity of offers.

(4) Bid Withdrawal

At any time before the deadline for receipt of bids, a bidder may withdraw its bid without consequence. The withdrawal must be by someone with the necessary authority, and must be a signed writing.

(5) Bid Modification

At any time before the deadline for receipt of bids, a bidder may modify its bid in writing. A bidder shall prepare and submit any modification to its bid to the Port in accordance with Port Contracting Rule B.055(9), unless otherwise specified in the solicitation document. Any modification must include the bidder's statement that the modification amends and ~~supersedes~~supersedes the prior bid. The bidder shall mark the submitted modification as follows:

(a) Bid (or Proposal) Modification; and

(b) Solicitation Number (or Other Identification as specified in the Solicitation Document).

(6) Receipt and Recording of Offers; Confidentiality of Offers

The Port shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The Port shall not open the Offer or modification upon receipt, but shall maintain it as confidential and secure until Opening. If the Port inadvertently opens an Offer or a modification prior to the Opening, the Port shall return the Offer or modification to its secure and confidential state until Opening. The Port shall document the resealing for the Procurement file (e.g. "Port inadvertently opened the Offer due to improper identification of the Offer").

(7) Bid Opening

Bids shall be opened in a place designated by the Port that is open to the public at the time bids are opened. The place bids will be opened may be changed by the Port at any time. The time for opening bids may be postponed at any time for the Port's convenience or if the Port determines that postponement would be in the Port's best interest. A bid opening postponement or relocation shall be communicated orally or by a posted sign to anyone who appears at the previously designated time and place for the bid opening. If time permits, a bid opening postponement or relocation shall be communicated to all prospective bidders on the list maintained by the Port's Contracts and Procurement Division by mail, fax, email, or any other commercially reasonable means. A bid opening postponement or relocation need not be communicated by addendum.

Subject to any exemptions under Oregon public records statutes, bids shall be available for public inspection only after the Port has finished evaluating them.

(8) Bid Evaluation

Opened bids shall be evaluated in accordance with applicable statutes and these Rules. When a bid is determined to be unresponsive to the invitation to bid, it will not be evaluated further. Bidders who submit responsive bids shall be evaluated for responsibility under applicable statutes, these Rules, and the invitation to bid.

(9) Bid Errors

(a) Errors of Judgment

A bid may not be corrected or withdrawn for an error in judgment. If a bidder is awarded a public contract and refuses to promptly and properly execute the public contract because of an error in judgment, the bidder's bid security must be forfeited under ORS 279B.055(3)(c).

(b) Minor Informalities

The Port may waive or permit a bidder to correct a minor informality. A minor informality is either a matter of form rather than substance that is evident on the face of the bid, or an insignificant mistake that can be waived without prejudice to other bidders. For example, failure to sign the bid in the designated block on the bid form is a minor informality if a signature appears on the bid bond or somewhere else in the bid evidencing an intent to be bound by the bid.

(c) Clerical Errors

A clerical error is an error in drafting the bid, and may include without limitation typographical errors, arithmetic errors, and transposition and other errors in transferring numbers from work sheets to the bid form. If a clerical error is apparent on the face of the bid and the correction also is apparent on the face of the bid, the Port shall correct the error before evaluating bids. A discrepancy between a unit price and an extended bid item price is a clerical error and shall be corrected by giving precedence to the unit price. If an error not apparent on the face of the bid is brought to the Port's attention, the bidder may submit evidence to establish that the error is a clerical error. If it is clear from the face of the bid or from evidence submitted by the bidder that an error is a clerical error, rather than an error in judgment, but the correction of the error is not apparent on the face of the bid, the bidder may either withdraw its bid without forfeiting its bid security under ORS 279B.055(3)(c), or agree to proceed with the public contract as bid, without correcting the error. If the bidder takes neither of those actions, the Port shall reject the bid as non responsive. A bidder may not correct a clerical error if the correction is not apparent on the face of the bid.

(10) Irrevocability of Offers

(a) Generally

All bids received by the Port for a particular public contract become binding offers when the deadline for receipt of bids passes, and remain irrevocable for 30 calendar days after opening unless a different period is specified in the invitation to bid.

(b) Extensions and Reinstatements

An offeror may extend the period of irrevocability of its offer by giving the Port a written extension specifying a new period of irrevocability. An offeror may reinstate an offer (unchanged) after the expiration of the period of irrevocability by giving the Port a written

reinstatement specifying a new period of irrevocability. An offeror may not "extend" or "reinstate" an offer that differs in any material respect from the original; a purported extension or reinstatement of a materially differing offer amounts to a new offer.

(11) Tied Low Bids or Quotations

(a) Generally

If (1) low bids or quotations are tied, (2) the price, fitness, availability, and quality of the goods or services offered by the tied offerors are otherwise equal, and (3) one of the tied offerors offers goods or services manufactured or produced in Oregon, the contract shall be awarded to that offeror in accordance with ORS 279A.120. If two or more of the tied offerors offer goods or services manufactured or produced in Oregon, the contract shall be awarded to one with principal offices or headquarters in Oregon. If two or more of the tied offerors offer goods or services manufactured or produced in Oregon, and none has principal offices or headquarters in Oregon, or if two or more of them have principal offices or headquarters in Oregon, the contract shall be awarded by drawing lots. If none or all of the tied offerors offer goods or services manufactured or produced in Oregon, the contract shall be awarded by drawing lots.

(b) Unequal Quality

If the fitness, availability, and quality of the goods or services offered by tied offerors are not otherwise equal, the contract shall be awarded to the offeror determined by the Port to offer the superior goods or services.

279C.370 First-tier subcontractor disclosure. (1)(a) Within two working hours after the date and time of the deadline when bids are due to a contracting agency for a public improvement contract, a bidder shall submit to the contracting agency a disclosure of the first-tier subcontractors that:

(A) Will be furnishing labor or will be furnishing labor and materials in connection with the public improvement contract; and

(B) Will have a contract value that is equal to or greater than five percent of the total project bid or \$15,000, whichever is greater, or \$350,000 regardless of the percentage of the total project bid.

(b) For each contract to which this subsection applies, the contracting agency shall designate a deadline for submission of bids that has a date on a Tuesday, Wednesday or Thursday and a time between 2 p.m. and 5 p.m., except that this paragraph does not apply to public contracts for maintenance or construction of highways, bridges or other transportation facilities.

(c) This subsection applies only to public improvement contracts with an estimated value, estimated by the contracting agency, of more than \$100,000.

(d) This subsection does not apply to public improvement contracts that have been exempted from competitive bidding requirements under ORS 279C.335 (2).

(2) The disclosure of first-tier subcontractors under subsection (1) of this section must include the name of each subcontractor, the category of work that each subcontractor will perform and the dollar value of each subcontract. The information shall be disclosed in substantially the following form:

FIRST-TIER SUBCONTRACTOR
DISCLOSURE FORM

PROJECT NAME: _____
 BID #: _____
 BID CLOSING: Date: _____ Time: _____

This form must be submitted at the location specified in the Invitation to Bid on the advertised bid closing date and within two working hours after the advertised bid closing time.

List below the name of each subcontractor that will be furnishing labor or will be furnishing labor and materials and that is required to be disclosed, the category of work that the subcontractor will be performing and the dollar value of the subcontract. Enter "NONE" if there are no subcontractors that need to be disclosed. (ATTACH ADDITIONAL SHEETS IF NEEDED.)

NAME	DOLLAR VALUE	CATEGORY OF WORK
1)	\$	
2)	\$	
3)	\$	
4)	\$	

Failure to submit this form by the disclosure deadline will result in a nonresponsive bid. A nonresponsive bid will not be considered for award.

Form submitted by (bidder name): _____
 Contact name: _____
 Phone no.: _____

(3) A contracting agency shall accept the subcontractor disclosure. The contracting agency shall consider the bid of any contractor that does not submit a subcontractor disclosure to the contracting agency to be a nonresponsive bid and may not award the contract to the contractor. A contracting agency is not required to determine the accuracy or the completeness of the subcontractor disclosure.

(4) After the bids are opened, the subcontractor disclosures must be made available for public inspection.

(5) A contractor may substitute a first-tier subcontractor under the provisions of ORS 279C.585.

(6) A subcontractor may file a complaint under ORS 279C.590 based on the disclosure requirements of subsection (1) of this section. [2003 c.794 §116; 2005 c.103 §16]

[no rule]

279C.375 Award and execution of contract or multiple contracts; determination of responsibility of bidder; bonds; impermissible exclusions. (1) After bids are ~~contracting agency has~~ opened bids and ~~a determination is made~~ determined that the contracting agency will

award a public improvement contract ~~is to be awarded~~, the contracting agency shall award the contract to the lowest responsible bidder.

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

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

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

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

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

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

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

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

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

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

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

— (H) Is legally qualified to contract with the contracting agency.

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

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

RESPONSIBILITY DETERMINATION FORM

Project Name: _____

Bid Number: _____

Business Entity Name: _____

CCB License Number: _____

Form Submitted By (Contracting Agency): _____

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

____ Title: _____

____ Date: _____

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

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

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

Determined whether the bidder has
____ met the standards of responsibility.

In so doing, the contracting agency
____ has ~~considered whether found that~~ the bidder: demonstrated that the bidder:

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

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

Is covered by liability insurance and other insurance in amounts required in the
solicitation documents.

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

Has disclosed the bidder's first-tier subcontractors in accordance with ORS
279C.370.

Has a satisfactory record of
____ performance.

Has a satisfactory record of
____ integrity.

Is Is legally qualified ~~legally~~ to contract
_____ with the contracting agency.

Has supplied all necessary
_____ information in connection with
_____ the inquiry concerning
_____ responsibility.

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

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

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

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

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

_____(4) The successful bidder shall:

_____(a) Promptly execute a formal contract; and

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

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

_____(6) A contracting agency may not exclude a commercial contractor from competing for a public contract on the basis that the license issued by the Construction Contractors Board is endorsed as a level 1 or level 2 license. As used in this section, "commercial contractor" has the meaning given that term in ORS 701.005. [2003 c.794 §117; 2005 c.103 §§17,18; 2005 c.376 §1; 2007 c.764 §§26,27; 2007 c.836 §§42,43; 2009 c.880 §§9,9a]

~~**Note:** The amendments to 279C.375 by section 43, chapter 836, Oregon Laws 2007, become operative July 1, 2008. See section 70, chapter 836, Oregon Laws 2007. The text that is operative until July 1, 2008, including amendments by section 27, chapter 764, Oregon Laws 2007, is set forth for the user's convenience.~~

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

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

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

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

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

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

_____ (B) A satisfactory record of performance. The contracting agency shall document the record of performance of a bidder if the contracting agency finds the bidder not to be responsible under this subparagraph.

_____ (C) A satisfactory record of integrity. The contracting agency shall document the record of integrity of a bidder if the contracting agency finds the bidder not to be responsible under this subparagraph.

_____ (D) Qualified legally to contract with the contracting agency.

_____ (E) Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder fails to promptly supply information requested by the contracting agency concerning responsibility, the contracting agency shall base the determination of responsibility upon any available information, or may find the bidder not to be responsible.

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

RESPONSIBILITY DETERMINATION FORM

Project Name: _____

Bid Number: _____

Business Entity Name: _____

CCB License Number: _____

Form Submitted By (Contracting Agency): _____

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

Title: _____

Date: _____

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

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

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

_____ _____ Determined whether the bidder has
_____ met the standards of responsibility.
_____ In so doing, the contracting agency
_____ has considered whether the bidder:

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

_____ _____ Has a satisfactory record of
_____ performance.

- Has a satisfactory record of integrity.
- Is qualified legally to contract with the contracting agency.
- Has supplied all necessary information in connection with the inquiry concerning responsibility.
- Determined the bidder to be (check one of the following):
 - Responsible under ORS 279C.375 (3)(a) and (b).
 - Not responsible under ORS 279C.375 (3)(a) and (b).

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

- (d) Submit the form described in paragraph (c) of this subsection, with any attachments, to the Construction Contractors Board within 30 days after the date the contracting agency awards the contract.
- (4) The successful bidder shall:
 - (a) Promptly execute a formal contract; and
 - (b) Execute and deliver to the contracting agency a performance bond and a payment bond when required under ORS 279C.380.
 - (5) Based on competitive bids, a contracting agency may award a public improvement contract or may award multiple public improvement contracts when specified in the invitation to bid.

Rule C.375 Award of Contracts

- (1) “Responsible bidder” or “responsible proposer” means a person who meets the standards of responsibility described in ORS 279C.375(3)(b).
- (2) “Responsive bid” or “responsive proposal” means a bid or proposal that substantially complies with the invitation to bid or request for proposals and all prescribed procurement procedures and requirements.

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

(a) A performance bond in an amount equal to the full contract price conditioned on the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. The performance bond must be solely for the protection of the contracting agency that awarded the contract and any public agency or agencies for whose benefit the contract was awarded. If the public improvement contract is with a single person to provide both design and construction of a public improvement, the obligation of the performance bond for the faithful performance of the contract required by this paragraph must also be for the preparation and completion of the design and related services covered under the contract. Notwithstanding when a cause of action, claim or demand accrues or arises, the surety is not liable after final completion of the contract, or longer if provided for in the contract, for damages of any nature, economic or otherwise and including corrective work, attributable to the design aspect of a

design-build project, or for the costs of design revisions needed to implement corrective work. A contracting agency may waive the requirement of a performance bond. A contracting agency may permit the successful bidder to submit a cashier's check or certified check in lieu of all or a portion of the required performance bond.

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

(2) If the public improvement contract is with a single person to provide construction manager and general contractor services, in which a guaranteed maximum 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 amendment. Such bonds must be provided before construction starts.

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

(4) In cases of emergency, or when the interest or property of the contracting agency or the public agency or agencies for whose benefit the contract was awarded probably would suffer material injury by delay or other cause, the requirement of furnishing a good and sufficient performance bond and a good and sufficient payment bond for the faithful performance of any public improvement contract may be excused, if a declaration of such emergency is made in accordance with rules adopted under ORS 279A.065.

(5) This section applies only to public improvement contracts with a value, estimated by the contracting agency, of more than \$100,000 or, in the case of contracts for highways, bridges and other transportation projects, more than \$50,000. [2003 c.794 §118; 2005 c.103 §20]

[no rule]

279C.385 Return or retention of bid security. (1) Upon the execution of a public improvement contract and delivery of a good and sufficient performance bond and a good and sufficient payment bond by the successful bidder, the bid security of the successful bidder shall be returned to the bidder. A contracting agency shall return the bid security of the successful bidder to the bidder after the bidder:

- (a) Executes the public improvement contract; and
- (b) Delivers a good and sufficient performance bond, a good and sufficient payment bond and any required proof of insurance.

(2) A bidder who is awarded a contract and who fails promptly and properly to execute the contract and to deliver the performance bond, and the payment bond and the proof of insurance, when bonds or insurance are required, shall forfeit the bid security that accompanied the successful bid. The bid security shall be taken and considered as liquidated damages and not as a penalty for failure of the bidder to execute the contract and deliver the bonds and proof of insurance.

(3) The contracting agency may return the bid security of unsuccessful bidders to them when the bids have been opened and the contract has been awarded, and may not retain the bid security after the contract has been duly signed. [2003 c.794 §119; 2005 c.103 §21]

[no rule]

279C.390 Exemption of contracts from bid security and bonds. (1) Subject to the provisions of subsection (2) of this section, the Director of the Oregon Department of Administrative Services, a state contracting agency with procurement authority under ORS 279A.050, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation may exempt certain contracts or classes of contracts from all or a portion of the requirement for bid security and from all or a portion of the requirement that good and sufficient bonds be furnished to ensure performance of the contract and payment of obligations incurred in the performance.

(2) The contracting agency may require bid security and a good and sufficient performance bond, a good and sufficient payment bond, or any combination of such bonds, even though the public improvement contract is of a class exempted under subsection (1) of this section.

*** [2003 c.794 §120; 2003 c.794 §120a; 2007 c.764 §28]

[no rule]

279C.395 Rejection of bids. A contracting agency may reject any bid not in compliance with all prescribed public bidding procedures and requirements, and may, for good cause, reject all bids upon a finding of the contracting agency it is in the public interest to do so. In any case where competitive bids are required and all bids are rejected, and the proposed project is not abandoned, new bids may be called for as in the first instance. [2003 c.794 §121]

Rule C.395 Rejection of Bids; Cancellation of Solicitation

(1) Rejection of Bids for Good Cause in the Public Interest

The Port may reject any or all bids in accordance with ORS 279C.100 for good cause upon a finding that rejection is in the public interest. Situations where good cause is sufficient to warrant rejection of all bids include but are not limited to: (1) competition is unnecessarily restricted because of the content of or an error in the solicitation document or the solicitation process; (2) all offered prices are too high or all offered performance is insufficient to meet the Port's needs; (3) ambiguous or misleading provisions in the solicitation document, or misconduct or error, threaten the fairness and integrity of the competitive process; and (4) events other than legitimate market forces threaten the integrity of the competitive procurement process.

(2) Cancellation of Solicitation Document

(a) Cancellation in the Public Interest. The Port may cancel a Solicitation for good cause if the Port finds that cancellation is in the public interest. The Port's reasons for cancellation shall be made part of the Solicitation file.

(b) Notice of Cancellation. If the Port cancels a Solicitation prior to Opening, the Port shall provide Notice of cancellation to all identified bidders. Such notice of cancellation shall:

(i) Identify the Solicitation;

(ii) Briefly explain the reason for cancellation; and

(iii) If appropriate, explain that an opportunity will be given to compete on any resolicitation.

(3) Disposition of Bids.

(a) Prior to Bid Opening. If the Port cancels a Solicitation prior to Bid Opening, the Port shall return all Bids it received to Bidders unopened, provided the Bidder submitted its Bid in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the Port shall open the Bid to determine the source and then return it to the Bidder.

(b) After Bid Opening. If the Port rejects all Bids, the Port shall retain all such Bids as part of the Port's Solicitation file.

(4) Creation of a Contract

A bid constitutes an offer by the bidder to perform the work described in the invitation to bid. The bid of a successful bidder is incorporated into a contract document which the bidder is required to sign. The Port does not accept a bid, and a contract does not otherwise come into existence, until the Port's authorized representative signs the partially executed contract document.

Competitive Proposals

279C.400 Competitive proposals; procedure. (1) When authorized or required by an exemption granted under ORS 279C.335, a contracting agency may solicit and award a public improvement contract, or may award multiple public improvement contracts when specified in the request for proposals, by requesting and evaluating competitive proposals. A contract awarded under this section may be amended only in accordance with rules adopted under ORS 279A.065.

(2) Except as provided in ORS 279C.330 to 279C.355, 279C.360 to 279C.390, 279C.395 and 279C.430 to 279C.450, competitive proposals shall be subject to the following requirements of competitive bidding:

(a) Advertisement under ORS 279C.360;

(b) Requirements for solicitation documents under ORS 279C.365;

(c) Disqualification due to a Construction Contractors Board listing as described in ORS 279C.375 (3)(a);

(d) Contract execution and bonding requirements under ORS 279C.375 and 279C.380;

(e) Determination of responsibility under ORS 279C.375 (3)(b);

(f) Rejection of bids under ORS 279C.395; and

(g) Disqualification and prequalification under ORS 279C.430, 279C.435 and 279C.440.

(3) For the purposes of applying the requirements listed in subsection (2) of this section to competitive proposals, when used in the sections listed in subsection (2) of this section, "bids" includes proposals, and "bid documents" and "invitation to bid" include requests for proposals.

(4) Competitive proposals are not subject to the following requirements of competitive bidding:

(a) First-tier subcontractor disclosure under ORS 279C.370; and

(b) Reciprocal preference under ORS 279A.120.

(5) The contracting agency may require proposal security that serves the same function with respect to proposals as bid security serves with respect to bids under ORS 279C.365 (5) and 279C.385, as follows:

(a) The contracting agency may require proposal security in a form and amount as may be determined to be reasonably necessary or prudent to protect the interests of the contracting agency.

(b) The contracting agency shall retain the proposal security if a proposer who is awarded a contract fails to promptly and properly execute the contract and provide any required bonds or insurance.

(c) The contracting agency shall return the proposal security to all proposers upon the execution of the contract, or earlier in the selection process.

(6) In all other respects, and subject to rules adopted under ORS 279A.065, references in this chapter to invitations to bid, bids or bidders shall, to the extent practicable within the proposal process, be deemed equally applicable to requests for proposals, proposals or proposers. However, notwithstanding ORS 279C.375 (1), a contracting agency may not be required to award a contract advertised under the competitive proposal process based on price, but may award the contract in accordance with ORS 279C.410 (8). [2003 c.794 §129; 2005 c.103 §23; 2007 c.764 §29]

Rule C.400 Competitive Proposals

(1) Generally. The use of competitive proposals must be specifically authorized for a Public Improvement Contract under the competitive bidding requirement of ORS 279C.335(1). If a Public Improvement Contract is exempt from competitive bidding, then it will be awarded through Competitive Proposals.

(2) Applicability of Rule C.365 to Competitive Proposals

The Rules stated in Section C.365 generally apply also to Competitive Proposals, with the following exceptions (note: the term “proposal” may be substituted for the word “bid” when a rule from Section C.365 is applied to Competitive Proposals):

—(a) Rather than apply Rule C.365(9), Bid Errors, the following rule applies:

—“Proposal Errors

— Unless there is limiting language in the request for proposals, errors in proposals may be corrected at any time prior to the deadline for the Port's receipt of best and final offers, or, if best and final offers are not invited or allowed, the beginning of the Port's final evaluation of proposals.”

—(b) Rather than apply Rule C.365(10), Irrevocability of Offers, the following rule applies:

—“Proposal Modification

—The proposer may not modify its proposal without the prior written consent of the Port.”

(3) Addenda Issued after Proposal Opening. If the Port issues an addendum after proposals are opened, the Port shall provide sufficient time for proposers to supplement their proposals, if necessary, based on the changes provided in the addendum. Less than five days may be allowed for proposal supplementation if the changes made by the addendum do not require extensive analysis or action on the part of the affected proposers.

279C.405 Requests for information, interest or qualifications; requirements for requests for proposals. (1) A contracting agency may issue a request for information, a request for interest, a request for qualifications or other preliminary documents to obtain information useful in the preparation or distribution of a request for proposals.

(2) In addition to the general requirements of ORS 279C.365, a contracting agency preparing a request for proposals shall include:

(a) All required contractual terms and conditions. The request for proposals also may:

(A) Identify those contractual terms or conditions 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; and

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

(b) The method of contractor selection, which may include but is not limited to award without negotiation, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed either to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers, or any combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065.

(c) All evaluation factors that will be considered by the contracting agency when evaluating the proposals, including the relative importance of price and any other evaluation factors. [2003 c.794 §130; 2007 c.764 §30]

[no rule]

279C.410 Receipt of proposals; evaluation and award. (1) Notwithstanding the public records law, ORS 192.410 to 192.505:

(a) Proposals may be opened so as to avoid disclosure of contents to competing proposers during, when applicable, the process of negotiation.

(b) Proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued.

(2) For each request for proposals, the contracting agency shall prepare a list of proposals.

(3) Notwithstanding any requirement to make proposals open to public inspection after the contracting agency's issuance of notice of intent to award a contract, a contracting agency may withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a proposal. The fact that proposals are opened at a public meeting as defined in ORS 192.610 does not make their contents 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. If a request for proposals is canceled after proposals are received, 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.

(4) As provided in the request for proposals, a contracting agency may conduct discussions with proposers who submit proposals the agency has determined to be closely competitive or to have a reasonable chance of being selected for award. The discussions may be conducted for the purpose of clarification to ensure full understanding of, and responsiveness to, the solicitation requirements. The contracting agency shall accord proposers fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions of proposals may be permitted after the submission of proposals and before award for the purpose of obtaining best and final offers. In conducting discussions, the contracting agency may not disclose information derived from proposals submitted by competing proposers.

(5) When provided for in the request for proposals, the contracting agency may employ methods of contractor selection including but not limited to award based solely on the ranking of proposals, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers, or any combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065. When applicable, in any instance in which the contracting agency determines that impasse has been reached in negotiations with a highest ranked proposer, the contracting agency may terminate negotiations with that proposer and commence negotiations with the next highest ranked proposer.

(6) The cancellation of requests for proposals and the rejection of proposals shall be in accordance with ORS 279C.395.

(7) At least seven days before the award of a public improvement contract, unless the contracting agency determines that seven days is impractical under rules adopted under ORS 279A.065, the contracting agency shall issue to each proposer or post, electronically or otherwise, a notice of intent to award.

(8) If a public improvement contract is awarded, the contracting agency shall award a public improvement contract to the responsible proposer whose proposal is determined in writing to be the most advantageous to the contracting agency based on the evaluation factors set forth in the request for proposals and, when applicable, the outcome of any negotiations authorized by the request for proposals. Other factors may not be used in the evaluation. [2003 c.794 §131; 2005 c.103 §24; 2007 c.764 §31]

Rule C.410 Competitive Proposals

(1) Applicability of Rule C.365 to Competitive Proposals

The Rules stated in Section C.365 generally apply also to Competitive Proposals, with the following exceptions (note: the term “proposal” may be substituted for the word “bid” when a rule from Section C.365 is applied to Competitive Proposals):

(a) Rather than apply Rule C.365(7), Bid Opening, the following [rule](#) applies:

“Proposal Opening

The Port may open proposals at any time. There is no requirement for proposals to be opened in public. Subject to any exemptions under Oregon public records statutes, proposals shall be available for public inspection only after the Port has finished evaluating them.”

(b) Rather than apply Rule C.365(8) Bid Evaluation, the following rule applies:

“Proposal Evaluation

Proposals shall be evaluated based upon the evaluation criteria established by the request for proposals. Changes in evaluation criteria shall be communicated to all proposers or prospective proposers by addendum. If evaluation criteria are changed after proposals have been submitted, all proposers shall have an opportunity to supplement their proposals or submit best and final offers after receipt of the addendum changing the evaluation criteria.”

(2) Competitive Range

The Port shall have discretion in the manner in which a competitive range is defined for a specific procurement. Generally, the competitive range will be defined as a natural “break” in evaluation scores between a higher scoring group of proposers and a lower scoring group of proposers. The number of proposers within a competitive range may not be defined prior to evaluation of proposals.

(3) Selection Method

(a) The Port shall have discretion in the method used to select the most advantageous contractor, including, but not necessarily limited to, negotiation with the highest-ranked proposer, competitive, simultaneous negotiations, multiple with one or more proposers, multi-tiered competition designed to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower-ranked proposers, or any combination of methods.

(b) The Request for ProposalProposals may, but is not required to, define the selection method to be used for the specific procurement or class of procurements.

279C.412 Competitive quotes for intermediate procurements. (1) A public improvement contract estimated by the contracting agency not to exceed \$100,000 may be awarded in accordance with intermediate procurement procedures for competitive quotes established by rules adopted under ORS 279A.065. A contract awarded under this section may be amended to exceed \$100,000 only in accordance with rules adopted under ORS 279A.065.

(2) A procurement may not be artificially divided or fragmented so as to constitute an intermediate procurement under this section or to circumvent competitive bidding requirements under this chapter.

(3) Intermediate procurements under this section need not be made through competitive bidding. However, nothing in this section may be construed as prohibiting a contracting agency from conducting a procurement that does not exceed \$100,000 under competitive bidding procedures. [2003 c.794 §132; 2007 c.764 §32]

Rule C.412 Intermediate Procurements

The Port may follow the requirements of ORS 279C.414 and the procedures established by the Manager of Contracts and Procurement for the award of public improvement contracts estimated not to exceed \$100,000, if the Manager of Contracts and Procurement determines it is in the best interests of the Port.

279C.414 Requirements for competitive quotes. (1) Rules adopted under ORS 279A.065 to govern competitive quotes shall require the contracting agency to seek at least three informally solicited competitive price quotes from prospective contractors. The contracting agency shall keep a written record of the sources and amounts of the quotes received. If three quotes are not reasonably available, fewer will suffice, but in that event the contracting agency shall make a written record of the effort made to obtain the quotes.

(2) If a contract is to be awarded by competitive quotes, the contracting agency shall award the contract to the prospective contractor whose quote will best serve the interests of the contracting agency, taking into account price as well as any other applicable factors such as, but not limited to, experience, specific expertise, availability, project understanding, contractor capacity and responsibility. If an award is not made to the prospective contractor offering the lowest price quote, the contracting agency shall make a written record of the basis for award. [2003 c.794 §133]

[no rule]

Prequalification and Disqualification

279C.430 Prequalification of bidders. (1) A contracting agency may adopt a rule, resolution, ordinance or other regulation requiring mandatory prequalification for all persons desiring to bid for public improvement contracts that are to be let by the agency. The rule, resolution, ordinance or other regulation authorized by this section must include the time for submitting prequalification applications and a general description of the type and nature of the contracts that may be let. The prequalification application must be in writing on a standard form prescribed under the authority of ORS 279A.050.

(2) When a contracting agency permits or requires prequalification of bidders, a person who wishes to prequalify shall submit a prequalification application to the contracting agency on a standard form prescribed under subsection (1) of this section. Within 30 days after receipt of a prequalification application, the contracting agency shall investigate the applicant as necessary to determine if the applicant is qualified. The determination shall be made in less than 30 days, if practicable, if the applicant requests an early decision to allow the applicant as much time as possible to prepare a bid on a contract that has been advertised. In making its determination, the contracting agency shall consider only the applicable standards of responsibility listed in ORS 279C.375 (3)(b). The agency shall promptly notify the applicant whether or not the applicant is qualified.

(3) If the contracting agency finds that the applicant is qualified, the notice must state the nature and type of contracts that the person is qualified to bid on and the period of time for which the qualification is valid under the contracting agency's rule, resolution, ordinance or other regulation. If the contracting agency finds the applicant is not qualified as to any contracts covered by the rule, resolution, ordinance or other regulation, the notice must specify the reasons found under ORS 279C.375 (3)(b) for not prequalifying the applicant and inform the applicant of the right to a hearing under ORS 279C.445 and 279C.450.

(4) If a contracting agency has reasonable cause to believe that there has been a substantial change in the conditions of a prequalified person and that the person is no longer qualified or is less qualified, the agency may revoke or may revise and reissue the prequalification after reasonable notice to the prequalified person. The notice shall state the reasons found under ORS

279C.375 (3)(b) for revocation or revision of the prequalification of the person and inform the person of the right to a hearing under ORS 279C.445 and 279C.450. A revocation or revision does not apply to any public improvement contract for which publication of an advertisement, in accordance with ORS 279C.360, commenced before the date the notice of revocation or revision was received by the prequalified person. [2003 c.794 §123; 2005 c.103 §25]

Rule C.430—Prequalification

(a) Generally

~~The Port, in its sole discretion, may require bidders or proposers to prequalify before being eligible to submit bids or proposals for a class of public contracts or for a particular public contract. If prequalification is required, the opportunity to prequalify shall be advertised in the same manner as a solicitation document for the class of public contracts or the particular public contract would be advertised under applicable statutes and these Rules.~~

(b) Disqualification

~~Disqualification of a previously prequalified bidder or proposer shall be in accordance with these Rules and the provisions of the Public Contracting Code regarding prequalification and disqualification.~~

(c) Additional Advertising Not Required

~~Bids or proposals may be solicited for a particular contract from bidders or proposers prequalified for that particular contract, or for a class of contracts including that particular contract, without additional advertising.~~

[no rule]

279C.435 Effect of prequalification by Department of Transportation or Oregon Department of Administrative Services. If a person is prequalified with the Department of Transportation or with the Oregon Department of Administrative Services, the person is rebuttably presumed qualified with any other contracting agency for the same kind of work. When qualifying for the same kind of work with another contracting agency, the person may submit proof of the prequalification in lieu of a prequalification application as required by ORS 279C.430. [2003 c.794 §128]

[no rule]

279C.440 Disqualification from consideration for award of contracts. (1)(a) A contracting agency may disqualify a person from consideration for award of the contracting agency's contracts for the reasons listed in subsection (2) of this section after providing the person with notice and a reasonable opportunity to be heard.

(b) In lieu of the disqualification process described in paragraph (a) of this subsection, a contracting agency contracting for a public improvement may petition the Construction Contractors Board to disqualify a person from consideration for award of the contracting agency's public improvement contracts for the reasons listed in subsection (2) of this section.

The Construction Contractors Board shall provide the person with notice and a reasonable opportunity to be heard.

(c) A contracting agency or the Construction Contractors Board may not disqualify a person under this section for a period of more than three years.

(2) A person may be disqualified from consideration for award of a contracting agency's contracts for any of the following reasons:

(a) The person has been convicted of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.

(b) The person has been convicted under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the person's responsibility as a contractor.

(c) The person has been convicted under state or federal antitrust statutes.

(d) The person has committed a violation of a contract provision that is regarded by the contracting agency or the Construction Contractors Board to be so serious as to justify disqualification. A violation may include but is not limited to a failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a failure to perform or an unsatisfactory performance caused by acts beyond the control of the contractor may not be considered to be a basis for disqualification.

(e) The person does not carry workers' compensation or unemployment insurance as required by statute.

(3) A contracting agency or the Construction Contractors Board shall issue a written decision to disqualify a person under this section. The decision shall:

(a) State the reasons for the action taken; and

(b) Inform the disqualified person of the appeal right of the person under:

(A) ORS 279C.445 and 279C.450 if the decision to disqualify was issued by a contracting agency; or

(B) ORS chapter 183 if the decision to disqualify was issued by the Construction Contractors Board.

(4) A copy of the decision issued under subsection (3) of this section must be mailed or otherwise furnished immediately to the disqualified person. [2003 c.794 §122]

[no rule]

279C.445 Appeal of disqualification. Any person who wishes to appeal disqualification shall, within three business days after receipt of notice of disqualification, notify the contracting agency that the person appeals the disqualification. Immediately upon receipt of the notice of appeal:

(2) All contracting agencies other than state contracting agencies shall notify the appropriate local contract review board. [2003 c.794 §124]

[no rule]

279C.450 Appeal procedure for decision to deny, revoke or revise prequalification and disqualification decisions; hearing; costs; judicial review. (1) ~~The procedure for~~ An appeal from a contracting agency's disqualification or denial, revocation or revision of a prequalification ~~by a contracting agency shall be in accordance with~~ subject to the procedures set forth in this section and is not subject to ORS chapter 183 except when specifically provided ~~by~~ in this section.

— (2) Promptly upon ~~receipt of~~ receiving notice of appeal from a contracting agency as provided ~~for by~~ in ORS 279C.445, the Director of the Oregon Department of Administrative Services or the local contract review board shall notify the person appealing and the contracting agency of the time and place of the hearing. The director or board shall conduct the hearing and decide the appeal within 30 days after receiving the notification from the contracting agency: unless the person appealing and the contracting agency mutually agree to a different period of time. The director or board shall set forth in writing the reasons for the decision.

— (3) In the hearing the director or board shall consider de novo the notice of disqualification or denial, revocation or revision of a prequalification, the reasons listed in ORS 279C.440 (2) on which the contracting agency based the disqualification or the standards of responsibility listed in ORS 279C.375 (3)(b) on which the contracting agency based the denial, revocation or revision of the prequalification and any evidence provided by the parties. In all other respects, a hearing before the director shall be conducted in the same manner as a contested case under ORS 183.417 (1) to (4) and (7), 183.425, 183.440, 183.450 and 183.452.

— (4) The director may allocate the director's cost for the hearing between the person appealing and the contracting agency whose disqualification or prequalification decision is being appealed. The director shall base the allocation ~~shall be based~~ upon facts ~~found by~~ the director finds in the record and ~~states~~ states in the final order that, in the director's opinion, warrant such allocation of the costs. If the final order does not allocate the director's costs for the hearing, the costs ~~shall~~ must be paid as follows:

— (a) If the director upholds the decision to disqualify or deny, revoke or revise a prequalification of a person ~~is upheld, the director's costs shall be paid by,~~ the person appealing the disqualification or prequalification decision shall pay the director's costs.

— (b) If the director reverses the decision to disqualify or deny, revoke or revise a prequalification of a person ~~as a bidder is reversed by the director, the director's costs shall be paid by,~~ the contracting agency whose disqualification or prequalification decision is the subject of the appeal shall pay the director's costs.

— (5) The decision of the director or board may be reviewed only upon a petition, filed within 15 days after the date of the decision, in the circuit court of the county in which the director or board has ~~the director's or the board's~~ its principal office. The circuit court shall reverse or modify the decision only if ~~the court~~ it finds:

— (a) The decision was obtained through corruption, fraud or undue means.

— (b) There was evident partiality or corruption on the part of the director or board or any of ~~the~~ its members of the board.

— (c) There was an evident material miscalculation of figures or an evident material mistake in the description of ~~any~~ a person, thing or property referred to in the decision.

— (6) The procedure provided in this section is the exclusive means of judicial review of the decision of the director or board. The judicial review provisions of ORS 183.480 ~~and, the~~ and writs of review and mandamus, as provided in ORS chapter 34, and other legal, declaratory and injunctive remedies, are not available.

____ (7) The circuit court may, in ~~the court's~~ discretion, stay the letting of the contract that is the subject of the petition in the same manner as the court may issue a stay in a suit in equity. ~~When~~If the court determines that ~~there has been~~ an improper disqualification or denial, revocation or revision of a prequalification occurred and the contract has been let, the court may proceed to take evidence to determine the damages, if any, ~~suffered by~~ the petitioner suffered and award such damages as the court may find as a judgment against the director or board. The court may award costs and attorney fees to the prevailing party. [2003 c.794 §125; 2005 c.103 §26; 2007 c.288 §13; 2009 c.149 §1]

[no rule]

Remedies

279C.460 Action by or on behalf of adversely affected bidder or proposer; exception for personal services contract. (1) Any bidder or proposer adversely affected or any trade association of construction contractors acting on behalf of a member of the association to protect interests common to construction contractor members may commence an action in the circuit court for the county where the principal offices of a contracting agency are located, for the purpose of requiring compliance with, or prevention of violations of, ORS 279C.300 to 279C.470 or to determine the applicability of ORS 279C.300 to 279C.470 to matters or decisions of the contracting agency.

(2) The court may order such equitable relief as the court considers appropriate in the circumstances. In addition to or in lieu of any equitable relief, the court may award an aggrieved bidder or proposer any damages suffered by the bidder or proposer as a result of violations of ORS 279C.300 to 279C.470 for the reasonable cost of preparing and submitting a bid or proposal. A decision of the contracting agency may not be voided if other equitable relief is available.

(3) If the contracting agency is successful in defending the contracting agency's actions against claims of violation or potential violation of ORS 279C.300 to 279C.470, the court may award to the aggrieved contracting agency any damages suffered as a result of the court action.

(4) The court may order payment of reasonable attorney fees and costs on trial and on appeal to a successful party in an action brought under this section.

(5) This section does not apply to personal services contracts under ORS 279C.100 to 279C.125. [2003 c.794 §134; 2007 c.764 §33]

Rule C.460 Protests

(a) Applicability

This rule applies to protests of special procurements, protests of solicitations, and protests of contract award.

(b) Written Protest Required

If an offeror or prospective offeror wishes to object to any aspect of a Port procurement, the offeror or prospective offeror ("protester") may file a written protest with the Port's Manager of Contracts and Procurement. The protest must include all grounds for the protest, and all supporting evidence, in the form of physical evidence, documents, or affidavits.

(c) Timeliness

A protest must be filed promptly as soon as the protester knows of the grounds for the protest. If the grounds for a protest were apparent on the face of the solicitation document, the Port may decline to consider a protest filed later than five business days before the date by which bids or proposals must be submitted. If the grounds for a protest were not apparent until contract award, the Port may decline to consider a protest filed later than five business days after the protester knew or should have known of the Port's intent to award the contract.

(d) Written Decision

The Port's Manager of Contracts and Procurement shall issue a written decision in response to a protest.

(e) Discretionary Meeting

The Manager of Contracts and Procurement may, but is not required to, schedule a meeting with the protester prior to issuing a written decision. The Manager of Contracts and Procurement may invite other Port staff to the meeting, and, in the case of a procurement involving a Port evaluation team, may invite one or more members of the evaluation team to the meeting.

(f) Appeal and Final Administrative Action

If the protester disagrees with the written decision issued by the Port's Manager of Contracts and Procurement, the protester may appeal in writing to the Port's Executive Director. The written appeal must be received by the Executive Director's office within five business days after the protester's receipt of the written decision by the Port's Manager of Contracts and Procurement. The Executive Director may decline to consider a late appeal. The written appeal must include all legal arguments and all evidence, in the form of physical evidence, documents, or affidavits. The Executive Director shall issue a written decision in response to the appeal, and that written decision shall be the Port's final administrative action with respect to the protest. The Executive Director's written decision shall be the Port's final action with respect to the protest.

(g) Port not required to delay process during protest

Subject to ORS 279B.405(9) and ORS 279B.415(4), the Port may proceed with the procurement after denial of protest or denial of appeal, including without limitation, award and execution of the contract.

279C.465 Action against successful bidder; amount of damages; when action to be commenced; defenses. (1) Any person that loses a competitive bid or proposal for a contract involving the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement or renovation of a building or structure may bring an action for damages against another person who is awarded the contract for which the bid or proposal was made if the person making the losing bid or proposal can establish that the other person knowingly violated ORS 279C.840, 656.017, 657.505 ~~or 701.026 while performing the work under the contract, or knowingly failed to pay to the Department of Revenue all sums withheld from employees under ORS 316.167.~~
~~—(2) A person bringing an action under this section must establish a violation of ORS 279C.840, 316.167, 656.017, 657.505 or 701.026 by a preponderance of the evidence.~~

- ~~—(3) Upon establishing that the violation occurred, the person shall recover, as liquidated damages, 10 percent of the total amount of the contract or \$5,000, whichever is greater.~~
- ~~—(4) In any action under this section, the prevailing party is entitled to an award of reasonable attorney fees.~~
- ~~—(5) An action under this section must be commenced within two years of the substantial completion of the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement or renovation. For the purposes of this subsection, “substantial completion” has the meaning given that term in ORS 12.135.~~
- ~~—(6) A person may not recover any amounts under this section if the defendant in the action establishes by a preponderance of the evidence that the plaintiff:~~
- ~~—(a) Was in violation of ORS 701.026 at the time of making the bid or proposal on the contract;~~
- ~~—(b) Was in violation of ORS 316.167, 656.017 or 657.505 with respect to any employees of the plaintiff as of the time of making the bid or proposal on the contract; or~~
- ~~—(c) Was in violation of ORS 279C.840 with respect to any contract performed by the plaintiff within one year before making the bid or proposal on the contract at issue in the action. [2003 c.794 §135]~~

~~**Note:** The amendments to 279C.465 by section 44, chapter 836, Oregon Laws 2007, become operative July 1, 2010. See section 70, chapter 836, Oregon Laws 2007. The text that is operative on and after July 1, 2010, is set forth for the user’s convenience.~~

~~—**279C.465.** (1) Any person that loses a competitive bid or proposal for a contract involving the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement or renovation of a building or structure may bring an action for damages against another person who is awarded the contract for which the bid or proposal was made if the person making the losing bid or proposal can establish that the other person knowingly violated ORS 279C.840, 656.017, 657.505, 701.021 or 701.026 while performing the work under the contract, or knowingly failed to pay to the Department of Revenue all sums withheld from employees under ORS 316.167.~~

~~—(2) A person bringing an action under this section must establish a violation of ORS 279C.840, 316.167, 656.017, 657.505, 701.021 or 701.026 by a preponderance of the evidence.~~

~~—(3) Upon establishing that the violation occurred, the person shall recover, as liquidated damages, 10 percent of the total amount of the contract or \$5,000, whichever is greater.~~

~~—(4) In any action under this section, the prevailing party is entitled to an award of reasonable attorney fees.~~

~~—(5) An action under this section must be commenced within two years of the substantial completion of the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement or renovation. For the purposes of this subsection, “substantial completion” has the meaning given that term in ORS 12.135.~~

~~—(6) A person may not recover any amounts under this section if the defendant in the action establishes by a preponderance of the evidence that the plaintiff:~~

~~—(a) Was in violation of ORS 701.021 or 701.026 at the time of making the bid or proposal on the contract;~~

~~—(b) Was in violation of ORS 316.167, 656.017 or 657.505 with respect to any employees of the plaintiff as of the time of making the bid or proposal on the contract; or~~

~~—(c) Was in violation of ORS 279C.840 with respect to any contract performed by the plaintiff within one year before making the bid or proposal on the contract at issue in the action.~~

~~[2003 c.794 §135; 2007 c.836 §44]~~

[no rule]

279C.470 Compensation for contractor on contract declared void by court; exceptions; applicability. (1) If a court determines that a public improvement contract is void because the contracting agency letting the contract failed to comply with any statutory or regulatory competitive bidding or other procurement requirements, and the contractor entered into the contract without intentionally violating the laws regulating public improvement contracts, then, unless the court determines that substantial injustice would result, the contractor is entitled to reimbursement for work performed under the contract as follows:

(a) If the work under the public improvement contract is substantially complete, the contracting agency shall ratify the contract.

(b) If the work under the public improvement contract is not substantially complete, the contracting agency shall ratify the contract and the contract shall be deemed terminated. Upon termination, the contractor shall be paid in accordance with ORS 279C.660, unless the court determines that payment under ORS 279C.660 would be a substantial injustice to the contracting agency or the contractor, in which case the contractor shall be paid as the court deems equitable.

(c) For the purposes of this section, a ratified contract shall be deemed valid, binding and legally enforceable, and the contractor's payment and performance bonds shall remain in full force and effect.

(2) Notwithstanding subsection (1) of this section, if a court determines that a public improvement contract is void as a result of fraudulent or criminal acts or omissions of the contractor or of both the contracting agency letting the contract and the contractor, the contractor is not entitled to reimbursement for work performed under the contract.

(3) This section does not apply to a public improvement contract if:

(a) The contracting agency's employee that awarded the public improvement contract did not have the authority to do so under law, ordinance, charter, contract or agency rule; or

(b) Payment is otherwise prohibited by Oregon law.

(4) The contractor and all subcontractors under a public improvement contract are prohibited from asserting that the public improvement contract is void for any reason described in this section. [2003 c.794 §136]

[no rule]

Construction Contracts Generally

Required Contract Conditions

279C.500 "Person" defined. As used in ORS 279C.500 to 279C.530, unless the context otherwise requires, "person" includes the State Accident Insurance Fund Corporation and the Department of Revenue. [2003 c.794 §137]

[no rule]

279C.505 Conditions concerning payment, contributions, liens, withholding, drug testing. (1) Every public improvement contract shall contain a condition that the contractor shall:

(a) Make payment promptly, as due, to all persons supplying to the contractor labor or material for the performance of the work provided for in the contract.

(b) Pay all contributions or amounts due the Industrial Accident Fund from the contractor or subcontractor incurred in the performance of the contract.

(c) Not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished.

(d) Pay to the Department of Revenue all sums withheld from employees under ORS 316.167.

(2) In addition to the conditions specified in subsection (1) of this section, every public improvement contract shall contain a condition that the contractor shall demonstrate that an employee drug testing program is in place. [2003 c.794 §138; 2005 c.103 §27]

[no rule]

279C.510 Demolition contracts to require material salvage; lawn and landscape maintenance contracts to require composting or mulching. (1) Every public improvement contract for demolition shall contain a condition requiring the contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective.

(2) Every public improvement contract for lawn and landscape maintenance shall contain a condition requiring the contractor to compost or mulch yard waste material at an approved site, if feasible and cost-effective. [2003 c.794 §139]

[no rule]

279C.515 Conditions concerning payment of claims by public officers, payment to persons furnishing labor or materials and complaints. (1) Every public improvement contract shall contain a clause or condition that, if the contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to the contractor or a subcontractor by any person in connection with the public improvement contract as the claim becomes due, the proper officer or officers representing the state or a county, school district, municipality, municipal corporation or subdivision thereof, as the case may be, may pay such claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due the contractor by reason of the contract.

(2) Every public improvement contract shall contain a clause or condition that, if the contractor or a first-tier subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public improvement contract within 30 days after receipt of payment from the contracting agency or a contractor, the contractor or first-tier subcontractor shall owe the person the amount due plus interest charges commencing at the end of the 10-day period that payment is due under ORS 279C.580 (4) and ending upon final payment, unless payment is subject to a good faith dispute as defined in ORS 279C.580. The rate of interest charged to the contractor or first-tier subcontractor on the amount due shall equal three times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank

in the Federal Reserve district that includes Oregon on the date that is 30 days after the date when payment was received from the contracting agency or from the contractor, but the rate of interest may not exceed 30 percent. The amount of interest may not be waived.

(3) Every public improvement contract and every contract related to the public improvement contract shall contain a clause or condition that, if the contractor or a subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public improvement contract, the person may file a complaint with the Construction Contractors Board, unless payment is subject to a good faith dispute as defined in ORS 279C.580.

(4) The payment of a claim in the manner authorized in this section does not relieve the contractor or the contractor's surety from obligation with respect to any unpaid claims. [2003 c.794 §140; 2005 c.103 §28]

[no rule]

279C.520 Condition concerning hours of labor. (1) Every public contract subject to this chapter must contain a condition that a person may not be employed for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency or when the public policy absolutely requires it, and in such cases, except in cases of contracts for personal services ~~designated under ORS 279A.055~~ as defined in ORS 279C.100, the employee shall be paid at least time and a half pay:

— (a)(A) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or

— (B) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and

— (b) For all work performed on Saturday and on any legal holiday specified in ORS 279C.540.

— (2) An employer must give notice in writing to employees who work on a public contract, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

— (3) In the case of contracts for personal services as ~~described in ORS 279A.055~~ defined in ORS 279C.100, the contract shall contain a provision that the employee shall be paid at least time and a half for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

— (4) In the case of a contract for services at a county fair or for other events authorized by a county fair board, the contract must contain a provision that employees must be paid at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week. An employer shall give notice in writing to employees who work on such a contract, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that employees may be required to work.

— (5)(a) Except as provided in subsection (4) of this section, contracts for services must contain a provision that requires that persons employed under the contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining

agreement or in ORS 279C.540 (1)(b)(B) to (G) and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

— (b) An employer shall give notice in writing to employees who work on a contract for services, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work. [2003 c.794 §141; 2005 c.103 §29]

[no rule]

279C.525 Provisions concerning environmental and natural resources laws; remedies.

(1) Solicitation documents for a public improvement contract shall make specific reference to federal, state and local agencies that have enacted ordinances, rules or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that affect the performance of the contract. If the successful bidder awarded the project is delayed or must undertake additional work by reason of existing ordinances, rules or regulations of agencies not cited in the public improvement contract or due to the enactment of new or the amendment of existing statutes, ordinances, rules or regulations relating to the prevention of environmental pollution and the preservation of natural resources occurring after the submission of the successful bid, the contracting agency may:

- (a) Terminate the contract;
- (b) Complete the work itself;
- (c) Use nonagency forces already under contract with the contracting agency;
- (d) Require that the underlying property owner be responsible for cleanup;
- (e) Solicit bids for a new contractor to provide the necessary services under the competitive bid requirements of this chapter; or
- (f) Issue the contractor a change order setting forth the additional work that must be undertaken.

(2) In addition to the obligation imposed under subsection (1) of this section to refer to federal, state and local agencies with ordinances, rules or regulations dealing with the prevention of environmental pollution and the preservation of natural resources, a solicitation document must also make specific reference to known conditions at the construction site that may require the successful bidder to comply with the ordinances, rules or regulations identified under subsection (1) of this section.

(3) If the successful bidder encounters a condition not referred to in the solicitation documents, not caused by the successful bidder and not discoverable by a reasonable prebid visual site inspection, and the condition requires compliance with the ordinances, rules or regulations referred to under subsection (1) of this section, the successful bidder shall immediately give notice of the condition to the contracting agency.

(4) Except in the case of an emergency and except as may otherwise be required by any environmental or natural resource ordinance, rule or regulation, the successful bidder may not commence work nor incur any additional job site costs in regard to the condition encountered and described in subsection (3) of this section without written direction from the contracting agency.

(5) Upon request by the contracting agency, the successful bidder shall estimate the emergency or regulatory compliance costs as well as the anticipated delay and costs resulting

from the encountered condition. This cost estimate shall be promptly delivered to the contracting agency for resolution.

(6) Within a reasonable period of time following delivery of an estimate under subsection (5) of this section, the contracting agency may:

- (a) Terminate the contract;
- (b) Complete the work itself;
- (c) Use nonagency forces already under contract with the contracting agency;
- (d) Require that the underlying property owner be responsible for cleanup;
- (e) Solicit bids for a new contractor to provide the necessary services under the competitive bid requirements of this chapter; or
- (f) Issue the contractor a change order setting forth the additional work that must be undertaken.

(7)(a) If the contracting agency chooses to terminate the contract under subsection (1)(a) or (6)(a) of this section, the successful bidder shall be entitled to all costs and expenses incurred to the date of termination, including overhead and reasonable profits, on the percentage of the work completed. The contracting agency shall have access to the contractor's bid documents when making the contracting agency's determination of the additional compensation due to the contractor.

(b) If the contracting agency causes work to be done by another contractor under subsection (1)(c) or (e) or (6)(c) or (e) of this section, the initial contractor may not be held liable for actions or omissions of the other contractor.

(c) The change order under subsection (1)(f) or (6)(f) of this section shall include the appropriate extension of contract time and compensate the contractor for all additional costs, including overhead and reasonable profits, reasonably incurred as a result of complying with the applicable statutes, ordinances, rules or regulations. The contracting agency shall have access to the contractor's bid documents when making the contracting agency's determination of the additional compensation due to the contractor.

(8) Notwithstanding subsections (1) to (7) of this section, a contracting agency:

(a) May allocate all or the Portion of the known environmental and natural resource risks to a contractor by listing such environmental and natural resource risks with specificity in the solicitation documents; and

(b) In a local improvement district, may allocate all or the Portion of the known and unknown environmental and natural resource risks to a contractor by so stating in the solicitation documents. [2003 c.794 §142]

[no rule]

279C.527 Inclusion of amount for solar energy technology in public improvement contract; written determination of appropriateness; exemptions and limitations. (1) Except as otherwise provided in this section, a public improvement contract for the construction of a public building or for the reconstruction or major renovation of a public building, if the cost of the reconstruction or major renovation exceeds 50 percent of the value of the public building, is considered to contain an amount equal to at least 1.5 percent of the total contract price for the inclusion of appropriate solar energy technology in the public building. Solar energy technology shall include solar electric or solar thermal systems and may include passive solar energy

systems when a proposed passive solar energy system will achieve a reduction in energy usage of at least 20 percent.

(2) Before entering into a public improvement contract described in subsection (1) of this section, a contracting agency shall prepare a written determination of whether the inclusion of solar energy technology in the construction, reconstruction or major renovation of the public building is appropriate. The contracting agency shall include in the determination the total contract price and the amount the agency intends to expend on the inclusion of solar energy technology in the public building. The State Department of Energy shall develop a form usable by contracting agencies for preparing the written determination described in this subsection.

(3) If the contracting agency determines that it would be inappropriate to include solar energy technology in the construction, reconstruction or major renovation of the public building, subsection (1) of this section does not apply to the public improvement contract. However:

(a) The contracting agency shall spend an amount equal to at least 1.5 percent of the total contract price on the inclusion of appropriate solar energy technology in a future public building project; and

(b) The amount spent by the contracting agency on the future public building project pursuant to paragraph (a) of this subsection is in addition to any amount required under subsection (1) of this section for the inclusion of appropriate solar energy technology in the future public building project.

(4) Subsection (3)(a) and (b) of this section does not apply to a public improvement contract for which no state funds are directly or indirectly used.

(5) This section does not exempt an authorized state agency, as defined in ORS 276.905, from complying with ORS 276.900 to 276.915, except that an authorized state agency, without complying with ORS 276.900 to 276.915, may determine that solar energy technology described in this section is appropriate for inclusion in the construction, reconstruction or major renovation of a public building.

(6)(a) As used in this section, “public building” means a building owned or controlled by a public body, as defined in ORS 174.109, and:

(A) Used or occupied by employees of the public body; or

(B) Used for conducting public business.

(b) Notwithstanding the provisions of ORS 174.108 (3), this section applies to intergovernmental entities described in ORS 174.108 (3). [2007 c.310 §2]

[Note: 279C.527 and 279C.528 were added to and made a part of 279C.005 to 279C.670 by legislative action but were not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.](#)

Rule C.527 Determination of Appropriateness

The determination of appropriateness required under ORS 279C.527(2) will be based on written findings and will be made by the Executive Director, except that the Manager of Contracts and Procurement may make such determination if the cost of the public improvement contract does not exceed the Manager’s level of delegated authority. Consistent with OAR 330-135-0045(3), in making such determination, consideration will be given to whether there are physical constraints in the building or funding constraints that make the installation of solar energy technology inappropriate for the building.

279C.528 State Department of Energy requirements and specifications; rules. Public improvement contracts subject to ORS 279C.527 are also subject to rules adopted by the State Department of Energy that include, but are not limited to, requirements and specifications for:

- (1) Using particular solar energy systems or technologies in public improvements;
- (2) Determining the cost-effectiveness of solar energy systems or technologies;
- (3) Reporting the use of solar energy systems or technologies in public improvements or submitting documents to the department for review, as appropriate; and
- (4) Determining whether a structure is a public building subject to the requirements of ORS 279C.527. [2007 c.310 §3]

[Note: See note under 279C.527.](#)

[no rule]

279C.530 Condition concerning payment for medical care and providing workers' compensation. (1) Every public improvement contract shall contain a condition that the contractor shall promptly, as due, make payment to any person, copartnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the contractor, of all sums that the contractor agrees to pay for the services and all moneys and sums that the contractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services.

(2) Every public contract subject to this chapter shall contain a clause or condition that all subject employers working under the contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126. [2003 c.794 §143; 2005 c.103 §30]

[no rule]

279C.535 Condition concerning steel material; rules. The Department of transportation shall adopt rules to require that public improvement contracts entered into by the department include a price escalation and de-escalation clause relating to steel material. As used in this section, "steel material" includes structural and reinforcing steel, steel studs, sheet piling, guardrail, ductile iron pipe and other steel products used for the construction, reconstruction or major renovation of a road or highway. [2005 c.557 §6]

~~—Note: Sections 2 to 4, chapter 557, Oregon Laws 2005 provide:~~

~~—Sec. 2. (1) As used in this section, "steel material" includes structural and reinforcing steel, steel studs, sheet piling, guardrail, ductile iron pipe and other steel products used for the construction, reconstruction or major renovation of a road or highway.~~

~~—(2) When the Department of Transportation and a contractor have entered into a public improvement contract that includes a steel material, the department shall adjust the amount paid to the contractor under the contract if the contractor requests an adjustment and demonstrates that the market price of a steel material charged to the contractor on the date the steel material was delivered to the~~

~~contractor was more than 10 percent above the market price of the steel material on the contractor's original bid quote.~~

~~—(3) A contractor that requests an adjustment under subsection (2) of this section has the burden of demonstrating the increased cost to the contractor resulting from the price increase for the steel material. To determine the increased cost to the contractor resulting from the increased price of the steel material, the contractor shall subtract the amount of the original bid quote from the amount on the invoice for the steel material. If the contractor demonstrates that the market price of the steel material has increased by more than 10 percent, the department shall adjust the amount owed to the contractor and shall pay the contractor for the amount of the contractor's increased cost that exceeds a 10 percent price increase for the steel material on or after the date the price increase exceeded 10 percent.~~

~~—(4) This section does not apply to local agency federally funded projects in the Statewide Transportation Improvement Program.~~

~~—(5) The department shall adopt rules to carry out this section. [2005 c.557 §2]~~

~~—Sec. 3. Section 2 of this 2005 Act applies to a public improvement contract entered into by the Department of Transportation and a contractor on or after April 1, 2003, and before October 1, 2005, regardless of whether the contractor has finished performance under the contract, unless application of section 2 of this 2005 Act to the contract would impair the value of the contract to the contractor. [2005 c.557 §3]~~

~~—Sec. 4. Sections 1 to 3 of this 2005 Act are repealed on January 2, 2010. [2005 c.557 §4]~~

[no rule]

Hours of Labor

279C.540 Maximum hours of labor on public contracts; holidays; exceptions; liability to workers; rules. (1) When labor is employed by the state or a county, school district, municipality, municipal corporation or subdivision thereof through a contractor, a person may not be required or permitted to labor more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity or emergency or when the public policy absolutely requires it, in which event, the person so employed for excessive hours shall receive at least time and a half pay:

(a)(A) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or

(B) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and

(b) For all work performed on Saturday and on the following legal holidays:

(A) Each Sunday.

(B) New Year's Day on January 1.

(C) Memorial Day on the last Monday in May.

(D) Independence Day on July 4.

(E) Labor Day on the first Monday in September.

(F) Thanksgiving Day on the fourth Thursday in November.

(G) Christmas Day on December 25.

(2) An employer shall give notice in writing to employees who perform work under subsection (1) of this section, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that employees may be required to work.

(3) For the purpose of this section, each time a legal holiday, other than Sunday, listed in subsection (1) of this section falls on Sunday, the succeeding Monday shall be recognized as a legal holiday. Each time a legal holiday listed in subsection (1) of this section falls on Saturday, the preceding Friday shall be recognized as a legal holiday.

(4) Subsections (1) and (2) to (3) of this section do not apply to a public improvement contract or a contract for services if the contractor is a party to a collective bargaining agreement in effect with any labor organization.

(5) When specifically agreed to under a written labor-management negotiated labor agreement, an employee may be paid at least time and a half pay for work performed on any legal holiday specified in ORS 187.010 and 187.020 that is not listed in subsection (1) of this section.

(6) This section does not apply to labor performed in the prevention or suppression of fire under contracts and agreements made under the authority of the State Forester or the State Board of Forestry, under ORS 477.406.

(7)(6) This section does not apply to contracts for personal services designated under ORS 279A.055 as defined in ORS 279C.100, provided that persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in subsection (1)(b)(B) to (G) of this section and for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(8)(7) Subsections (1) and (2) of this section do not apply to contracts for services at a county fair or for other events authorized by a county fair board if persons employed under the contract receive at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week.

(9)(a)(8)(a) Subsections (1) and (2) of this section do not apply to contracts for services. However, persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in subsection (1)(b)(B) to (G) of this section and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) An employer shall give notice in writing to employees who work on a contract for services, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

(10)(9) Any contractor or subcontractor or contractor's or subcontractor's surety that violates the provisions of this section is liable to the affected employees in the amount of their unpaid overtime wages and in an additional amount equal to the unpaid overtime wages as liquidated damages. If the violation results from willful falsification of payroll records, the contractor or subcontractor or contractor's or subcontractor's surety is liable to the affected employees in the amount of their unpaid overtime wages and an additional amount equal to twice the unpaid overtime wages as liquidated damages.

(11)(10) An action to enforce liability to employees under subsection (10)(9) of this section may be brought as an action on the contractor's payment bond as provided for in ORS 279C.610.

(12) This section does not apply to financial institutions as defined in ORS 706.008.

(13)(11) In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries may adopt rules to carry out the provisions of this section. [2003 c.794 §144; 2005 c.103 §31]

[no rule]

279C.545 Time limitation on claim for overtime; posting of circular by contractor.

When labor is employed by the state or a county, school district, municipality, municipal corporation or subdivision thereof through another as a contractor, any worker employed by the contractor shall be foreclosed from the right to collect for any overtime provided in ORS 279C.540 unless a claim for payment is filed with the contractor within 90 days from the completion of the contract, providing the contractor has:

(1) Caused a circular clearly printed in boldfaced 12-point type and containing a copy of this section to be posted in a prominent place alongside the door of the timekeeper's office or in a similar place that is readily available and freely visible to workers employed on the work.

(2) Maintained the circular continuously posted from the inception to the completion of the contract on which workers are or have been employed. [2003 c.794 §145]

[no rule]

Retainage and Payments

279C.550 "Retainage" defined. As used in ORS 279C.550 to 279C.570, "retainage" means the difference between the amount earned by a contractor on a public improvement contract and the amount paid on the contract by the contracting agency. [2003 c.794 §146; 2005 c.103 §32]

[no rule]

279C.555 Withholding of retainage. The withholding of retainage by a contractor or subcontractor on public improvement contracts shall be in accordance with ORS 701.420 and 701.430 except when the charter of the contracting agency contains provisions requiring retainage by the contracting agency of more than five percent of the contract price of the work completed. [2003 c.794 §147]

[no rule]

279C.560 Form of retainage; procedures for holding and payment. (1) ~~Moneys retained by~~ Unless a contracting agency that reserves an amount as retainage under ORS 279C.570 (7) ~~shall be:~~

~~—(finds in writing that accepting a) Retained in a fund by bond or instrument described in paragraph (a) or (b) of this subsection poses an extraordinary risk that is not typically associated with the bond or instrument, the contracting agency and paid in lieu of withholding moneys from payment shall accept from a contractor:~~

(a) Bonds, securities or other instruments of a character described in subsection (6) of this section that are deposited as provided in subsection (4) of this section; or

(b) A surety bond deposited as provided in subsection (7) of this section.

(2) A contracting agency that holds moneys as retainage under ORS 279C.570 (7) shall:

(a) Hold the moneys in a fund and pay the moneys to the contractor in accordance with ORS 279C.570; or

— (b) At the ~~option~~ election of the contractor, ~~paid~~ pay the moneys to the contractor in accordance with subsection ~~(34)~~ or ~~(45)~~ of this section and in a manner authorized by the Director of the Oregon Department of Administrative Services.

— ~~(2)~~ (3) If the contracting agency incurs additional costs as a result of the exercise of ~~the~~ ~~options~~ an option described in subsection (1) or (5) of this section, the contracting agency may recover ~~such~~ the costs from the contractor by ~~reduction of~~ reducing the final payment. As work on the contract progresses, the contracting agency shall, upon demand, inform the contractor of all accrued costs.

— ~~(3)~~ (4) The contractor may deposit bonds ~~or~~, securities or other instruments with the contracting agency or in ~~any~~ bank or trust company for the contracting agency to be held hold for the contracting agency's benefit in lieu of ~~the cash moneys held as~~ retainage for the benefit of. If the contracting agency ~~in such event~~ accepts bonds, securities or other instruments deposited as provided in this subsection, the contracting agency shall reduce the moneys held as retainage in an amount equal to the value of the bonds, securities and ~~securities~~ other instruments and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Interest or earnings on the bonds ~~or~~, securities or other instruments shall accrue to the contractor.

— ~~(4)~~ (5) If the contractor elects, the contracting agency shall deposit the retainage as accumulated ~~shall be deposited by the contracting agency~~ in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the contracting agency. When the contracting agency is a state contracting agency, the account ~~shall~~ must be established through the State Treasurer. Earnings on the account ~~shall~~ accrue to the contractor.

— ~~(5)~~ (6) Bonds ~~and~~, securities and other instruments deposited or acquired in lieu of retainage, as permitted by this section, shall must be of a character approved by the Director of the Oregon Department of Administrative Services, including but not limited to:

— (a) Bills, certificates, notes or bonds of the United States.

— (b) Other obligations of the United States or ~~its~~ agencies of the United States.

— (c) Obligations of ~~any~~ corporation wholly owned by the federal government.

— (d) Indebtedness of the Federal National Mortgage Association.

— ~~(6)~~ (e) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.

(f) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.

(7) The contractor, with the approval of the contracting agency, may deposit a surety bond for all or any portion of the amount of funds retained, or to be retained, by the contracting agency in a form acceptable to the contracting agency. The bond and any proceeds ~~therefrom~~ shall of the bond must be made subject to all claims and liens and in the same manner and priority as set forth for retainage under ORS 279C.550 to 279C.570 and 279C.600 to 279C.625. The contracting agency shall reduce the moneys the contracting agency holds as retainage in an amount equal to the value of the bond and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Whenever a contracting agency accepts a surety bond from a contractor in lieu of retainage, the contractor shall accept like bonds from ~~any~~ subcontractor or supplier from which the contractor has retainage. The contractor shall then reduce the moneys

the contractor holds as retainage in an amount equal to the value of the bond and pay the amount of the reduction to the subcontractor or supplier. [2003 c.794 §148; 2009 c.568 §1]

~~The relevant Department of Administrative Services rule is set forth below for the convenience of the user:~~

125-249-0820

Retainage

~~(1) * * *~~

~~(2) * * *~~

~~(3) Alternatives to cash retainage. In lieu of cash retainage to be held by an Authorized Agency, the Contractor may substitute one of the following:~~

~~(a) Deposit of Securities:~~

~~(A) The Contractor may deposit bonds or securities with the Authorized Agency or in any bank or trust company to be held for the benefit of the Authorized Agency. In such event, the Authorized Agency must reduce the retainage by an amount equal to the value of the bonds and securities, and reimburse the excess to the Contractor.~~

~~(B) Bonds and securities deposited or acquired in lieu of retainage must be of a character approved by the Department, including but not limited to:~~

~~(i) Bills, certificates, notes or bonds of the United States.~~

~~(ii) Other obligations of the United States or its Authorized Agencies.~~

~~(iii) Obligations of any corporation wholly owned by the Federal Government.~~

~~(iv) Indebtedness of the Federal National Mortgage Association.~~

~~(v) Upon the Authorized Agency's determination that all requirements for the protection of the Authorized Agency's interests have been fulfilled, it must release to the Contractor all bonds and securities deposited in lieu of retainage.~~

~~(C) Deposit of Surety Bond. An Authorized Agency, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the Authorized Agency in lieu of all or a portion of funds retained or to be retained. A Contractor depositing such a bond must accept surety bonds from its subcontractors and suppliers in lieu of retainage.~~

~~In such cases, retainage must be reduced by an amount equal to the value of the bond, and the excess must be reimbursed.~~

~~(4) Recovery of Costs. An Authorized Agency may recover from the Contractor all costs incurred in the proper handling of cash retainage and securities, by reduction of the final payment~~

~~(5) * * *~~

~~Stat. Auth.: ORS 279A.065(5)(a) & 279A.070~~

~~Stats. Implemented: ORS 279C.560, 279C.570 & 701.420~~

~~Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06~~

[no rule]

279C.565 Limitation on retainage requirements. Unless otherwise specifically included by statute, the provisions of ORS 279C.560 or 279C.625 apply only as between the contracting agency or public body and the party with whom it contracts. [2003 c.794 §149]

[no rule]

279C.570 Prompt payment policy; progress payments; retainage; interest; exception; settlement of compensation disputes. (1) It is the policy of the State of Oregon that all payments due on a public improvement contract and owed by a contracting agency shall be paid promptly. No contracting agency is exempt from the provisions of this section.

(2) Contracting agencies shall make progress payments on the contract monthly as work progresses on a public improvement contract. Payments shall be based upon estimates of work completed that are approved by the contracting agency. A progress payment is not considered acceptance or approval of any work or waiver of any defects therein. The contracting agency shall pay to the contractor interest on the progress payment, not including retainage, due the contractor. The interest shall commence 30 days after receipt of the invoice from the contractor or 15 days after the payment is approved by the contracting agency, whichever is the earlier date. The rate of interest charged to the contracting agency on the amount due shall equal three times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date that is 30 days after receipt of the invoice from the contractor or 15 days after the payment is approved by the contracting agency, whichever is the earlier date, but the rate of interest may not exceed 30 percent.

(3) Interest shall be paid automatically when payments become overdue. The contracting agency shall document, calculate and pay any interest due when payment is made on the principal. Interest payments shall accompany payment of net due on public improvement contracts. The contracting agency may not require the contractor to petition, invoice, bill or wait additional days to receive interest due.

(4) When an invoice is filled out incorrectly, when there is any defect or impropriety in any submitted invoice or when there is a good faith dispute, the contracting agency shall so notify the contractor within 15 days stating the reason or reasons the invoice is defective or improper or the reasons for the dispute. A defective or improper invoice, if corrected by the contractor within

seven days of being notified by the contracting agency, may not cause a payment to be made later than specified in this section unless interest is also paid.

(5) If requested in writing by a first-tier subcontractor, the contractor, within 10 days after receiving the request, shall send to the first-tier subcontractor a copy of that portion of any invoice, request for payment submitted to the contracting agency or pay document provided by the contracting agency to the contractor specifically related to any labor or materials supplied by the first-tier subcontractor.

(6) Payment of interest may be postponed when payment on the principal is delayed because of disagreement between the contracting agency and the contractor. Whenever a contractor brings formal administrative or judicial action to collect interest due under this section, the prevailing party is entitled to costs and reasonable attorney fees.

(7) A contracting agency may reserve as retainage from any progress payment on a public improvement contract an amount not to exceed five percent of the payment. As work progresses, a contracting agency may reduce the amount of the retainage and the contracting agency may eliminate retainage on any remaining monthly contract payments after 50 percent of the work under the contract is completed if, in the contracting agency's opinion, such work is progressing satisfactorily. Elimination or reduction of retainage shall be allowed only upon written application by the contractor, and the application shall include written approval of the contractor's surety. However, when the contract work is 97.5 percent completed the contracting agency may, at the contracting agency's discretion and without application by the contractor, reduce the retained amount to 100 percent of the value of the contract work remaining to be done. Upon receipt of a written application by the contractor, the contracting agency shall respond in writing within a reasonable time.

(8) The retainage held by a contracting agency shall be included in and paid to the contractor as part of the final payment of the contract price. The contracting agency shall pay to the contractor interest at the rate of 1.5 percent per month on the final payment due the contractor, interest to commence 30 days after the work under the contract has been completed and accepted and to run until the date when the final payment is tendered to the contractor. The contractor shall notify the contracting agency in writing when the contractor considers the work complete and the contracting agency shall, within 15 days after receiving the written notice, either accept the work or notify the contractor of work yet to be performed on the contract. If the contracting agency does not, within the time allowed, notify the contractor of work yet to be performed to fulfill contractual obligations, the interest provided by this subsection shall commence to run 30 days after the end of the 15-day period.

(9)(a) The contracting agency shall pay, upon settlement or judgment in favor of the contractor regarding any dispute as to the compensation due a contractor for work performed under the terms of a public improvement contract, the amount due plus interest at the rate of two times the discount rate, but not to exceed 30 percent, on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date of the settlement or judgment, and accruing from the later of:

(A) The due date of any progress payment received under the contract for the period in which such work was performed; or

(B) Thirty days after the date on which the claim for the payment under dispute was presented to the contracting agency by the contractor in writing or in accordance with applicable provisions of the contract.

(b) Interest shall be added to and not made a part of the settlement or judgment. [2003 c.794 §150; 2005 c.103 §33]

[no rule]

Subcontractors

279C.580 Contractor's relations with subcontractors. (1) A contractor may not request payment from the contracting agency of any amount withheld or retained in accordance with subsection (5) of this section until such time as the contractor has determined and certified to the contracting agency that the subcontractor has determined and certified to the contracting agency that the subcontractor is entitled to the payment of such amount.

(2) A dispute between a contractor and first-tier subcontractor relating to the amount or entitlement of a first-tier subcontractor to a payment or a late payment interest penalty under a clause included in the subcontract under subsection (3) or (4) of this section does not constitute a dispute to which the contracting agency is a party. The contracting agency may not be included as a party in any administrative or judicial proceeding involving such a dispute.

(3) Each public improvement contract awarded by a contracting agency shall include a clause that requires the contractor to include in each subcontract for property or services entered into by the contractor and a first-tier subcontractor, including a material supplier, for the purpose of performing a construction contract:

(a) A payment clause that obligates the contractor to pay the first-tier subcontractor for satisfactory performance under its subcontract within 10 days out of such amounts as are paid to the contractor by the contracting agency under the contract; and

(b) An interest penalty clause that obligates the contractor, if payment is not made within 30 days after receipt of payment from the contracting agency, to pay to the first-tier subcontractor an interest penalty on amounts due in the case of each payment not made in accordance with the payment clause included in the subcontract under paragraph (a) of this subsection. A contractor or first-tier subcontractor may not be obligated to pay an interest penalty if the only reason that the contractor or first-tier subcontractor did not make payment when payment was due is that the contractor or first-tier subcontractor did not receive payment from the contracting agency or contractor when payment was due. The interest penalty shall be:

(A) For the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

(B) Computed at the rate specified in ORS 279C.515 (2).

(4) The contract awarded by the contracting agency shall require the contractor to include in each of the contractor's subcontracts, for the purpose of performance of such contract condition, a provision requiring the first-tier subcontractor to include a payment clause and an interest penalty clause conforming to the standards of subsection (3) of this section in each of the first-tier subcontractor's subcontracts and to require each of the first-tier subcontractor's subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.

(5)(a) The clauses required by subsections (3) and (4) of this section are not intended to impair the right of a contractor or a subcontractor at any tier to negotiate, and to include in the subcontract, provisions that:

(A) Permit the contractor or a subcontractor to retain, in the event of a good faith dispute, an amount not to exceed 150 percent of the amount in dispute from the amount due a subcontractor under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties consider appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond;

(B) Permit the contractor or subcontractor to make a determination that part or all of the subcontractor's request for payment may be withheld in accordance with the subcontract agreement; and

(C) Permit such withholdings without incurring any obligation to pay a late payment interest penalty if:

(i) A notice conforming to the standards of subsection (8) of this section has been previously furnished to the subcontractor; and

(ii) A copy of any notice issued by a contractor under sub-subparagraph (i) of this subparagraph has been furnished to the contracting agency.

(b) As used in this subsection, "good faith dispute" means a documented dispute concerning:

(A) Unsatisfactory job progress.

(B) Defective work not remedied.

(C) Third-party claims filed or reasonable evidence that claims will be filed.

(D) Failure to make timely payments for labor, equipment and materials.

(E) Damage to the prime contractor or subcontractor.

(F) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.

(6) If, after making application to a contracting agency for payment under a contract but before making a payment to a subcontractor for the subcontractor's performance covered by such application, a contractor discovers that all or the Portion of the payment otherwise due the subcontractor is subject to withholding from the subcontractor in accordance with the subcontract agreement, the contractor shall:

(a) Furnish to the subcontractor a notice conforming to the standards of subsection (8) of this section as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the due date for subcontractor payment;

(b) Furnish to the contracting agency, as soon as practicable, a copy of the notice furnished to the subcontractor under paragraph (a) of this subsection;

(c) Reduce the subcontractor's progress payment by an amount not to exceed the amount specified in the notice of withholding furnished under paragraph (a) of this subsection;

(d) Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency;

(e) Make such payment within:

(A) Seven days after correction of the identified subcontract performance deficiency unless the funds therefor must be recovered from the contracting agency because of a reduction under paragraph (f)(A) of this subsection; or

(B) Seven days after the contractor recovers such funds from the contracting agency;

(f) Notify the contracting agency upon:

(A) Reduction of the amount of any subsequent certified application for payment; or

(B) Payment to the subcontractor of any withheld amounts of a progress payment, specifying:

- (i) The amounts of the progress payments withheld under paragraph (a) of this subsection; and
- (ii) The dates that such withholding began and ended; and
- (g) Be obligated to pay to the contracting agency an amount equal to interest on the withheld payments computed in the manner provided in ORS 279C.570 from the 11th day after receipt of the withheld amounts from the contracting agency until:
 - (A) The day the identified subcontractor performance deficiency is corrected; or
 - (B) The date that any subsequent payment is reduced under paragraph (f)(A) of this subsection.

(7)(a) If a contractor, after making payment to a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor a written notice asserting a deficiency in such first-tier subcontractor's performance under the contract for which the contractor may be ultimately liable and the contractor determines that all or the Portion of future payments otherwise due such first-tier subcontractor is subject to withholding in accordance with the subcontract agreement, the contractor may, without incurring an obligation to pay a late payment interest penalty under subsection (6)(e) of this section:

- (A) Furnish to the first-tier subcontractor a notice conforming to the standards of subsection (8) of this section as soon as practicable upon making such determination; and
- (B) Withhold from the first-tier subcontractor's next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under subparagraph (A) of this paragraph.

(b) As soon as practicable, but not later than 10 days after receipt of satisfactory written notification that the identified subcontract performance deficiency has been corrected, the contractor shall pay the amount withheld under paragraph (a)(B) of this subsection to such first-tier subcontractor, or shall incur an obligation to pay a late payment interest penalty to such first-tier subcontractor computed at the rate specified in ORS 279C.570.

(8) A written notice of any withholding shall be issued to a subcontractor, with a copy to the contracting agency of any such notice issued by a contractor, specifying:

- (a) The amount to be withheld;
- (b) The specified causes for the withholding under the terms of the subcontract; and
- (c) The remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

(9) Except as provided in subsection (2) of this section, this section does not limit or impair any contractual, administrative or judicial remedies otherwise available to a contractor or a subcontractor in the event of a dispute involving late payment or nonpayment by a contractor or deficient performance or nonperformance by a subcontractor.

(10) A contractor's obligation to pay a late payment interest penalty to a subcontractor under the clause included in a subcontract under subsection (3) or (4) of this section is not intended to be an obligation of the contracting agency. A contract modification may not be made for the purpose of providing reimbursement of such late payment interest penalty. A cost reimbursement claim may not include any amount for reimbursement of such late payment interest penalty.
[2003 c.794 §151; 2005 c.103 §34]

[no rule]

279C.585 Authority to substitute undisclosed first-tier subcontractor; circumstances; rules. A contractor whose bid is accepted may substitute a first-tier subcontractor that was not disclosed under ORS 279C.370 by submitting the name of the new subcontractor and the reason for the substitution in writing to the contracting agency. A contractor may substitute a first-tier subcontractor under this section in the following circumstances:

— (1) When the subcontractor disclosed under ORS 279C.370 fails or refuses to execute a written contract after having had a reasonable opportunity to do so after the written contract, which must be reasonably based upon the general terms, conditions, plans and specifications for the public improvement project or the terms of the subcontractor's written bid, is presented to the subcontractor by the contractor.

— (2) When the disclosed subcontractor becomes bankrupt or insolvent.

— (3) When the disclosed subcontractor fails or refuses to perform the subcontract.

— (4) When the disclosed subcontractor fails or refuses to meet the bond requirements of the contractor that had been identified prior to the bid submittal.

— (5) When the contractor demonstrates to the contracting agency that the subcontractor was disclosed as the result of an inadvertent clerical error.

— (6) When the disclosed subcontractor does not hold a license from, or has a license that is not properly endorsed by, the Construction Contractors Board and is required to be licensed by the board.

— (7) When the contractor determines that the work performed by the disclosed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications or that the subcontractor is substantially delaying or disrupting the progress of the work.

~~— (8) When the disclosed subcontractor is ineligible to work on a public improvement contract under applicable statutory provisions.~~

~~— (9) When the substitution is for good cause. The Construction Contractors Board shall define "good cause" by rule. "Good cause" includes but is not limited to the financial instability of a subcontractor. The definition of "good cause" must reflect the least cost policy for public improvements established in ORS 279C.305.~~

~~— (10) When the substitution is reasonably based on the contract alternates chosen by the contracting agency. [2003 c.794 §152]~~

Note: The amendments to 279C.585 by section 45, chapter 836, Oregon Laws 2007, become operative July 1, 2010. See section 70, chapter 836, Oregon Laws 2007. The text that is operative on and after July 1, 2010, is set forth for the user's convenience.

~~— **279C.585.** A contractor whose bid is accepted may substitute a first tier subcontractor that was not disclosed under ORS 279C.370 by submitting the name of the new subcontractor and the reason for the substitution in writing to the contracting agency. A contractor may substitute a first tier subcontractor under this section in the following circumstances:~~

~~— (1) When the subcontractor disclosed under ORS 279C.370 fails or refuses to execute a written contract after having had a reasonable opportunity to do so after the written contract, which must be reasonably based upon the general terms, conditions, plans and specifications for the public improvement project or the terms of the subcontractor's written bid, is presented to the subcontractor by the contractor.~~

~~— (2) When the disclosed subcontractor becomes bankrupt or insolvent.~~

~~— (3) When the disclosed subcontractor fails or refuses to perform the subcontract.~~

~~— (4) When the disclosed subcontractor fails or refuses to meet the bond requirements of the contractor that had been identified prior to the bid submittal.~~

~~_____ (5) When the contractor demonstrates to the contracting agency that the subcontractor was disclosed as the result of an inadvertent clerical error.~~

~~_____ (6) When the disclosed subcontractor does not hold a license from, or has a license that is not properly endorsed by, the Construction Contractors Board and is required to be licensed by the board.~~

~~_____ (7) When the contractor determines that the work performed by the disclosed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications or that the subcontractor is substantially delaying or disrupting the progress of the work.~~

____ (8) When the disclosed subcontractor is ineligible to work on a public improvement contract under applicable statutory provisions.

____ (9) When the substitution is for good cause. The Construction Contractors Board shall define “good cause” by rule. “Good cause” includes but is not limited to the financial instability of a subcontractor. The definition of “good cause” must reflect the least-cost policy for public improvements established in ORS 279C.305.

____ (10) When the substitution is reasonably based on the contract alternates chosen by the contracting agency. [\[2003 c.794 §152; 2007 c.836 §45\]](#)

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[no rule]

279C.590 Complaint process for substitutions of subcontractors; civil penalties. (1)(a) A subcontractor disclosed under ORS 279C.370 may file a complaint based on the subcontractor disclosure requirements under ORS 279C.370 with the Construction Contractors Board about a contractor if the contractor has substituted another subcontractor for the complaining subcontractor.

(b) If more than one subcontractor files a complaint with the board under paragraph (a) of this subsection relating to a single subcontractor disclosure, the board shall consolidate the complaints into one proceeding. If the board imposes a civil penalty under this section against a contractor, the amount collected by the board shall be divided evenly among all of the complaining subcontractors.

(c) Each subcontractor filing a complaint under paragraph (a) of this subsection shall post a deposit of \$500 with the board upon filing the complaint.

(d) If the board determines that a contractor’s substitution was not in compliance with ORS 279C.585, the board shall return the full amount of the deposit posted under paragraph (c) of this subsection to the complaining subcontractor.

(e) If the board determines that a contractor has not substituted a subcontractor or that the contractor’s substitution was in compliance with ORS 279C.585, the board shall award the contractor \$250 of the deposit and shall retain the other \$250, which may be expended by the board.

(2) Upon receipt of a complaint under subsection (1) of this section, the board shall investigate the complaint. If the board determines that a contractor has substituted a subcontractor in a manner not in compliance with ORS 279C.585, the board may impose a civil penalty against the contractor under subsections (3) to (5) of this section. Civil penalties under this section shall be imposed in the manner provided under ORS 183.745.

(3) If the board imposes a civil penalty under subsection (2) of this section and it is the first time the board has imposed a civil penalty under subsection (2) of this section against the contractor during a three-year period, the board shall:

(a) Impose a civil penalty on the contractor of up to 10 percent of the amount of the subcontract bid submitted by the complaining subcontractor to the contractor or \$15,000, whichever is less. Amounts collected by the board under this paragraph shall be awarded to the complaining subcontractor or subcontractors; and

(b) Impose a civil penalty on the contractor of up to \$1,000. Amounts collected by the board under this paragraph shall be retained by the board and may be expended by the board.

(4) If the board imposes a civil penalty under subsection (2) of this section and it is the second time the board has imposed a civil penalty under subsection (2) of this section against the contractor during a three-year period, the board may:

(a) Impose a civil penalty on the contractor of up to 10 percent of the amount of the subcontract bid submitted by the complaining subcontractor to the contractor or \$15,000, whichever is less. Amounts collected by the board under this paragraph shall be awarded to the complaining subcontractor or subcontractors; and

(b) Impose a civil penalty on the contractor of up to \$1,000 and shall place the contractor on the list established under ORS 701.227 for up to six months. Amounts collected by the board under this paragraph shall be retained by the board and may be expended by the board.

(5) If the board imposes a civil penalty under subsection (2) of this section and the board has imposed a civil penalty under subsection (2) of this section against the contractor three or more times during a three-year period, the board may:

(a) Impose a civil penalty on the contractor of up to 10 percent of the amount of the subcontract bid submitted by the complaining subcontractor to the contractor or \$15,000, whichever is less. Amounts collected by the board under this paragraph shall be awarded to the complaining subcontractor or subcontractors; and

(b) Impose a civil penalty on the contractor of up to \$1,000 and shall place the contractor on the list established under ORS 701.227 for up to one year. Amounts collected by the board under this paragraph shall be retained by the board and may be expended by the board.

(6) Within 10 working days after receiving a complaint under subsection (1) of this section, the board shall notify, in writing, any contracting agency that is a party to the contract for which the complaint has been filed that the complaint has been filed. [2003 c.794 §153]

[no rule]

Action on Payment Bonds and Public Works Bonds

279C.600 Right of action on payment bond or public works bond of contractor or subcontractor; notice of claim. (1) A person claiming to have supplied labor or materials for the performance of the work provided for in a public contract, including any person having a direct contractual relationship with the contractor furnishing the payment bond or a direct contractual relationship with any subcontractor, or an assignee of such person, or a person claiming moneys due the State Accident Insurance Fund Corporation, the Unemployment Compensation Trust Fund or the Department of Revenue in connection with the performance of the contract, has a right of action on the contractor's payment bond as provided for in ORS 279C.380 and 279C.400 only if:

(a) The person or the assignee of the person has not been paid in full; and

(b) The person gives written notice of claim, as prescribed in ORS 279C.605, to the contractor and the contracting agency.

(2) When, upon investigation, the Commissioner of the Bureau of Labor and Industries has received information indicating that one or more workers providing labor on a public works have not been paid in full at the prevailing rate of wage or overtime wages, the commissioner has a right of action first on the contractor's public works bond required under ORS 279C.836 and then, for any amount of a claim not satisfied by the public works bond, on the contractor's payment bond, as provided in ORS 279C.380 and 279C.400. When an investigation indicates that a subcontractor's workers have not been paid in full at the prevailing rate of wage or overtime wages, the commissioner has a right of action first on the subcontractor's public works bond and then, for any amount of a claim not satisfied by the subcontractor's public works bond, on the contractor's payment bond. The commissioner's right of action exists without necessity of an assignment and extends to workers on the project who are not identified when the written notice of claim is given, but for whom the commissioner has received information indicating that the workers have provided labor on the public works and have not been paid in full. The commissioner shall give written notice of the claim, as prescribed in ORS 279C.605, to the contracting agency, the Construction Contractors Board, the contractor and, if applicable, the subcontractor. The commissioner may not make a claim for the same unpaid wages against more than one bond under this section. [2003 c.794 §154; 2005 c.360 §3]

[no rule]

279C.605 Notice of claim. (1) The notice of claim required by ORS 279C.600 must be sent by registered or certified mail or hand delivered no later than ~~120~~180 days after the day the person last provided labor or furnished materials or ~~120~~180 days after the worker listed in the notice of claim by the Commissioner of the Bureau of Labor and Industries last provided labor. The notice may be sent or delivered to the contractor or subcontractor at any place the contractor or subcontractor maintains an office or conducts business or at the residence of the contractor or subcontractor.

— (2) Notwithstanding subsection (1) of this section, if the claim is for a required contribution to a fund of ~~any~~any employee benefit plan, the notice required by ORS 279C.600 must be sent or delivered within ~~150~~200 days after the employee last provided labor or materials.

— (3) The notice must be in writing substantially as follows:

—
— To (here insert the name of the contractor or subcontractor and the name of the public body):
— Notice hereby is given that the undersigned (here insert the name of the claimant) has a claim for (here insert a brief description of the labor or materials performed or furnished and the person by whom performed or furnished; if the claim is for other than labor or materials, insert a brief description of the claim) in the sum of (here insert the amount) dollars against the (here insert public works bond or payment bond, as applicable) taken from (here insert the name of the principal and, if known, the surety or sureties upon the public works bond or payment bond) for the work of (here insert a brief description of the work concerning which the public works bond or payment bond was taken). Such material or labor was supplied to (here insert the name of the contractor or subcontractor). ~~(here to be signed)~~

(here to be signed)

 (4) When notice of claim is given by the commissioner and if the claim includes a worker who is then unidentified, the commissioner shall include in the notice a statement that the claim includes an unidentified worker for whom the commissioner has received information indicating that the worker has not been paid in full at the prevailing rate of wage required by ORS 279C.840 or overtime wages required by ORS 279C.540.

~~(5) The notice shall be signed by t~~ (5) The person making the claim or giving the notice shall sign the notice. [2003 c.794 §155; 2005 c.-360 §4; 2009 c.160 §1]

[no rule]

279C.610 Action on contractor’s public works bond or payment bond; time limitation.

(1) The Commissioner of the Bureau of Labor and Industries or a person who has a right of action on the public works bond or the payment bond under ORS 279C.600 and, where required, who has filed and served the notice or notices of claim, as required under ORS 279C.600 and 279C.605, or that person’s assignee, may institute an action on the contractor’s public works bond or payment bond in a circuit court of this state or the federal district court of the district.

(2) The action shall be on the relation of the commissioner, the claimant, or that person’s assignee, as the case may be, and shall be in the name of the contracting agency that let the contract or, when applicable, the public agency or agencies for whose benefit the contract was let. It may be prosecuted to final judgment and execution for the use and benefit of the commissioner or the claimant, or that person’s assignee, as the fact may appear.

(3) The action shall be instituted no later than two years after the person last provided labor or materials or two years after the worker listed in the commissioner’s notice of claim last provided labor. [2003 c.794 §156; 2005 c.360 §5]

[no rule]

279C.615 Preference for labor and material liens. All labor and material liens have preference and are superior to all other liens and claims of any kind or nature created by ORS 279C.500 to 279C.530 and 279C.600 to 279C.625. [2003 c.794 §157]

[no rule]

279C.620 Rights of person providing medical care to employees of contractor. A person providing medical, surgical or hospital care services or other needed care and attention, incident to sickness or injury, to the employees of a contractor or subcontractor on a public contract is deemed to have performed labor on the public contract for the purposes of ORS 279C.600 to 279C.625. [2003 c.794 §158]

[no rule]

279C.625 Joint liability when payment bond not executed. If the public improvement contract is one for which a payment bond as provided for in ORS 279C.380 and 279C.400 is

required and the contractor fails to pay for labor or materials or to pay claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund or the Department of Revenue and the officers of the public body that authorized the contract fail or neglect to require the person entering into the contract to execute the payment bond:

(1) The State of Oregon and the officers authorizing the contract shall be jointly liable for the labor and materials used in the performance of any work under the contract, and for claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund and the Department of Revenue, if the contract was entered into with the State of Oregon.

(2) The public body and the officers authorizing the contract shall be jointly liable for the labor and materials used in the performance of any work under the contract and for claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund and the Department of Revenue, if the contract was entered into on behalf of a public body other than the state. [2003 c.794 §159; 2005 c.103 §35]

[no rule]

Termination or Suspension of Contract for Public Interest Reasons

279C.650 “Labor dispute” defined. As used in ORS 279C.650 to 279C.670, “labor dispute” has the meaning given that term in ORS 662.010. [2003 c.794 §160]

[no rule]

279C.655 Extension and compensation when work suspended. If a public contract is not terminated but work under the contract is suspended by an order of a contracting agency for any reason considered to be in the public interest other than a labor dispute or any third-party judicial proceeding relating to the work other than a suit or action filed in regards to a labor dispute, the contractor is entitled to a reasonable extension of the contract time and reasonable compensation for all costs resulting from the suspension plus a reasonable allowance for overhead with respect to such costs. [2003 c.794 §161]

[no rule]

279C.660 Compensation when contract terminated due to public interest. When a public contract is terminated by mutual agreement, provision shall be made for the payment of compensation to the contractor. In addition to a reasonable amount of compensation for preparatory work and for all costs and expenses arising out of termination, the amount to be paid to the contractor:

(1) Shall be determined on the basis of the contract price in the case of any fully completed separate item or portion of the work for which there is a separate or unit contract price; and

(2) May, with respect to any other work, be a percent of the contract price equal to the percentage of the work completed. [2003 c.794 §162]

[no rule]

279C.665 Contractual provisions for compensation when contract terminated due to public interest. A contracting agency may provide in a public improvement contract detailed provisions under which the contractor shall be entitled, as a matter of right, to compensation upon termination of the contract on account of any reason considered to be in the public interest. [2003 c.794 §163]

[no rule]

279C.670 Application of ORS 279C.650 to 279C.670. ORS 279C.650 to 279C.670 do not apply to suspension of the work or termination of the contract that occurs as a result of the contractor's violation of federal, state or local statutes, ordinances, rules or regulations in existence at the time the contract was executed or as a result of violations of the terms of the contract. [2003 c.794 §164]

[no rule]

Prevailing Wage Rate

279C.800. As used in ORS 279C.800 to 279C.870:

(1) "Fringe benefits" means the amount of:

(a) The rate of contribution a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program; and

(b) The rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing the following items, except for items that federal, state or local law requires the contractor or subcontractor to provide:

(A) Benefits to workers pursuant to an enforceable written commitment to the workers to carry out a financially responsible plan or program for:

(i) Medical or hospital care;

(ii) Pensions on retirement or death; or

(iii) Compensation for injuries or illness that result from occupational activity;

(B) Insurance to provide the benefits described in subparagraph (A) of this paragraph;

(C) Unemployment benefits;

(D) Life insurance;

(E) Disability and sickness insurance or accident insurance;

(F) Vacation and holiday pay;

(G) Costs of apprenticeship or other similar programs; or

(H) Other bona fide fringe benefits.

(2) "Housing" has the meaning given that term in ORS 456.055.

(3) "Locality" means the following district in which the public works, or the major portion thereof, is to be performed:

(a) District 1, composed of Clatsop, Columbia and Tillamook Counties;

(b) District 2, composed of Clackamas, Multnomah and Washington Counties;

(c) District 3, composed of Marion, Polk and Yamhill Counties;

(d) District 4, composed of Benton, Lincoln and Linn Counties;

(e) District 5, composed of Lane County;

(f) District 6, composed of Douglas County;

(g) District 7, composed of Coos and Curry Counties;
(h) District 8, composed of Jackson and Josephine Counties;
(i) District 9, composed of Hood River, Sherman and Wasco Counties;
(j) District 10, composed of Crook, Deschutes and Jefferson Counties;
(k) District 11, composed of Klamath and Lake Counties;
(L) District 12, composed of Gilliam, Grant, Morrow, Umatilla and Wheeler Counties;
(m) District 13, composed of Baker, Union and Wallowa Counties; and
(n) District 14, composed of Harney and Malheur Counties.

(4) “Prevailing rate of wage” means the rate of hourly wage, including all fringe benefits, that the Commissioner of the Bureau of Labor and Industries determines is paid in the locality to the majority of workers employed on projects of a similar character in the same trade or occupation.

(5) “Public agency” means the State of Oregon or a political subdivision of the State of Oregon, or a county, city, district, authority, public corporation or public entity organized and existing under law or charter or an instrumentality of the county, city, district, authority, public corporation or public entity.

(6)(a) “Public works” includes, but is not limited to:

(A) Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest;

(B) A project that uses funds of a private entity and \$750,000 or more of funds of a public agency for constructing, reconstructing, painting or performing a major renovation on a privately owned road, highway, building, structure or improvement of any type;

(C) A project that uses funds of a private entity for constructing a privately owned road, highway, building, structure or improvement of any type in which a public agency will use or occupy 25 percent or more of the square footage of the completed project; or

(D) Notwithstanding the provisions of ORS 279C.810 (2)(a), (b) and (c), a device, structure or mechanism, or a combination of devices, structures or mechanisms, that:

(i) Uses solar radiation as a source for generating heat, cooling or electrical energy; and
(ii) Is constructed or installed, with or without using funds of a public agency, on land, premises, structures or buildings that a public body, as defined in ORS 174.109, owns.

(b) “Public works” does not include:

(A) The reconstruction or renovation of privately owned property that a public agency leases;
or
(B) The renovation of publicly owned real property that is more than 75 years old by a private nonprofit entity if:

(i) The real property is leased to the private nonprofit entity for more than 25 years;
(ii) Funds of a public agency used in the renovation do not exceed 15 percent of the total cost of the renovation; and
(iii) Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 13, 2007. [2003 c.794 §165; 2007 c.764 §34; 2010 Enrolled House Bill 3651 (2010 Special Session; see Note below)]

Note: The amendments to 279C.800 by Enrolled House Bill 3651, 2010 Special Session, become operative January 1, 2011; see section 3 of such bill. The text that is operative until January 1, 2011, is set forth below for the user's convenience.

- **279C.800 Definitions for ORS 279C.800 to 279C.870.** As used in ORS 279C.800 to 279C.870, unless the context requires otherwise:

- (1) "Fringe benefits" means the amount of:
 - (a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person under a plan, fund or program; and
 - (b) The rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program that is committed in writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only when the contractor or subcontractor is not required by other federal, state or local law to provide any of these benefits.
- (2) "Housing" has the meaning given that term in ORS 456.055.
- (3) "Locality" means the following district in which the public works, or the major portion thereof, is to be performed:
 - (a) District 1, composed of Clatsop, Columbia and Tillamook Counties;
 - (b) District 2, composed of Clackamas, Multnomah and Washington Counties;
 - (c) District 3, composed of Marion, Polk and Yamhill Counties;
 - (d) District 4, composed of Benton, Lincoln and Linn Counties;
 - (e) District 5, composed of Lane County;
 - (f) District 6, composed of Douglas County;
 - (g) District 7, composed of Coos and Curry Counties;
 - (h) District 8, composed of Jackson and Josephine Counties;
 - (i) District 9, composed of Hood River, Sherman and Wasco Counties;
 - (j) District 10, composed of Crook, Deschutes and Jefferson Counties;
 - (k) District 11, composed of Klamath and Lake Counties;
 - (L) District 12, composed of Gilliam, Grant, Morrow, Umatilla and Wheeler Counties;
 - (m) District 13, composed of Baker, Union and Wallowa Counties; and
 - (n) District 14, composed of Harney and Malheur Counties.
- (4) "Prevailing rate of wage" means the rate of hourly wage, including all fringe benefits, paid in the locality to the majority of workers employed on projects of similar character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries.
- (5) "Public agency" means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any instrumentality thereof organized and existing under law or charter.
- (6)(a) "Public works" includes, but is not limited to:
 - (A) Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest;
 - (B) A project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and \$750,000 or more of funds of a public agency; or
 - (C) A project for the construction of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency.
- (b) "Public works" does not include:
 - (A) The reconstruction or renovation of privately owned property that is leased by a public agency; or

(B) The renovation of publicly owned real property that is more than 75 years old by a private nonprofit entity if:

- (i) The real property is leased to the private nonprofit entity for more than 25 years;
- (ii) Funds of a public agency used in the renovation do not exceed 15 percent of the total cost of the renovation; and
- (iii) Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 13, 2007. [2003 c.794 §165; 2007 c.764 §34]

[no rule]

279C.805 Policy. The Legislative Assembly declares that the purposes of the prevailing rate of wage law are:

- (1) To ensure that contractors compete on the ability to perform work competently and efficiently while maintaining community-established compensation standards.
- (2) To recognize that local participation in publicly financed construction and family wage income and benefits are essential to the protection of community standards.
- (3) To encourage training and education of workers to industry skills standards.
- (4) To encourage employers to use funds allocated for employee fringe benefits for the actual purchase of those benefits. [2003 c.794 §166]

[no rule]

| **279C.807 Workforce diversity for public works projects. *******

[no rule]

| **279C.808 Rules. *******

[no rule]

| **279C.810 Exemptions; rules.** (1) As used in this section:

- (a) “Funds of a public agency” does not include:
 - (A) Funds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction, reconstruction, major renovation or painting;
 - (B) Building and development permit fees paid or waived by the public agency;
 - (C) Tax credits or tax abatements;
 - (D) Land that a public agency sells to a private entity at fair market value;
 - (E) The difference between:
 - (i) The value of land that a public agency sells to a private entity as determined at the time of the sale after taking into account any plan, requirement, covenant, condition, restriction or other limitation, exclusive of zoning or land use regulations, that the public agency imposes on the development or use of the land; and
 - (ii) The fair market value of the land if the land is not subject to the limitations described in subparagraph (i) of this paragraph;

(F) Staff resources of the public agency used to manage a project or to provide a principal source of supervision, coordination or oversight of a project;

(G) Staff resources of the public agency used to design or inspect one or more components of a project;

(H) Moneys derived from the sale of bonds that are loaned by a state agency to a private entity, unless the moneys will be used for a public improvement;

(I) Value added to land as a consequence of a public agency's site preparation, demolition of real property or remediation or removal of environmental contamination, except for value added in excess of the expenses the public agency incurred in the site preparation, demolition or remediation or removal when the land is sold for use in a project otherwise subject to ORS 279C.800 to 279C.870; or

(J) Bonds, or loans from the proceeds of bonds, issued in accordance with ORS chapter 289 or ORS 441.525 to 441.595, unless the bonds or loans will be used for a public improvement.

(b) "Nonprofit organization" means an organization or group of organizations described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.

(2) ORS 279C.800 to 279C.870 do not apply to:

(a) Projects for which the contract price does not exceed \$50,000. In determining the price of a project, a public agency:

(A) May not include the value of donated materials or work performed on the project by individuals volunteering to the public agency without pay; and

(B) Shall include the value of work performed by every person paid by a contractor or subcontractor in any manner for the person's work on the project.

(b) Projects for which no funds of a public agency are directly or indirectly used. In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries shall adopt rules to carry out the provisions of this paragraph.

(c) Projects:

(A) That are privately owned;

(B) That use funds of a private entity;

(C) In which less than 25 percent of the square footage of a completed project will be occupied or used by a public agency; and

(D) For which less than \$750,000 of funds of a public agency are used.

(d) Projects for residential construction that are privately owned and that predominantly provide affordable housing. As used in this paragraph:

(A) "Affordable housing" means housing that serves occupants whose incomes are no greater than 60 percent of the area median income or, if the occupants are owners, whose incomes are no greater than 80 percent of the area median income.

(B) "Predominantly" means 60 percent or more.

(C) "Privately owned" includes:

(i) Affordable housing provided on real property owned by a public agency if the real property and related structures are leased to a private entity for 50 or more years; and

(ii) Affordable housing owned by a partnership, nonprofit corporation or limited liability company in which a housing authority, as defined in ORS 456.005, is a general partner, director or managing member and the housing authority is not a majority owner in the partnership, nonprofit corporation or limited liability company.

(D) “Residential construction” includes the construction, reconstruction, major renovation or painting of single-family houses or apartment buildings not more than four stories in height and all incidental items, such as site work, parking areas, utilities, streets and sidewalks, pursuant to the United States Department of Labor’s “All Agency Memorandum No. 130: Application of the Standard of Comparison “Projects of a Character Similar” Under Davis-Bacon and Related Acts,” dated March 17, 1978. However, the commissioner may consider different definitions of residential construction in determining whether a project is a residential construction project for purposes of this paragraph, including definitions that:

(i) Exist in local ordinances or codes; or

(ii) Differ, in the prevailing practice of a particular trade or occupation, from the United States Department of Labor’s description of residential construction. [2003 c.794 §172; 2005 c.153 §1; 2005 c.360 §8; 2007 c.764 §35]

[no rule]

279C.815 Determination of prevailing wage; sources of information; comparison of state and federal prevailing wage; other powers of commissioner. (1) As used in this section, “person” includes any employer, labor organization or any official representative of an employee or employer association.

(2)(a) The Commissioner of the Bureau of Labor and Industries shall determine the prevailing rate of wage for workers in each trade or occupation in each locality described in ORS 279C.800 at least once each year by means of an independent wage survey and make this information available at least twice each year. The commissioner may amend the rate at any time.

(b) If it appears to the commissioner that the data derived only from the survey described in paragraph (a) of this subsection are insufficient to determine the prevailing rate of wage, the commissioner also shall consider additional information such as collective bargaining agreements, other independent wage surveys and the prevailing rates of wage determined by appropriate federal agencies or agencies of adjoining states. If there is not a majority in the same trade or occupation paid at the same rate, the average rate of hourly wage, including all fringe benefits, paid in the locality to workers in the same trade or occupation shall be the prevailing rate. If the wage paid by any contractor or subcontractor to workers on any public works is based on some period of time other than an hour, the hourly wage shall be mathematically determined by the number of hours worked in that period of time.

(c) The commissioner shall compare the prevailing rate of wage determined under paragraph (a) of this subsection with the federal prevailing rate of wage required under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) and determine which rate is higher for workers in each trade or occupation in each locality. The commissioner shall make this information, showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality, available at the same time as the commissioner makes information available under paragraph (a) of this subsection.

(3) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

(4) Notwithstanding ORS 192.410 to 192.505, all reports and returns or other information provided to the commissioner under this section are confidential and not available for inspection by the public.

(5) In order to assist the commissioner in making determinations of the prevailing rates of wage, the commissioner may enter into contracts with public or private parties to obtain relevant data and information. Any such contract may include provisions for the manner and extent of the market review of affected trades and occupations and such other requirements regarding timelines of reports, accuracy of data and information and supervision and review as the commissioner may prescribe. [2003 c.794 §173; 2005 c.360 §9; 2007 c.764 §36; 2007 c.844 §3]

[no rule]

279C.817 Determination of applicability of prevailing wage rate; time limitation; hearing; rules. (1) The Commissioner of the Bureau of Labor and Industries shall, upon the request of a public agency or other interested person, make a determination about whether a project or proposed project is or would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840.

(2) The requester shall provide the commissioner with information necessary to enable the commissioner to make the determination.

(3) The commissioner shall make the determination within 60 days after receiving the request or 60 days after the requester has provided the commissioner with the information necessary to enable the commissioner to make the determination, whichever is later. The commissioner may take additional time to make the determination if the commissioner and the requester mutually agree that the commissioner may do so.

(4) The commissioner shall afford the requester or a person adversely affected or aggrieved by the commissioner's determination a hearing in accordance with ORS 183.413 to 183.470. An order the commissioner issues under ORS 183.413 to 183.470 is subject to judicial review as provided in ORS 183.482.

(5) The commissioner shall adopt rules establishing the process for requesting and making the determinations described in this section. [2007 c.764 §43]

Rule C.817 Requests for Determination of Applicability of Prevailing Wage Rate

All requests for a determination of the applicability of the prevailing wage rate under ORS 279C.817(1) will be made by the Manager of Contracts and Procurement, if such Manager determines that a request is appropriate. In determining the appropriateness of a request, the Manager may require the preparation of written findings describing the matter.

279C.820 Advisory committee to assist commissioner. (1) The Commissioner of the Bureau of Labor and Industries shall appoint an advisory committee to assist the commissioner in the administration of ORS 279C.800 to 279C.870.

(2) The advisory committee must include equal representation of members from management and labor in the building and construction industry who perform work on public works contracts and such other interested parties as the commissioner shall appoint. [2003 c.794 §179]

[no rule]

279C.825 Fees; rules. (1)(a) The Commissioner of the Bureau of Labor and Industries, by rule order, shall establish a fee to be paid by the public agency that awards a public works contract subject to ORS 279C.800 to 279C.870. The fee commissioner shall ~~be used~~ use the fee to pay the costs of:

— (A) Surveys to determine the prevailing rates of wage;

— (B) Administering and providing investigations under and enforcement of ORS 279C.800 to 279C.870; and

— (C) Providing educational programs on public contracting law under the Public Contracting Code.

— (b) The fee commissioner shall ~~be establish the fee at~~ 0.1 percent of the contract price. However, in no event may a fee be charged and collected that is less than \$250 or more than \$5,000 or less than \$1007,500.

— (2) The commissioner shall pay moneys received under this section into the State Treasury. The moneys shall be credited to the Prevailing Wage Education and Enforcement Account created by ORS 651.185.

— (3) The public agency shall pay the fee at the time the public agency ~~enters into~~ notifies the ~~public works commissioner under ORS 279C.835 a~~ contract subject to the provisions of ORS 279C.800 to 279C.870 has been awarded. [2003 c.794 §178; 2007 c.844 §7]

Note: Section 8, chapter 844, Oregon Laws 2007, provides:

Sec. 8. ~~Notwithstanding the maximum and minimum fee amounts set forth in ORS 279C.825 (1)(b), for public works contracts entered into on or after the effective date of this 2007 Act [January 1, 2008] and before January 1, 2011, the fee charged and collected may not be more than \$7,500 or less than \$250. [2007; 2009 c.844 §8161 §1; 2009 c.788 §1]~~

[no rule]

279C.827 Division of public works project; applicability of prevailing wage rate to divided projects. (1)(a) A public agency may not divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.

(b) When the Commissioner of the Bureau of Labor and Industries determines that a public agency has divided a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner shall issue an order compelling compliance.

(c) In making determinations under this subsection, the commissioner shall consider:

(A) The physical separation of the project structures;

(B) The timing of the work on project phases or structures;

(C) The continuity of project contractors and subcontractors working on project parts or phases;

(D) The manner in which the public agency and the contractors administer and implement the project;

(E) Whether a single public works project includes several types of improvements or structures; and

(F) Whether the combined improvements or structures have an overall purpose or function.

(2) If a project is a public works of the type described in ORS 279C.800 (6)(a)(B) or (C), the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsection (1)(c) of this section to separate the parts of the project that include funds of a public agency or that will be occupied or used by a public agency from the parts of the project that do not include funds of a public agency and that will not be occupied or used by a public agency. If the commissioner divides the project, any part of the project that does not include funds of a public agency and that will not be occupied or used by a public agency is not subject to ORS 279C.800 to 279C.870.

(3) If a project includes parts that are owned by a public agency and parts that are owned by a private entity, the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsections (1)(c) and (2) of this section to separate the parts of the project that are public works from the parts of the project that are not public works. If the commissioner divides the project, parts of the project that are not public works are not subject to ORS 279C.800 to 279C.870. [2007 c.764 §44]

[no rule]

279C.829 Agreement with other state to pay less than prevailing rate of wage.
Notwithstanding any other provision of law, a contracting agency may not enter into an agreement with another state or a political subdivision or agency of another state in which the contracting agency agrees that a contractor or subcontractor may pay less than the prevailing rate of wage determined in accordance with ORS 279C.815 under the terms of a contract for public works to which the contracting agency is a party or of which the contracting agency is a beneficiary. [2009 c.322 §2]

[no rule]

279C.830 Provisions concerning prevailing rate of wage in specifications, contracts and subcontracts; applicability of prevailing wage; ~~fee~~; bond. (1)(a) Except as provided in paragraph (d) of this subsection, the specifications for every contract for public works shall contain a provision stating the existing state prevailing rate of wage and, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) that may be paid to workers in each trade or occupation required for the public works employed in the performance of the contract either by the contractor or subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract. When the prevailing rates of wage are available electronically or are accessible on the Internet, the rates may be incorporated into the specifications by referring to the electronically accessible or Internet-accessible rates and by providing adequate information about how to access the rates.

— (b) If a public agency is required under paragraph (a) of this subsection to include the state and federal prevailing rates of wage in the specifications, the public agency also shall include in the specifications information showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality, as determined by the Commissioner of the Bureau of Labor and Industries under ORS 279C.815 (2)(c).

— (c) Every contract and subcontract shall contain a provision that the workers shall be paid not less than the specified minimum hourly rate of wage in accordance with ORS 279C.838 and 279C.840.

— (d) A public works project described in ORS 279C.800 (6)(a)(B) or (C) is subject to the existing state prevailing rate of wage or, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act that is in effect at the time a public agency enters into an agreement with a private entity for the project. After that time, the specifications for any contract for the public works shall include the applicable prevailing rate of wage.

~~— (2) The specifications for every contract for public works between a public agency and a contractor shall contain a provision stating that a fee is required to be paid to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279C.825 (1). The contract shall contain a provision that the fee shall be paid to the commissioner under the administrative rule of the commissioner.~~

— (2) The specifications for every contract for public works shall contain a provision stating that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9). Every contract awarded by a contracting agency shall contain a provision requiring the contractor:

— (a) To have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9).

— (b) To include in every subcontract a provision requiring the subcontractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9). [2003 c.794 §168; 2005 c.360 §10; 2007 c.415 §2; 2007 c.764 §37; 2007 c.844 §4; [2009 c.161 §2](#)]

[no rule]

279C.835 Notifying commissioner of public works contract- [subject to prevailing wage; payment of fee.](#) Public agencies shall notify the Commissioner of the Bureau of Labor and Industries in writing, on a form prescribed by the commissioner, whenever a contract subject to the provisions of ORS 279C.800 to 279C.870 has been awarded. The notification shall be made within 30 days of the date that the contract is awarded. The notification shall include [payment of the fee required under ORS 279C.825 and](#) a copy of the disclosure of first-tier subcontractors that was submitted under ORS 279C.370. [2003 c.794 §175; [2009 c.161 §3](#)]

[no rule]

279C.836 Public works bond; rules. (1) Except as provided in subsection (4), (7), (8) or (9) of this section, before starting work on a contract or subcontract for a public works project, a contractor or subcontractor shall file with the Construction Contractors Board a public works bond with a corporate surety authorized to do business in this state in the amount of \$30,000. The bond must provide that the contractor or subcontractor will pay claims ordered by the Bureau of Labor and Industries to workers performing labor upon public works projects. The bond must be a continuing obligation, and the surety's liability for the aggregate of claims that may be payable from the bond may not exceed the penal sum of the bond. The bond must remain in effect continuously until depleted by claims paid under this section, unless the surety sooner cancels the bond. The surety may cancel the bond by giving 30 days' written notice to the contractor or subcontractor, to the board and to the Bureau of Labor and Industries. When the bond is canceled, the surety is relieved of further liability for work performed on contracts

entered into after the cancellation. The cancellation does not limit the surety's liability for work performed on contracts entered into before the cancellation.

(2) Before permitting a subcontractor to start work on a public works project, the contractor shall verify that the subcontractor has filed a public works bond as required under this section, has elected not to file a public works bond under subsection (7) or (8) of this section or is exempt under subsection (4) or (9) of this section.

(3) A contractor or subcontractor is not required under this section to file a separate public works bond for each public works project for which the contractor or subcontractor has a contract.

(4) A person that is not required under ORS 279C.800 to 279C.870 to pay prevailing rates of wage on a public works project is not required to file a public works bond under this section.

(5) A public works bond required by this section is in addition to any other bond the contractor or subcontractor is required to obtain.

(6) The board may, by rule, require a contractor or subcontractor to obtain a new public works bond if a surety pays a claim out of an existing public works bond. The new bond must be in the amount of \$30,000. The board may allow a contractor or subcontractor to obtain, instead of a new bond, a certification that the surety remains liable for the full penal sum of the existing bond, notwithstanding payment by the surety on the claim.

(7)(a) A disadvantaged, minority, women or emerging small business enterprise certified under ORS 200.055 may, for up to four years after certification, elect not to file a public works bond as required under subsection (1) this section. If a business enterprise elects not to file a public works bond, the business enterprise shall give the board written verification of the certification and written notice that the business enterprise elects not to file the bond.

(b) A business enterprise that elects not to file a public works bond under this subsection shall notify the public agency for whose benefit the contract was awarded or, if the business enterprise is a subcontractor, the contractor of the election before starting work on a public works project. When a business enterprise elects not to file a public works bond under this subsection, a claim for unpaid wages may be made against the payment bond of the business enterprise or, if the business enterprise is a subcontractor, the payment bond of the contractor.

(c) An election not to file a public works bond expires four years after the date the business enterprise is certified. After an election has expired and before starting or continuing work on a contract or subcontract for a public works project, the business enterprise shall file a public works bond with the board as required under subsection (1) of this section.

(8) A contractor or subcontractor may elect not to file a public works bond as required under subsection (1) of this section for any public works project for which the contract price does not exceed \$100,000.

(9) In cases of emergency, or when the interest or property of the public agency for whose benefit the contract was awarded probably would suffer material injury by delay or other cause, the requirement for filing a public works bond may be excused, if a declaration of the emergency is made in accordance with rules adopted under ORS 279A.065.

(10) The board shall make available on a searchable public website information concerning public works bonds filed with the board, claims made on those bonds, elections made by certified business enterprises not to file those bonds and the expiration date of each election. The board may adopt rules necessary to perform the duties required of the board by this section.

(11) The Commissioner of the Bureau of Labor and Industries, with approval of the board, shall adopt rules that establish language for public works bonds. [2005 c.360 §2; 2007 c.415 §1; 2007 c.764 §38]

[no rule]

279C.838 Applicability of state and federal rates of wage; determination of site of project; determination of applicability of wage to transportation workers; waiver. When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.):

(1) If the state prevailing rate of wage is higher than the federal prevailing rate of wage, the contractor and every subcontractor on the project shall pay at least the state prevailing rate of wage as determined under ORS 279C.815;

(2) The Commissioner of the Bureau of Labor and Industries shall determine the site of the project in a manner consistent with the term “site of the work” as that term is used in federal law and in regulations adopted or guidelines issued in accordance with the Davis-Bacon Act;

(3) The commissioner shall determine in a manner that is consistent with federal law and regulations adopted or guidelines issued in accordance with the Davis-Bacon Act whether workers transporting materials and supplies to and from the site of the project are subject to the Davis-Bacon Act and are entitled to be paid the prevailing rate of wage;

(4) Except as provided in subsection (1) of this section, the commissioner, in consultation with the advisory committee appointed under ORS 279C.820, may administer and enforce ORS 279C.800 to 279C.870 in a manner that is consistent with federal law and regulations adopted or guidelines issued in accordance with the Davis-Bacon Act. The commissioner may provide a waiver from a requirement set forth in ORS 279C.800 to 279C.870 if necessary to achieve consistency with the Davis-Bacon Act and to further the purposes of ORS 279C.805; and

(5) ORS 279C.800 to 279C.870 do not apply to workers enrolled in skill training programs that are certified by the United States Secretary of Transportation under the Federal-Aid Highway Act (23 U.S.C. 113(c)). [2005 c.360 §7; 2007 c.844 §5]

[no rule]

279C.840 Payment of prevailing rate of wage; posting of rates and fringe benefit plan provisions. (1) The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour’s work in the same trade or occupation in the locality where the labor is performed. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash, by the making of contributions of a type referred to in ORS 279C.800 (1)(a), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in ORS 279C.800 (1)(b), or any combination thereof, where the aggregate of any such payments, contributions and costs is not less than the prevailing rate of wage. [The contractor or subcontractor shall pay all wages due and owing to the contractor’s or subcontractor’s workers upon public works on the regular payday established and maintained under ORS 652.120.](#)

— (2) After a contract for public works is executed with any contractor or work is commenced upon any public works, the amount of the prevailing rate of wage is not subject to

attack in any legal proceeding by any contractor or subcontractor in connection with that contract.

— (3) It is not a defense in any legal proceeding that the prevailing rate of wage is less than the amount required to be in the specifications of a contract for public works, or that there was an agreement between the employee and the employer to work at less than the wage rates required to be paid under this section.

— (4) Every contractor or subcontractor engaged on a project for which there is a contract for a public works shall keep the prevailing rates of wage for that project posted in a conspicuous and accessible place in or about the project. The Commissioner of the Bureau of Labor and Industries shall furnish without charge copies of the prevailing rates of wage to contractors and subcontractors.

— (5) Every contractor or subcontractor engaged on a project for which there is a contract for a public works to which the prevailing wage requirements apply that also provides or contributes to a health and welfare plan or a pension plan, or both, for the contractor or subcontractor's employees on the project shall post a notice describing the plan in a conspicuous and accessible place in or about the project. The notice preferably shall be posted in the same place as the notice required under subsection (4) of this section. In addition to the description of the plan, the notice shall contain information on how and where to make claims and where to obtain further information.

— (6)(a) Except as provided in paragraph (c) of this subsection, no person other than the contractor or subcontractor may pay or contribute any portion of the prevailing rate of wage paid by the contractor or subcontractor to workers employed in the performance of a public works contract.

— (b) For the purpose of this subsection, the prevailing rate of wage is the prevailing rate of wage specified in the contract.

— (c) This subsection is not intended to prohibit payments to a worker who is enrolled in any government-subsidized training or retraining program.

— (7) A person may not take any action that circumvents the payment of the prevailing rate of wage to workers employed on a public works contract, including, but not limited to, reducing an employee's regular rate of pay on any project not subject to ORS 279C.800 to 279C.870 in a manner that has the effect of offsetting the prevailing rate of wage on a public works project.

[2003 c.794 §167; [2009 c.161 §4](#)]

[no rule]

279C.845 Certified statements regarding payment of prevailing rates of wage; retainage. (1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public agency in writing, on a form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:

— (a) The hourly rate of wage paid each worker whom the contractor or the subcontractor has employed upon the public works; and

— (b) That no worker employed upon the public works has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract.

— (2) The certified statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read the certified statement ~~and~~, [that the contractor or subcontractor](#) knows

the contents ~~thereof~~ of the certified statement and that ~~the same is true~~ to the contractor or subcontractor's knowledge the certified statement is true.

— (3) The certified statements shall set out accurately and completely the contractor's or subcontractor's payroll records ~~for the prior week~~, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, ~~deductions made and actual wages paid and the gross wages the worker earned upon the public works during each week identified in the certified statement~~.

— (4) The contractor or subcontractor shall deliver or mail each certified statement required by subsection (1) of this section to the public agency. Certified statements for each week during which the contractor or subcontractor employs a worker upon the public works shall be submitted once a month, by the fifth business day of the following month. Information submitted on certified statements may be used only to ensure compliance with the provisions of ORS 279C.800 to 279C.870.

— (5) Each contractor or subcontractor shall preserve the certified statements for a period of three years from the date of completion of the contract.

— (6) Certified statements received by a public agency are public records subject to the provisions of ORS 192.410 to 192.505.

— (7) Notwithstanding ORS 279C.555 or 279C.570 (7), if a contractor is required to file certified statements under this section, the public agency shall retain 25 percent of any amount earned by the contractor on the public works until the contractor has filed with the public agency certified statements as required by this section. The public agency shall pay the contractor the amount retained under this subsection within 14 days after the contractor files the certified statements as required by this section, regardless of whether a subcontractor has failed to file certified statements as required by this section. The public agency is not required to verify the truth of the contents of certified statements filed by the contractor under this section.

— (8) Notwithstanding ORS 279C.555, the contractor shall retain 25 percent of any amount earned by a first-tier subcontractor on a public works until the subcontractor has filed with the public agency certified statements as required by this section. The contractor shall verify that the first-tier subcontractor has filed the certified statements before the contractor may pay the subcontractor any amount retained under this subsection. The contractor shall pay the first-tier subcontractor the amount retained under this subsection within 14 days after the subcontractor files the certified statements as required by this section. Neither the public agency nor the contractor is required to verify the truth of the contents of certified statements filed by a first-tier subcontractor under this section. [2003 c.794 §169; 2005 c.360 §11; 2009 c.7 §1]

[no rule]

279C.850 Inspection to determine whether prevailing rate of wage being paid; civil action for failure to pay prevailing rate of wage or overtime. (1) At any reasonable time the Commissioner of the Bureau of Labor and Industries may enter the office or business establishment of any contractor or subcontractor performing public works and gather facts and information necessary to determine whether the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works.

(2) Upon request by the commissioner, every contractor or subcontractor performing work on public works shall make available to the commissioner for inspection during normal business hours any payroll or other records in the possession or under the control of the contractor or

subcontractor that are deemed necessary by the commissioner to determine whether the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works. The commissioner's request must be made a reasonable time in advance of the inspection.

(3) Notwithstanding ORS 192.410 to 192.505, any record obtained or made by the commissioner under this section is not open to inspection by the public.

(4) The commissioner may, without necessity of an assignment, initiate legal proceedings against employers to enjoin future failures to pay required prevailing rates of wage or overtime pay and to require the payment of prevailing rates of wage or overtime pay due employees. The commissioner is entitled to recover, in addition to other costs, such sum as the court or judge may determine reasonable as attorney fees. If the commissioner does not prevail in the action, the commissioner shall pay all costs and disbursements from the Bureau of Labor and Industries Account. [2003 c.794 §170]

[no rule]

279C.855 Liability for violations. (1) Any contractor or subcontractor or contractor's or subcontractor's surety that violates the provisions of ORS 279C.840 is liable to the workers affected in the amount of their unpaid minimum wages, including all fringe benefits, and in an additional amount equal to the unpaid wages as liquidated damages.

(2) Actions to enforce liability to workers under subsection (1) of this section may be brought as actions on contractors' bonds as provided for in ORS 279C.610.

(3) If a public agency fails to include a provision that the contractor and any subcontractor shall comply with ORS 279C.840 in the advertisement for bids, the request for bids, the contract specifications, the accepted bid or elsewhere in the contract documents, the liability of the public agency for unpaid minimum wages, as described in subsection (1) of this section, is joint and several with any contractor or subcontractor that had notice of the requirement to comply with ORS 279C.840.

(4) When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.) and a public agency fails to include the state and federal prevailing rates of wage in the specifications for the contract for public works as required under ORS 279C.830 (1)(a), or fails to include in the specifications information showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality as required under ORS 279C.830 (1)(b), the public agency is liable to each affected worker for:

(a) The worker's unpaid minimum wages, including fringe benefits, in an amount that equals, for each hour worked, the difference between the applicable higher rate of wage and the lower rate of wage; and

(b) An additional amount, equal to the amount of unpaid minimum wages due under paragraph (a) of this subsection, as liquidated damages.

(5) The Commissioner of the Bureau of Labor and Industries may enforce the provisions of subsections (3) and (4) of this section by a civil action under ORS 279C.850 (4), by a civil action on an assigned wage claim under ORS 652.330, or by an administrative proceeding on an assigned wage claim under ORS 652.332. [2003 c.794 §171; 2007 c.844 §6]

[no rule]

279C.860 Ineligibility for public works contracts for failure to pay or post notice of prevailing rates of wage; certified payroll reports to commissioner. (1) ~~When~~A contractor, subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or subcontract for public works for a period of three years from the date on which the Commissioner of the Bureau of Labor and Industries publishes the contractor's or subcontractor's name on the list described in subsection (2) of this section. The commissioner shall add a contractor's or subcontractor's name to the list after determining, in accordance with ~~the provisions of~~ ORS chapter 183, ~~determines that:~~

(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works;~~a;~~

(b) The subcontractor has failed to pay to ~~its~~the subcontractor's employees amounts required by ORS 279C.840 and the contractor has paid those amounts on the subcontractor's behalf;~~or a;~~

(c) The contractor or subcontractor has intentionally failed or refused to post the prevailing rates of wage as required by ORS 279C.840 (4);~~the contractor, subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest shall be ineligible, for a period not to exceed three years from the date of publication of the name of the contractor or subcontractor on the ineligible list as provided in this section, to receive any contract or subcontract for public works.); or~~

(d) The contractor or subcontractor has intentionally falsified information in the contractor's or subcontractor's certified statements submitted under ORS 279C.845.

(2) The commissioner shall maintain a written list of the names of those contractors and subcontractors determined to be ineligible under this section and the period of time for which they are ineligible. A~~The commissioner shall publish a~~ copy of the list ~~shall be published, furnished, furnish the list~~ upon request and ~~make~~make the list available to contracting agencies.

~~(2)~~ (3) When the contractor or subcontractor is a corporation, the provisions of subsection ~~(4)~~ (4) of this section apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing rate of wage~~or,~~ the failure to pay to a subcontractor's employees amounts required by ORS 279C.840 that are paid by the contractor on the subcontractor's behalf~~or the intentional falsification of information in the contractor's or subcontractor's certified statements submitted under ORS 279C.845.~~

~~(3)~~ (4) For good cause shown, the commissioner may direct the removal of the name of a contractor or subcontractor from the ineligible list.

~~(4)~~ (5) To assist the commissioner in determining whether the contractor or subcontractor is paying the prevailing rate of wage, when a prevailing rate of wage claim is filed, or evidence indicating a violation has occurred, a contractor or subcontractor required to pay the prevailing rate of wage to workers employed upon public works under ORS 279C.800 to 279C.870 shall send a certified copy of the payroll for those workers when the commissioner requests the certified copy. [2003 c.794 §174; 2009 c.107 §1]

[no rule]

279C.865 Civil penalties. (1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$5,000 for each violation of any provision of ORS 279C.800 to 279C.870 or any rule of the commissioner adopted thereunder.

(2) Civil penalties under this section shall be imposed as provided in ORS 183.745.

(3) All moneys collected as penalties under this section shall be first applied toward reimbursement of costs incurred in determining violations, conducting hearings and assessing and collecting the penalties. The remainder, if any, of moneys collected as penalties under this section shall be paid into the State Treasury and credited to the General Fund and are available for general governmental expenses. [2003 c.794 §177]

[no rule]

279C.870 Civil action to enforce payment of prevailing rates of wage. (1) The Commissioner of the Bureau of Labor and Industries or any other person may bring a civil action in any court of competent jurisdiction to require a public agency under a public contract with a contractor to withhold twice the wages in dispute if it is shown that the contractor or subcontractor on the contract has intentionally failed or refused to pay the prevailing rate of wage to workers employed on that contract and to require the contractor to pay the prevailing rate of wage and any deficiencies that can be shown to exist because of improper wage payments already made. In addition to other relief, the court may also enjoin the contractor or subcontractor from committing future violations. The contractor or subcontractor involved shall be named as a party in all civil actions brought under this section. In addition to other costs, the court may award the prevailing party reasonable attorney fees at the trial and on appeal. However, attorney fees may not be awarded against the commissioner under this section.

— (2) The court shall require any party, other than the commissioner, that brings a civil action under this section to post a bond sufficient to cover the estimated attorney fees and costs to the public agency and to the contractor or subcontractor of any temporary restraining order, preliminary injunction or permanent injunction awarded in the action, in the event that the party bringing the action does not ultimately prevail.

— (3) In addition to any other relief, the court in a civil action brought under this section may enjoin the public agency from contracting with the contractor or subcontractor if the court finds that the commissioner would be entitled to place the contractor or subcontractor on the ineligible list established under ORS 279C.860-~~(1)~~. If the court issues such an injunction, the commissioner shall place the contractor or subcontractor on the list for a period of three years, subject to the provision of ORS 279C.860 (24). [2003 c.794 §176; 2007 c.764 §39; [2009 c.107 §2](#)]

[no rule]

[\[End of Division C\]](#)

PORT OF PORTLAND CONTRACTING RULES

INTRODUCTION

Adoption and Authority

These Contracting Rules were adopted by the Port of Portland Board of Commissioners on February 9, 2005, and revised on March 8, 2006, July 9, 2008, and November 10, 2010, pursuant to the authority granted by ORS 279A.065(5).

Effective Date

These Contracting Rules became effective on November 10, 2010 with respect to contracts entered into or advertised on or after that date.

Repeal of Rules

The contracting rules adopted by the Port of Portland Board of Commissioners on October 13, 1999, corrected on November 10, 1999, and amended on November 12, 2003, were repealed as of March 1, 2005.

Format

Those sections of the Public Contracting Code (ORS 279A, 279B, and 279C) applicable to Port of Portland contracting are set forth in full (sections, subsections, paragraphs, etc. applicable only to state agencies have been excluded; deleted subsections, paragraphs, etc. are denoted by “* * *”; compiler’s notes generally have been omitted). The Contracting Rule implementing or otherwise related to a particular statutory section appears immediately after the statutory section. This format has been selected to facilitate the integrated application of statutory requirements and rule requirements to Port of Portland contracting.

Contract Review Board Rules Published Separately

These Contracting Rules do NOT include the Port of Portland’s Contract Review Board Rules. The Contract Review Board Rules are published separately.

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[no rule]

279A.010 Definitions for Public Contracting Code. (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 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

[2003 c.794 §2; 2003 c.794 §2a; 2005 c.22 §199; 2005 c.103 §1a; 2005 c.153 §2; 2005 c.360 §13; 2007 c.764 §1]

Rule A.010 *Definition of Disaster*

As used in the Port’s Contracting Rules, unless the context clearly requires a different meaning: “Disaster” means a severe storm, volcanic eruption, landslide, mudslide, drought, fire, earthquake, explosion, war, acts of terrorism, civil disturbance, or other catastrophe that causes or may cause substantial damage or injury to persons or property within the Port of Portland’s boundaries or area of jurisdiction.

279A.015 Policy. It is the policy of the State of Oregon, in enacting the Public Contracting Code, that a sound and responsive public contracting system should:

- (1) Simplify, clarify and modernize procurement practices so that they reflect the market place and industry standards.
- (2) Instill public confidence through ethical and fair dealing, honesty and good faith on the part of government officials and those who do business with the government.
- (3) Promote efficient use of state and local government resources, maximizing the economic investment in public contracting within this state.
- (4) Clearly identify rules and policies that implement each of the legislatively mandated socioeconomic programs that overlay public contracting and accompany the expenditure of public funds.
- (5) Allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement. In public procurement, as set out in ORS chapter 279B, meaningful competition may be obtained by evaluation of performance factors and other aspects of service and product quality, as well as pricing, in arriving at best value.

(6) Provide a public contracting structure that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competitive bidding as the standard for public improvement contracts unless otherwise exempted. [2003 c.794 §3]

Rule A.015 Policy

The Port's Contracting Rules are intended to fully implement the Public Contracting Code, maximize the Port's flexibility in adjusting its contracting procedure to the specific circumstances of each procurement, and to ensure that the Port receives the maximum benefit from the public funds expended on public contracts.

279A.020 Organization of Public Contracting Code. (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, 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. [2003 c.794 §4; 2005 c.103 §2]

Note: *Although the Port's Contracting Rules generally follow the order of the sections in the Public Contracting Code, the Port's rules regarding public contracting involving architects, engineers, land surveyors and related services appear in Division B, and not in Division C.*

[no rule]

279A.025 Application of Public Contracting Code. (1) Except as provided in subsections (2) to (4) of this section, the Public Contracting Code applies to all public contracting.

(2) The Public Contracting Code does not apply to:

(a) Contracts between a contracting agency and:

(A) Another contracting agency;

(B) The Oregon Health and Science University;

(C) The Oregon State Bar;

(D) A governmental body of another state;

(E) The federal government;

(F) An American Indian tribe or an agency of an American Indian tribe;

(G) A nation, or a governmental body in a nation, other than the United States; or

(H) An intergovernmental entity formed between or among:

(i) Governmental bodies of this or another state;

(ii) The federal government;

(iii) An American Indian tribe or an agency of an American Indian tribe;

(iv) A nation other than the United States; or

(v) A governmental body in a nation other than the United States.

(b) Agreements authorized by ORS chapter 190 or by a statute, charter provision, ordinance or other authority for establishing agreements between or among governmental bodies or agencies or tribal governing bodies or agencies;

(c) Insurance and service contracts as provided for under ORS 414.115, 414.125, 414.135 and 414.145 for purposes of source selection;

(d) Grants;

(e) Contracts for professional or expert witnesses or consultants to provide services or testimony relating to existing or potential litigation or legal matters in which a public body is or may become interested;

(f) Acquisitions or disposals of real property or interest in real property;

(g) Sole-source expenditures when rates are set by law or ordinance for purposes of source selection;

* * *

(i) Procurements by a contracting agency from an Oregon Corrections Enterprises program;

* * *

(q) Contracts, agreements or other documents entered into, issued or established in connection with:

(A) The issuance of obligations, as defined in ORS 286A.100 and 287A.310, of a public body;

(B) The making of program loans and similar extensions or advances of funds, aid or assistance by a public body to a public or private body for the purpose of carrying out, promoting or sustaining activities or programs authorized by law; or

(C) The investment of funds by a public body as authorized by law, and other financial transactions of a public body that by their character cannot practically be established under the competitive contractor selection procedures of ORS 279B.050 to 279B.085;

(r) Contracts for employee benefit plans as provided in ORS 243.105 (1), 243.125 (4), 243.221, 243.275, 243.291, 243.303 and 243.565;

(s) Contracts for employee benefit plans as provided in ORS 243.860 to 243.886; or

(t) Any other public contracting of a public body specifically exempted from the code by another provision of law.

* * *

(4) ORS 279A.200 to 279A.225 and 279B.050 to 279B.085 do not apply to contracts made with qualified nonprofit agencies providing employment opportunities for individuals with disabilities under ORS 279.835 to 279.855. [2003 c.794 §5; 2003 c.794 §5a; 2005 c.22 §200; 2005 c.103 §3; 2005 c.109 §3; 2005 c.297 §3; 2005 c.748 §12; 2005 c.777 §15; 2007 c.7 §19; 2007 c.70 §67; 2007 c.71 §81; 2007 c.764 §2; 2007 c.783 §91]

[no rule]

Note: ORS 279.835 to 279.855 are set forth below for the convenience of the user in applying ORS 279A.025(4):

279.835 Definitions for ORS 279.835 to 279.855. As used in ORS 279.835 to 279.855:

(1) “Department” means the Oregon Department of Administrative Services.

(2) “Direct labor” includes all work required for preparation, processing and packing, but not supervision, administration, inspection and shipping.

(3) “Individual with a disability” means an individual who, because of the nature of disabilities, is not able to participate fully in competitive employment, and for whom specialized employment opportunities must be provided.

(4) “Public agency” or “public contracting agency” means any agency of the State of Oregon or any political subdivision thereof authorized by law to enter into public contracts and any public body created by intergovernmental agreement.

(5) “Qualified nonprofit agency for individuals with disabilities” means a nonprofit activity center or rehabilitation facility:

(a) Organized under the laws of the United States or of this state and operated in the interest of individuals with disabilities, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual;

(b) That complies with any applicable occupational health and safety standard required by the laws of the United States or of this state; and

(c) That in the manufacture of products and in the provision of services, whether or not the products or services are procured under ORS 279.835 to 279.855, during the fiscal year employs individuals with disabilities for not less than 75 percent of the work hours of direct labor required for the manufacture or provision of the products or services. [1977 c.304 §3; 1983 c.690 §17; 1989 c.224 §42; 1991 c.93 §1; 1993 c.500 §34; 2001 c.104 §96; 2003 c.794 §229b; 2007 c.70 §62]

279.840 Purpose. The purpose of ORS 279.835 to 279.855, 279A.025 (4) and 279C.335 is to further the policy of this state to encourage and assist individuals with disabilities to achieve maximum personal independence through useful and productive gainful employment by assuring an expanded and constant market for sheltered workshop and activity center products and services, thereby enhancing their dignity and capacity for self-support and minimizing their dependence on welfare and need for costly institutionalization. [1977 c.304 §2; 1989 c.224 §43; 2003 c.794 §229c; 2007 c.70 §63]

279.845 Duties of Oregon Department of Administrative Services; prices for products and services of nonprofit agency for individuals with disabilities; sources of products and services; rules. (1) It is the duty of the Oregon Department of Administrative Services to:

(a) Determine the price of all products manufactured and services offered for sale to the various public agencies by any qualified nonprofit agency for individuals with disabilities. The price shall recover for the workshops the cost of raw materials, labor, overhead, delivery costs and a margin held in reserve for inventory and equipment replacement;

(b) To revise such prices from time to time in accordance with changing cost factors; and

(c) To make such rules regarding specifications, time of delivery and other relevant matters of procedure as shall be necessary to carry out the purposes of ORS 279.835 to 279.855, 279A.025 (4) and 279C.335.

(2) The department shall establish and publish a list of sources or potential sources of products produced by any qualified nonprofit agency for individuals with disabilities and the services provided by any such agency, which the department determines are suitable for procurement by public agencies pursuant to ORS 279.835 to 279.855, 279A.025 (4) and 279C.335. This procurement list and revisions thereof shall be distributed to all public purchasing officers.

(3) The department may not delegate any duty imposed under this section to any person or public agency outside of the department. [1977 c.304 §4; 1989 c.224 §44; 2003 c.794 §229d; 2007 c.70 §64]

279.850 Procurement of product or service; agreements for procurement. (1) If any public agency intends to procure any product or service on the procurement list, that public agency shall, in accordance with rules of the Oregon Department of Administrative Services, procure such product or service, at the price established by the department, from a qualified nonprofit agency for individuals with disabilities, provided the product or service is of the appropriate specifications and is available within the period required by that public agency.

(2) In furthering the purposes of ORS 279.835 to 279.855, 279A.025 (4) and 279C.335, it is the intent of the Legislative Assembly that there be close cooperation between the department, public contracting agencies and qualified nonprofit agencies for individuals with disabilities. The department on behalf of public contracting agencies and qualified nonprofit agencies for individuals with disabilities is authorized to enter into such contractual agreements, cooperative working relationships or other arrangements as may be determined to be necessary for effective coordination and efficient realization of the objectives of ORS 279.835 to 279.855, 279A.025 (4) and 279C.335 and any other law requiring procurement of products or services. [1977 c.304 §5; 1989 c.224 §45; 2003 c.794 §229e; 2007 c.70 §65]

279.855 Entities that may obtain goods and services through Oregon Department of Administrative Services. The following may purchase equipment, materials, supplies and services through the Oregon Department of Administrative Services in the same manner as state agencies as provided in ORS 279A.140 to 279A.155 and 279A.250 to 279A.290:

(1) Qualified nonprofit agencies for individuals with disabilities participating in the program set forth in ORS 279.835 to 279.855, 279A.025 (4) and 279C.335.

(2) Residential programs when under contract with the Department of Human Services to provide services to youth in the custody of the state.

(3) Public benefit corporations, as defined in ORS 65.001, that provide public services either under contract with a state agency, as defined in ORS 171.133, or under contract with a unit of local government, as defined in ORS 190.003, that funds the contract, in whole or in part, with state funds. [1977 c.304 §7; 1989 c.224 §46; 1991 c.419 §1; 2001 c.900 §51; 2003 c.794 §229f; 2007 c.70 §66]

279A.030 Federal law prevails in case of conflict. Except as otherwise expressly provided in ORS 279C.800 to 279C.870, and notwithstanding ORS 279C.005 to 279C.670 and this chapter and ORS chapter 279B, applicable federal statutes and regulations govern when federal funds are involved and the federal statutes or regulations conflict with any provision of ORS 279C.005 to 279C.670 or this chapter or ORS chapter 279B, or require additional conditions in public contracts not authorized by ORS 279C.005 to 279C.670 or this chapter or ORS chapter 279B. [2003 c.794 §6]

[no rule]

Authority

279A.050 Procurement authority. (1)(a) Except as otherwise provided in the Public Contracting Code, a contracting agency shall exercise all procurement authority in accordance with the provisions of the Public Contracting Code.

(b) When a contracting agency has authority under this section to carry out functions described in this section, or has authority to make procurements under a provision of law other than the Public Contracting Code, the contracting agency is not required to exercise that authority in accordance with the provisions of the code if, under ORS 279A.025, the code does not apply to the contract or contracting authority.

* * *

[2003 c.794 §7; 2005 c.625 §61; 2007 c.70 §68; 2007 c.197 §1; 2007 c.764 §3; 2009 c.397 §2; 2009 c.828 §13]

[no rule]

279A.055 Personal services contracts. (1) Except as provided in ORS 279A.140, a contracting agency may enter into personal services contracts. The provisions of this section do not relieve a contracting agency of the duty to comply with ORS 279A.140, any other law applicable to state agencies or applicable city or county charter provisions.

(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 service contracts or classes of service contracts as personal services contracts. [2003 c.794 §8; 2005 c.103 §4]

[no rule; see Port of Portland Contract Review Board Rules for designation of personal service contracts; see also Port Rule B.500]

279A.060 Local contract review boards. If the governing body of a local contracting agency takes no action to provide otherwise, the governing body is the local contract review board of that local contracting agency. However, the governing body of a local contracting agency may, by charter, ordinance or other local legislation, authorize a body, board or commission other than the governing body to serve as the local contract review board of the local contracting agency. The governing body of a local contracting agency also may enter into intergovernmental agreements under ORS chapter 190 to permit the local contract review board of another local contracting agency or the Director of the Oregon Department of Administrative Services to exercise authority under ORS 279B.085. [2003 c.794 §9]

[no rule]

279A.065 Model rules generally; applicability to contracting agencies.

* * *

(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. [2003 c.794 §10; 2003 c.794 §10a]

Rule A.065

The model rules adopted by the Attorney General under ORS 279A.065 do not apply to the Port of Portland.

279A.070 Rules. In addition to rules adopted under ORS 279A.065 (5), a contracting agency may, in the exercise of authority granted under ORS 279A.050, adopt rules necessary to carry out the provisions of the Public Contracting Code, including but not limited to rules for the procurement, management, disposal and control of goods, services, personal services and public improvements under the Public Contracting Code. Each contracting agency authorized to enter into personal services contracts shall create procedures for the screening and selection of persons to perform personal services. [2003 c.794 §11; 2003 c.794 §11a]

[no rule; see specific rules]

279A.075 Delegation. (1) Unless otherwise provided in the Public Contracting Code, the exercise of all authorities in the code may be delegated and subdelegated in whole or in part. Notwithstanding delegations of authority under this section, a person's or agency's exercise of the delegated authority is governed by the code and rules adopted under the code.

* * * [2003 c.794 §12]

[no rule]

Minorities, Women And Emerging Small Businesses

279A.100 Affirmative action; limited competition permitted. (1) As used in this section:

(a) "Affirmative action" means a program designed to ensure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age or physical or mental disability or a policy to give a preference in awarding public contracts to disabled veterans.

(b) "Disabled veteran" has the meaning given that term in ORS 408.225.

(2) The provisions of the Public Contracting Code may not be construed to prohibit a contracting agency from engaging in public contracting practices designed to promote affirmative action goals, policies or programs for disadvantaged or minority groups or to give a preference in awarding public contracts to disabled veterans.

(3) In carrying out an affirmative action goal, policy or program, a contracting agency by appropriate ordinance, resolution or rule may limit competition for a public contract for goods and services, or for any other public contract estimated to cost \$50,000 or less, to contracting entities owned or controlled by persons described in subsection (1) of this section. [2003 c.794 §13; 2009 c.235 §1]

Rule A.100

The Port may exercise its authority under ORS 279A.100(3) if the Port's legal counsel determines that the exercise of authority would be legally permissible, and if the Port determines that the exercise of authority would be desirable under the particular circumstances.

279A.105 Subcontracting to emerging small businesses or businesses owned or controlled by disabled veterans. (1) A contracting agency may require a contractor to subcontract some part of a contract to, or to obtain materials to be used in performing the contract from, a business enterprise that is certified under ORS 200.055 as an emerging small business or a business enterprise that is owned or controlled by a disabled veteran, as defined in ORS 408.225.

(2) A contracting agency may require a contractor to subcontract some part of a contract to, or to obtain materials to be used in performing the contract from, a business enterprise that is certified under ORS 200.055 as an emerging small business and that, as identified by the contracting agency, is located in or draws the business enterprise's workforce from economically distressed areas, as designated by the Oregon Business Development Department.

(3) A contracting agency may require that a public contract be awarded to a responsible bidder, as defined in ORS 200.005, who the contracting agency determines has made good faith efforts as prescribed in ORS 200.045 (3). For purposes of this subsection, "responsible bidder" includes a responsible proposer that has made good faith efforts as prescribed in ORS 200.045 (3). [2003 c.794 §14; 2005 c.103 §5; 2009 c.235 §2]

Note: ORS 200.005, 200.045, 200.065 and 200.075 are set forth below for the convenience of the user in applying ORS 279A.105.

200.005 Definitions for ORS 200.005 to 200.075, 200.160 to 200.200 and 279A.105. As used in ORS 200.005 to 200.075, 200.160 to 200.200 and 279A.105:

* * *

(6) "Responsible bidder" means a bidder who, as determined by the Advocate for Minority, Women and Emerging Small Business, has undertaken both a policy and practice of actively pursuing participation by minority or women business enterprises in all bids, both public and private, submitted by the bidder.

* * *

[1987 c.893 §2; 1989 c.1043 §1; 1991 c.517 §9; 2001 c.104 §71; 2003 c.794 §213; 2005 c.22 §§150,151; 2005 c.683 §§4, 5]

200.045 Standards for good faith efforts to meet contract requirements; standards for establishing bidder's responsibility. (1) To determine whether a bidder that has failed to meet emerging small business enterprise contract requirements may be awarded the contract, the public contracting agency must decide whether the bidder's efforts to obtain participation by emerging small business enterprises were good faith efforts to meet the requirements.

(2) Performing all of the following actions by a bidder constitutes a rebuttable presumption that the bidder has made a good faith effort to satisfy the subcontracting requirement for emerging small businesses. It shall be a rebuttable presumption that the bidder has not made a good faith effort if the bidder has not acted consistently with such actions. Efforts that are merely superficial are not good faith efforts:

(a) The bidder attended any presolicitation or prebid meetings that were scheduled by the contracting agency to inform emerging small business enterprises of contracting and subcontracting or material supply opportunities available on the project;

(b) The bidder identified and selected specific economically feasible units of the project to be performed by emerging small business enterprises in order to increase the likelihood of participation by such enterprises;

(c) The bidder advertised in general circulation, trade association, minority and trade oriented, women-focus publications, if any, concerning the subcontracting or material supply opportunities;

(d) The bidder provided written notice to a reasonable number of specific emerging small business enterprises, identified from a list of certified emerging small business enterprises provided or maintained by the Oregon Business Development Department for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;

(e) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested;

(f) The bidder provided interested emerging small business enterprises with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;

(g) The bidder negotiated in good faith with the enterprises, and did not without justifiable reason reject as unsatisfactory bids prepared by any emerging small business enterprises;

(h) Where applicable, the bidder advised and made efforts to assist interested emerging small business enterprises in obtaining bonding, lines of credit or insurance required by the contracting agency or contractor;

(i) The bidder's efforts to obtain emerging small business enterprise participation were reasonably expected to produce a level of participation

sufficient to meet the goals or requirement of the public contracting agency;
and

(j) The bidder used the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Advocate for Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of emerging small business enterprises.

(3) To determine whether a bidder is a responsible bidder, the performance of all the following actions constitutes a rebuttable presumption that the bidder is responsible. It shall be a rebuttable presumption that the bidder is not responsible if the bidder has not acted consistently with the actions described in this subsection. Efforts that are merely superficial are not good faith efforts.

(a) The bidder attended any presolicitation or prebid meetings that were scheduled by the contracting agency to inform minority or women business enterprises of contracting and subcontracting or material supply opportunities available on the project;

(b) The bidder identified and selected specific economically feasible units of the project to be performed by minority or women business enterprises in order to increase the likelihood of participation by such enterprises;

(c) The bidder advertised in general circulation, trade association, minority and trade oriented, women-focus publications, if any, concerning the subcontracting or material supply opportunities;

(d) The bidder provided written notice to a reasonable number of specific minority or women business enterprises, identified from a list of certified minority or women business enterprises provided or maintained by the Oregon Business Development Department for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;

(e) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested;

(f) The bidder provided interested minority or women business enterprises with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;

(g) The bidder negotiated in good faith with interested, capable and competitive minority or women business enterprises submitting bids;

(h) Where applicable, the bidder advised and made efforts to assist interested minority or women business enterprises in obtaining bonding, lines of credit or insurance required by the contracting agency or contractor;

(i) The bidder's efforts to obtain minority or women business enterprise participation were reasonably expected to produce a level of participation sufficient to meet the goals of the public contracting agency; and

(j) The bidder used the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Advocate for

Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of disadvantaged, minority or women business enterprises. [1987 c.893 §7; 1989 c.1043 §8; 1997 c.145 §2; 2003 c.794 §215; 2009 c.830 §136]

200.065 Fraudulent conduct prohibited; sanctions. (1) It shall be unlawful for any person fraudulently to obtain or retain or attempt to obtain or retain or to aid another person fraudulently to obtain or retain or attempt to obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise.

(2) It shall be unlawful knowingly to make a false claim that any person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a contract or subcontract or other benefit.

(3) The public contracting agency may withhold payment, suspend or terminate the contract and may impose on any person a civil penalty not to exceed 10 percent of the contract or subcontract price or \$5,000, whichever is less, for each violation of subsection (1) or (2) of this section. The penalty shall be paid to the Office for Minority, Women and Emerging Small Business.

(4) The Oregon Business Development Department or an affected public contracting agency shall investigate any complaint that a person has violated subsection (1) or (2) of this section. In investigating such a complaint, the department or an affected public contracting agency may require any additional information, administer oaths, take depositions and issue subpoenas to compel the attendance of witnesses and the production of books, papers, records, memoranda or other information necessary to carry out its duties. If any person fails to comply with any subpoena issued under this subsection or refuses to testify on any matter on which a person may lawfully be interrogated, the procedure provided in ORS 183.440 shall be followed to compel compliance.

(5) An affected public contracting agency or the department disqualify any person found to have violated subsection (1) or (2) of this section or who admits to such violation under oath during the course of an investigation from bidding or participating in any public contract for a period of time specified by the agency or department, not to exceed three years. Any contracting agency that has notice of the finding of the fraudulent certification may also disqualify the person from bidding on or participating in any public contract. [1987 c.893 §9; 1989 c.1043 §5; 1997 c.145 §4; 2009 c.830 §139]

200.075 Prohibited conduct; suspension of certification or right to participate in public contracts. (1) Any bidder or contractor or subcontractor on a public contract that knowingly commits any of the acts listed in paragraphs (a) to (c) of this subsection shall have its right to bid on or participate in any public contract suspended. The suspension shall occur only after notice and opportunity for hearing in such manner as the affected public contracting agency, by rule, shall provide. The suspension shall be for up to 90 days for a first violation, up to one year for a second violation and up to five years for a

third violation. Each violation shall remain on record for five years. After five years the violation shall no longer be considered in reviewing future violations. The following acts are prohibited:

(a) Entering into any agreement representing that a disadvantaged, minority, women or emerging small business enterprise certified pursuant to ORS 200.055 will be performing work or supplying materials under the public improvement contract without the knowledge and consent of the disadvantaged, minority, women or emerging small business enterprise.

(b) Exercising management and decision making control over the internal operations of any certified disadvantaged, minority, women or emerging small business enterprise. As used in this paragraph, “internal operations” does not include normal scheduling, coordination, execution or performance as a subcontractor on a public contract.

(c) Using a disadvantaged, minority, women or emerging small business enterprise to perform a subcontract or supply material under a public improvement contract to meet an established goal or requirement when the disadvantaged, minority, women or emerging small business enterprise does not perform a commercially useful function in carrying out its responsibilities and obligations under the contract.

(2) Any disadvantaged, minority, women or emerging small business enterprise certified under ORS 200.055 that allows or commits any of the acts listed in paragraphs (a) to (c) of this subsection shall have its certification suspended for up to 90 days for the first violation, up to one year for a second violation and up to five years for a third violation. Each violation shall remain on record for five years. After five years the violation shall no longer be considered in reviewing future violations. The following acts are prohibited:

(a) Use of the firm’s name to meet a disadvantaged, minority, women or emerging small business enterprise goal or requirement on a public contract when the firm does not in fact intend to or does not actually perform the work under the subcontract or purchase and supply material to the project under a material supply contract.

(b) Use of any personnel of an uncertified business to operate, manage or otherwise control the disadvantaged, minority, women or emerging small business enterprise.

(c) Failure to perform a commercially useful function in carrying out its functions under a subcontract or a material supply contract entered into with a contractor or subcontractor on a public contract when represented as a certified business to meet an established goal or requirement.

(3) For the purpose of this section “commercially useful function” means the actual performance of a function or service by the business for which there is a demand in the marketplace, and for which the business receives payment not disproportionate to the work performed or in conformance with industry standards. Acting as a broker to provide for the performance of work by others does not constitute a “commercially useful function.” [1987 c.893 §11; 1989 c.1043 §6; 1991 c.91 §1; 1995 c.452 §21]

Rule A.105

(1) A subcontractor certified under ORS 200.055 as an emerging small business is located in or draws its workforce from economically distressed areas if:

(a) Its principal place of business is located in an area designated as economically distressed by the Oregon Business Development Department; or

(b) The contractor certifies in writing to the Port that a substantial number of the subcontractor's employees or subcontractors who will manufacture the goods or complete the services under the contract reside in an area designated as economically distressed by the Oregon Business Development Department. For the purposes of making the foregoing determination, the Port will determine in each particular instance what proportion of a contractor's subcontractor's employees or subcontractors constitute a substantial number.

(2) Disqualification for Violation of DBE Statute.

(a) The Port may disqualify a person from consideration for award of a contract under ORS 200.065(5), or suspend a person's right to bid on or participate in any public contract pursuant to ORS 200.075(1), after providing the person with notice and a reasonable opportunity to be heard in accordance with subsections (d) and (e) of this section.

(b) As provided in ORS 200.065 and 200.075, the Port may disqualify or suspend a person's right to submit an offer or to participate in a contract (e.g. act as a subcontractor) as follows:
(A) For a DBE disqualification under ORS 200.065, the Port may disqualify a person upon finding that the person engaged in any of the activities made unlawful by ORS 200.065(1) or (2), or if the person has been disqualified by another contracting agency pursuant to ORS 200.065.
(B) For a DBE disqualification under ORS 200.075, the Port may suspend a person upon finding that the person engaged in any of the acts prohibited by ORS 200.075(a) through (c).

(c) The Port may disqualify or suspend a person's right to submit offers or participate in public contracts only for the length of time permitted by ORS 200.065 or ORS 200.075, as applicable.

(d) The Port shall notify the person in writing of a proposed DBE disqualification pursuant to this section, served personally or by registered or certified mail, return receipt requested. This notice shall:

(A) State that the Port intends to disqualify or suspend the person;

(B) Set forth the reasons for the DBE disqualification;

(C) Include a statement of the person's right to a hearing if requested in writing within the time stated in the notice and that if the Port does not receive the person's written request for a hearing within the time stated, the person shall have waived its right to a hearing;

(D) Include a statement of the authority and jurisdiction under which the hearing will be held;

(E) Include a reference to the particular sections of the statutes and rules involved;

(F) State the proposed DBE Disqualification period; and

(G) State that the person may be represented by legal counsel.

(e) The Port shall schedule a hearing upon the Port's receipt of the person's timely request. The Port shall notify the person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing prior to hearing.

(f) Notice of DBE Disqualification. The Port will notify the person in writing of its DBE disqualification, served personally or by registered or certified mail, return receipt requested. The notice shall contain:

(A) The effective date and period of DBE disqualification;

(B) The grounds for DBE disqualification; and

(C) A statement of the person's appeal rights and applicable appeal deadlines.

279A.110 Discrimination in subcontracting prohibited; remedies. (1) A bidder or proposer who competes for or is awarded a public contract may not discriminate against a subcontractor in awarding a subcontract because the subcontractor is a minority, women or emerging small business enterprise certified under ORS 200.055 or a business enterprise that is owned or controlled by or that employs a disabled veteran, as defined in ORS 408.225.

(2) A contracting agency may debar or disqualify, under ORS 279B.130 or 279C.440, as appropriate, a bidder or proposer if the contracting agency finds that the bidder or proposer has violated subsection (1) of this section in awarding a subcontract in connection with a contract advertised by the contracting agency or a contract between the contracting agency and the bidder or proposer. A debarred or disqualified bidder or proposer may appeal the debarment or disqualification under ORS 279B.425 or ORS 279C.445 and 279C.450, as appropriate.

(3) A contracting agency may not allege an occurrence of discrimination in subcontracting as a basis for debarring or disqualifying a bidder or proposer under subsection (2) of this section more than three years after the alleged discriminatory conduct occurred or more than three years after the contracting agency, in the exercise of reasonable diligence, should have discovered the conduct, whichever is later.

(4) A bidder or proposer shall certify in the documents accompanying the bidder's or proposer's offer to enter into a public contract that the bidder or proposer has not discriminated and will not discriminate, in violation of subsection (1) of this section, against any minority, women or emerging small business enterprise or against a business enterprise that is owned or controlled by or that employs a disabled veteran in obtaining a required subcontract.

(5) After a contractor is awarded a public contract, if the contractor violates the certification made under subsection (4) of this section, the contracting agency may regard the violation as a breach of contract that permits the contracting agency to:

(a) Terminate the contract; or

(b) Exercise any of the remedies for breach of contract that are reserved in the contract. [2003 c.794 §15; 2009 c.235 §3]

[no rule]

Contract Preferences

279A.120 Preference for Oregon goods and services; nonresident bidders. (1) As used in this section:

(a) “Nonresident bidder” means a bidder who is not a resident bidder.

(b) “Resident bidder” means a bidder that has paid unemployment taxes or income taxes in this state during the 12 calendar months immediately preceding submission of the bid, has a business address in this state and has stated in the bid whether the bidder is a “resident bidder” under this paragraph.

(2) For the purposes of awarding a public contract, a contracting agency shall:

(a) Give preference to goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal; and

(b) Add a percent increase to the bid of a nonresident bidder equal to the percent, if any, of the preference given to the bidder in the state in which the bidder resides.

(3) When a public contract is awarded to a nonresident bidder and the contract price exceeds \$10,000, the bidder shall promptly report to the Department of Revenue on forms to be provided by the department the total contract price, terms of payment, length of contract and such other information as the department may require before the bidder may receive final payment on the public contract. The contracting agency shall satisfy itself that the requirement of this subsection has been complied with before the contracting agency issues a final payment on a public contract.

(4) The Oregon Department of Administrative Services on or before January 1 of each year shall publish a list of states that give preference to in-state bidders with the percent increase applied in each state. A contracting agency may rely on the names of states and percentages so published in determining the lowest responsible bidder without incurring any liability to any bidder. [2003 c.794 §16]

Rule A.120

If low bids or quotations are tied, the price, fitness, availability, and quality of the goods or services offered by the tied offerors are otherwise equal, and one of the tied offerors offers goods or services manufactured or produced in Oregon, then the contract shall be awarded to the offeror whose goods or services are manufactured or produced in Oregon. If two or more of the tied offerors offer goods or services manufactured or produced in Oregon, then the contract shall be awarded by drawing lots among those offering goods or services manufactured or produced in Oregon. If none or all of the tied offerors offer goods or services manufactured or produced in Oregon, the contract shall be awarded by drawing lots among the tied offerors.

279A.125 Preference for recycled materials. (1) Notwithstanding provisions of law requiring a contracting agency to award a contract to the lowest responsible bidder or best proposer or provider of a quotation and subject to subsection (2) of this section, a contracting agency charged with the procurement of goods for any public use shall give preference to the procurement of goods manufactured from recycled materials.

(2) A contracting agency shall give preference to goods that are certified to be made from recycled materials if:

(a) The recycled product is available;

- (b) The recycled product meets applicable standards;
- (c) The recycled product can be substituted for a comparable nonrecycled product; and
- (d) The recycled product's costs do not exceed the costs of nonrecycled products by more than five percent, or a higher percentage if a written determination is made by the contracting agency. [2003 c.794 §17]

[no rule]

279A.128 Preference for agricultural product produced and transported within state. Notwithstanding provisions of law requiring a contracting agency to award a contract to the lowest responsible bidder or best proposer or provider of a quotation, a contracting agency that uses public funds to procure goods for a public use may give preference to procuring an agricultural product that is produced and transported entirely within this state if the agricultural product costs not more than 10 percent more than an agricultural product that is not produced and transported entirely within this state. The contracting agency may set a higher percentage by order if the contracting agency, in a written determination to support the order, finds good cause to set the higher percentage and explains the contracting agency's reasons and evidence for the finding. [2009 c.214 §2]

[no rule]

State Procurement

* * *

Intergovernmental Relations

Generally

279A.180 Purchases through federal programs. Notwithstanding any other provision of the Public Contracting Code, a procurement may be made without competitive sealed bidding, competitive sealed proposals or other competition required under ORS 279B.050 to 279B.085 provided that:

- (1) The procurement is made in accordance with rules adopted by the contracting agency for procurements under this section; and
- (2) The procurement is made under 10 U.S.C. 381, the Electronic Government Act of 2002 (P.L. 107-347) or other federal law that is, as determined by the Director of the Oregon Department of Administrative Services or a local contract review board, similar to 10 U.S.C. 381 or section 211 of the Electronic Government Act of 2002 in effectuating or promoting transfers of property to contracting agencies. [2003 c.794 §22]

Rule A.180

The Port may procure goods or services through agencies of the federal government, either directly or through the State of Oregon, and from vendors to agencies of the federal government

if the Executive Director or the Manager of Contracts and Procurement determines that the procurement would be in the best interest of the Port. Procurements under this section are permitted only if expressly permitted by federal law, and shall be made in accordance with procedures established by the responsible federal agencies. If the procurement is also through the State of Oregon, the procurement also shall comply with procedures established by the State of Oregon. The procurements authorized by this section include without limitation: (1) procurements under 10 U.S.C. 381 through the State of Oregon and the Department of Defense of law enforcement equipment suitable for counter-drug activities; and (2) procurements under P.L. 107-347, section 211, through General Services Administration supply schedules of automated data processing equipment (including firmware), software, supplies, support equipment, and services (as contained in federal supply classification code group 70).

279A.185 Local contracting agency arrangements for use or disposition of personal property authorized. (1) Notwithstanding the competitive procurement requirements of ORS chapters 279B and 279C, a local contracting agency may sell, transfer or dispose of personal property in accordance with rules adopted under ORS 279A.070.

(2) Notwithstanding the competitive procurement requirements of ORS chapters 279B and 279C, a local contracting agency may negotiate with one or more private or public entities to establish contracts, agreements and other cooperative arrangements for the use, operation, maintenance or ultimate lawful disposition of personal property owned by or under the control of the local contracting agency, including property acquired under ORS 279A.260. Before approving such a contract, agreement or arrangement, the governing body of the local contracting agency must make a finding that the contract, agreement or arrangement will promote the economic development of the local contracting agency, of the geographical area in which the local contracting agency is situated or of other public bodies that perform similar functions. [2003 c.794 §23]

Rule A.185 Sale of Surplus Personal Property

(1) The Port may sell personal property no longer required for Port purposes. If the Port elects to sell personal property, the sale shall be by sealed, competitive bid or by auction unless the Manager of Contracts and Procurement determines that another method of sale will better serve the Port's interests. Alternative methods of sale include without limitation sale through the State of Oregon's surplus property program and sale via an electronic auction, such as e-Bay.

(2) The Port may transfer personal property no longer required for Port purposes to another public or private entity if the Manager of Contracts and Procurement determines that the transfer will promote the maritime, shipping, aviation, commercial, or industrial interests of the Port, and that the value to the Port of the resulting promotion exceeds the amount the Port would be likely to realize if the personal property were sold.

(3) The Port may dispose of personal property no longer required for Port purposes by depositing it in a land fill, or otherwise disposing of it without a sale or transfer under sections (1) and (2) of this Rule if the Manager of Contracts and Procurement determines that such disposal results in the least net cost to the Port.

(4) The Port may dispose of personal property no longer required for Port purposes by transferring it to a public entity or a charitable organization if the Manager of Contracts and Procurement determines that such a transfer results in a net cost to the Port less than if the Port were to dispose of the property under section (3) of this Rule. Preference among charitable organizations shall be given to those whose activities tend to promote the maritime, shipping, aviation, commercial, or industrial interests of the Port.

279A.190 Transfers of fire protection equipment between fire departments. (1) As used in this section:

- (a) “Fire protection equipment” has the meaning given that term in ORS 476.005.
- (b) “Public contract” includes a sale at no cost.
- (c) “Regularly organized fire department” has the meaning given that term in ORS 652.050.

(2) Notwithstanding any other provision of the Public Contracting Code, transfers of fire protection equipment under public contracts between regularly organized fire departments may be made without competitive sealed bidding, competitive sealed proposals or other competition required in ORS 279B.050 to 279B.085, provided:

- (a) The recipient regularly organized fire department makes a written request for the fire protection equipment to the transferor regularly organized fire department;
- (b) The fire protection equipment is surplus to or unusable by the transferor;
- (c) The total fair market value of fire protection equipment received by the recipient does not exceed \$50,000 per calendar year; and
- (d) The transferor holds a public hearing, with hearing notice published in at least one trade newspaper of general statewide circulation a minimum of 14 days before the hearing, and finds that the public contract is in the public’s interest. [2003 c.794 §24]

[no rule]

Cooperative Procurement

279A.200 Definitions for ORS 279A.200 to 279A.225. (1) As used in ORS 279A.200 to 279A.225:

(a) “Administering contracting agency” means a governmental body in this state or in another jurisdiction that solicits and establishes the original contract for the procurement of goods, services or public improvements in a cooperative procurement.

(b) “Cooperative procurement” means a procurement conducted on behalf of more than one governmental body. “Cooperative procurement” includes but is not limited to multiagency contracts and price agreements. “Cooperative procurement” does not include an agreement formed among only governmental bodies under ORS chapter 190 or by a statute, charter provision, ordinance or other authority for establishing agreements between or among governmental bodies or agencies or tribal governing bodies or agencies.

(c) “Cooperative procurement group” means a group of governmental bodies joined through an intergovernmental agreement for the purpose of facilitating cooperative procurements.

(d) “Interstate cooperative procurement” means a permissive cooperative procurement in which the administering contracting agency is a governmental body, domestic or foreign, that is authorized under the governmental body’s laws, rules or regulations to enter into public contracts and in which one or more of the participating governmental bodies are located outside this state.

(e) “Joint cooperative procurement” means a cooperative procurement in which the participating governmental bodies or the cooperative procurement group and the bodies’ or group’s contract requirements or estimated contract requirements for price agreements are identified.

(f) “Original contract” means the initial contract or price agreement solicited and awarded during a cooperative procurement by an administering contracting agency.

(g) “Permissive cooperative procurement” means a cooperative procurement in which the purchasing contracting agencies are not identified.

(h) “Purchasing contracting agency” means a governmental body that procures goods, services or public improvements from a contractor based on the original contract established by an administering contracting agency.

(2) As used in ORS 279A.210 (1)(a), 279A.215 (1)(a) and 279A.220 (1)(a), an administering contracting agency’s solicitation and award process uses source selection methods “substantially equivalent” to those identified in ORS 279B.055, 279B.060 or 279B.085 if the solicitation and award process:

(a) Calls for award of a contract on the basis of a lowest responsible bidder or a lowest and best bidder determination in the case of competitive bids, or on the basis of a determination of the proposer whose proposal is most advantageous based on evaluation factors set forth in the request for proposals in the case of competitive proposals;

(b) Does not permit the application of any geographic preference that is more favorable to bidders or proposers who reside in the jurisdiction or locality favored by the preference than the preferences provided in ORS 279A.120 (2); and

(c) Uses reasonably clear and precise specifications that promote suitability for the purposes intended and that reasonably encourage competition. [2003 c.794 §25; 2007 c.764 §4]

[no rule]

279A.205 Cooperative procurements authorized. (1) A contracting agency may participate in, sponsor, conduct or administer a cooperative procurement for the procurement of any goods, services or public improvements.

(2) A contracting agency may participate in, sponsor, conduct or administer a permissive or interstate cooperative procurement for the procurement of any goods or services, but not public improvements. [2003 c.794 §26; 2005 c.103 §6]

[no rule]

279A.210 Joint cooperative procurements. (1) A joint cooperative procurement is valid only if:

(a) The administering contracting agency’s solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055, 279B.060 or 279B.085 or uses a

competitive bidding process substantially equivalent to the competitive bidding process in ORS chapter 279C;

(b) The administering contracting agency's solicitation and the original contract or price agreement identifies the cooperative procurement group or each participating purchasing contracting agency and specifies the estimated contract requirements; and

(c) No material change is made in the terms, conditions or prices of the contract between the contractor and the purchasing contracting agency from the terms, conditions and prices of the original contract between the contractor and the administering contracting agency.

(2) A joint cooperative procurement may not be a permissive cooperative procurement. [2003 c.794 §27]

[no rule]

279A.215 Permissive cooperative procurements. (1) A contracting agency may establish a contract or price agreement through a permissive cooperative procurement only if:

(a) The administering contracting agency's solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055 or 279B.060;

(b) The administering contracting agency's solicitation and the original contract allow other contracting agencies to establish contracts or price agreements under the terms, conditions and prices of the original contract;

(c) The contractor agrees to extend the terms, conditions and prices of the original contract to the purchasing contracting agency; and

(d) No material change is made in the terms, conditions or prices of the contract or price agreement between the contractor and the purchasing contracting agency from the terms, conditions and prices of the original contract between the contractor and the administering contracting agency.

(2)(a) A purchasing contracting agency shall provide public notice of intent to establish a contract or price agreement through a permissive cooperative procurement if the estimated amount of the procurement exceeds \$250,000.

(b) The notice of intent must include:

(A) A description of the procurement;

(B) An estimated amount of the procurement;

(C) The name of the administering contracting agency; and

(D) A time, place and date by which comments must be submitted to the purchasing contracting agency regarding the intent to establish a contract or price agreement through a permissive cooperative procurement.

(c) Public notice of the intent to establish a contract or price agreement through a permissive cooperative procurement must be given in the same manner as provided in ORS 279B.055 (4)(b) and (c).

(d) Unless otherwise specified in rules adopted under ORS 279A.070, the purchasing contracting agency shall give public notice at least seven days before the deadline for submission of comments regarding the intent to establish a contract or price agreement through a permissive cooperative procurement.

(3) If a purchasing contracting agency is required to provide notice of intent to establish a contract or price agreement through a permissive cooperative procurement under subsection (2) of this section:

(a) The purchasing contracting agency shall provide vendors who would otherwise be prospective bidders or proposers on the contract or price agreement, if the procurement were competitively procured under ORS chapter 279B, an opportunity to comment on the intent to establish a contract or price agreement through a permissive cooperative procurement.

(b) Vendors must submit comments within seven days after the notice of intent is published.

(c) And if the purchasing contracting agency receives comments on the intent to establish a contract or price agreement through a permissive cooperative procurement, before the purchasing contracting agency may establish a contract or price agreement through the permissive cooperative procurement, the purchasing contracting agency shall make a written determination that establishing a contract or price agreement through a permissive cooperative procurement is in the best interest of the purchasing contracting agency. The purchasing contracting agency shall provide a copy of the written determination to any vendor that submitted comments. [2003 c.794 §28]

[no rule]

279A.220 Interstate cooperative procurements. (1) A contracting agency may establish a contract or price agreement through an interstate cooperative procurement only if:

(a) The administering contracting agency's solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055 or 279B.060;

(b) The administering contracting agency's solicitation and the original contract allows other governmental bodies to establish contracts or price agreements under the terms, conditions and prices of the original contract; and

(c) The administering contracting agency permits the contractor to extend the use of the terms, conditions and prices of the original contract to the purchasing contracting agency.

(2) In addition to the requirements in subsection (1) of this section:

(a) The purchasing contracting agency, or the cooperative procurement group of which the purchasing contracting agency is a member, must be listed in the solicitation of the administering contracting agency as a party that may establish contracts or price agreements under the terms, conditions and prices of the original contract, and the solicitation must be advertised in Oregon; or

(b)(A) The purchasing contracting agency, or the cooperative procurement group of which the purchasing contracting agency is a member, shall advertise a notice of intent to establish a contract or price agreement through an interstate cooperative procurement.

(B) The notice of intent must include:

(i) A description of the procurement;

(ii) An estimated amount of the procurement;

(iii) The name of the administering contracting agency; and

(iv) A time, place and date by which comments must be submitted to the purchasing contracting agency regarding the intent to establish a contract or price agreement through an interstate cooperative procurement.

(C) Public notice of the intent to establish a contract or price agreement through an interstate cooperative procurement must be given in the same manner as provided in ORS 279B.055 (4)(b) and (c).

(D) Unless otherwise specified in rules adopted under ORS 279A.070, the purchasing contracting agency shall give public notice at least seven days before the deadline for submission of comments regarding the intent to establish a contract or price agreement through an interstate cooperative procurement.

(3) If a purchasing contracting agency is required to provide notice of intent to establish a contract or price agreement through an interstate cooperative procurement under subsection (2) of this section:

(a) The purchasing contracting agency shall provide vendors who would otherwise be prospective bidders or proposers on the contract or price agreement, if the procurement were competitively procured under ORS chapter 279B, an opportunity to comment on the intent to establish a contract or price agreement through an interstate cooperative procurement.

(b) Vendors must submit comments within seven days after the notice of intent is published.

(c) And if the purchasing contracting agency receives comments on the intent to establish a contract or price agreement through an interstate cooperative procurement, before the purchasing contracting agency may establish a contract or price agreement through the interstate cooperative procurement, the purchasing contracting agency shall make a written determination that establishing a contract or price agreement through an interstate cooperative procurement is in the best interest of the purchasing contracting agency. The purchasing contracting agency shall provide a copy of the written determination to any vendor that submitted comments.

(4) For purposes of this section, an administering contracting agency may be any governmental body, domestic or foreign, authorized under its laws, rules or regulations to enter into contracts for the procurement of goods and services for use by a governmental body. [2003 c.794 §29]

[no rule]

279A.225 Protests and disputes. (1) A protest regarding the procurement process, the contents of solicitation documents or the award or proposed award of an original contract may be directed only to the administering contracting agency. The protest must be in accordance with the provisions of ORS 279B.400 to 279B.425.

(2) A protest regarding the use of a cooperative procurement by a purchasing contracting agency after the execution of an original contract may be directed only to the purchasing contracting agency. The protest must be in accordance with the provisions of ORS 279B.400 to 279B.425 and is limited in scope to the purchasing contracting agency's authority to enter into a cooperative procurement contract.

(3) The decision of a local contracting agency to use a cooperative procurement is reviewable in the circuit court of the county where the principal offices of the local contracting agency are located. The decision of a state contracting agency to use a cooperative procurement shall be reviewable by the Circuit Court for Marion County or the circuit court of the county where the principal offices of the state contracting agency are located.

(4) Disputes regarding contract performance between a purchasing contracting agency and a contractor may be resolved solely by the purchasing contracting agency and the contractor. [2003 c.794 §30]

[no rule]

State Surplus Property

* * *

Penalties

279A.990 Penalties. (1) The provisions of ORS 291.990 apply to ORS 279A.140, 279A.280 and 279B.270. Any violation of ORS 279A.140, 279A.280 or 279B.270 shall be punished as described in ORS 291.990.

(2) Any contractor, subcontractor, agent or person in authority or in charge who violates any provision of ORS 279C.520 or 279C.540 as to hours of labor shall be fined not less than \$50 nor more than \$1,000 or imprisoned in the county jail for not less than five days nor more than one year, or both.

(3) Any contractor or subcontractor subject to ORS 279C.840 who fails to pay the prevailing rate of wage as required by ORS 279C.840 shall be punished by a fine of not more than \$1,000 or by imprisonment in the county jail for not more than six months, or both. [2003 c.794 §46]

[no rule]

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DIVISION B

PUBLIC CONTRACTING – PUBLIC PROCUREMENTS

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[no rule]

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General Provisions

279B.005 Definitions. (1) As used in this chapter, unless the context or a specifically applicable definition requires otherwise:

(a) “Invitation to bid” means all documents, whether attached or incorporated by reference, used for soliciting bids.

(b) “Procurement description” means the words used in a solicitation to describe the goods or services to be procured. “Procurement description” includes specifications attached to or made a part of the solicitation.

(c) “Request for proposals” means all documents, whether attached or incorporated by reference, used for soliciting proposals.

(d) “Responsible bidder” or “responsible proposer” means a person who meets the standards of responsibility described in ORS 279B.110.

(e) “Responsive bid” or “responsive proposal” means a bid or proposal that substantially complies with the invitation to bid or request for proposals and all prescribed procurement procedures and requirements.

(2) ORS 279A.010 contains general definitions applicable throughout this chapter. [2003 c.794 §47; 2005 c.103 §7; 2007 c.764 §5]

[no rule]

Note: “Personal Services,” as used in this Division B, has the meaning given to it by the Port’s Contract Review Board Rule No. 5, restated here for the convenience of the user:

5. Personal Services Contracts

(a) "Personal services" means services where the unique or unusual professional, analytical, creative, or artistic abilities of the individual providing the service are of paramount importance.

(b) Personal services include but are not limited to:

(1) Services performed as an independent contractor in a professional capacity, including, but not limited to, the services of an accountant, attorney, architectural or land use planning consultant, physician, dentist, registered professional engineer, appraiser, surveyor, or data processing consultant.

(2) Services as an artist in the performing or fine arts, including, but not limited to, persons identified as photographer, film maker, painter, weaver, or sculptor.

(3) Services of a specialized, creative or research-oriented nature.

(4) Services of a consultant.

(5) Services of an insurance agent of record.

*(c) The following are **not** personal services:*

(1) Services, even though in a professional capacity, if they result predominantly in a tangible product. For example, a landscape architect's designing of a garden

is personal services, but designing a garden and supplying all the shrubs and trees results predominantly in a tangible product.

(2) Labor that is of a type that generally can be done by any competent and trained worker, including without limitation janitorial, security guard, crop spraying, laundry, and landscape maintenance services.

(3) Trade-related activities that amount to the provision of labor or materials, even though a specific license may be required to engage in the activity. [Revised July 9, 2008]

279B.010 Policy. In addition to the policy stated in ORS 279A.015, it is the policy of the State of Oregon that public contracting activities should:

(1) Provide effective outcomes that represent optimal value to the contracting agency and, to the greatest extent feasible, be consistent with market practices;

(2) Seek consistency in procurement practices between contracting agencies covered under the Public Contracting Code while preserving each contracting agency's ability to adopt rules to maximize the contracting agency's effectiveness; and

(3) Apply innovative practices while maintaining quality and integrity. [2003 c.794 §48]

[no rule]

279B.015 Applicability. As provided in ORS 279A.020 Except as provided in ORS 279C.320, public contracting under this chapter is subject to ORS chapter 279A, but not ORS chapter 279C. [2003 c.794 §48a; 2005 c.103 §8]

Rule B.015 Application

These Division B rules implement ORS chapter 279B, Public Procurements, and apply to the procurement of goods, services, and personal services. These rules do not apply to the procurement of public works or public improvement contract awards. Rules for public works and public improvement contract awards are found in Division C of these rules.

279B.020 Maximum hours of labor on public contracts; holidays; exceptions; liability to workers; rules.

(1) When labor is employed by a contracting agency through a contractor, a person may not be required or permitted to labor more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity or emergency or when the public policy absolutely requires it, in which event, the person so employed for excessive hours shall receive at least time and a half pay:

(a)(A) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or

(B) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and

(b) For all work performed on Saturday and on the following legal holidays:

(A) Each Sunday.

(B) New Year's Day on January 1.

(C) Memorial Day on the last Monday in May.

- (D) Independence Day on July 4.
- (E) Labor Day on the first Monday in September.
- (F) Thanksgiving Day on the fourth Thursday in November.
- (G) Christmas Day on December 25.

(2) An employer shall give notice in writing to employees who perform work under subsection (1) of this section, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that employees may be required to work.

(3) For the purpose of this section, each time a legal holiday, other than Sunday, listed in subsection (1) of this section falls on Sunday, the succeeding Monday shall be recognized as a legal holiday. Each time a legal holiday listed in subsection (1) of this section falls on Saturday, the preceding Friday shall be recognized as a legal holiday.

(4) When specifically agreed to under a written labor-management negotiated labor agreement, an employee may be paid at least time and a half pay for work performed on any legal holiday specified in ORS 187.010 and 187.020 that is not listed in subsection (1) of this section.

(5) This section does not apply to contracts for personal services designated under ORS 279A.055, provided that persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in subsection (1)(b)(B) to (G) of this section and for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(6) Subsections (1) and (2) of this section do not apply to contracts for services at a county fair or for other events authorized by a county fair board if persons employed under the contract receive at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week.

(7) Subsections (1) to (3) of this section do not apply to a contract for services if the contractor is a party to a collective bargaining agreement in effect with any labor organization.

(8)(a) Subsections (1) and (2) of this section do not apply to contracts for services. However, persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in subsection (1)(b)(B) to (G) of this section and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) An employer shall give notice in writing to employees who work on a contract for services, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

(9) Any contractor or subcontractor or contractor's or subcontractor's surety who violates subsection (1) or (2) that violates the provisions of this section is liable to the affected employees in the amount of their unpaid overtime wages and in an additional amount equal to the unpaid overtime wages as liquidated damages. If the violation resulted from willful falsification of payroll records, the contractor or subcontractor or contractor's or subcontractor's surety is liable to the affected employees in the amount of their unpaid overtime wages and in an additional amount equal to twice the unpaid overtime wages as liquidated damages.

(10) An action to enforce liability to employees under subsection (3) of this section may be brought as an action on the contractor's payment bond as provided for in ORS 279C.610.

(11) This section does not apply to:

(a) Financial institutions as defined in ORS 706.008.

(b) Labor performed in the prevention or suppression of fire under contracts and agreements made pursuant to the authority of the State Forester or the State Board of Forestry under ORS 477.406.

(c) Public contracts for goods or personal property.

(12) In accordance with any applicable provision of ORS chapter 183, the Commissioner of the Bureau of Labor and Industries may adopt rules to carry out the provisions of this section. [2003 c.794 §48b; 2005 c.103 §8a]

[no rule]

Note: The Bureau of Labor and Industries rules that carry out the provisions of section 279B.020 may be found in Oregon Administrative Rules Chapter 839 Division 020.

279B.025 Procurement practices regarding recyclable and reusable goods. All contracting agencies shall establish procurement practices that ensure, to the maximum extent economically feasible, the procurement of goods that may be recycled or reused when discarded. [2003 c.794 §49]

[no rule]

279B.030 Demonstration that procurement will cost less than performing service or that performing service is not feasible; exemptions. (1) * * * .

(2) * * * .

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

* * *

(d) The Port of Portland; or

* * * . [2009 c.880 §2]

279B.033 Contents of cost analysis; conditions under which procurement may proceed; exceptions. * * * [2009 c.880 §3]

279B.036 Determination of feasibility of procurement. * * * [2009 c.880 §4]

Note: * * * . [2009 c.880 §4a]

Source Selection

Methods of Source Selection

279B.050 Methods of source selection. (1) Except as provided in subsection (2) of this section, a contracting agency shall award a public contract for goods or services by competitive sealed bidding under ORS 279B.055 or competitive sealed proposals under ORS 279B.060.

(2) The requirements of subsection (1) of this section do not apply to public contracts established as provided in ORS 279B.065, 279B.070, 279B.075, 279B.080 or 279B.085.

(3) Notwithstanding the applicability of ORS 279B.065, 279B.070, 279B.075, 279B.080 or 279B.085 to a public contract, a contracting agency nevertheless may award the public contract under subsection (1) of this section.

(4) A local contracting agency may elect, by rule, charter, ordinance or other appropriate legislative action, to award contracts for personal services, as designated under ORS 279A.055, under the procedures of ORS 279B.050 to 279B.085.

(5) State contracting agencies shall solicit contracts for personal services in accordance with ORS 279B.050 to 279B.085. [2003 c.794 §50; 2007 c.764 §6]

Rule B.050 Procurement Methods

(1) The Port shall award contracts for goods and services covered by these Rules using any method authorized by state law or Port Contracting Rules. Such different methods are called methods of “source selection.” Source selection methods include cooperative procurements, competitive sealed bidding, competitive sealed proposals, and small, intermediate, sole source, emergency and special procurements.

(2) State law requires the Port to use the services of Qualified Rehabilitation Facilities (QRFs) in certain instances. When required, the Port shall use a QRF in accordance with the rules established for public agencies by the Department of Administrative Services, as restated in Port Contracting Rules Division A.

(3) Once the appropriate source selection method has been chosen the Port may consider the best means of selecting a contractor within the source selection method it has chosen, provided the method is amenable to such discretion.

(4) The Manager of Contracts and Procurement is authorized to waive any nonconformity with the rules of contractor selection if the Manager of Contracts & Procurement determines that the defect was minor and likely would not have had an effect on the outcome of the selection process.

Note: Rules for the screening and selection of personal services providers begin at Port Rule B.500

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

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

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

(b) Specify the name and title of the person designated to receive bids 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 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 bidders must be prequalified in accordance with ORS 279B.120.

(e) State that the contracting agency may cancel the procurement or reject any or all bids 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 invitation to bid.

(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 invitation to bid or the contractor’s failure to meet established performance standards. The consequences may include, but are not limited to:

(A) Reducing or withholding payment;

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Notwithstanding a requirement to make bids 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 trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a bid.

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

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

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

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

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

(10) If a contracting agency awards a contract, the contracting agency shall award the contract:

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

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

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

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

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

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

(13) The contracting agency may issue a request for information, a request for interest or other preliminary documents to obtain information useful in preparing an invitation to bid. [2003 c.794 §51; 2009 c.880 §5]

Rule B.055 Competitive Sealed Bidding

(1) Advertisement:

(a) The Port shall advertise invitations to bid in the Oregonian or the Daily Journal of Commerce, and shall also Post all notices for invitations to bid on the Port's website. If the Executive Director or the Manager of Contracts and Procurement make a determination that limiting the posting of the notice for invitations to bid solely by electronic means is cost effective to the Port, then publishing the notice in a newspaper may be waived.

(b) The notice shall be posted at least 7 days prior to the date the invitations to bid are due, unless the Manager of Contracts and Procurement determines that a shorter time period is necessary and in the Port's best interest.

(2) Distribution of Solicitation Documents

The Port normally distributes solicitation documents by handing them to individuals who appear at the office of the Port's Contracts and Procurement Division or via U.S. Mail. The Port may distribute solicitation documents by any commercially reasonable means, including without limitation fax, other electronic means and express mail, if the Port determines in its sole discretion that other means are appropriate under the circumstances. The Port may, but is not obligated to, deliver a solicitation document by other more costly means if a particular prospective offeror pays the additional cost.

(3) Prospective Bidders and Proposers Lists

A prospective bidder or proposer for a particular procurement is responsible for ensuring that its correct name, address, telephone number, and fax number have been effectively and accurately communicated to the Port's Contracts and Procurement Division for inclusion on the list of prospective bidders or proposers for that procurement. The Port's Contracts and

Procurement Division endeavors to include on the list for a particular procurement each prospective bidder or proposer to which a solicitation document is issued by the Contracts and Procurement Division. Prospective bidders or proposers who obtain solicitation documents from other sources, such as plan centers, are not automatically added to the list, and must contact the Contracts and Procurement Division to be added. Listed prospective bidders and proposers are responsible for immediately notifying the Port's Contracts and Procurement Division in writing of any changes in name, address, telephone number, or fax number.

(4) Responsibility of Bidders

While the Port endeavors to provide all known solicitation holders with all the available information and documentation necessary to provide a responsive bid, through notice of document availability by mail or electronic means, the Port cannot guarantee that such notice will be delivered to or read by solicitation holders in a timely manner. Bidders are therefore responsible for ensuring they have received all necessary information to provide a responsive bid, including without limitation all bid documents, addenda, plans, attachments, exhibits, etc., prior to submitting a bid.

(5) Prebid and Proposal Conferences

(a) Generally.

The Port may hold a prebid or preproposal conference to allow a site inspection and to hear and respond to questions. If the time and place of a prebid or preproposal conference are not stated in the invitation to bid or request for proposal, all prospective bidders or proposers on the list maintained by the Port's Contracts and Procurement Division shall be notified of the time and place. Notification may be by telephone, fax or other electronic means, or in writing, at the Port's option.

(b) Mandatory.

The Port may require attendance at a prebid or preproposal conference as a condition precedent to the submission of a bid or proposal. The Port may refuse to open or may reject as nonresponsive a bid from a bidder who failed to attend a mandatory prebid conference, and may refuse to open or decline to evaluate a proposal from a proposer who failed to attend a mandatory preproposal conference. The Port may, but is not obligated to, arrange for a subsequent prebid or preproposal conference if requested by one or more prospective bidders or proposers who were unable to attend a scheduled, mandatory prebid or preproposal conference for a reason determined by the Port to be commercially reasonable under the circumstances. If a subsequent prebid or preproposal conference is arranged, all prospective bidders or proposers on the Contracts and Procurement Division's list shall be notified in advance and allowed to attend.

(c) Limited Effect.

Statements and other information from Port employees at a prebid or preproposal conference do not effect any change in the invitation to bid or the request for proposals, or the contracts that may arise from them. Changes in the invitation to bid or the request for proposals may be effected only by a written addendum issued by the Port. Bidders and proposers may rely only upon the invitation to bids or the request for proposals, with any changes made by addendum, to

establish all of the procurement requirements and all contract provisions other than those established by the bid or proposal.

(d) Change Requests.

A prospective bidder or proposer who wants to propose a change to the invitation to bid or the request for proposals should submit a written request, even if the change was requested during a prebid or preproposal conference. The request should be submitted in accordance with any instructions in the invitation to bid or the request for proposals. If the Port fails to respond to a change request made during a prebid or preproposal conference, or to a written change request, the request shall be deemed denied. If the Port responds to a change request, the response may be in the form of an addendum issued to all prospective bidders or proposers, with no specific response to the requestor.

(6) Addenda

(a) Requirement

A solicitation document may be changed only by a written addendum issued by the Port. When an addendum is required, it shall be issued to all prospective bidders or proposers on the list maintained for the procurement in question by the Port's Contracts and Procurement Division.

(b) Acknowledgment Required

A bidder or proposer must timely acknowledge in writing receipt of all addenda issued by the Port. Failure to acknowledge receipt of an addendum may cause a bid to be rejected as nonresponsive, and may cause a proposal to be considered outside the competitive range or to be determined after evaluation to be inferior to other proposals that included acknowledgment of receipt of the addendum. Acknowledgment of receipt of an addendum most often will be part of the bid or proposal, but may be separate from the bid or proposal, and need not be sealed. The Port shall accept a written acknowledgment of receipt of an addendum by any commercially reasonable means, including but not limited to fax and email. Acknowledgment of receipt of an addendum to an invitation to bid is timely only if it is received in a manner and at a time that would make it timely if it were a bid.

(c) Distribution and Receipt

Addenda may be distributed by U.S. mail, fax or other electronic means, hand delivery, or other commercially reasonable means. Failure to receive an addendum to a solicitation does not excuse failure to acknowledge receipt of the addendum, even if the failure to receive was through no fault of the prospective bidder or proposer, and even if the failure to receive was the fault of the Port. The Port, in its sole discretion, may extend a bid opening to allow a bidder or proposer time to acknowledge receipt of an addendum.

(7) Method of Submitting Offers

(a) Generally

Bids must be submitted in writing on the form provided by the Port or a reasonable facsimile. Bids may not be submitted by fax or other electronic means unless expressly directed or permitted by the invitation to bid. A bid shall be considered timely submitted if it is delivered to

the Manager of Contracts and Procurement or the Manager's designee by the deadline stated in the invitation to bid.

(b) Timeliness

Offerors are responsible for ensuring their offers are timely. The Port may decline to consider a late offer, even if the offer is late because of a delay in the Port's internal handling of mail or documents or because the Port's receiving equipment was unavailable.

(c) Completeness

Offerors are responsible for ensuring their offers are received by the Port in a complete, legible, ungarbled form. The Port may decline to consider an offer that is incomplete, illegible, or garbled, even if the problem is caused by the Port's hardware or software.

(d) Electronic Submission

Offers submitted electronically must bear a facsimile signature, provided that the requirement for a facsimile signature is excused when an electronic quotation is properly submitted in lieu of an oral quotation, or when the solicitation document expressly authorizes electronic data interchange, e-mail, or another electronic submission method by which facsimile signatures generally cannot be transmitted. A solicitation document expressly authorizing electronic submission of offers may specify methods for establishing the authenticity of offers.

(8) Bid Withdrawal

At any time before the deadline for receipt of bids, a bidder may withdraw its bid without consequence. The withdrawal must be by someone with the necessary authority, and must be a signed writing.

(9) Bid Modification

At any time before the deadline for receipt of bids, a bidder may modify its bid in writing. A bidder shall prepare and submit any modification to its bid to the Port in accordance with Port Contracting Rule B.055(7), unless otherwise specified in the solicitation document. Any modification must include the bidder's statement that the modification amends and supersedes the prior bid. The bidder shall mark the submitted modification as follows:

(a) Bid (or Proposal) Modification; and

(b) Solicitation Number (or Other Identification as specified in the Solicitation Document).

(10) Receipt and Recording of Offers; Confidentiality of Offers

The Port shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The Port shall not open the Offer or modification upon receipt, but shall maintain it as confidential and secure until Opening. If the Port inadvertently opens an Offer or a modification prior to the Opening, the Port shall return the Offer or modification to its secure and confidential state until Opening. The Port shall document the resealing for the Procurement file (e.g. "Port inadvertently opened the Offer due to improper identification of the Offer").

*(11) Bid Opening**(a) Generally*

Bids shall be opened in a place designated by the Port that is open to the public at the time bids are opened. The place bids will be opened may be changed by the Port at any time. The time for opening bids may be postponed at any time for the Port's convenience or if the Port determines that postponement would be in the Port's best interest. A bid opening postponement or relocation shall be communicated orally or by a posted sign to anyone who appears at the previously designated time and place for the bid opening. If time permits, a bid opening postponement or relocation shall be communicated to all prospective bidders on the list maintained by the Port's Contracts and Procurement Division by mail, fax, email, or any other commercially reasonable means. A bid opening postponement or relocation need not be communicated by addendum.

(b) Availability for inspection

Subject to any exemptions under Oregon public records statutes, bids shall be available for public inspection only after the Port has finished evaluating them for responsiveness.

(12) Bid Evaluation

Opened bids shall be evaluated in accordance with applicable statutes and these Rules. When a bid is determined to be unresponsive to the invitation to bid, it will not be evaluated further. Bidders who submit responsive bids shall be evaluated for responsibility under applicable statutes, these Rules, and the invitation to bid.

*(13) Bid Errors**(a) Errors of Judgment*

A bid may not be corrected or withdrawn for an error in judgment. If a bidder is awarded a public contract and refuses to promptly and properly execute the public contract because of an error in judgment, the bidder's bid security must be forfeited under ORS 279B.055(3)(c).

(b) Minor Informalities

The Port may waive or permit a bidder to correct a minor informality. A minor informality is either a matter of form rather than substance that is evident on the face of the bid, or an insignificant mistake that can be waived without prejudice to other bidders. For example, failure to sign the bid in the designated block on the bid form is a minor informality if a signature appears on the bid bond or somewhere else in the bid evidencing an intent to be bound by the bid.

(c) Clerical Errors

A clerical error is an error in drafting the bid, and may include without limitation typographical errors, arithmetic errors, and transposition and other errors in transferring numbers from work sheets to the bid form. If a clerical error is apparent on the face of the bid and the correction also is apparent on the face of the bid, the Port shall correct the error before evaluating bids. A discrepancy between a unit price and an extended bid item price is a clerical error and shall be corrected by giving precedence to the unit price. If an error not apparent on the face of the bid is brought to the Port's attention, the bidder may submit evidence to establish that the error is a

clerical error. If it is clear from the face of the bid or from evidence submitted by the bidder that an error is a clerical error, rather than an error in judgment, but the correction of the error is not apparent on the face of the bid, the bidder may either withdraw its bid without forfeiting its bid security under ORS 279B.055(3)(c), or agree to proceed with the public contract as bid, without correcting the error. If the bidder takes neither of those actions, the Port shall reject the bid as non responsive. A bidder may not correct a clerical error if the correction is not apparent on the face of the bid.

(14) Irrevocability of Offers

(a) Generally

All bids received by the Port for a particular public contract become binding offers when the deadline for receipt of bids passes, and remain irrevocable for 30 calendar days after opening unless a different period is specified in the invitation to bid.

(b) Extensions and Reinstatements

An offeror may extend the period of irrevocability of its offer by giving the Port a written extension specifying a new period of irrevocability. An offeror may reinstate an offer (unchanged) after the expiration of the period of irrevocability by giving the Port a written reinstatement specifying a new period of irrevocability. An offeror may not "extend" or "reinstate" an offer that differs in any material respect from the original; a purported extension or reinstatement of a materially differing offer amounts to a new offer.

(15) Tied Low Bids or Quotations

(a) Generally

If (1) low bids or quotations are tied, (2) the price, fitness, availability, and quality of the goods or services offered by the tied offerors are otherwise equal, and (3) one of the tied offerors offers goods or services manufactured or produced in Oregon, the contract shall be awarded to that offeror in accordance with ORS 279A.120. If two or more of the tied offerors offer goods or services manufactured or produced in Oregon, the contract shall be awarded to one with principal offices or headquarters in Oregon. If two or more of the tied offerors offer goods or services manufactured or produced in Oregon, and none has principal offices or headquarters in Oregon, or if two or more of them have principal offices or headquarters in Oregon, the contract shall be awarded by drawing lots. If none or all of the tied offerors offer goods or services manufactured or produced in Oregon, the contract shall be awarded by drawing lots.

(b) Unequal Quality

If the fitness, availability, and quality of the goods or services offered by tied offerors are not otherwise equal, the contract shall be awarded to the offeror determined by the Port to offer the superior goods or services.

(16) Rejection of Bids for Good Cause in the Public Interest

The Port may reject any or all bids in accordance with ORS 279B.100 for good cause upon a finding that rejection is in the public interest. Situations where good cause is sufficient to warrant rejection of all bids include but are not limited to: (1) competition is unnecessarily restricted because of the content of or an error in the solicitation document or the solicitation

process; (2) all offered prices are too high or all offered performance is insufficient to meet the Port's needs; (3) ambiguous or misleading provisions in the solicitation document, or misconduct or error, threaten the fairness and integrity of the competitive process; and (4) events other than legitimate market forces threaten the integrity of the competitive procurement process.

279B.060 Competitive sealed proposals. (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 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. [2003 c.794 §52; 2009 c.880 §6]

Rule B.060 Competitive Sealed Proposals

(1) Applicability of Rule B.055 to Competitive Proposals

The Rules stated in Section B.055 generally apply also to Competitive Proposals, with the following exceptions: (Note: The term "proposal" may be substituted for the word "bid" when a rule from Section B.055 is applied to Competitive Proposals)

(a) Rather than apply Rule B.055.11, Bid Opening, the following rule applies:

Proposal Opening

The Port may open proposals at any time. There is no requirement for proposals to be opened in public. Subject to any exemptions under Oregon public records statutes, proposals shall be available for public inspection only after the Port has finished evaluating them.

(b) Rather than apply Rule B.055.12, Bid Evaluation, the following rule applies:

Proposal Evaluation

Proposals shall be evaluated based upon the evaluation criteria established by the request for proposals. Changes in evaluation criteria shall be communicated to all proposers or prospective proposers by addendum. If evaluation criteria are changed after proposals have been submitted, all proposers shall have an opportunity to supplement their proposals or submit best and final offers after receipt of the addendum changing the evaluation criteria.

(c) Rather than apply Rule B.055.13, Bid Errors, the following rule applies:

Proposal Errors

Unless there is limiting language in the request for proposals, errors in proposals may be corrected at any time prior to the deadline for the Port's receipt of best and final offers, or, if best and final offers are not invited or allowed, the beginning of the Port's final evaluation of proposals.

(d) Rather than apply Rule B.055.14, Irrevocability of Offers, the following rule applies:

Proposal Modification

The proposer may not modify its proposal without the prior written consent of the Port.

(2) Competitive Range

The Port shall have discretion in the manner in which a competitive range is defined for a specific procurement. Generally, the competitive range will be defined as a natural "break" in evaluation scores between a higher scoring group of proposers and a lower scoring group of proposers. The number of proposers within a competitive range may not be defined prior to evaluation of proposals.

(3) Selection Method

(a) The Port shall have discretion in the method used to select the most advantageous contractor, including but not necessarily limited to negotiation with the highest ranked proposer, competitive, simultaneous negotiations with one or more proposers, multi-tiered competition designed to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower-ranked proposers, or any combination of methods.

(b) The Request for Proposals may, but is not required to, define the selection method to be used for the specific procurement or class of procurements.

(4) Addenda Issued after Proposal Opening

(a) If the Port issues an addendum after proposals are opened, the Port shall provide sufficient time for proposers to supplement their proposals, if necessary, based on the changes provided in the addendum. Less than five days may be allowed for proposal supplementation if the changes made by the addendum do not require extensive analysis or action on the part of the affected proposers.

279B.065 Small procurements. (1) Any procurement of goods or services not exceeding \$5,000 may be awarded in any manner deemed practical or convenient by the contracting agency, including by direct selection or award. A contract awarded under this section may be amended to exceed \$5,000 only in accordance with rules adopted under ORS 279A.065.

(2) A procurement may not be artificially divided or fragmented so as to constitute a small procurement under this section. [2003 c.794 §53; 2005 c.103 §8b; 2005 c.64 §1]

Rule B.065 Small Procurements

The Port shall follow procedures established by the Manager of Contracts and Procurement when procuring goods or services not exceeding \$5,000. Contracts awarded under this section

may be amended in accordance with the Port's Contract Review Board Rules.

279B.070 Intermediate procurements. (1) Any procurement of goods or services exceeding \$5,000 but not exceeding \$150,000 may be awarded in accordance with intermediate procurement procedures. A contract awarded under this section may be amended to exceed \$150,000 only in accordance with rules adopted under ORS 279A.065.

(2) A procurement may not be artificially divided or fragmented so as to constitute an intermediate procurement under this section.

(3) When conducting an intermediate procurement, a contracting agency shall seek at least three informally solicited competitive price quotes or competitive proposals from prospective contractors. The contracting agency shall keep a written record of the sources of the quotes or proposals received. If three quotes or proposals are not reasonably available, fewer will suffice, but the contracting agency shall make a written record of the effort made to obtain the quotes or proposals.

(4) If a contract is awarded, the contracting agency shall award the contract to the offeror whose quote or proposal will best serve the interests of the contracting agency, taking into account price as well as considerations including, but not limited to, experience, expertise, product functionality, suitability for a particular purpose and contractor responsibility under ORS 279B.110. [2003 c.794 §54]

Rule B.070 Intermediate procurements

The Port shall follow the requirements of ORS 279B.070, and the procedures established by the Manager of Contracts and Procurement for the award of contracts less than or equal to \$100,000. Award of Contracts greater than \$100,000 shall be made under the requirements set forth in ORS 279B.055 and .060.

279B.075 Sole-source procurements. (1) A contracting agency may award a contract for goods or services without competition when the Director of the Oregon Department of Administrative Services, the local contract review board or a state contracting agency, if it has procurement authority under ORS 279A.050, or a person designated in writing by the director, or board or state contracting agency with procurement authority under ORS 279A.050, determines in writing, in accordance with rules adopted under ORS 279A.065, that the goods or services, or class of goods or services, are available from only one source.

(2) The determination of a sole source must be based on written findings that may include:

- (a) That the efficient utilization of existing goods requires the acquisition of compatible goods or services;
- (b) That the goods or services required for the exchange of software or data with other public or private agencies are available from only one source;
- (c) That the goods or services are for use in a pilot or an experimental project; or
- (d) Other findings that support the conclusion that the goods or services are available from only one source.

(3) To the extent reasonably practical, the contracting agency shall negotiate with the sole source to obtain contract terms advantageous to the contracting agency. [2003 c.794 §55; 2005 c.103 §8c]

Rule B.075 Sole-Source Procurements

Determination of sole source procurement applicability shall be made in writing by the Executive Director or the Manager of Contracts and Procurement, as applicable in accordance with Port Contract Review Board Rules.

279B.080 Emergency procurements. (1) The head of a contracting agency, or a person designated under ORS 279A.075, may make or authorize others to make emergency procurements of goods or services in an emergency. The contracting agency shall document the nature of the emergency and describe the method used for the selection of the particular contractor.

(2) For an emergency procurement of construction services that are not public improvements, the contracting agency shall ensure competition for a contract for the emergency work that is reasonable and appropriate under the emergency circumstances. In conducting the procurement, the contracting agency shall set a solicitation time period that the contracting agency determines to be reasonable under the emergency circumstances and may issue written or oral requests for offers or make direct appointments without competition in cases of extreme necessity. [2003 c.794 §56; 2007 c.764 §6a]

Rule B.080 Emergency Procurements

(a) Award of a public contract under emergency procurement conditions as described in ORS 279A.010 shall be authorized in writing by Executive Director, except that the Manager of Contracts and Procurement may authorize in writing an emergency procurement up to the Manager's level of delegated authority.

(b) Award of a public contract under conditions of a disaster as described in Port Contracting Rule A.010 may be made by any Port Personnel designated by the Manager of Contracts and Procurement or by the Emergency Operations Center Chief, if active.

(c) A public contract exempt from competitive bidding because of an emergency or disaster may be awarded by any commercially reasonable means under the circumstances.

279B.085 Special procurements. (1) As used in this section and ORS 279B.400:

(a) "Class special procurement" means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of entering into a series of contracts over time or for multiple projects.

(b) "Contract-specific special procurement" means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of entering into a single contract or a number of related contracts on a one-time basis or for a single project.

(c) "Special procurement" means, unless the context requires otherwise, a class special procurement, a contract-specific special procurement or both.

(2) Except as provided in subsection (3) of this section, to seek approval of a special procurement, a contracting agency shall submit a written request to the Director of the Oregon Department of Administrative Services or the local contract review board, as applicable, that describes the contracting procedure, the goods or services or the class of goods or services that

are the subject of the special procurement and the circumstances that justify the use of a special procurement under the standards set forth in subsection (4) of this section.

(3) When the contracting agency is the office of the Secretary of State or the office of the State Treasurer, to seek approval of a special procurement, the contracting agency shall submit a written request to the Secretary of State or the State Treasurer, as applicable, that describes the contracting procedure, the goods or services or the class of goods or services that are the subject of the special procurement and the circumstances that justify the use of a special procurement under the standards set forth in subsection (4) of this section.

(4) The director, a local contract review board, the Secretary of State or the State Treasurer may approve a special procurement if the director, board, Secretary of State or State Treasurer finds that a written request submitted under subsection (2) or (3) of this section demonstrates that the use of a special procurement as described in the request, or an alternative procedure prescribed by the director, board, Secretary of State or State Treasurer:

(a) Is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts; and

(b)(A) Is reasonably expected to result in substantial cost savings to the contracting agency or to the public; or

(B) Otherwise substantially promotes the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under ORS 279B.055, 279B.060, 279B.065 or 279B.070 or under any rules adopted thereunder.

(5) Public notice of the approval of a special procurement must be given in the same manner as provided in ORS 279B.055 (4).

(6) If a contracting agency intends to award a contract through a special procurement that calls for competition among prospective contractors, the contracting agency shall award the contract to the offeror the contracting agency determines to be the most advantageous to the contracting agency.

(7) When the director, a local contract review board, the Secretary of State or the State Treasurer approves a class special procurement under this section, the contracting agency may award contracts to acquire goods or services within the class of goods or services in accordance with the terms of the approval without making a subsequent request for a special procurement. [2003 c.794 §57; 2005 c.103 §8d; 2007 c.764 §7]

Note: * * * [2009 c.627 §8]

Rule B.085 Special Procurements

When the Port determines that there is a need to award a contract or class of contracts by means other than the rules provided for competitive sealed bids, competitive sealed proposals, small procurements, or intermediate procurements, and when the rules for sole source, emergency, or cooperative procurements do not apply, approval must first be sought from the Port Contract Review Board following the procedures set forth in ORS 279.B.085. Class special procurements that are approved by the Contract Review Board shall be incorporated into the Contract Review Board Rules.

Cancellation, Rejection and Delay of Invitations for Bids or Requests for Proposals

279B.100 Cancellation, rejection, delay of invitations for bids or requests for proposals.

(1) Any solicitation or procurement described in a solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part, when the cancellation or rejection is in the best interest of the contracting agency as determined by the contracting agency. The reasons for the cancellation or rejection must be made part of the solicitation file. A contracting agency is not liable to any bidder or proposer for any loss or expense caused by or resulting from the cancellation or rejection of a solicitation, bid, proposal or award.

(2) Any solicitation or procurement described in a solicitation may be delayed or suspended when the delay or suspension is in the best interest of the contracting agency as determined by the contracting agency. The contracting agency shall make the reasons for the delay or suspension part of the solicitation file. A contracting agency is not liable to any bidder or proposer for any loss or expense caused by or resulting from the delay or suspension of a solicitation, bid, proposal or award. [2003 c.794 §58]

[no rule]

Qualifications

279B.110 Responsibility of bidders and proposers. (1) A contracting agency shall prepare a written determination of nonresponsibility for a bidder or proposer if the contracting agency determines that the bidder or proposer does not meet the standards of responsibility.

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

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

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

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

(d) Is legally qualified to contract with the contracting agency.

(e) Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder or proposer fails to promptly supply information concerning

responsibility that the contracting agency requests, the contracting agency shall determine the bidder's or proposer's responsibility based on available information or may find that the bidder or proposer is not responsible.

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

(3) A contracting agency may refuse to disclose outside of the contracting agency confidential information furnished by a bidder or proposer under this section when the bidder or proposer has clearly identified in writing the information the bidder or proposer seeks to have treated as confidential and the contracting agency has authority under ORS 192.410 to 192.505 to withhold the identified information from disclosure. [2003 c.794 §59; 2009 c.880 §7]

[no rule]

279B.115 Qualified products lists. (1) A contracting agency may develop and maintain a qualified products list in instances in which the testing or examination of goods before initiating a procurement is necessary or desirable in order to best satisfy the requirements of the contracting agency. For purposes of this section, "goods" includes products that have associated or incidental service components, such as supplier warranty obligations or maintenance service programs.

(2) In the initial development of any qualified products list, a contracting agency shall give public notice, in accordance with ORS 279B.055 (4), of the opportunity for potential contractors, sellers or suppliers to submit goods for testing and examination to determine their acceptability for inclusion on the list and may solicit in writing representative groups of potential contractors, sellers or suppliers to submit goods for the testing and examination. Any potential contractor, seller or supplier, even though not solicited, may offer its goods for consideration.

(3) A contracting agency's inclusion of goods on a qualified products list shall be based on the results of tests or examinations. Notwithstanding any provision of ORS 192.410 to 192.505, a contracting agency may make the test or examination results public in a manner that protects the identity of the potential contractor, seller or supplier that offered the goods for testing or examination, including by using only numerical designations. Notwithstanding any provision of ORS 192.410 to 192.505, a contracting agency may keep confidential trade secrets, test data and similar information provided by a potential contractor, seller or supplier if so requested in writing by the potential contractor, seller or supplier.

(4) The inclusion of goods on a qualified products list does not constitute and may not be construed as a prequalification under ORS 279B.120 and 279B.125 of any prospective contractor, seller or supplier of goods on the qualified products list. [2003 c.794 §60]

[no rule]

279B.120 Prequalification of prospective bidders and proposers. (1) A contracting agency may prequalify prospective bidders or proposers to submit bids or proposals for public contracts to provide particular types of goods or services. The method of submitting prequalification applications, the information required in order to be prequalified and the forms to be used for submitting prequalification information shall be determined by the contracting agency unless otherwise prescribed by rule adopted by the Director of the Oregon Department of Administrative Services or the local contract review board.

(2) The contracting agency shall, in response to the receipt of a prequalification

application submitted under subsection (1) of this section, notify the prospective bidder or proposer whether the prospective bidder or proposer is qualified based on the standards of responsibility listed in ORS 279B.110 (2), the type and nature of contracts that the prospective bidder or proposer is qualified to compete for and the time period for which the prequalification is valid. If the contracting agency does not prequalify a prospective bidder or proposer as to any contracts covered by the prequalification process, the notice must specify which of the standards of responsibility listed in ORS 279B.110 (2) the prospective bidder or proposer failed to meet. Unless the reasons are specified, the prospective bidder or proposer shall be deemed to have been prequalified in accordance with the application.

(3) If a contracting agency subsequently discovers that a prospective bidder or proposer that prequalified under subsections (1) and (2) of this section is no longer qualified, the agency may revoke the prequalification upon reasonable notice to the prospective bidder or proposer, except that a revocation is invalid as to any contract for which an advertisement for bids or proposals has already been issued. [2003 c.794 §61]

Rule B.120 Prequalification

(a) Generally

The Port, in its sole discretion, may require bidders or proposers to prequalify before being eligible to submit bids or proposals for a class of public contracts or for a particular public contract. If prequalification is required, the opportunity to prequalify shall be advertised in the same manner as a solicitation document for the class of public contracts or the particular public contract would be advertised under applicable statutes and these Rules. The method of submitting prequalification applications, the information required in order to be prequalified and the forms to be used for submitting prequalification information shall be provided either in the advertisement or in the solicitation document.

(b) Disqualification

Disqualification of a previously prequalified bidder or proposer shall be in accordance with these Rules and the provisions of the Public Contracting Code regarding prequalification and disqualification.

(c) Additional Advertising Not Required

Bids or proposals may be solicited for a particular contract from bidders or proposers prequalified for that particular contract, or for a class of contracts including that particular contract, without additional advertising.

279B.125 Application for prequalification. (1) When a contracting agency permits or requires prequalification of bidders or proposers, a prospective bidder or proposer who wishes to prequalify shall submit a prequalification application to the contracting agency on a form prescribed under ORS 279B.120 (1). Upon receipt of a prequalification application, the contracting agency shall investigate the prospective bidder or proposer as necessary to determine whether the prospective bidder or proposer is qualified. The determination shall be made in less than 30 days, if practicable, if the prospective bidder or proposer requests an early decision to allow the prospective bidder or proposer as much time as possible to prepare a bid or proposal for a contract that has been advertised. In making its determination, the contracting agency shall

consider only the applicable standards of responsibility listed in ORS 279B.110 (2). The contracting agency shall promptly notify the prospective bidder or proposer whether the prospective bidder or proposer is qualified.

(2) If the contracting agency finds that a prospective bidder or proposer is qualified, the notice must state the type and nature of contracts that the prospective bidder or proposer is qualified to compete for and the period of time for which the prequalification is valid. If the agency finds that the prospective bidder or proposer is not qualified as to any contracts covered by the rule, resolution, ordinance or other regulation, the notice must specify the reasons given under ORS 279B.120 for not prequalifying the prospective bidder or proposer and inform the prospective bidder or proposer of the right to a hearing under ORS 279B.425. To be entitled to a hearing under ORS 279B.425, a prospective bidder or proposer shall, within three business days after receipt of the notice, notify the contracting agency that the prospective bidder or proposer demands a hearing under ORS 279B.425.

(3) If a contracting agency has reasonable cause to believe that there has been a substantial change in the conditions of a prequalified prospective bidder or proposer and that the prospective bidder or proposer is no longer qualified or is less qualified, the contracting agency may revoke or may revise and reissue the prequalification after reasonable notice to the prequalified prospective bidder or proposer. The notice must specify the reasons given under ORS 279B.120 for revocation or revision of the prequalification of the prospective bidder or proposer and inform the prospective bidder or proposer of the right to a hearing under ORS 279B.425. To be entitled to a hearing under ORS 279B.425, a prospective bidder or proposer shall, within three business days after receipt of the notice, notify the contracting agency that the prospective bidder or proposer demands a hearing under ORS 279B.425. A revocation or revision does not apply to any contract for which an advertisement for bids or proposals was issued before the date the notice of revocation or revision was received by the prequalified prospective bidder or proposer. [2003 c.794 §62]

[no rule]

279B.130 Debarment of prospective bidders and proposers. (1)(a) A contracting agency may debar a prospective bidder or proposer from consideration for award of the contracting agency's contracts for the reasons listed in subsection (2) of this section after providing the prospective bidder or proposer with notice and a reasonable opportunity to be heard.

(b) A contracting agency may not debar a prospective bidder or proposer under this section for more than three years.

(2) A prospective bidder or proposer may be debarred from consideration for award of a contracting agency's contracts if:

(a) The prospective bidder or proposer has been convicted of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract or in the performance of a public or private contract or subcontract.

(b) The prospective bidder or proposer has been convicted under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the prospective bidder's or proposer's responsibility as a contractor.

(c) The prospective bidder or proposer has been convicted under state or federal antitrust statutes.

(d) The prospective bidder or proposer has committed a violation of a contract provision that is regarded by the contracting agency or the Construction Contractors Board to be so serious as to justify disqualification. A violation may include but is not limited to a failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a failure to perform or an unsatisfactory performance caused by acts beyond the control of the contractor may not be considered to be a basis for debarment.

(e) The prospective bidder or proposer does not carry workers' compensation or unemployment insurance as required by statute.

(3) A contracting agency shall issue a written decision to debar a prospective bidder or proposer under this section. The decision must:

(a) State the reasons for the action taken; and

(b) Inform the debarred prospective bidder or proposer of the appeal rights of the prospective bidder or proposer under ORS 279B.425.

(4) A copy of the decision issued under subsection (3) of this section must be mailed or otherwise furnished immediately to the debarred prospective bidder or proposer.

(5) A prospective bidder or proposer that wishes to appeal debarment shall, within three business days after receipt of notice of debarment, notify the contracting agency that the prospective bidder or proposer appeals the debarment as provided in ORS 279B.425. [2003 c.794 §63; 2007 c.764 §8]

[no rule]

Notice of Intent to Award

279B.135 Notice of intent to award. At least seven days before the award of a public contract, unless the contracting agency determines that seven days is impractical under rules adopted under ORS 279A.065, the contracting agency shall post or provide to each bidder or proposer notice of the contracting agency's intent to award a contract. This section does not apply to a contract awarded as a small procurement under ORS 279B.065, an intermediate procurement under ORS 279B.070, a sole-source procurement under ORS 279B.075, an emergency procurement under ORS 279B.080 or a special procurement under ORS 279B.085. The notice and its manner of posting or issuance must conform to rules adopted under ORS 279A.065. [2003 c.794 §64]

Rule B.135 Notice of Intent to Award

(a) The Port shall post any notice of intent to award pursuant to ORS 279B.135 on its public website, or alternatively, send the notice of award via mail, fax or other electronic means to all solicitation holders of record.

(b) Until the notice of intent to award has been posted, bidders or proposers shall not have the opportunity to protest the award in accordance with ORS 279B.410 and Port Contracting Rule B.400.

(c) The Port may proceed with the contract execution process during the seven day intent to

award period if it is determined that failure to do so may result in a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety.

Price Agreements

279B.140 Price agreements. (1) A price agreement constitutes a firm offer by the contractor regardless of whether any order or purchase has been made or any performance has been tendered under the price agreement. Unless the price agreement otherwise provides, a price agreement is enforceable for the period stated in the price agreement and, notwithstanding ORS 72.2050, obligations thereunder are not revocable by the contractor.

(2) Under a price agreement, no quantity unreasonably disproportionate to any stated estimate or, in the absence of a stated estimate, to any normal or otherwise comparable prior requirements may be demanded unless otherwise expressly provided in the price agreement. However, a contracting agency may amend or terminate a price agreement or an order under a price agreement under any of the following circumstances:

(a) Any failure of the contracting agency to receive funding, appropriations, limitations, allotments or other expenditure authority, including the continuation of program operating authority sufficient, as determined in the discretion of the contracting agency, to sustain purchases at the levels contemplated at the time of contracting; or

(b) Any change in law or program termination that makes purchases under the price agreement no longer authorized or appropriate for the contracting agency's use.

(3) A price agreement does not constitute an exclusive dealing commitment on the part of the contracting agency or the contractor unless the price agreement expressly so provides. [2003 c.794 §68]

[no rule]

Determinations

279B.145 Finality of determinations. The determinations under ORS 279B.030, 279B.033, 279B.036, 279B.055 (3) and (7), 279B.060 (4) and (14), 279B.075, 279B.080, 279B.085 and 279B.110 are final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law. [2003 c.794 §71; 2009 c.880 §8]

[no rule]

Specifications

General Provisions

279B.200 Definitions for ORS 279B.200 to 279B.240. As used in ORS 279B.200 to 279B.240:

(1) "Brand name or equal specification" means a specification that uses one or more manufacturers' names, makes, catalog numbers or similar identifying characteristics to describe

the standard of quality, performance, functionality or other characteristics needed to meet the contracting agency's requirements and that authorizes bidders or proposers to offer goods or services that are equivalent or superior to those named or described in the specification.

(2) "Brand name specification" means a specification limited to one or more products, brand names, makes, manufacturer's names, catalog numbers or similar identifying characteristics.

(3) "Specification" means any description of the physical or functional characteristics of, or of the nature of, goods or services to be procured by a contracting agency. "Specification" may include a description of any requirement for inspecting, testing or preparing goods or services for delivery. When a solicitation required or authorized by ORS 279B.050 (4) or (5) to be conducted under ORS 279B.055 or 279B.060 calls in whole or in part for the performance of personal services as designated under ORS 279A.055, "specification" also includes any description of the characteristics or nature of the personal services. [2003 c.794 §72; 2007 c.764 §9]

[no rule]

279B.205 Specifications to encourage reasonable competition. Consistent with ORS 279A.015, specifications must seek to promote optimal value and suitability for the purposes intended and to reasonably encourage competition in satisfying a contracting agency's needs. Subject to ORS 279B.405, the specification content must be determined in the sole discretion of the contracting agency. [2003 c.794 §74]

[no rule]

279B.210 Policy; development of specifications. It is the policy of the State of Oregon to encourage the development of clear, precise and accurate specifications in solicitations for public contracts. To that end, in developing specifications, contracting agencies may consult, under contract or otherwise, with technical experts, suppliers, prospective contractors and representatives of the industries with which the contracting agencies contract. However, a contracting agency shall take reasonable measures to ensure that no person who prepares or assists in the preparation of solicitation documents, specifications, plans or scopes of work, and no business with which the person is associated, realizes a material competitive advantage in a procurement that arises from the agency's use of the solicitation documents, specifications, plans or scopes of work. The policy against the realization of a material competitive advantage from the character of the specifications developed in conjunction with persons outside the contracting agency does not proscribe advantages that result incidentally from a contracting agency's specification of the characteristics of a product or work to meet the contracting agency's needs. [2003 c.794 §75]

[no rule]

279B.215 Brand name or equal specification; brand name specification. (1)(a) A brand name or equal specification may be used when the use of a brand name or equal specification is advantageous to the contracting agency, because the brand name describes the standard of quality, performance, functionality and other characteristics of the product needed by the contracting agency.

(b) The contracting agency is entitled to determine what constitutes a product that is equal or superior to the product specified, and any such determination is final.

(c) Nothing in this subsection may be construed as prohibiting a contracting agency from specifying one or more comparable products as examples of the quality, performance, functionality or other characteristics of the product needed by the contracting agency.

(2) A brand name specification may be prepared and used only if the contracting agency determines for a solicitation or a class of solicitations that only the identified brand name specification will meet the needs of the contracting agency based on one or more of the following written determinations:

(a) That use of a brand name specification is unlikely to encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts;

(b) That use of a brand name specification would result in substantial cost savings to the contracting agency;

(c) That there is only one manufacturer or seller of the product of the quality, performance or functionality required; or

(d) That efficient utilization of existing goods requires the acquisition of compatible goods or services.

(3) A contracting agency's use of a brand name specification may be subject to review only as provided in ORS 279B.405. [2003 c.794 §76; 2005 c.103 §8e]

Rule B.215 Specification of Particular Products

(a) Generally

The Port may expressly or implicitly require a particular product by brand name, trade name, manufacturer, or seller as an abbreviated means of specifying the Port's needs, in which case offerors may substitute equivalent products. The invitation to bid or request for proposals may require substitutions to be approved by the Port prior to the submission of offers; otherwise substitutions are allowed after contract award, if they are approved by the Port. The Port shall approve a substitution if the substitute product has all of the salient features of the expressly or implicitly required product. This provision does not apply to products or classes of products that are exempt under ORS 279.B.215(2).

(b) Brand Name Exemptions

The Port may expressly or implicitly require a particular product by brand name, trade name, manufacturer or seller and disallow any substitution of named product when a determination has been made by the Manager of Contracts and Procurement that doing so meets the requirements of ORS 279.B.215(2). Brand Name Exemptions shall be effective only for the period of time designated by the Manager of Contracts and Procurement, whereupon a new determination of applicability of this rule must be made. Determinations of exemptions under ORS 279.215(2) shall be available for public inspection upon request.

279B.220 Conditions concerning payment, contributions, liens, withholding. Every public contract shall contain a condition that the contractor shall:

(1) Make payment promptly, as due, to all persons supplying to the contractor labor or material for the performance of the work provided for in the contract.

(2) Pay all contributions or amounts due the Industrial Accident Fund from the contractor or

subcontractor incurred in the performance of the contract.

(3) Not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished.

(4) Pay to the Department of Revenue all sums withheld from employees under ORS 316.167. [2003 c.794 §76a]

[no rule]

279B.225 Condition concerning salvaging, recycling, composting or mulching yard waste material. Every public contract for lawn and landscape maintenance shall contain a condition requiring the contractor to salvage, recycle, compost or mulch yard waste material at an approved site, if feasible and cost-effective. [2003 c.794 §76b]

[no rule]

279B.230 Condition concerning payment for medical care and providing workers' compensation. (1) Every public contract shall contain a condition that the contractor shall promptly, as due, make payment to any person, copartnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the contractor, of all sums that the contractor agrees to pay for the services and all moneys and sums that the contractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services.

(2) Every public contract shall contain a clause or condition that all subject employers working under the contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126. [2003 c.794 §76c]

[no rule]

279B.235 Condition concerning hours of labor. (1) Except as provided in subsections (3) to (6) of this section, every public contract subject to this chapter must contain a condition that a person may not be employed for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency or when the public policy absolutely requires it, and in such cases, except in cases of contracts for personal services designated under ORS 279A.055, the employee shall be paid at least time and a half pay:

(a)(A) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or

(B) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and

(b) For all work performed on Saturday and on any legal holiday specified in ORS 279B.020.

(2) An employer must give notice in writing to employees who work on a public contract, either at the time of hire or before commencement of work on the contract, or by posting a notice

in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

(3) In the case of contracts for personal services as described in ORS 279A.055, the contract shall contain a provision that the employee shall be paid at least time and a half for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(4) In the case of a contract for services at a county fair or for other events authorized by a county fair board, the contract must contain a provision that employees must be paid at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week. An employer shall give notice in writing to employees who work on such a contract, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that employees may be required to work.

(5)(a) Except as provided in subsection (4) of this section, contracts for services must contain a provision that requires that persons employed under the contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in ORS 279B.020 (1)(b)(B) to (G) and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) An employer shall give notice in writing to employees who work on a contract for services, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

(6) This section does not apply to public contracts:

(a) With financial institutions as defined in ORS 706.008.

(b) Made pursuant to the authority of the State Forester or the State Board of Forestry under ORS 477.406 for labor performed in the prevention or suppression of fire.

(c) For goods or personal property. [2003 c.794 §77; 2005 c.103 §8f]

[no rule]

279B.240 Exclusion of recycled oils prohibited. Every contracting agency shall revise its procedures and specifications for the procurement of lubricating oil and industrial oil to eliminate any exclusion of recycled oils and any requirement that oils be manufactured from virgin materials. [2003 c.794 §78]

[no rule]

Specifications in State Contracts

* * *

Legal Remedies

279B.400 Protests and judicial review of approvals of special procurements. (1) Before

seeking judicial review of the approval of a special procurement, a person must file a protest, in accordance with the rules adopted under ORS 279A.065, with the Director of the Oregon Department of Administrative Services or the local contracting agency, as applicable, and exhaust all available nonjudicial remedies. The rules adopted under ORS 279A.065 shall provide a reasonable time and manner for affected persons to protest a contracting agency's request for the approval of a special procurement under ORS 279B.085.

(2) The approval of a class special procurement by the director under ORS 279B.085 constitutes rulemaking and not a contested case under ORS chapter 183. Any affected person, except the state contracting agency that requested the approval or anyone representing the state contracting agency, may petition the Court of Appeals in the manner provided in ORS 183.400 to test the validity of a class special procurement approved by the director. A proceeding under ORS 183.400 does not affect the validity of a contract executed pursuant to a class special procurement before the petition is filed. Notwithstanding ORS 183.400 (1), before seeking judicial review under this subsection, a person must file a protest with the director as described in subsection (1) of this section.

(3)(a) The approval of a contract-specific special procurement by the director is reviewable under ORS 183.484, but only if judicial review is sought before the contract is awarded. Otherwise, a contract awarded pursuant to the contract-specific special procurement is conclusively presumed valid and may not, in any future judicial or administrative proceeding, be challenged on the ground that the contract was awarded under an invalid special procurement.

(b) Judicial review may be sought from the Circuit Court for Marion County or the circuit court for the county in which the principal offices of the state contracting agency that requested the approval are located. The circuit court shall give priority on its docket and expedited review to proceedings under this subsection.

(4)(a) The approval of a special procurement by a local contract review board may be challenged by filing a writ of review under ORS chapter 34, provided that all available nonjudicial remedies first have been exhausted, including protests as described in subsection (1) of this section. Notwithstanding the 60-day filing period prescribed by ORS 34.030, the approval of a special procurement is not subject to a writ of review proceeding more than 10 days after the board approves the use of the special procurement.

(b) The writ of review may be filed with and is reviewable by the circuit court for the county in which the principal offices of the local contracting agency that requested the approval are located. The circuit court shall give priority on its docket and expedited review to proceedings under this subsection.

(5) If timely judicial review is sought regarding the approval of a special procurement under ORS 279B.085, the contracting agency may not proceed with contract execution unless the contracting agency determines that there is a compelling governmental interest in proceeding or that the goods or services are urgently needed. If the contracting agency makes such a determination, the contracting agency shall set forth the reasons for the determination in writing and immediately provide them to the person who filed the challenge. Thereafter, after joining the prospective contractor as a party to the litigation and upon motion by the person filing the challenge, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination of the existence of a compelling governmental interest in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a

manifest abuse of discretion. In granting a stay, the court may require the person seeking the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in contract performance.

(6) In its review, the circuit court shall give due deference to any factual contracting decision made by the contracting agency and may not substitute its judgment for that of the contracting agency, but shall review all questions of law de novo. Thereafter:

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

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

(c) The court may award costs and attorney fees to the prevailing party. [2003 c.794 §83; 2005 c.103 §8g]

Rule B.400 Protests

(a) Applicability

This rule applies to protests of special procurements, protests of solicitations, and protests of contract award.

(b) Written Protest Required

If an offeror or prospective offeror wishes to object to any aspect of a Port procurement, the offeror or prospective offeror ("protester") may file a written protest with the Port's Manager of Contracts and Procurement. The protest must include all grounds for the protest, and all supporting evidence, in the form of physical evidence, documents, or affidavits.

(c) Timeliness

A protest must be filed promptly as soon as the protester knows of the grounds for the protest. If the grounds for a protest were apparent on the face of the solicitation document, the Port may decline to consider a protest filed later than five business days before the date by which bids or proposals must be submitted. If the grounds for a protest were not apparent until contract award, the Port may decline to consider a protest filed later than five business days after the protester knew or should have known of the Port's intent to award the contract.

(d) Written Decision

The Port's Manager of Contracts and Procurement shall issue a written decision in response to a protest.

(e) Discretionary Meeting

The Manager of Contracts and Procurement may, but is not required to, schedule a meeting with the protester prior to issuing a written decision. The Manager of Contracts and Procurement may invite other Port staff to the meeting, and, in the case of a procurement involving a Port evaluation team, may invite one or more members of the evaluation team to the meeting.

(f) Appeal and Final Administrative Action

If the protester disagrees with the written decision issued by the Port's Manager of Contracts and Procurement, the protester may appeal in writing to the Port's Executive Director. The written appeal must be received by the Executive Director's office within five business days after the protester's receipt of the written decision by the Port's Manager of Contracts and Procurement. The Executive Director may decline to consider a late appeal. The written appeal must include all legal arguments and all evidence, in the form of physical evidence, documents, or affidavits. The Executive Director shall issue a written decision in response to the appeal, and that written decision shall be the Port's final administrative action with respect to the protest. The Executive Director's written decision shall be the Port's final action with respect to the protest.

(g) Port not required to delay process during protest

Subject to ORS 279B.405(9) and ORS 279B.415(4), the Port may proceed with the procurement after denial of protest or denial of appeal, including without limitation, award and execution of the contract.

279B.405 Protests and judicial review of solicitations. (1) As used in this section:

(a) "Brand name" means a brand name specification as defined in ORS 279B.200.

(b) "Legally flawed" means that a solicitation document contains terms or conditions that are contrary to law.

(c) "Unnecessarily restrictive" means that specifications limit competition arbitrarily, without reasonably promoting the fulfillment of the procurement needs of a contracting agency.

(2) A prospective bidder, proposer or offeror for a public contract solicited under ORS 279B.055, 279B.060 or 279B.085 may file a protest with the contracting agency if the prospective bidder, proposer or offeror believes that the procurement process is contrary to law or that a solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand name. If a prospective bidder, proposer or offeror fails to timely file such a protest, the prospective bidder, proposer or offeror may not challenge the contract on grounds under this subsection in any future legal or administrative proceeding.

(3) The contracting agency, pursuant to rules adopted under ORS 279A.065, shall notify prospective bidders, proposers or offerors of the time and manner in which a protest under this section may be filed and considered. Before seeking judicial review, a prospective bidder, proposer or offeror must file a protest with the contracting agency and exhaust all available administrative remedies.

(4) The contracting agency shall consider the protest if the protest is timely filed and contains the following:

(a) Sufficient information to identify the solicitation that is the subject of the protest;

(b) The grounds that demonstrate how the procurement process is contrary to law or how the solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand name;

(c) Evidence or supporting documentation that supports the grounds on which the protest is based; and

(d) The relief sought.

(5) If the protest meets the requirements of subsection (4) of this section, the contracting agency shall consider the protest and issue a decision in writing. Otherwise, the contracting agency shall promptly notify the prospective bidder, proposer or offeror that the protest is untimely or that the protest failed to meet the requirements of subsection (4) of this section and give the reasons for the failure.

(6) The contracting agency shall issue a decision on the protest in accordance with rules adopted under ORS 279A.065 no fewer than three business days before bids, proposals or offers are due, unless a written determination is made by the agency that circumstances exist that justify a shorter time limit.

(7) A decision of a contracting agency on a protest under this section, including a protest of a special procurement, is subject to judicial review only if the action or writ of review is filed before the opening of bids, proposals or offers.

(8)(a) A decision of a state contracting agency on a protest under this section is reviewable by the Circuit Court for Marion County or the circuit court for the county in which the principal offices of the state contracting agency are located.

(b) A decision of a local contracting agency on a protest under this section is reviewable by the circuit court for the county in which the principal offices of the local contracting agency are located.

(9) If judicial review of a contracting agency's decision on a protest under this section is sought, the contracting agency may not proceed with contract execution unless the contracting agency determines that there is a compelling governmental interest in proceeding or that the goods and services are urgently needed. If the contracting agency makes such a determination, the contracting agency shall set forth the reasons for the determination in writing and immediately provide them to the prospective bidder, proposer or offeror that filed the protest. Thereafter, after joining the contractor as a party to the litigation and upon motion from the person filing the protest, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination of the existence of a compelling governmental interest in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a manifest abuse of discretion. In granting a stay, the court may require the person seeking the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in contract performance.

(10) In its review, the court shall give due deference to any factual decision made by the contracting agency and may not substitute its judgment for that of the contracting agency, but shall review all questions of law de novo. Thereafter:

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

(b) In addition to the relief provided for in paragraph (a) of this subsection, if a contract has been executed, the court shall include in its order a determination whether the party that signed the contract with the contracting agency is entitled to reimbursement under the conditions of, and

calculated in the same manner as provided in, ORS 279C.470. Notwithstanding that ORS 279C.470 otherwise applies only to public improvement contracts, under this paragraph the court shall apply ORS 279C.470 to both public improvement contracts and other public contracts of contracting agencies.

(c) The court may award costs and attorney fees to the prevailing party. [2003 c.794 §84; 2007 c.764 §11]

[no rule]

Note: Refer to rule B.400 for the Port's rules for protest of solicitations.

279B.410 Protests of contract award. (1) A bidder or proposer may protest the award of a public contract or a notice of intent to award a public contract, whichever occurs first, if:

(a) The bidder or proposer is adversely affected because the bidder or proposer would be eligible to be awarded the public contract in the event that the protest were successful; and

(b) The reason for the protest is that:

(A) All lower bids or higher ranked proposals are nonresponsive;

(B) The contracting agency has failed to conduct the evaluation of proposals in accordance with the criteria or processes described in the solicitation materials;

(C) The contracting agency has abused its discretion in rejecting the protestor's bid or proposal as nonresponsive; or

(D) The contracting agency's evaluation of bids or proposals or the contracting agency's subsequent determination of award is otherwise in violation of this chapter or ORS chapter 279A.

(2) The bidder or proposer shall submit the protest to the contracting agency in writing and shall specify the grounds for the protest to be considered by the contracting agency.

(3) The rules adopted under ORS 279A.065 shall establish a reasonable time and manner for protests to be submitted. The contracting agency may not consider late protests.

(4) The contracting agency shall consider and respond in writing to a protest in a timely manner. After the contracting agency issues the response, the bidder or proposer may seek judicial review in the manner provided in ORS 279B.415. [2003 c.794 §85]

[no rule]

Note: Refer to rule B.400 for the Port's rules for protests of contract award.

279B.415 Judicial review of protests of contract award. (1) As used in this section, "bidder" includes a person who submits a proposal to a public contracting agency pursuant to a request for proposals.

(2) A decision by a state contracting agency on a protest of a contract award is reviewable by the Circuit Court for Marion County or the circuit court for the county in which the principal offices of the state contracting agency are located. A decision by a local contracting agency on a protest of a contract award is reviewable by the circuit court for the county in which the principal offices of the local contracting agency are located.

(3) To obtain review, a complainant must commence an action before the contract that is the

subject of the protest is approved by the Attorney General, if required by ORS 291.047, and executed by the contracting agency. In the complaint, the complainant shall state the nature of the complainant's interest, the facts showing how the complainant is adversely affected or aggrieved by the contracting agency's decision and the basis upon which the decision should be reversed or remanded. The complainant shall join as parties all bidders that would be in line for an award of the contract ahead of the complainant. If injunctive relief is sought, the court may require the person seeking a stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in execution of the contract.

(4) When judicial review is sought, the contracting agency may not proceed with contract execution unless the contracting agency determines that there is a compelling governmental interest in proceeding or that the goods and services are urgently needed. If the contracting agency makes such a determination, the contracting agency shall set forth the reasons for the determination in writing and immediately provide them to the complainant. Thereafter, upon motion from the complainant, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination of the existence of a compelling governmental interest in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a manifest abuse of discretion. In granting a stay, the court may require the person seeking the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in contract performance.

(5) The court shall review the matter without a jury and shall consider only those grounds the complainant raised in the protest to the contracting agency.

(6) The court shall remand the matter to the contracting agency for a further decision if:

(a) Substantial evidence does not exist to support the contracting agency's decision.

Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding;

(b) The contracting agency's decision was outside the range of discretion delegated to the contracting agency by law;

(c) The decision was inconsistent with a contracting agency rule, an officially stated contracting agency position or an officially stated prior contracting agency practice, if the inconsistency is not explained by the contracting agency; or

(d) The decision was in violation of a constitutional or statutory provision.

(7)(a) In addition to remanding the decision to the contracting agency, the court may order such ancillary relief, such as the cost of bid preparation, as the court finds necessary to redress the effects of official action wrongfully taken or withheld. Ancillary relief does not include the award of a contract to the complainant or the award of lost profits or other damages.

(b) If a contract has not been executed and the court rules in favor of the complainant, the court shall remand the matter to the contracting agency for a determination whether to continue with the procurement process in light of the court's decision.

(c) If a contract has been executed, in addition to the relief provided for in paragraph (a) of this subsection, the court shall include in its order a determination whether the party that signed the contract with the contracting agency is entitled to reimbursement under the conditions of, and calculated in the same manner as provided in, ORS 279C.470. Notwithstanding that ORS 279C.470 otherwise applies only to public improvement contracts, under this paragraph the court shall apply ORS 279C.470 to both public improvement contracts and other public contracts of

contracting agencies.

(d) The court may award costs and attorney fees to the prevailing party. [2003 c.794 §86; 2007 c.764 §12]

[no rule]

279B.420 Judicial review of other violations. (1) If a contracting agency allegedly violates a provision of ORS chapter 279A and a judicial remedy is not otherwise available under ORS chapter 279A, 279B or 279C, the alleged violation is subject to judicial review only as provided in this section.

(2) If a contracting agency allegedly violates a provision of this chapter, except a provision of ORS 279B.030, 279B.033, 279B.036, 279B.270, 279B.275, 279B.280 or 279B.400 to 279B.425, and a judicial remedy is not otherwise provided in this chapter or ORS chapter 279A, the alleged violation is subject to judicial review only as provided in this section.

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

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

(b) The alleged violation of a provision of this chapter or ORS chapter 279A, except a provision of ORS 279B.030, 279B.033 or 279B.036 or 279B.270, 279B.275, 279B.280 and 279B.400 to 279B.425, occurred in the procurement process for the public contract and the alleged violation resulted in or will result in an unlawful award of a contract or an unlawful failure to award the contract;

(c) The alleged violation deprived the person of the award of the contract or deprived the person of the opportunity to compete for the award of the contract;

(d) The person was qualified to receive the award of the contract under ORS 279B.110;

(e) The person gave written notice that described the alleged violation to the contracting agency not later than 10 days after the date on which the alleged violation occurred and, regardless of when the alleged violation occurred, not later than 10 days after the date of execution of the contract;

(f) The person has exhausted all administrative remedies the contracting agency provides; and

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

(B) The alleged violation is a violation of a provision of this chapter, except a provision of ORS 279B.030, 279B.033, 279B.036, 279B.270, 279B.275, 279B.280 or 279B.400 to 279B.425, and no other section of this chapter or ORS chapter 279A provides judicial review.

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

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

(6) If a person gives the notice required under subsection (3)(e) of this section and timely seeks judicial review under this section, the contracting agency may not execute the contract unless the contracting agency determines that a compelling governmental interest exists in proceeding or that the goods and services are urgently needed. A contracting agency that makes

such a determination shall set forth in writing the reasons for the determination and immediately provide the reasons to the person who filed the challenge. Thereafter, after joining the prospective contractor as a party to the litigation and upon motion by the person who filed the challenge, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination that a compelling governmental interest exists in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a manifest abuse of discretion. In granting a stay, the court may require the person who sought the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with a delay in contract performance.

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

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

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

(c) The court may award costs and attorney fees to the prevailing party. [2003 c.794 §86a; 2009 c.880 §8a]

[no rule]

279B.425 Review of prequalification and debarment decisions. (1) The procedure for appeal from the denial, revocation or revision of a prequalification under ORS 279B.125, or from a debarment under ORS 279B.130, shall be in accordance with this section and is not subject to ORS chapter 183 except when specifically provided by this section.

(2) Upon receipt of a notice from a contracting agency of a prequalification decision under ORS 279B.125 or of a decision to debar under ORS 279B.130, a prospective bidder or proposer that wishes to appeal the decision shall, within three business days after receipt of the notice, notify the contracting agency that the prospective bidder or proposer appeals the decision as provided in this section.

(3) Immediately upon receipt of the prospective bidder's or proposer's notice of appeal, the contracting agency shall:

(a) If the contracting agency is a state contracting agency, notify the Director of the Oregon Department of Administrative Services.

(b) If the contracting agency is a local contracting agency, notify the appropriate local contract review board.

(4) Upon the receipt of notice from the contracting agency under subsection (3) of this section, the director or board shall promptly notify the person appealing and the contracting agency of the time and place of the hearing. The director or board shall conduct the hearing and decide the appeal within 30 days after receiving the notice from the contracting agency. The director or board shall set forth in writing the reasons for the hearing decision.

(5) At the hearing the director or board shall consider de novo the notice of denial, revocation or revision of a prequalification or the notice of debarment, the standards of responsibility listed in ORS 279B.110 (2) on which the contracting agency based the denial, revocation or revision of the prequalification or the reasons listed in ORS 279B.130 (2) on which the contracting agency based the debarment, and any evidence provided by the parties. In all other respects, a hearing before the director shall be conducted in the same manner as a contested case under ORS 183.417 (1) to (4) and (7), 183.425, 183.440, 183.450 and 183.452. Hearings before a board shall be conducted under rules of procedure adopted by the board.

(6) The director or board may allocate the director's or board's costs for the hearing between the person appealing and the contracting agency whose prequalification or debarment decision is being appealed. The allocation shall be based upon facts found by the director or board and stated in the final order that, in the director's or board's opinion, warrant such allocation of costs. If the final order does not allocate the costs for the hearing, the costs shall be paid as follows:

(a) If the decision to deny, revoke or revise a prequalification of a person as a bidder or the decision to debar a person is upheld, the costs shall be paid by the person appealing the decision.

(b) If the decision to deny, revoke or revise a prequalification of a person as a bidder or the decision to debar a person is reversed, the costs shall be paid by the contracting agency whose prequalification or debarment decision is the subject of the appeal.

(7) A decision of the director or board may be reviewed only upon a petition, filed within 15 days after the date of the decision, in the circuit court of the county in which the director or board has its principal office. The circuit court shall reverse or modify the decision only if it finds:

(a) The decision was obtained through corruption, fraud or undue means;

(b) There was evident partiality or corruption that operated to the substantial prejudice of the petitioner on the part of the director or board or any of the board's members; or

(c) There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the decision, and the miscalculation or mistake operated to the substantial prejudice of the petitioner.

(8) The procedure provided in this section is the exclusive means of judicial review of the decision of the director or board. The judicial review provisions of ORS 183.480 and writs of review and mandamus as provided in ORS chapter 34, and other legal, declaratory and injunctive remedies, are not available.

(9) The circuit court may stay the letting of the contract that is the subject of the petition in the same manner as a suit in equity. When the court determines that there has been an improper debarment or denial, revocation or revision of a prequalification and the contract has been let, the court may proceed to take evidence to determine the damages, if any, suffered by the petitioner and may award such damages as the court may find as a judgment against the director or board. The court may award costs and attorney fees to the prevailing party. [2003 c.794 §87; 2007 c.288 §12]

[no rule]

Note: Port Contract Review Board Rule 12, Disqualification and Appeal Procedure, sets forth the Port's Rules applicable to ORS 279B.425.

PERSONAL SERVICES

B.500 Personal Services Contracts

(1) Applicability

(a) Pursuant to ORS 279.A.070, the following rules shall constitute the procedures for the screening and selection of persons to perform personal services for the Port.

(b) These rules do not apply, and the requirements of ORS 279C.110 shall apply, when the Port intends to contract for personal services and the following conditions are evident:

(i) The process is being carried out for the selection of architectural, engineering, or land surveying services and related services;

(ii) The Port will receive or has received money 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;

(iii) The total amount of any grants, loans, or moneys from the State Highway Fund or from the state for the project exceeds 35 percent of the value of the project; and

(iv) the value of the project exceeds \$400,000.

(2) Sufficient Quality and Fair and Reasonable Price

Regardless of the selection process used, the individual(s) in charge of selecting a personal services contractor on behalf of the Port shall ensure that the quality of the service offered by the personal services contractor is sufficient for the Port's particular needs under the circumstances, and that the cost to the Port for the services is fair and reasonable under the circumstances.

(3) Personal Services Contracts of \$5,000 or less

A personal services contractor may be selected without soliciting proposals from more than one qualified proposer if the total cost of the personal services contract is estimated to be \$5,000 or less, the quality of service offered by the personal services contractor is sufficient for the Port's particular needs under the circumstances, the cost to the Port is fair and reasonable under the circumstances, the award does not reflect favoritism, and the award is in all other respects in the Port's best interests.

(4) Personal Services Contracts Over \$5,000 But Not Over \$100,000

If the total cost of a personal services contract is estimated to be more than \$5,000 but not more than \$100,000, proposals may be solicited informally, either orally or in writing. If it is practicable, proposals shall be solicited from a sufficient number of qualified prospective proposers to ensure no fewer than two qualified proposers submit proposals. If fewer than two

qualified proposers submit proposals, the efforts made to solicit proposals should be documented in the Port's files.

(5) Personal Services Contracts Over \$100,000

(A) When a nonexempt personal services contract is estimated to exceed \$100,000, written proposals shall be solicited by a written request for proposals and a contract shall be awarded based upon competitive negotiation.

(B) Solicitation of Proposals

(i) Elements

The written request for proposals for a personal services contract shall include at least the following elements:

- (a) A description of the criteria upon which proposals will be evaluated;*
- (b) The contractual terms and conditions required by the Port;*
- (c) A description of the work;*
- (d) The requirements that must be satisfied by written proposals; and*
- (e) A protest procedure.*

(C) Evaluation of Proposals

Written proposals for personal services contracts estimated to exceed \$100,000 shall be evaluated based upon evaluation criteria described in the written request for proposals. The evaluation criteria shall be presumed to have equal importance unless the request for proposals indicates otherwise. The evaluation criteria may be changed only by written addendum to the request for proposal. Except in the case of certain federally assisted architectural and engineering contracts, price may be included as one of the evaluation criteria. The Port may follow the selection procedure established by ORS 279C.110 for contracts for architectural, engineering, or land surveying services if the Port determines that selection procedure would be in the Port's best interest under the circumstances.

(6) Personal Services Contract Exemptions from Competitive Proposal Requirements

(A) Sole Source

If only one firm is qualified and available to perform a personal services contract, a contract may be awarded to that firm without soliciting proposals from others.

(B) Sensitive Contracts

A personal services contract may be awarded without soliciting proposals from others if the contract is of a sensitive nature such that the public interest would be best served if the matter were not disclosed or publicized at the time the contract is being awarded.

(C) Unique or Specialized Knowledge or Expertise

A personal services contract may be awarded without soliciting proposals from others if the contractor has unique or specialized knowledge or expertise required by the Port, and the

Manager of Contracts and Procurement has determined that solicitation of proposals from others would not be in the Port's best interests.

(D) Emergency Contracts

A personal services contract may be awarded without soliciting proposal from others if prompt execution of a contract is necessary to remedy an emergency or in the event of a disaster.

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[no rule]

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279C.800 Definitions for ORS 279C.800 to 279C.870

[no rule]

279C.805 Policy

[no rule]

279C.807 Workforce diversity for public works projects

[no rule]

279C.808 Rules

[no rule]

279C.810 Exemptions; rules

[no rule]

279C.815 Determination of prevailing wage; sources of information; comparison of state and federal prevailing wage; other powers of commissioner

[no rule]

279C.817 Determination of applicability of prevailing wage rate; time limitation; hearing; rules

Port Rule C.817 Request for Determination

279C.820 Advisory committee to assist commissioner

[no rule]

- 279C.825 Fees; rules
[no rule]
- 279C.827 Division of public works project; applicability of prevailing wage rate to divided projects
[no rule]
- 279C.829 Agreement with other state to pay less than prevailing rate of wage
[no rule]
- 279C.830 Provisions concerning prevailing rate of wage in specifications, contracts and subcontracts; applicability of prevailing wage; fee; bond
[no rule]
- 279C.835 Notifying commissioner of public works contract
[no rule]
- 279C.836 Public works bond; rules
[no rule]
- 279C.838 Applicability of state and federal rates of wage; determination of site of project; determination of applicability of wage to transportation workers; waiver
[no rule]
- 279C.840 Payment of prevailing rate of wage; posting of rates and fringe benefit plan provisions
[no rule]
- 279C.845 Certified statements regarding payment of prevailing rates of wage; retainage
[no rule]
- 279C.850 Inspection to determine whether prevailing rate of wage being paid; civil action for failure to pay prevailing rate of wage or overtime
[no rule]
- 279C.855 Liability for violations
[no rule]

279C.860 Ineligibility for public works contracts for failure to pay or post notice of prevailing rates of wage; certified payroll reports to commissioner

[no rule]

279C.865 Civil penalties

[no rule]

279C.870 Civil action to enforce payment of prevailing rates of wage

[no rule]

Relevant Statutes with Rules

General Provisions

279C.005 Definitions. ORS 279A.010 (1) contains general definitions applicable throughout this chapter.

[no rule]

279C.010 Applicability. As provided in ORS 279A.020 Except as provided in ORS 279C.320, public contracting under this chapter is subject to ORS chapter 279A, but not ORS chapter 279B. [2003 c.794 §88a; 2005 c.103 §9]

Rule C.010 Application

These Division C rules implement ORS chapter 279C, Public Contracting – Public Improvements, and apply to the procurement of public works and public improvement contracts.

Architectural, Engineering, Land Surveying and Related Services

279C.100 Definitions for ORS 279C.100 to 279C.125. 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 and land surveying services” means professional services that are required to be performed by an architect, engineer 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 as personal services. “Personal services” includes architectural, engineering 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. [2003 c.794 §89; 2005 c.103 §10; 2005 c.445 §12]

[no rule]

279C.105 Contracts for architectural, engineering, land surveying and related services; procedures. (1) Except as provided in ORS 279A.140, contracting agencies may enter into contracts for architectural, engineering and land surveying services and related services. *** 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 state contracting agencies, or any applicable city or county charter provisions. Each contracting agency authorized to enter into contracts for architectural, engineering and land surveying services and related services shall adopt procedures for the screening and selection of persons to perform those 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 designate certain personal services contracts or classes of personal services contracts as contracts for architectural, engineering and land surveying services or related services. [2003 c.794 §90; 2005 c.103 §11]

[no rule]

279C.107 Public disclosure of contents of proposals for architectural, engineering or land surveying services; treatment of trade secrets and confidential information. (1) Notwithstanding the public records law, ORS 192.410 to 192.505, if a contracting agency solicits a contract for architectural, engineering or land surveying services or related services by a competitive proposal:

(a) Proposals may be opened so as to avoid disclosure of contents to competing proposers during, when applicable, the process of negotiation.

(b) Proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued.

(2) Notwithstanding any requirement to make proposals open to public inspection after the contracting agency's issuance of notice of intent to award a contract, a contracting agency may withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a proposal. The fact that proposals are opened at a public meeting as defined in ORS 192.610 does not make their contents 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. If a request for proposals is canceled after proposals are received, 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. [2007 c.764 §41]

[no rule]

279C.110 Selection procedure for architects, engineers and land surveyors; compensation; applicability. (1) A state contracting agency shall select consultants to provide architectural,

engineering or land surveying services on the basis of qualifications for the type of professional service required. A state contracting agency may solicit or use pricing policies and proposals or other pricing information to determine consultant compensation only after the agency has selected a candidate pursuant to subsection (3) 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:

(a) Specialized experience, capabilities and technical competence that may be demonstrated by the proposed approach and methodology to meet the project requirements;

(b) Resources available to perform the work and the proportion of the candidate staff's time that would be spent on the project, including any 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 under subsection (3) of this section result in the determination by the contracting agency that two or more candidates are equally qualified, the contracting agency may select a candidate through any process adopted by the contracting agency.

(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 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 the architectural, engineering and land surveying services contracts and related services contracts to be performed throughout the state, the locations of the selected consultants and the direct expenses on each contract. This record shall include the total number of contracts over a 10-year period for each consultant firm. The record of direct expenses shall 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.

[2003 c.794 §91; 2005 c.509 §1]

[no rule]

Note: The Port awards Personal Services Contracts for architectural, engineering and land surveying services under Port Contracting Rule B.500.

279C.115 Direct contracts for services of architects, engineers and land surveyors. (1)

As used in this section, “consultant” means an architect, engineer or land surveyor.

(2) A local contracting agency may enter into an architectural, engineering or land surveying services contract 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 project.

(3) A local contracting agency may adopt criteria for determining when this section applies to an architectural, engineering or land surveying services contract. [2003 c.794 §94]

[no rule]

279C.120 Selection procedure for related services. (1) A contracting agency may select consultants to perform related services:

- (a) In accordance with screening and selection procedures adopted under ORS 279C.105;
- (b) On the basis of the qualifications of the consultants for the types of related services required, under the requirements of ORS 279C.110; or
- (c) On the basis of price competition, price and performance evaluations, an evaluation of the capabilities of bidders to perform the needed related services or an evaluation of the capabilities of the bidders to perform the needed related services followed by negotiations between the parties on the price for those related services.

(2) Subject to the requirements of subsection (1) of this section, the procedures that a contracting agency adopts for the screening and selection of consultants and the selection of a candidate under this section is 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. [2003 c.794 §95]

[no rule]

279C.125 Architectural, engineering and land surveying services selection process for local government public improvements procured through state agency; rules.

(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 or land surveyors. [2003 c.794 §96]

[no rule]

Procurement of Construction Services

General Policies

279C.300 Policy on competition. It is the policy of the State of Oregon that public improvement contracts awarded under this chapter must be based on competitive bidding, except as otherwise specifically provided in ORS 279C.335 for exceptions and formal exemptions from competitive bidding requirements. [2003 c.794 §97]

[no rule]

279C.305 Least-cost policy for public improvements; costs estimates in budget process; use of agency forces; record of costs. (1) It is the policy of the State of Oregon that contracting agencies shall make every effort to construct public improvements at the least cost to the contracting agency.

(2) Not less than 30 days prior to adoption of the contracting agency's budget for the subsequent budget period, each contracting agency shall prepare and file with the Commissioner of the Bureau of Labor and Industries a list of every public improvement known to the contracting agency that the contracting agency plans to fund in the budget period, identifying each improvement by name and estimating the total on-site construction costs. The list shall also contain a statement as to whether the contracting agency intends to perform the construction through a private contractor. If the contracting agency intends to perform construction work using the contracting agency's own equipment and personnel on a project estimated to cost more than \$125,000, the contracting agency shall also show that the contracting agency's decision conforms to the policy stated in subsection (1) of this section. The list is a public record and may be revised periodically by the agency.

(3) Before a contracting agency constructs a public improvement with its own equipment or

personnel:

(a) If the estimated cost exceeds \$125,000, the contracting agency shall prepare adequate plans and specifications and the estimated unit cost of each classification of work. The estimated cost of the work must include a reasonable allowance for the cost, including investment cost, of any equipment used. As used in this paragraph, “adequate” means sufficient to control the performance of the work and to ensure satisfactory quality of construction by the contracting agency personnel.

(b) The contracting agency shall cause to be kept and preserved a full, true and accurate account of the costs of performing the work, including all engineering and administrative expenses and the cost, including investment costs, of any equipment used. The final account of the costs is a public record.

(4) Subsections (2) and (3) of this section do not apply to a contracting agency when the public improvement is to be used for the distribution or transmission of electric power.

(5) For purposes of this section, resurfacing of highways, roads or streets at a depth of two or more inches and at an estimated cost that exceeds \$125,000 is a public improvement. [2003 c.794 §98]

[no rule]

279C.307 Limitations in procurement of personal services; exception. (1) Except as provided in subsection (2) of this section, a contracting agency that procures personal services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a public contract that is subject to this chapter may not:

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

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

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

(3) As used in this section, “affiliate” means a person that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the contractor described in subsection (1)(a) of this section. [2009 c.880 §11]

Note: 279C.307 was added to and made a part of ORS chapter 279C by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

[no rule]

279C.310 Limitation on contracting agency constructing public improvement. If a contracting agency fails to adopt and apply a cost accounting system that substantially complies with the model cost accounting guidelines developed by the Oregon Department of Administrative Services pursuant to section 3, chapter 869, Oregon Laws 1979, as determined by an accountant qualified to perform audits required by ORS 297.210 and 297.405 to 297.555

(Municipal Audit Law), the contracting agency may not construct a public improvement with the contracting agency's own equipment or personnel if the cost exceeds \$5,000. [2003 c.794 §99]

[no rule]

279C.315 Waiver of damages for unreasonable delay by contracting agency against public policy. (1) Any clause in a public improvement contract that purports to waive, release or extinguish the rights of a contractor to damages or an equitable adjustment arising out of unreasonable delay in performing the contract, if the delay is caused by acts or omissions of the contracting agency or persons acting therefor, is against public policy and is void and unenforceable.

(2) Subsection (1) of this section is not intended to render void any contract provision that:

- (a) Requires notice of any delay;
- (b) Provides for arbitration or other procedures for settlement of contract disputes; or
- (c) Provides for reasonable liquidated damages. [2003 c.794 §100]

[no rule]

279C.320 Contracts for construction other than public improvements. (1) Contracting agencies shall enter into contracts for emergency work, minor alteration, ordinary repair or maintenance of public improvements, as well as any other construction contract that is not defined as a public improvement under ORS 279A.010, in accordance with the provisions of ORS chapter 279B. Contracts for emergency work are regulated under ORS 279B.080.

(2) Nothing in this section relieves contracting agencies or contractors of any other relevant requirements under this chapter, including payment of prevailing wage rates when applicable.

(3) When construction services are not considered to be a public improvement under this chapter because no funds of a public agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection, the benefiting public body may nonetheless condition acceptance of the services on receipt of such protections as the public body considers to be in the public interest, including a performance bond, a payment bond and appropriate insurance. [2003 c.794 §101; 2007 c.764 §13]

Rule C.320 Emergency Procurements

Emergency contracts for construction services are not public improvement contracts and are regulated under ORS 279B.080 and Port Rule B.080.

279C.325 Limitation on contracting agency awarding contract to nonresident education service district. A contracting agency may not award a public improvement contract, a contract for a public works, as defined in ORS 279C.800, or a contract for personal services, as defined in ORS 279C.100, to a nonresident bidder, as defined in ORS 279A.120, that is an education service district. [2005 c.413 §2]

[no rule]

Competitive Bidding; Contract Specifications; Exceptions; Exemptions

279C.330 “Findings” defined. As used in ORS 279C.335, 279C.345 and 279C.350, “findings” means the justification for a contracting agency conclusion that includes, but is not limited to, information regarding:

- (1) Operational, budget and financial data;
- (2) Public benefits;
- (3) Value engineering;
- (4) Specialized expertise required;
- (5) Public safety;
- (6) Market conditions;
- (7) Technical complexity; and
- (8) Funding sources. [2003 c.794 §102]

[no rule]

279C.335 Competitive bidding; exceptions; exemptions. (1) All public improvement contracts shall be based upon competitive bids except:

- (a) Contracts made with qualified nonprofit agencies providing employment opportunities for individuals with disabilities under ORS 279.835 to 279.855.
- (b) A public improvement contract exempt under subsection (2) of this section.
- (c) A public improvement contract with a value of less than \$5,000.
- (d) A contract not to exceed \$100,000 made under procedures for competitive quotes in ORS 279C.412 and 279C.414.
- (e) Contracts for repair, maintenance, improvement or protection of property obtained by the Department of Veterans’ Affairs under ORS 407.135 and 407.145 (1).
- (f) Energy savings performance contracts entered into in accordance with rules of procedure adopted under ORS 279A.065.

(2) Subject to subsection (4)(b) of this section, the Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation may exempt a public improvement contract or a class of public improvement contracts from the competitive bidding requirements of subsection (1) of this section upon approval of the following findings submitted by the contracting agency or, if a state agency is not the contracting agency, the state agency seeking the exemption:

- (a) It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts.
- (b) The awarding of public improvement contracts under the exemption will likely result in substantial cost savings to the contracting agency, to the state agency based upon the justification and information described in ORS 279C.330 or, if the contracts are for public improvements described in ORS 279A.050 (3)(b), to the contracting agency or the public. In making the finding, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board may consider the type, cost and amount of the contract, the number of persons available to bid and such other factors as may be deemed appropriate.

- (c) As an alternative to the finding described in paragraph (b) of this subsection, when a

contracting agency or state agency seeks an exemption that would allow the use of an alternate contracting method that the agency has not previously used, the agency may make a finding that identifies the project as a pilot project for which the agency intends to determine whether the use of the alternate contracting method actually results in substantial cost savings to the contracting agency, to the state agency or, if the contract is for a public improvement described in ORS 279A.050 (3)(b), to the contracting agency or the public. The agency shall include an analysis and conclusion regarding actual cost savings, if any, in the evaluation required under ORS 279C.355.

(3) In making findings to support an exemption for a class of public improvement contracts, the contracting agency or state agency shall clearly identify the class using the class's defining characteristics. Those characteristics shall include some 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 appropriate, direct the use of alternate 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.

(5)(a) Before final adoption of the findings required by subsection (2) of this section exempting 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 be published in at least one trade newspaper of general statewide circulation a minimum of 14 days before the hearing.

(c) The notice shall 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 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 act promptly due to 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 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 the findings and granting the exception. The findings may describe anticipated features of the resulting public improvement contract, but the final parameters of the contract are those characteristics or specifics announced in the solicitation document.

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

(8) Public improvement contracts excepted from competitive bid requirements under subsection (1)(a), (c), (d), (e) or (f) of this section are not subject to the exemption requirements of subsection (2) of this section. [2003 c.794 §103; 2003 c.794 §§104,105a; 2005 c.103 §§12,13,14; 2005 c.625 §§58,59,60; 2007 c.70 §§69,70,71; 2007 c.764 §§14,15,17]

[no rule]

Rule C.335 Contracts for Energy Savings Performance Projects

Pursuant to ORS 279C.335 (1) (f), the Port may enter into energy savings performance contracts without following the competitive bidding requirements of ORS 279C. “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. The Port may award an energy savings performance contract through a method of contracting determined by the Manager of Contracts & Procurement, after an analysis of the proposed project and the likelihood of obtaining competitive proposals, to be most advantageous to the Port. The method of award may include without limitation a competitive proposal process, a competitive negotiation process, or direct negotiation with a qualified energy service company, provided that direct negotiation will not be used if there are two or more qualified energy service companies ready and willing to timely provide the particular goods and services required by the Port at a reasonable price. If the proposed energy savings performance project is a design-build project of which less than 50 percent of the project cost is estimated to be for a public improvement, the Port may enter into the contract under the rules governing personal service contracts described in Rule 279B.500. Nothing in this rule shall be deemed to preclude the Port from awarding an energy savings performance contract through competitive bidding if the Manager of Contracts & Procurement determines that competitive bidding would be most advantageous to the Port.

279C.340 Contract negotiations. If a public improvement contract is competitively bid and all responsive bids from responsible bidders exceed the contracting agency’s cost estimate, the contracting agency, in accordance with rules adopted by the contracting agency, may negotiate with the lowest responsive, responsible bidder, prior to awarding the contract, in order to solicit value engineering and other options to attempt to bring the contract within the contracting agency’s cost estimate. A negotiation with the lowest responsive, responsible bidder under this

section may not result in the award of the contract to that bidder if the scope of the project is significantly changed from the original bid proposal. Notwithstanding any other provision of law, the records of a bidder used in contract negotiation under this section are not subject to public inspection until after the negotiated contract has been awarded or the negotiation process has been terminated. [2003 c.794 §106]

Rule C.340 Negotiations When All Bids Exceed Estimate

Pursuant to ORS 279C.340, the Port may negotiate with the lowest responsible bidder submitting a responsive bid if all responsive bids from responsible bidders exceed the Port's cost estimate. If a written cost estimate was not prepared prior to bidding, the amount budgeted for the public contract shall be deemed the cost estimate for the purposes of this rule. The Port may negotiate under this rule only if the Port has determined that it would not be in the Port's best interest to cancel the procurement, revise the specifications.

279C.345 Specifications for contracts; exemptions. (1) Specifications for public improvement contracts may not expressly or implicitly require any product by any brand name or mark, nor the product of any particular manufacturer or seller unless the product is exempt under subsection (2) of this section.

(2) The Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation may exempt certain products or classes of products from subsection (1) of this section upon any of the following findings:

- (a) It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts;
- (b) The specification of a product by brand name or mark, or the product of a particular manufacturer or seller, would result in substantial cost savings to the contracting agency;
- (c) There is only one manufacturer or seller of the product of the quality required; or
- (d) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies. [2003 c.794 §107; 2007 c.764 §19]

Rule C.345 Specification of Particular Products

(a) *Generally*

The Port may expressly or implicitly require a particular product by brand name, trade name, manufacturer, or seller as an abbreviated means of specifying the Port's needs, in which case offerors may substitute equivalent products. The invitation to bid or request for proposals may require substitutions to be approved by the Port prior to the submission of offers; otherwise substitutions are allowed after contract award, if they are approved by the Port. The Port shall approve a substitution if the substitute product has all of the salient features of the expressly or implicitly required product. This provision does not apply to products or classes of products that are exempt under ORS 279C.345(2).

(b) Brand Name Exemptions

The Port may expressly or implicitly require a particular product by brand name, trade name, manufacturer or seller and disallow any substitution of named product when a determination has been made by the Manager of Contracts and Procurement that doing so meets the requirements of ORS 279C.345(2). Brand Name Exemptions shall be effective only for the period of time designated by the Manager of Contracts and Procurement, whereupon a new determination of applicability of this rule must be made. Determinations of exemptions under ORS 279C.345(2) shall be available for public inspection upon request.

279C.350 Exemption procedure; appeal.

(3) Any person except the contracting agency or anyone representing the contracting agency may bring an action for writ of review under ORS chapter 34 to test the validity of an exemption granted under ORS 279C.335 or 279C.345 by a local contract review board. [2003 c.794 §108; 2003 c.794 §109; 2007 c.764 §20]

[no rule]

279C.355 Evaluation of public improvement projects not contracted by competitive bidding. (1) Upon completion of and final payment for any public improvement contract, or class of public improvement contracts, in excess of \$100,000 for which the contracting agency did not use the competitive bidding process, the contracting agency shall prepare and deliver to the Director of the Oregon Department of Administrative Services, the local contract review board or, for public improvement contracts described in ORS 279A.050 (3)(b), the Director of Transportation an evaluation of the public improvement contract or the class of public improvement contracts.

(2) The evaluation must include but is not limited to the following matters:

- (a) The actual project cost as compared with original project estimates;
- (b) The amount of any guaranteed maximum price;
- (c) The number of project change orders issued by the contracting agency;
- (d) A narrative description of successes and failures during the design, engineering and construction of the project; and

(e) An objective assessment of the use of the alternative contracting process as compared to the findings required by ORS 279C.335.

(3) The evaluations required by this section:

- (a) Must be made available for public inspection; and
- (b) Must be completed within 30 days of the date the contracting agency accepts:
 - (A) The public improvement project; or
 - (B) The last public improvement project if the project falls within a class of public improvement contracts. [2003 c.794 §111; 2003 c.794 §112; 2007 c.764 §§22,23]

Rule C.355 Evaluation

The evaluation must be completed within 30 days of the date the Port grants “final acceptance” of the public improvement project, as defined in the applicable public improvement contract. The evaluation must be delivered to the Port Commission at the next regularly-scheduled Commission meeting after the evaluation is completed. The evaluation may be included as part of the Executive Director’s Report, or may be delivered to the Commission as otherwise deemed appropriate by the Executive Director.

Solicitation; Contract Award; Rejection

279C.360 Requirement for public improvement advertisements. (1) An advertisement for public improvement contracts must be published at least once in at least one newspaper of general circulation in the area where the contract is to be performed and in as many additional issues and publications as the contracting agency may determine. The Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation, by rule or order, may authorize advertisements for public improvement contracts to be published electronically instead of in a newspaper of general circulation if the director or board determines that electronic advertisements are likely to be cost-effective. If the public improvement contract has an estimated cost in excess of \$125,000, the advertisement must be published in at least one trade newspaper of general statewide circulation. The Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board may, by rule or order, require an advertisement to be published more than once or in one or more additional publications.

(2) All advertisements for public improvement contracts must state:

- (a) The public improvement project;
- (b) The office where the specifications for the project may be reviewed;
- (c) The date that prequalification applications must be filed under ORS 279C.430 and the class or classes of work for which bidders must be prequalified if prequalification is a requirement;
- (d) The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement;
- (e) The name and title of the person designated for receipt of bids;
- (f) The date, time and place that the contracting agency will publicly open the bids; and
- (g) If the contract is for a public works subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 et seq.). [2003 c.794 §114; 2005 c.103 §14a; 2007 c.844 §1]

Rule C.360 Competitive Sealed Bidding*(1) Advertisement*

(a) The Port shall advertise invitations to bid in the Oregonian or the Daily Journal of Commerce, and shall also Post all notices for invitations to bid on the Port’s website. If the Executive Director or the Manager of Contracts and Procurement make a determination that limiting the posting of the notice for invitations to bid solely by electronic means is cost effective

to the Port, and the public improvement contract has an estimated cost of \$125,000 or less, then publishing the notice in a newspaper may be waived.

(b) The notice shall be posted at least 7 days prior to the date the invitations to bid are due, unless the Manager of Contracts and Procurement determines that a shorter time period is necessary and in the Port's best interest.

(2) Distribution of Solicitation Documents

The Port normally distributes solicitation documents by handing them to individuals who appear at the office of the Port's Contracts and Procurement Division or via U.S. Mail. The Port may distribute solicitation documents by any commercially reasonable means, including without limitation fax, other electronic means and express mail, if the Port determines in its sole discretion that other means are appropriate under the circumstances. The Port may, but is not obligated to, deliver a solicitation document by other more costly means if a particular prospective offeror pays the additional cost.

(3) Prospective Bidders and Proposers Lists

A prospective bidder or proposer for a particular procurement is responsible for ensuring that its correct name, address, telephone number, and fax number have been effectively and accurately communicated to the Port's Contracts and Procurement Division for inclusion on the list of prospective bidders or proposers for that procurement. The Port's Contracts and Procurement Division endeavors to include on the list for a particular procurement each prospective bidder or proposer to which a solicitation document is issued by the Contracts and Procurement Division. Prospective bidders or proposers who obtain solicitation documents from other sources, such as plan centers, are not automatically added to the list, and must contact the Contracts and Procurement Division to be added. Listed prospective bidders and proposers are responsible for immediately notifying the Port's Contracts and Procurement Division in writing of any changes in name, address, telephone number, or fax number.

(4) Responsibility of Bidders

While the Port endeavors to provide all known solicitation holders with all the available information and documentation necessary to provide a responsive bid, through notice of document availability by mail or electronic means, the Port cannot guarantee that such notice will be delivered to or read by solicitation holders in a timely manner. Bidders are therefore responsible for ensuring they have received all necessary information to provide a responsive bid, including without limitation all bid documents, addenda, plans, attachments, exhibits, etc., prior to submitting a bid.

279C.365 Requirements for solicitation documents and bids and proposals. (1) A contracting agency that prepares solicitation documents for a public improvement contract shall, at a minimum, include in the solicitation documents:

- (a) A designation for or description of the public improvement project;
- (b) The office where the specifications for the project may be reviewed;
- (c) The date that prequalification applications must be filed under ORS 279C.430 and the

class or classes of work for which bidders must be prequalified if prequalification is a requirement;

(d) The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement, and may, in the sole discretion of the contracting agency, direct or permit bidders to submit and the contracting agency to receive bids by electronic means;

(e) The name and title of the person designated to receive bids;

(f) The date on which and the time and place at which the contracting agency will publicly open the bids;

(g) A statement that, if the contract is for a public works project subject to the state prevailing rates of wage under ORS 279C.800 to 279C.870, the federal prevailing rates of wage under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) or both the state and federal prevailing rates of wage, the contracting agency will not receive or consider a bid unless the bid contains a statement by the bidder that the bidder will comply with ORS 279C.838 or 279C.840 or 40 U.S.C. 3141 et seq.;

(h) A statement that each bid must identify whether the bidder is a resident bidder, as defined in ORS 279A.120;

(i) A statement that the contracting agency may reject a bid that does not comply with prescribed public contracting procedures and requirements, including the requirement to demonstrate the bidder's responsibility under ORS 279C.375 (3)(b), and that the contracting agency may reject for good cause all bids after finding that doing so is in the public interest;

(j) Information addressing whether a contractor or subcontractor must be licensed under ORS 468A.720; and

(k) A statement that the contracting agency may not receive or consider a bid for a public improvement contract unless the bidder is licensed by the Construction Contractors Board or the State Landscape Contractors Board.

(2) A contracting agency may provide solicitation documents by electronic means.

(3) A bid made to the contracting agency under ORS 279C.335 or 279C.400 must be:

(a) In writing;

(b) Filed with the person the contracting agency designates to receive bids; and

(c) Opened publicly by the contracting agency immediately after the deadline for submitting bids.

(4) After the contracting agency opens the bids, the contracting agency shall make the bids available for public inspection.

(5) A bidder shall submit or post a surety bond, irrevocable letter of credit issued by an insured institution as defined in ORS 706.008, cashier's check or certified check for all bids as bid security unless the contracting agency has exempted the contract for which the bidder submits a bid from this requirement under ORS 279C.390. The security may not exceed 10 percent of the amount bid for the contract.

(6) Subsection (5) of this section applies only to public improvement contracts with a value, estimated by the contracting agency, of more than \$100,000 or, in the case of contracts for highways, bridges and other transportation projects, more than \$50,000. [2003 c.794 §115; 2005 c.103 §15; 2007 c.764 §25; 2007 c.844 §2; 2009 c.368 §1]

Rule C.365 Competitive Bidding*(1) Prebid and Proposal Conferences**(a) Generally*

The Port may hold a prebid or preproposal conference to allow a site inspection and to hear and respond to questions. If the time and place of a prebid or preproposal conference are not stated in the invitation to bid or request for proposal, all prospective bidders or proposers on the list maintained by the Port's Contracts and Procurement Division shall be notified of the time and place. Notification may be by telephone, fax or other electronic means, or in writing, at the Port's option.

(b) Mandatory

The Port may require attendance at a prebid or preproposal conference as a condition precedent to the submission of a bid or proposal. The Port may refuse to open or may reject as nonresponsive a bid from a bidder who failed to attend a mandatory prebid conference, and may refuse to open or decline to evaluate a proposal from a proposer who failed to attend a mandatory preproposal conference. The Port may, but is not obligated to, arrange for a subsequent prebid or preproposal conference if requested by one or more prospective bidders or proposers who were unable to attend a scheduled, mandatory prebid or preproposal conference for a reason determined by the Port to be commercially reasonable under the circumstances. If a subsequent prebid or preproposal conference is arranged, all prospective bidders or proposers on the Contracts and Procurement Division's list shall be notified in advance and allowed to attend.

(c) Limited Effect

Statements and other information from Port employees at a prebid or preproposal conference do not effect any change in the invitation to bid or the request for proposals, or the contracts that may arise from them. Changes in the invitation to bid or the request for proposals may be effected only by a written addendum issued by the Port. Bidders and proposers may rely only upon the invitation to bids or the request for proposals, with any changes made by addendum, to establish all of the procurement requirements and all contract provisions other than those established by the bid or proposal.

(d) Change Requests

A prospective bidder or proposer who wants to propose a change to the invitation to bid or the request for proposals should submit a written request, even if the change was requested during a prebid or preproposal conference. The request should be submitted in accordance with any instructions in the invitation to bid or the request for proposals. If the Port fails to respond to a change request made during a prebid or preproposal conference, or to a written change request, the request shall be deemed denied. If the Port responds to a change request, the response may be in the form of an addendum issued to all prospective bidders or proposers, with no specific response to the requestor.

*(2) Addenda**(a) Requirement*

A solicitation document may be changed only by a written addendum issued by the Port. When an addendum is required, it shall be issued to all prospective bidders or proposers on the list maintained for the procurement in question by the Port's Contracts and Procurement Division.

(b) Acknowledgment Required

A bidder or proposer must timely acknowledge in writing receipt of all addenda issued by the Port. Failure to acknowledge receipt of an addendum may cause a bid to be rejected as nonresponsive, and may cause a proposal to be considered outside the competitive range or to be determined after evaluation to be inferior to other proposals that included acknowledgment of receipt of the addendum. Acknowledgment of receipt of an addendum most often will be part of the bid or proposal, but may be separate from the bid or proposal, and need not be sealed. The Port shall accept a written acknowledgment of receipt of an addendum by any commercially reasonable means, including but not limited to fax and email. Acknowledgment of receipt of an addendum to an invitation to bid is timely only if it is received in a manner and at a time that would make it timely if it were a bid.

(c) Distribution and Receipt

Addenda may be distributed by U.S. mail, fax or other electronic means, hand delivery, or other commercially reasonable means. Failure to receive an addendum to a solicitation does not excuse failure to acknowledge receipt of the addendum, even if the failure to receive was through no fault of the prospective bidder or proposer, and even if the failure to receive was the fault of the Port. The Port, in its sole discretion, may extend a bid opening to allow a bidder or proposer time to acknowledge receipt of an addendum.

*(3) Method of Submitting Offers**(a) Generally*

Bids must be submitted in writing on the form provided by the Port or a reasonable facsimile. Bids may not be submitted by fax or other electronic means unless expressly directed or permitted by the invitation to bid. A bid shall be considered timely submitted if it is delivered to the Manager of Contracts and Procurement or the Manager's designee by the deadline stated in the invitation to bid.

(b) Timeliness

Offerors are responsible for ensuring their offers are timely. The Port may decline to consider a late offer, even if the offer is late because of a delay in the Port's internal handling of mail or documents or because the Port's receiving equipment was unavailable.

(c) Completeness

Offerors are responsible for ensuring their offers are received by the Port in a complete, legible, ungarbled form. The Port may decline to consider an offer that is incomplete, illegible, or garbled, even if the problem is caused by the Port's hardware or software.

(d) Electronic Submission

Offers submitted electronically must bear a facsimile signature, provided that the requirement for a facsimile signature is excused when an electronic quotation is properly submitted in lieu of an oral quotation, or when the solicitation document expressly authorizes electronic data interchange, e-mail, or another electronic submission method by which facsimile signatures generally cannot be transmitted. A solicitation document expressly authorizing electronic submission of offers may specify methods for establishing the authenticity of offers.

(4) Bid Withdrawal

At any time before the deadline for receipt of bids, a bidder may withdraw its bid without consequence. The withdrawal must be by someone with the necessary authority, and must be a signed writing.

(5) Bid Modification

At any time before the deadline for receipt of bids, a bidder may modify its bid in writing. A bidder shall prepare and submit any modification to its bid to the Port in accordance with Port Contracting Rule B.055(9), unless otherwise specified in the solicitation document. Any modification must include the bidder's statement that the modification amends and supersedes the prior bid. The bidder shall mark the submitted modification as follows:

(a) Bid (or Proposal) Modification; and

(b) Solicitation Number (or Other Identification as specified in the Solicitation Document).

(6) Receipt and Recording of Offers; Confidentiality of Offers

The Port shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The Port shall not open the Offer or modification upon receipt, but shall maintain it as confidential and secure until Opening. If the Port inadvertently opens an Offer or a modification prior to the Opening, the Port shall return the Offer or modification to its secure and confidential state until Opening. The Port shall document the resealing for the Procurement file (e.g. "Port inadvertently opened the Offer due to improper identification of the Offer").

(7) Bid Opening

Bids shall be opened in a place designated by the Port that is open to the public at the time bids are opened. The place bids will be opened may be changed by the Port at any time. The time for opening bids may be postponed at any time for the Port's convenience or if the Port determines that postponement would be in the Port's best interest. A bid opening postponement or relocation shall be communicated orally or by a posted sign to anyone who appears at the previously designated time and place for the bid opening. If time permits, a bid opening postponement or relocation shall be communicated to all prospective bidders on the list maintained by the Port's Contracts and Procurement Division by mail, fax, email, or any other commercially reasonable means. A bid opening postponement or relocation need not be communicated by addendum.

Subject to any exemptions under Oregon public records statutes, bids shall be available for public inspection only after the Port has finished evaluating them.

(8) Bid Evaluation

Opened bids shall be evaluated in accordance with applicable statutes and these Rules. When a bid is determined to be unresponsive to the invitation to bid, it will not be evaluated further. Bidders who submit responsive bids shall be evaluated for responsibility under applicable statutes, these Rules, and the invitation to bid.

*(9) Bid Errors**(a) Errors of Judgment*

A bid may not be corrected or withdrawn for an error in judgment. If a bidder is awarded a public contract and refuses to promptly and properly execute the public contract because of an error in judgment, the bidder's bid security must be forfeited under ORS 279B.055(3)(c).

(b) Minor Informalities

The Port may waive or permit a bidder to correct a minor informality. A minor informality is either a matter of form rather than substance that is evident on the face of the bid, or an insignificant mistake that can be waived without prejudice to other bidders. For example, failure to sign the bid in the designated block on the bid form is a minor informality if a signature appears on the bid bond or somewhere else in the bid evidencing an intent to be bound by the bid.

(c) Clerical Errors

A clerical error is an error in drafting the bid, and may include without limitation typographical errors, arithmetic errors, and transposition and other errors in transferring numbers from work sheets to the bid form. If a clerical error is apparent on the face of the bid and the correction also is apparent on the face of the bid, the Port shall correct the error before evaluating bids. A discrepancy between a unit price and an extended bid item price is a clerical error and shall be corrected by giving precedence to the unit price. If an error not apparent on the face of the bid is brought to the Port's attention, the bidder may submit evidence to establish that the error is a clerical error. If it is clear from the face of the bid or from evidence submitted by the bidder that an error is a clerical error, rather than an error in judgment, but the correction of the error is not apparent on the face of the bid, the bidder may either withdraw its bid without forfeiting its bid security under ORS 279B.055(3)(c), or agree to proceed with the public contract as bid, without correcting the error. If the bidder takes neither of those actions, the Port shall reject the bid as non responsive. A bidder may not correct a clerical error if the correction is not apparent on the face of the bid.

*(10) Irrevocability of Offers**(a) Generally*

All bids received by the Port for a particular public contract become binding offers when the deadline for receipt of bids passes, and remain irrevocable for 30 calendar days after opening unless a different period is specified in the invitation to bid.

(b) Extensions and Reinstatements

An offeror may extend the period of irrevocability of its offer by giving the Port a written extension specifying a new period of irrevocability. An offeror may reinstate an offer

(unchanged) after the expiration of the period of irrevocability by giving the Port a written reinstatement specifying a new period of irrevocability. An offeror may not "extend" or "reinstate" an offer that differs in any material respect from the original; a purported extension or reinstatement of a materially differing offer amounts to a new offer.

(11) Tied Low Bids or Quotations

(a) Generally

If (1) low bids or quotations are tied, (2) the price, fitness, availability, and quality of the goods or services offered by the tied offerors are otherwise equal, and (3) one of the tied offerors offers goods or services manufactured or produced in Oregon, the contract shall be awarded to that offeror in accordance with ORS 279A.120. If two or more of the tied offerors offer goods or services manufactured or produced in Oregon, the contract shall be awarded to one with principal offices or headquarters in Oregon. If two or more of the tied offerors offer goods or services manufactured or produced in Oregon, and none has principal offices or headquarters in Oregon, or if two or more of them have principal offices or headquarters in Oregon, the contract shall be awarded by drawing lots. If none or all of the tied offerors offer goods or services manufactured or produced in Oregon, the contract shall be awarded by drawing lots.

(b) Unequal Quality

If the fitness, availability, and quality of the goods or services offered by tied offerors are not otherwise equal, the contract shall be awarded to the offeror determined by the Port to offer the superior goods or services.

279C.370 First-tier subcontractor disclosure. (1)(a) Within two working hours after the date and time of the deadline when bids are due to a contracting agency for a public improvement contract, a bidder shall submit to the contracting agency a disclosure of the first-tier subcontractors that:

(A) Will be furnishing labor or will be furnishing labor and materials in connection with the public improvement contract; and

(B) Will have a contract value that is equal to or greater than five percent of the total project bid or \$15,000, whichever is greater, or \$350,000 regardless of the percentage of the total project bid.

(b) For each contract to which this subsection applies, the contracting agency shall designate a deadline for submission of bids that has a date on a Tuesday, Wednesday or Thursday and a time between 2 p.m. and 5 p.m., except that this paragraph does not apply to public contracts for maintenance or construction of highways, bridges or other transportation facilities.

(c) This subsection applies only to public improvement contracts with an estimated value, estimated by the contracting agency, of more than \$100,000.

(d) This subsection does not apply to public improvement contracts that have been exempted from competitive bidding requirements under ORS 279C.335 (2).

(2) The disclosure of first-tier subcontractors under subsection (1) of this section must include the name of each subcontractor, the category of work that each subcontractor will perform and the dollar value of each subcontract. The information shall be disclosed in substantially the following form:

FIRST-TIER SUBCONTRACTOR
DISCLOSURE FORM

PROJECT NAME: _____
 BID #: _____
 BID CLOSING: Date: _____ Time: _____

This form must be submitted at the location specified in the Invitation to Bid on the advertised bid closing date and within two working hours after the advertised bid closing time.

List below the name of each subcontractor that will be furnishing labor or will be furnishing labor and materials and that is required to be disclosed, the category of work that the subcontractor will be performing and the dollar value of the subcontract. Enter "NONE" if there are no subcontractors that need to be disclosed. (ATTACH ADDITIONAL SHEETS IF NEEDED.)

NAME	DOLLAR VALUE	CATEGORY OF WORK
1)	\$	
2)	\$	
3)	\$	
4)	\$	

Failure to submit this form by the disclosure deadline will result in a nonresponsive bid. A nonresponsive bid will not be considered for award.

Form submitted by (bidder name): _____
 Contact name: _____
 Phone no.: _____

(3) A contracting agency shall accept the subcontractor disclosure. The contracting agency shall consider the bid of any contractor that does not submit a subcontractor disclosure to the contracting agency to be a nonresponsive bid and may not award the contract to the contractor. A contracting agency is not required to determine the accuracy or the completeness of the subcontractor disclosure.

(4) After the bids are opened, the subcontractor disclosures must be made available for public inspection.

(5) A contractor may substitute a first-tier subcontractor under the provisions of ORS 279C.585.

(6) A subcontractor may file a complaint under ORS 279C.590 based on the disclosure requirements of subsection (1) of this section. [2003 c.794 §116; 2005 c.103 §16]

[no rule]

279C.375 Award and execution of contract; determination of responsibility of bidder; bonds; impermissible exclusions. (1) After a contracting agency has opened bids and determined that the contracting agency will award a public improvement contract, the contracting agency shall award the contract to the lowest responsible bidder.

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

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

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

(b) Determine whether the bidder is responsible. A responsible bidder must demonstrate to the contracting agency that the bidder:

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

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

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

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

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

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

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

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

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

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

RESPONSIBILITY DETERMINATION FORM

Project Name: _____

Bid Number: _____

Business Entity Name: _____

CCB License Number: _____

Form Submitted By (Contracting Agency): _____

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

Title: _____

Date: _____

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

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

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

Determined whether the bidder has met the standards of responsibility. In so doing, the contracting agency has found that the bidder demonstrated that the bidder:

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

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

Is covered by liability insurance and other insurance in amounts required in the solicitation documents.

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

Has disclosed the bidder's first-tier subcontractors in accordance with ORS 279C.370.

Has a satisfactory record of performance.

Has a satisfactory record of integrity.

Is legally qualified to contract with the contracting agency.

Has supplied all necessary information in connection with the inquiry concerning responsibility.

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

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

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

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

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

(4) The successful bidder shall:

(a) Promptly execute a formal contract; and

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

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

(6) A contracting agency may not exclude a commercial contractor from competing for a public contract on the basis that the license issued by the Construction Contractors Board is endorsed as a level 1 or level 2 license. As used in this section, “commercial contractor” has the meaning given that term in ORS 701.005. [2003 c.794 §117; 2005 c.103 §§17,18; 2005 c.376 §1; 2007 c.764 §§26,27; 2007 c.836 §§42,43; 2009 c.880 §§9,9a]

Rule C.375 Award of Contracts

(1) “Responsible bidder” or “responsible proposer” means a person who meets the standards of responsibility described in ORS 279C.375(3)(b).

(2) “Responsive bid” or “responsive proposal” means a bid or proposal that substantially complies with the invitation to bid or request for proposals and all prescribed procurement procedures and requirements.

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

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

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

(2) If the public improvement contract is with a single person to provide construction manager and general contractor services, in which a guaranteed maximum 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 amendment. Such bonds must be provided before construction starts.

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

(4) In cases of emergency, or when the interest or property of the contracting agency or the public agency or agencies for whose benefit the contract was awarded probably would suffer material injury by delay or other cause, the requirement of furnishing a good and sufficient performance bond and a good and sufficient payment bond for the faithful performance of any public improvement contract may be excused, if a declaration of such emergency is made in accordance with rules adopted under ORS 279A.065.

(5) This section applies only to public improvement contracts with a value, estimated by the contracting agency, of more than \$100,000 or, in the case of contracts for highways, bridges and other transportation projects, more than \$50,000. [2003 c.794 §118; 2005 c.103 §20]

[no rule]

279C.385 Return or retention of bid security. (1) Upon the execution of a public improvement contract and delivery of a good and sufficient performance bond and a good and sufficient payment bond by the successful bidder, the bid security of the successful bidder shall be returned to the bidder. A contracting agency shall return the bid security of the successful bidder to the bidder after the bidder:

- (a) Executes the public improvement contract; and
- (b) Delivers a good and sufficient performance bond, a good and sufficient payment bond and any required proof of insurance.

(2) A bidder who is awarded a contract and who fails promptly and properly to execute the contract and to deliver the performance bond and the payment bond and the proof of insurance, when bonds or insurance are required, shall forfeit the bid security that accompanied the successful bid. The bid security shall be taken and considered as liquidated damages and not as a penalty for failure of the bidder to execute the contract and deliver the bonds and proof of insurance.

(3) The contracting agency may return the bid security of unsuccessful bidders to them when the bids have been opened and the contract has been awarded, and may not retain the bid security after the contract has been duly signed. [2003 c.794 §119; 2005 c.103 §21]

[no rule]

279C.390 Exemption of contracts from bid security and bonds. (1) Subject to the provisions of subsection (2) of this section, the Director of the Oregon Department of Administrative Services, a state contracting agency with procurement authority under ORS 279A.050, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation may exempt certain contracts or classes of contracts from all or a portion of the requirement for bid security and from all or a portion of the requirement that good and sufficient bonds be furnished to ensure performance of the contract and payment of obligations incurred in the performance.

(2) The contracting agency may require bid security and a good and sufficient performance bond, a good and sufficient payment bond, or any combination of such bonds, even though the public improvement contract is of a class exempted under subsection (1) of this section.

*** [2003 c.794 §120; 2003 c.794 §120a; 2007 c.764 §28]

[no rule]

279C.395 Rejection of bids. A contracting agency may reject any bid not in compliance with all prescribed public bidding procedures and requirements, and may, for good cause, reject all bids upon a finding of the contracting agency it is in the public interest to do so. In any case where competitive bids are required and all bids are rejected, and the proposed project is not abandoned, new bids may be called for as in the first instance. [2003 c.794 §121]

Rule C.395 Rejection of Bids; Cancellation of Solicitation

(1) Rejection of Bids for Good Cause in the Public Interest

The Port may reject any or all bids in accordance with ORS 279C.100 for good cause upon a finding that rejection is in the public interest. Situations where good cause is sufficient to warrant rejection of all bids include but are not limited to: (1) competition is unnecessarily restricted because of the content of or an error in the solicitation document or the solicitation process; (2) all offered prices are too high or all offered performance is insufficient to meet the Port's needs; (3) ambiguous or misleading provisions in the solicitation document, or misconduct or error, threaten the fairness and integrity of the competitive process; and (4) events other than legitimate market forces threaten the integrity of the competitive procurement process.

(2) Cancellation of Solicitation Document

(a) Cancellation in the Public Interest. The Port may cancel a Solicitation for good cause if the Port finds that cancellation is in the public interest. The Port's reasons for cancellation shall be made part of the Solicitation file.

(b) Notice of Cancellation. If the Port cancels a Solicitation prior to Opening, the Port shall provide Notice of cancellation to all identified bidders. Such notice of cancellation shall:

(i) Identify the Solicitation;

(ii) Briefly explain the reason for cancellation; and

(iii) If appropriate, explain that an opportunity will be given to compete on any resolicitation.

(3) Disposition of Bids.

(a) Prior to Bid Opening. If the Port cancels a Solicitation prior to Bid Opening, the Port shall return all Bids it received to Bidders unopened, provided the Bidder submitted its Bid in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the Port shall open the Bid to determine the source and then return it to the Bidder.

(b) After Bid Opening. If the Port rejects all Bids, the Port shall retain all such Bids as part of the Port's Solicitation file.

(4) Creation of a Contract

A bid constitutes an offer by the bidder to perform the work described in the invitation to bid. The bid of a successful bidder is incorporated into a contract document which the bidder is required to sign. The Port does not accept a bid, and a contract does not otherwise come into existence, until the Port's authorized representative signs the partially executed contract document.

Competitive Proposals

279C.400 Competitive proposals; procedure. (1) When authorized or required by an exemption granted under ORS 279C.335, a contracting agency may solicit and award a public improvement contract, or may award multiple public improvement contracts when specified in the request for proposals, by requesting and evaluating competitive proposals. A contract awarded under this section may be amended only in accordance with rules adopted under ORS 279A.065.

(2) Except as provided in ORS 279C.330 to 279C.355, 279C.360 to 279C.390, 279C.395 and 279C.430 to 279C.450, competitive proposals shall be subject to the following requirements of competitive bidding:

- (a) Advertisement under ORS 279C.360;
- (b) Requirements for solicitation documents under ORS 279C.365;
- (c) Disqualification due to a Construction Contractors Board listing as described in ORS 279C.375 (3)(a);
- (d) Contract execution and bonding requirements under ORS 279C.375 and 279C.380;
- (e) Determination of responsibility under ORS 279C.375 (3)(b);
- (f) Rejection of bids under ORS 279C.395; and
- (g) Disqualification and prequalification under ORS 279C.430, 279C.435 and 279C.440.

(3) For the purposes of applying the requirements listed in subsection (2) of this section to competitive proposals, when used in the sections listed in subsection (2) of this section, "bids" includes proposals, and "bid documents" and "invitation to bid" include requests for proposals.

(4) Competitive proposals are not subject to the following requirements of competitive bidding:

- (a) First-tier subcontractor disclosure under ORS 279C.370; and
- (b) Reciprocal preference under ORS 279A.120.

(5) The contracting agency may require proposal security that serves the same function with respect to proposals as bid security serves with respect to bids under ORS 279C.365 (5) and 279C.385, as follows:

(a) The contracting agency may require proposal security in a form and amount as may be determined to be reasonably necessary or prudent to protect the interests of the contracting agency.

(b) The contracting agency shall retain the proposal security if a proposer who is awarded a contract fails to promptly and properly execute the contract and provide any required bonds or insurance.

(c) The contracting agency shall return the proposal security to all proposers upon the execution of the contract, or earlier in the selection process.

(6) In all other respects, and subject to rules adopted under ORS 279A.065, references in this chapter to invitations to bid, bids or bidders shall, to the extent practicable within the proposal process, be deemed equally applicable to requests for proposals, proposals or proposers. However, notwithstanding ORS 279C.375 (1), a contracting agency may not be required to award a contract advertised under the competitive proposal process based on price, but may award the contract in accordance with ORS 279C.410 (8). [2003 c.794 §129; 2005 c.103 §23; 2007 c.764 §29]

Rule C.400 Competitive Proposals

(1) Generally. The use of competitive proposals must be specifically authorized for a Public Improvement Contract under the competitive bidding requirement of ORS 279C.335(1). If a Public Improvement Contract is exempt from competitive bidding, then it will be awarded through Competitive Proposals.

(2) Applicability of Rule C.365 to Competitive Proposals

The Rules stated in Section C.365 generally apply also to Competitive Proposals, with the following exceptions (note: the term “proposal” may be substituted for the word “bid” when a rule from Section C.365 is applied to Competitive Proposals):

(a) Rather than apply Rule C.365(9), Bid Errors, the following rule applies:

Proposal Errors

Unless there is limiting language in the request for proposals, errors in proposals may be corrected at any time prior to the deadline for the Port's receipt of best and final offers, or, if best and final offers are not invited or allowed, the beginning of the Port's final evaluation of proposals.

(b) Rather than apply Rule C.365(10), Irrevocability of Offers, the following rule applies:

Proposal Modification

The proposer may not modify its proposal without the prior written consent of the Port.

(3) Addenda Issued after Proposal Opening. If the Port issues an addendum after proposals are opened, the Port shall provide sufficient time for proposers to supplement their proposals, if necessary, based on the changes provided in the addendum. Less than five days may be allowed for proposal supplementation if the changes made by the addendum do not require extensive analysis or action on the part of the affected proposers.

279C.405 Requests for information, interest or qualifications; requirements for requests for proposals. (1) A contracting agency may issue a request for information, a request for interest, a request for qualifications or other preliminary documents to obtain information useful in the preparation or distribution of a request for proposals.

(2) In addition to the general requirements of ORS 279C.365, a contracting agency preparing a request for proposals shall include:

(a) All required contractual terms and conditions. The request for proposals also may:

(A) Identify those contractual terms or conditions 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; and

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

(b) The method of contractor selection, which may include but is not limited to award without negotiation, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed either to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers, or any combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065.

(c) All evaluation factors that will be considered by the contracting agency when evaluating the proposals, including the relative importance of price and any other evaluation factors. [2003 c.794 §130; 2007 c.764 §30]

[no rule]

279C.410 Receipt of proposals; evaluation and award. (1) Notwithstanding the public records law, ORS 192.410 to 192.505:

(a) Proposals may be opened so as to avoid disclosure of contents to competing proposers during, when applicable, the process of negotiation.

(b) Proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued.

(2) For each request for proposals, the contracting agency shall prepare a list of proposals.

(3) Notwithstanding any requirement to make proposals open to public inspection after the contracting agency's issuance of notice of intent to award a contract, a contracting agency may withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a proposal. The fact that proposals are opened at a public meeting as defined in ORS 192.610 does not make their contents 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. If a request for proposals is canceled after proposals are received, 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.

(4) As provided in the request for proposals, a contracting agency may conduct discussions with proposers who submit proposals the agency has determined to be closely competitive or to

have a reasonable chance of being selected for award. The discussions may be conducted for the purpose of clarification to ensure full understanding of, and responsiveness to, the solicitation requirements. The contracting agency shall accord proposers fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions of proposals may be permitted after the submission of proposals and before award for the purpose of obtaining best and final offers. In conducting discussions, the contracting agency may not disclose information derived from proposals submitted by competing proposers.

(5) When provided for in the request for proposals, the contracting agency may employ methods of contractor selection including but not limited to award based solely on the ranking of proposals, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers, or any combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065. When applicable, in any instance in which the contracting agency determines that impasse has been reached in negotiations with a highest ranked proposer, the contracting agency may terminate negotiations with that proposer and commence negotiations with the next highest ranked proposer.

(6) The cancellation of requests for proposals and the rejection of proposals shall be in accordance with ORS 279C.395.

(7) At least seven days before the award of a public improvement contract, unless the contracting agency determines that seven days is impractical under rules adopted under ORS 279A.065, the contracting agency shall issue to each proposer or post, electronically or otherwise, a notice of intent to award.

(8) If a public improvement contract is awarded, the contracting agency shall award a public improvement contract to the responsible proposer whose proposal is determined in writing to be the most advantageous to the contracting agency based on the evaluation factors set forth in the request for proposals and, when applicable, the outcome of any negotiations authorized by the request for proposals. Other factors may not be used in the evaluation. [2003 c.794 §131; 2005 c.103 §24; 2007 c.764 §31]

Rule C.410 Competitive Proposals

(1) Applicability of Rule C.365 to Competitive Proposals

The Rules stated in Section C.365 generally apply also to Competitive Proposals, with the following exceptions (note: the term “proposal” may be substituted for the word “bid” when a rule from Section C.365 is applied to Competitive Proposals):

(a) Rather than apply Rule C.365(7), Bid Opening, the following rule applies:

Proposal Opening

The Port may open proposals at any time. There is no requirement for proposals to be opened in public. Subject to any exemptions under Oregon public records statutes, proposals shall be available for public inspection only after the Port has finished evaluating them.

(b) Rather than apply Rule C.365(8) Bid Evaluation, the following rule applies:

Proposal Evaluation

Proposals shall be evaluated based upon the evaluation criteria established by the request for proposals. Changes in evaluation criteria shall be communicated to all proposers or prospective proposers by addendum. If evaluation criteria are changed after proposals have been submitted, all proposers shall have an opportunity to supplement their proposals or submit best and final offers after receipt of the addendum changing the evaluation criteria.

(2) Competitive Range

The Port shall have discretion in the manner in which a competitive range is defined for a specific procurement. Generally, the competitive range will be defined as a natural “break” in evaluation scores between a higher scoring group of proposers and a lower scoring group of proposers. The number of proposers within a competitive range may not be defined prior to evaluation of proposals.

(3) Selection Method

(a) The Port shall have discretion in the method used to select the most advantageous contractor, including but not necessarily limited to negotiation with the highest-ranked proposer, competitive, simultaneous negotiations with one or more proposers, multi-tiered competition designed to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower-ranked proposers, or any combination of methods.

(b) The Request for Proposals may, but is not required to, define the selection method to be used for the specific procurement or class of procurements.

279C.412 Competitive quotes for intermediate procurements. (1) A public improvement contract estimated by the contracting agency not to exceed \$100,000 may be awarded in accordance with intermediate procurement procedures for competitive quotes established by rules adopted under ORS 279A.065. A contract awarded under this section may be amended to exceed \$100,000 only in accordance with rules adopted under ORS 279A.065.

(2) A procurement may not be artificially divided or fragmented so as to constitute an intermediate procurement under this section or to circumvent competitive bidding requirements under this chapter.

(3) Intermediate procurements under this section need not be made through competitive bidding. However, nothing in this section may be construed as prohibiting a contracting agency from conducting a procurement that does not exceed \$100,000 under competitive bidding procedures. [2003 c.794 §132; 2007 c.764 §32]

Rule C.412 Intermediate Procurements

The Port may follow the requirements of ORS 279C.414 and the procedures established by the Manager of Contracts and Procurement for the award of public improvement contracts estimated not to exceed \$100,000, if the Manager of Contracts and Procurement determines it is in the best interests of the Port.

279C.414 Requirements for competitive quotes. (1) Rules adopted under ORS 279A.065 to govern competitive quotes shall require the contracting agency to seek at least three informally solicited competitive price quotes from prospective contractors. The contracting agency shall keep a written record of the sources and amounts of the quotes received. If three quotes are not reasonably available, fewer will suffice, but in that event the contracting agency shall make a written record of the effort made to obtain the quotes.

(2) If a contract is to be awarded by competitive quotes, the contracting agency shall award the contract to the prospective contractor whose quote will best serve the interests of the contracting agency, taking into account price as well as any other applicable factors such as, but not limited to, experience, specific expertise, availability, project understanding, contractor capacity and responsibility. If an award is not made to the prospective contractor offering the lowest price quote, the contracting agency shall make a written record of the basis for award. [2003 c.794 §133]

[no rule]

Prequalification and Disqualification

279C.430 Prequalification of bidders. (1) A contracting agency may adopt a rule, resolution, ordinance or other regulation requiring mandatory prequalification for all persons desiring to bid for public improvement contracts that are to be let by the agency. The rule, resolution, ordinance or other regulation authorized by this section must include the time for submitting prequalification applications and a general description of the type and nature of the contracts that may be let. The prequalification application must be in writing on a standard form prescribed under the authority of ORS 279A.050.

(2) When a contracting agency permits or requires prequalification of bidders, a person who wishes to prequalify shall submit a prequalification application to the contracting agency on a standard form prescribed under subsection (1) of this section. Within 30 days after receipt of a prequalification application, the contracting agency shall investigate the applicant as necessary to determine if the applicant is qualified. The determination shall be made in less than 30 days, if practicable, if the applicant requests an early decision to allow the applicant as much time as possible to prepare a bid on a contract that has been advertised. In making its determination, the contracting agency shall consider only the applicable standards of responsibility listed in ORS 279C.375 (3)(b). The agency shall promptly notify the applicant whether or not the applicant is qualified.

(3) If the contracting agency finds that the applicant is qualified, the notice must state the nature and type of contracts that the person is qualified to bid on and the period of time for which the qualification is valid under the contracting agency's rule, resolution, ordinance or other regulation. If the contracting agency finds the applicant is not qualified as to any contracts covered by the rule, resolution, ordinance or other regulation, the notice must specify the reasons found under ORS 279C.375 (3)(b) for not prequalifying the applicant and inform the applicant of the right to a hearing under ORS 279C.445 and 279C.450.

(4) If a contracting agency has reasonable cause to believe that there has been a substantial change in the conditions of a prequalified person and that the person is no longer qualified or is less qualified, the agency may revoke or may revise and reissue the prequalification after

reasonable notice to the prequalified person. The notice shall state the reasons found under ORS 279C.375 (3)(b) for revocation or revision of the prequalification of the person and inform the person of the right to a hearing under ORS 279C.445 and 279C.450. A revocation or revision does not apply to any public improvement contract for which publication of an advertisement, in accordance with ORS 279C.360, commenced before the date the notice of revocation or revision was received by the prequalified person. [2003 c.794 §123; 2005 c.103 §25]

[no rule]

279C.435 Effect of prequalification by Department of Transportation or Oregon Department of Administrative Services. If a person is prequalified with the Department of Transportation or with the Oregon Department of Administrative Services, the person is rebuttably presumed qualified with any other contracting agency for the same kind of work. When qualifying for the same kind of work with another contracting agency, the person may submit proof of the prequalification in lieu of a prequalification application as required by ORS 279C.430. [2003 c.794 §128]

[no rule]

279C.440 Disqualification from consideration for award of contracts. (1)(a) A contracting agency may disqualify a person from consideration for award of the contracting agency's contracts for the reasons listed in subsection (2) of this section after providing the person with notice and a reasonable opportunity to be heard.

(b) In lieu of the disqualification process described in paragraph (a) of this subsection, a contracting agency contracting for a public improvement may petition the Construction Contractors Board to disqualify a person from consideration for award of the contracting agency's public improvement contracts for the reasons listed in subsection (2) of this section. The Construction Contractors Board shall provide the person with notice and a reasonable opportunity to be heard.

(c) A contracting agency or the Construction Contractors Board may not disqualify a person under this section for a period of more than three years.

(2) A person may be disqualified from consideration for award of a contracting agency's contracts for any of the following reasons:

(a) The person has been convicted of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.

(b) The person has been convicted under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the person's responsibility as a contractor.

(c) The person has been convicted under state or federal antitrust statutes.

(d) The person has committed a violation of a contract provision that is regarded by the contracting agency or the Construction Contractors Board to be so serious as to justify disqualification. A violation may include but is not limited to a failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However,

a failure to perform or an unsatisfactory performance caused by acts beyond the control of the contractor may not be considered to be a basis for disqualification.

(e) The person does not carry workers' compensation or unemployment insurance as required by statute.

(3) A contracting agency or the Construction Contractors Board shall issue a written decision to disqualify a person under this section. The decision shall:

(a) State the reasons for the action taken; and

(b) Inform the disqualified person of the appeal right of the person under:

(A) ORS 279C.445 and 279C.450 if the decision to disqualify was issued by a contracting agency; or

(B) ORS chapter 183 if the decision to disqualify was issued by the Construction Contractors Board.

(4) A copy of the decision issued under subsection (3) of this section must be mailed or otherwise furnished immediately to the disqualified person. [2003 c.794 §122]

[no rule]

279C.445 Appeal of disqualification. Any person who wishes to appeal disqualification shall, within three business days after receipt of notice of disqualification, notify the contracting agency that the person appeals the disqualification. Immediately upon receipt of the notice of appeal:

(2) All contracting agencies other than state contracting agencies shall notify the appropriate local contract review board. [2003 c.794 §124]

[no rule]

279C.450 Appeal procedure for decision to deny, revoke or revise prequalification; hearing; costs; judicial review. (1) An appeal from a contracting agency's disqualification or denial, revocation or revision of a prequalification is subject to the procedures set forth in this section and is not subject to ORS chapter 183 except when specifically provided in this section.

(2) Promptly upon receiving notice of appeal from a contracting agency as provided in ORS 279C.445, the Director of the Oregon Department of Administrative Services or the local contract review board shall notify the person appealing and the contracting agency of the time and place of the hearing. The director or board shall conduct the hearing and decide the appeal within 30 days after receiving the notification from the contracting agency unless the person appealing and the contracting agency mutually agree to a different period of time. The director or board shall set forth in writing the reasons for the decision.

(3) In the hearing the director or board shall consider de novo the notice of disqualification or denial, revocation or revision of a prequalification, the reasons listed in ORS 279C.440 (2) on which the contracting agency based the disqualification or the standards of responsibility listed in ORS 279C.375 (3)(b) on which the contracting agency based the denial, revocation or revision of the prequalification and any evidence provided by the parties. In all other respects, a hearing before the director shall be conducted in the same manner as a contested case under ORS 183.417 (1) to (4) and (7), 183.425, 183.440, 183.450 and 183.452.

(4) The director may allocate the director's cost for the hearing between the person appealing and the contracting agency whose disqualification or prequalification decision is being appealed. The director shall base the allocation upon facts the director finds in the record and states in the final order that, in the director's opinion, warrant such allocation of the costs. If the final order does not allocate the director's costs for the hearing, the costs must be paid as follows:

(a) If the director upholds the decision to disqualify or deny, revoke or revise a prequalification of a person, the person appealing the disqualification or prequalification decision shall pay the director's costs.

(b) If the director reverses the decision to disqualify or deny, revoke or revise a prequalification of a person, the contracting agency whose disqualification or prequalification decision is the subject of the appeal shall pay the director's costs.

(5) The decision of the director or board may be reviewed only upon a petition, filed within 15 days after the date of the decision, in the circuit court of the county in which the director or board has the director's or the board's principal office. The circuit court shall reverse or modify the decision only if the court finds:

(a) The decision was obtained through corruption, fraud or undue means.

(b) There was evident partiality or corruption on the part of the director or board or any of the members of the board.

(c) There was an evident material miscalculation of figures or an evident material mistake in the description of a person, thing or property referred to in the decision.

(6) The procedure provided in this section is the exclusive means of judicial review of the decision of the director or board. The judicial review provisions of ORS 183.480, the writs of review and mandamus, as provided in ORS chapter 34, and other legal, declaratory and injunctive remedies are not available.

(7) The circuit court may, in the court's discretion, stay the letting of the contract that is the subject of the petition in the same manner as the court may issue a stay in a suit in equity. If the court determines that an improper disqualification or denial, revocation or revision of a prequalification occurred and the contract has been let, the court may proceed to take evidence to determine the damages, if any, the petitioner suffered and award such damages as the court may find as a judgment against the director or board. The court may award costs and attorney fees to the prevailing party. [2003 c.794 §125; 2005 c.103 §26; 2007 c.288 §13; 2009 c.149 §1]

[no rule]

Remedies

279C.460 Action by or on behalf of adversely affected bidder or proposer; exception for personal services contract. (1) Any bidder or proposer adversely affected or any trade association of construction contractors acting on behalf of a member of the association to protect interests common to construction contractor members may commence an action in the circuit court for the county where the principal offices of a contracting agency are located, for the purpose of requiring compliance with, or prevention of violations of, ORS 279C.300 to 279C.470 or to determine the applicability of ORS 279C.300 to 279C.470 to matters or decisions of the contracting agency.

(2) The court may order such equitable relief as the court considers appropriate in the circumstances. In addition to or in lieu of any equitable relief, the court may award an aggrieved bidder or proposer any damages suffered by the bidder or proposer as a result of violations of ORS 279C.300 to 279C.470 for the reasonable cost of preparing and submitting a bid or proposal. A decision of the contracting agency may not be voided if other equitable relief is available.

(3) If the contracting agency is successful in defending the contracting agency's actions against claims of violation or potential violation of ORS 279C.300 to 279C.470, the court may award to the aggrieved contracting agency any damages suffered as a result of the court action.

(4) The court may order payment of reasonable attorney fees and costs on trial and on appeal to a successful party in an action brought under this section.

(5) This section does not apply to personal services contracts under ORS 279C.100 to 279C.125. [2003 c.794 §134; 2007 c.764 §33]

Rule C.460 Protests

(a) Applicability

This rule applies to protests of special procurements, protests of solicitations, and protests of contract award.

(b) Written Protest Required

If an offeror or prospective offeror wishes to object to any aspect of a Port procurement, the offeror or prospective offeror ("protester") may file a written protest with the Port's Manager of Contracts and Procurement. The protest must include all grounds for the protest, and all supporting evidence, in the form of physical evidence, documents, or affidavits.

(c) Timeliness

A protest must be filed promptly as soon as the protester knows of the grounds for the protest. If the grounds for a protest were apparent on the face of the solicitation document, the Port may decline to consider a protest filed later than five business days before the date by which bids or proposals must be submitted. If the grounds for a protest were not apparent until contract award, the Port may decline to consider a protest filed later than five business days after the protester knew or should have known of the Port's intent to award the contract.

(d) Written Decision

The Port's Manager of Contracts and Procurement shall issue a written decision in response to a protest.

(e) Discretionary Meeting

The Manager of Contracts and Procurement may, but is not required to, schedule a meeting with the protester prior to issuing a written decision. The Manager of Contracts and Procurement may invite other Port staff to the meeting, and, in the case of a procurement involving a Port evaluation team, may invite one or more members of the evaluation team to the meeting.

(f) Appeal and Final Administrative Action

If the protester disagrees with the written decision issued by the Port's Manager of Contracts and Procurement, the protester may appeal in writing to the Port's Executive Director. The written appeal must be received by the Executive Director's office within five business days after the protester's receipt of the written decision by the Port's Manager of Contracts and Procurement. The Executive Director may decline to consider a late appeal. The written appeal must include all legal arguments and all evidence, in the form of physical evidence, documents, or affidavits. The Executive Director shall issue a written decision in response to the appeal, and that written decision shall be the Port's final administrative action with respect to the protest. The Executive Director's written decision shall be the Port's final action with respect to the protest.

(g) Port not required to delay process during protest

Subject to ORS 279B.405(9) and ORS 279B.415(4), the Port may proceed with the procurement after denial of protest or denial of appeal, including without limitation, award and execution of the contract.

279C.465 Action against successful bidder; amount of damages; when action to be commenced; defenses. (1) Any person that loses a competitive bid or proposal for a contract involving the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement or renovation of a building or structure may bring an action for damages against another person who is awarded the contract for which the bid or proposal was made if the person making the losing bid or proposal can establish that the other person knowingly violated ORS 279C.840, 656.017, 657.505, 701.021 or 701.026 while performing the work under the contract, or knowingly failed to pay to the Department of Revenue all sums withheld from employees under ORS 316.167.

(2) A person bringing an action under this section must establish a violation of ORS 279C.840, 316.167, 656.017, 657.505, 701.021 or 701.026 by a preponderance of the evidence.

(3) Upon establishing that the violation occurred, the person shall recover, as liquidated damages, 10 percent of the total amount of the contract or \$5,000, whichever is greater.

(4) In any action under this section, the prevailing party is entitled to an award of reasonable attorney fees.

(5) An action under this section must be commenced within two years of the substantial completion of the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement or renovation. For the purposes of this subsection, "substantial completion" has the meaning given that term in ORS 12.135.

(6) A person may not recover any amounts under this section if the defendant in the action establishes by a preponderance of the evidence that the plaintiff:

(a) Was in violation of ORS 701.021 or 701.026 at the time of making the bid or proposal on the contract;

(b) Was in violation of ORS 316.167, 656.017 or 657.505 with respect to any employees of the plaintiff as of the time of making the bid or proposal on the contract; or

(c) Was in violation of ORS 279C.840 with respect to any contract performed by the plaintiff within one year before making the bid or proposal on the contract at issue in the action. [2003 c.794 §135; 2007 c.836 §44]

[no rule]

279C.470 Compensation for contractor on contract declared void by court; exceptions; applicability.

(1) If a court determines that a public improvement contract is void because the contracting agency letting the contract failed to comply with any statutory or regulatory competitive bidding or other procurement requirements, and the contractor entered into the contract without intentionally violating the laws regulating public improvement contracts, then, unless the court determines that substantial injustice would result, the contractor is entitled to reimbursement for work performed under the contract as follows:

(a) If the work under the public improvement contract is substantially complete, the contracting agency shall ratify the contract.

(b) If the work under the public improvement contract is not substantially complete, the contracting agency shall ratify the contract and the contract shall be deemed terminated. Upon termination, the contractor shall be paid in accordance with ORS 279C.660, unless the court determines that payment under ORS 279C.660 would be a substantial injustice to the contracting agency or the contractor, in which case the contractor shall be paid as the court deems equitable.

(c) For the purposes of this section, a ratified contract shall be deemed valid, binding and legally enforceable, and the contractor's payment and performance bonds shall remain in full force and effect.

(2) Notwithstanding subsection (1) of this section, if a court determines that a public improvement contract is void as a result of fraudulent or criminal acts or omissions of the contractor or of both the contracting agency letting the contract and the contractor, the contractor is not entitled to reimbursement for work performed under the contract.

(3) This section does not apply to a public improvement contract if:

(a) The contracting agency's employee that awarded the public improvement contract did not have the authority to do so under law, ordinance, charter, contract or agency rule; or

(b) Payment is otherwise prohibited by Oregon law.

(4) The contractor and all subcontractors under a public improvement contract are prohibited from asserting that the public improvement contract is void for any reason described in this section. [2003 c.794 §136]

[no rule]

Construction Contracts Generally

Required Contract Conditions

279C.500 "Person" defined. As used in ORS 279C.500 to 279C.530, unless the context otherwise requires, "person" includes the State Accident Insurance Fund Corporation and the Department of Revenue. [2003 c.794 §137]

[no rule]

279C.505 Conditions concerning payment, contributions, liens, withholding, drug testing. (1) Every public improvement contract shall contain a condition that the contractor shall:

(a) Make payment promptly, as due, to all persons supplying to the contractor labor or material for the performance of the work provided for in the contract.

(b) Pay all contributions or amounts due the Industrial Accident Fund from the contractor or subcontractor incurred in the performance of the contract.

(c) Not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished.

(d) Pay to the Department of Revenue all sums withheld from employees under ORS 316.167.

(2) In addition to the conditions specified in subsection (1) of this section, every public improvement contract shall contain a condition that the contractor shall demonstrate that an employee drug testing program is in place. [2003 c.794 §138; 2005 c.103 §27]

[no rule]

279C.510 Demolition contracts to require material salvage; lawn and landscape maintenance contracts to require composting or mulching. (1) Every public improvement contract for demolition shall contain a condition requiring the contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective.

(2) Every public improvement contract for lawn and landscape maintenance shall contain a condition requiring the contractor to compost or mulch yard waste material at an approved site, if feasible and cost-effective. [2003 c.794 §139]

[no rule]

279C.515 Conditions concerning payment of claims by public officers, payment to persons furnishing labor or materials and complaints. (1) Every public improvement contract shall contain a clause or condition that, if the contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to the contractor or a subcontractor by any person in connection with the public improvement contract as the claim becomes due, the proper officer or officers representing the state or a county, school district, municipality, municipal corporation or subdivision thereof, as the case may be, may pay such claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due the contractor by reason of the contract.

(2) Every public improvement contract shall contain a clause or condition that, if the contractor or a first-tier subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public improvement contract within 30 days after receipt of payment from the contracting agency or a contractor, the contractor or first-tier subcontractor shall owe the person the amount due plus interest charges commencing at the end of the 10-day period that payment is due under ORS 279C.580 (4) and ending upon final payment, unless payment is subject to a good faith dispute as defined in ORS 279C.580. The rate of interest charged to the contractor or first-tier subcontractor on the amount due shall equal three times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date that is 30 days after the date when

payment was received from the contracting agency or from the contractor, but the rate of interest may not exceed 30 percent. The amount of interest may not be waived.

(3) Every public improvement contract and every contract related to the public improvement contract shall contain a clause or condition that, if the contractor or a subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public improvement contract, the person may file a complaint with the Construction Contractors Board, unless payment is subject to a good faith dispute as defined in ORS 279C.580.

(4) The payment of a claim in the manner authorized in this section does not relieve the contractor or the contractor's surety from obligation with respect to any unpaid claims. [2003 c.794 §140; 2005 c.103 §28]

[no rule]

279C.520 Condition concerning hours of labor. (1) Every public contract subject to this chapter must contain a condition that a person may not be employed for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency or when the public policy absolutely requires it, and in such cases, except in cases of contracts for personal services as defined in ORS 279C.100, the employee shall be paid at least time and a half pay:

(a)(A) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or

(B) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and

(b) For all work performed on Saturday and on any legal holiday specified in ORS 279C.540.

(2) An employer must give notice in writing to employees who work on a public contract, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

(3) In the case of contracts for personal services as defined in ORS 279C.100, the contract shall contain a provision that the employee shall be paid at least time and a half for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(4) In the case of a contract for services at a county fair or for other events authorized by a county fair board, the contract must contain a provision that employees must be paid at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week. An employer shall give notice in writing to employees who work on such a contract, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that employees may be required to work.

(5)(a) Except as provided in subsection (4) of this section, contracts for services must contain a provision that requires that persons employed under the contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in ORS 279C.540 (1)(b)(B) to (G) and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) An employer shall give notice in writing to employees who work on a contract for services, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work. [2003 c.794 §141; 2005 c.103 §29]

[no rule]

279C.525 Provisions concerning environmental and natural resources laws; remedies.

(1) Solicitation documents for a public improvement contract shall make specific reference to federal, state and local agencies that have enacted ordinances, rules or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that affect the performance of the contract. If the successful bidder awarded the project is delayed or must undertake additional work by reason of existing ordinances, rules or regulations of agencies not cited in the public improvement contract or due to the enactment of new or the amendment of existing statutes, ordinances, rules or regulations relating to the prevention of environmental pollution and the preservation of natural resources occurring after the submission of the successful bid, the contracting agency may:

- (a) Terminate the contract;
- (b) Complete the work itself;
- (c) Use nonagency forces already under contract with the contracting agency;
- (d) Require that the underlying property owner be responsible for cleanup;
- (e) Solicit bids for a new contractor to provide the necessary services under the competitive bid requirements of this chapter; or
- (f) Issue the contractor a change order setting forth the additional work that must be undertaken.

(2) In addition to the obligation imposed under subsection (1) of this section to refer to federal, state and local agencies with ordinances, rules or regulations dealing with the prevention of environmental pollution and the preservation of natural resources, a solicitation document must also make specific reference to known conditions at the construction site that may require the successful bidder to comply with the ordinances, rules or regulations identified under subsection (1) of this section.

(3) If the successful bidder encounters a condition not referred to in the solicitation documents, not caused by the successful bidder and not discoverable by a reasonable prebid visual site inspection, and the condition requires compliance with the ordinances, rules or regulations referred to under subsection (1) of this section, the successful bidder shall immediately give notice of the condition to the contracting agency.

(4) Except in the case of an emergency and except as may otherwise be required by any environmental or natural resource ordinance, rule or regulation, the successful bidder may not commence work nor incur any additional job site costs in regard to the condition encountered and described in subsection (3) of this section without written direction from the contracting agency.

(5) Upon request by the contracting agency, the successful bidder shall estimate the emergency or regulatory compliance costs as well as the anticipated delay and costs resulting from the encountered condition. This cost estimate shall be promptly delivered to the contracting agency for resolution.

(6) Within a reasonable period of time following delivery of an estimate under subsection (5) of this section, the contracting agency may:

- (a) Terminate the contract;
- (b) Complete the work itself;
- (c) Use nonagency forces already under contract with the contracting agency;
- (d) Require that the underlying property owner be responsible for cleanup;
- (e) Solicit bids for a new contractor to provide the necessary services under the competitive bid requirements of this chapter; or
- (f) Issue the contractor a change order setting forth the additional work that must be undertaken.

(7)(a) If the contracting agency chooses to terminate the contract under subsection (1)(a) or (6)(a) of this section, the successful bidder shall be entitled to all costs and expenses incurred to the date of termination, including overhead and reasonable profits, on the percentage of the work completed. The contracting agency shall have access to the contractor's bid documents when making the contracting agency's determination of the additional compensation due to the contractor.

(b) If the contracting agency causes work to be done by another contractor under subsection (1)(c) or (e) or (6)(c) or (e) of this section, the initial contractor may not be held liable for actions or omissions of the other contractor.

(c) The change order under subsection (1)(f) or (6)(f) of this section shall include the appropriate extension of contract time and compensate the contractor for all additional costs, including overhead and reasonable profits, reasonably incurred as a result of complying with the applicable statutes, ordinances, rules or regulations. The contracting agency shall have access to the contractor's bid documents when making the contracting agency's determination of the additional compensation due to the contractor.

(8) Notwithstanding subsections (1) to (7) of this section, a contracting agency:

(a) May allocate all or the Portion of the known environmental and natural resource risks to a contractor by listing such environmental and natural resource risks with specificity in the solicitation documents; and

(b) In a local improvement district, may allocate all or the Portion of the known and unknown environmental and natural resource risks to a contractor by so stating in the solicitation documents. [2003 c.794 §142]

[no rule]

279C.527 Inclusion of amount for solar energy technology in public improvement contract; written determination of appropriateness; exemptions and limitations. (1) Except as otherwise provided in this section, a public improvement contract for the construction of a public building or for the reconstruction or major renovation of a public building, if the cost of the reconstruction or major renovation exceeds 50 percent of the value of the public building, is considered to contain an amount equal to at least 1.5 percent of the total contract price for the inclusion of appropriate solar energy technology in the public building. Solar energy technology shall include solar electric or solar thermal systems and may include passive solar energy systems when a proposed passive solar energy system will achieve a reduction in energy usage of at least 20 percent.

(2) Before entering into a public improvement contract described in subsection (1) of this section, a contracting agency shall prepare a written determination of whether the inclusion of solar energy technology in the construction, reconstruction or major renovation of the public building is appropriate. The contracting agency shall include in the determination the total contract price and the amount the agency intends to expend on the inclusion of solar energy technology in the public building. The State Department of Energy shall develop a form usable by contracting agencies for preparing the written determination described in this subsection.

(3) If the contracting agency determines that it would be inappropriate to include solar energy technology in the construction, reconstruction or major renovation of the public building, subsection (1) of this section does not apply to the public improvement contract. However:

(a) The contracting agency shall spend an amount equal to at least 1.5 percent of the total contract price on the inclusion of appropriate solar energy technology in a future public building project; and

(b) The amount spent by the contracting agency on the future public building project pursuant to paragraph (a) of this subsection is in addition to any amount required under subsection (1) of this section for the inclusion of appropriate solar energy technology in the future public building project.

(4) Subsection (3)(a) and (b) of this section does not apply to a public improvement contract for which no state funds are directly or indirectly used.

(5) This section does not exempt an authorized state agency, as defined in ORS 276.905, from complying with ORS 276.900 to 276.915, except that an authorized state agency, without complying with ORS 276.900 to 276.915, may determine that solar energy technology described in this section is appropriate for inclusion in the construction, reconstruction or major renovation of a public building.

(6)(a) As used in this section, “public building” means a building owned or controlled by a public body, as defined in ORS 174.109, and:

- (A) Used or occupied by employees of the public body; or
- (B) Used for conducting public business.

(b) Notwithstanding the provisions of ORS 174.108 (3), this section applies to intergovernmental entities described in ORS 174.108 (3). [2007 c.310 §2]

Note: 279C.527 and 279C.528 were added to and made a part of 279C.005 to 279C.670 by legislative action but were not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

Rule C.527 Determination of Appropriateness

The determination of appropriateness required under ORS 279C.527(2) will be based on written findings and will be made by the Executive Director, except that the Manager of Contracts and Procurement may make such determination if the cost of the public improvement contract does not exceed the Manager’s level of delegated authority. Consistent with OAR 330-135-0045(3), in making such determination, consideration will be given to whether there are physical constraints in the building or funding constraints that make the installation of solar energy technology inappropriate for the building.

279C.528 State Department of Energy requirements and specifications; rules. Public improvement contracts subject to ORS 279C.527 are also subject to rules adopted by the State Department of Energy that include, but are not limited to, requirements and specifications for:

- (1) Using particular solar energy systems or technologies in public improvements;
- (2) Determining the cost-effectiveness of solar energy systems or technologies;
- (3) Reporting the use of solar energy systems or technologies in public improvements or submitting documents to the department for review, as appropriate; and
- (4) Determining whether a structure is a public building subject to the requirements of ORS 279C.527. [2007 c.310 §3]

Note: See note under 279C.527.

[no rule]

279C.530 Condition concerning payment for medical care and providing workers' compensation. (1) Every public improvement contract shall contain a condition that the contractor shall promptly, as due, make payment to any person, copartnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the contractor, of all sums that the contractor agrees to pay for the services and all moneys and sums that the contractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services.

(2) Every public contract subject to this chapter shall contain a clause or condition that all subject employers working under the contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126. [2003 c.794 §143; 2005 c.103 §30]

[no rule]

279C.535 Condition concerning steel material; rules. The Department of transportation shall adopt rules to require that public improvement contracts entered into by the department include a price escalation and de-escalation clause relating to steel material. As used in this section, "steel material" includes structural and reinforcing steel, steel studs, sheet piling, guardrail, ductile iron pipe and other steel products used for the construction, reconstruction or major renovation of a road or highway. [2005 c.557 §6]

[no rule]

Hours of Labor

279C.540 Maximum hours of labor on public contracts; holidays; exceptions; liability to workers; rules. (1) When labor is employed by the state or a county, school district, municipality, municipal corporation or subdivision thereof through a contractor, a person may not be required or permitted to labor more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity or emergency or when the public policy absolutely requires it,

in which event, the person so employed for excessive hours shall receive at least time and a half pay:

(a)(A) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or

(B) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and

(b) For all work performed on Saturday and on the following legal holidays:

(A) Each Sunday.

(B) New Year's Day on January 1.

(C) Memorial Day on the last Monday in May.

(D) Independence Day on July 4.

(E) Labor Day on the first Monday in September.

(F) Thanksgiving Day on the fourth Thursday in November.

(G) Christmas Day on December 25.

(2) An employer shall give notice in writing to employees who perform work under subsection (1) of this section, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that employees may be required to work.

(3) For the purpose of this section, each time a legal holiday, other than Sunday, listed in subsection (1) of this section falls on Sunday, the succeeding Monday shall be recognized as a legal holiday. Each time a legal holiday listed in subsection (1) of this section falls on Saturday, the preceding Friday shall be recognized as a legal holiday.

(4) Subsections (1) and (2) to (3) of this section do not apply to a public improvement contract or a contract for services if the contractor is a party to a collective bargaining agreement in effect with any labor organization.

(5) When specifically agreed to under a written labor-management negotiated labor agreement, an employee may be paid at least time and a half pay for work performed on any legal holiday specified in ORS 187.010 and 187.020 that is not listed in subsection (1) of this section.

(6) This section does not apply to labor performed in the prevention or suppression of fire under contracts and agreements made under the authority of the State Forester or the State Board of Forestry, under ORS 477.406.

(7)(6) This section does not apply to contracts for personal services designated under ORS 279A.055 as defined in ORS 279C.100, provided that persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in subsection (1)(b)(B) to (G) of this section and for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(8)(7) Subsections (1) and (2) of this section do not apply to contracts for services at a county fair or for other events authorized by a county fair board if persons employed under the contract receive at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week.

(9)(a)(8)(a) Subsections (1) and (2) of this section do not apply to contracts for services. However, persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in

subsection (1)(b)(B) to (G) of this section and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) An employer shall give notice in writing to employees who work on a contract for services, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

(10)(9) Any contractor or subcontractor or contractor's or subcontractor's surety that violates the provisions of this section is liable to the affected employees in the amount of their unpaid overtime wages and in an additional amount equal to the unpaid overtime wages as liquidated damages. If the violation results from willful falsification of payroll records, the contractor or subcontractor or contractor's or subcontractor's surety is liable to the affected employees in the amount of their unpaid overtime wages and an additional amount equal to twice the unpaid overtime wages as liquidated damages.

(11)(10) An action to enforce liability to employees under subsection (10)(9) of this section may be brought as an action on the contractor's payment bond as provided for in ORS 279C.610.

(12) This section does not apply to financial institutions as defined in ORS 706.008.

(13)(11) In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries may adopt rules to carry out the provisions of this section. [2003 c.794 §144; 2005 c.103 §31]

[no rule]

279C.545 Time limitation on claim for overtime; posting of circular by contractor.

When labor is employed by the state or a county, school district, municipality, municipal corporation or subdivision thereof through another as a contractor, any worker employed by the contractor shall be foreclosed from the right to collect for any overtime provided in ORS 279C.540 unless a claim for payment is filed with the contractor within 90 days from the completion of the contract, providing the contractor has:

(1) Caused a circular clearly printed in boldfaced 12-point type and containing a copy of this section to be posted in a prominent place alongside the door of the timekeeper's office or in a similar place that is readily available and freely visible to workers employed on the work.

(2) Maintained the circular continuously posted from the inception to the completion of the contract on which workers are or have been employed. [2003 c.794 §145]

[no rule]

Retainage and Payments

279C.550 "Retainage" defined. As used in ORS 279C.550 to 279C.570, "retainage" means the difference between the amount earned by a contractor on a public improvement contract and the amount paid on the contract by the contracting agency. [2003 c.794 §146; 2005 c.103 §32]

[no rule]

279C.555 Withholding of retainage. The withholding of retainage by a contractor or subcontractor on public improvement contracts shall be in accordance with ORS 701.420 and 701.430 except when the charter of the contracting agency contains provisions requiring retainage by the contracting agency of more than five percent of the contract price of the work completed. [2003 c.794 §147]

[no rule]

279C.560 Form of retainage; procedures for holding and payment. (1) Unless a contracting agency that reserves an amount as retainage under ORS 279C.570 (7) finds in writing that accepting a bond or instrument described in paragraph (a) or (b) of this subsection poses an extraordinary risk that is not typically associated with the bond or instrument, the contracting agency in lieu of withholding moneys from payment shall accept from a contractor:

(a) Bonds, securities or other instruments of a character described in subsection (6) of this section that are deposited as provided in subsection (4) of this section; or

(b) A surety bond deposited as provided in subsection (7) of this section.

(2) A contracting agency that holds moneys as retainage under ORS 279C.570 (7) shall:

(a) Hold the moneys in a fund and pay the moneys to the contractor in accordance with ORS 279C.570; or

(b) At the election of the contractor, pay the moneys to the contractor in accordance with subsection (4) or (5) of this section and in a manner authorized by the Director of the Oregon Department of Administrative Services.

(3) If the contracting agency incurs additional costs as a result of the exercise of an option described in subsection (1) or (5) of this section, the contracting agency may recover the costs from the contractor by reducing the final payment. As work on the contract progresses, the contracting agency shall, upon demand, inform the contractor of all accrued costs.

(4) The contractor may deposit bonds, securities or other instruments with the contracting agency or in a bank or trust company for the contracting agency to hold for the contracting agency's benefit in lieu of moneys held as retainage. If the contracting agency accepts bonds, securities or other instruments deposited as provided in this subsection, the contracting agency shall reduce the moneys held as retainage in an amount equal to the value of the bonds, securities and other instruments and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Interest or earnings on the bonds, securities or other instruments shall accrue to the contractor.

(5) If the contractor elects, the contracting agency shall deposit the retainage as accumulated in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the contracting agency. When the contracting agency is a state contracting agency, the account must be established through the State Treasurer. Earnings on the account accrue to the contractor.

(6) Bonds, securities and other instruments deposited or acquired in lieu of retainage, as permitted by this section, must be of a character approved by the Director of the Oregon Department of Administrative Services, including but not limited to:

(a) Bills, certificates, notes or bonds of the United States.

(b) Other obligations of the United States or agencies of the United States.

(c) Obligations of a corporation wholly owned by the federal government.

(d) Indebtedness of the Federal National Mortgage Association.

(e) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.

(f) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.

(7) The contractor, with the approval of the contracting agency, may deposit a surety bond for all or any portion of the amount of funds retained, or to be retained, by the contracting agency in a form acceptable to the contracting agency. The bond and any proceeds of the bond must be made subject to all claims and liens and in the same manner and priority as set forth for retainage under ORS 279C.550 to 279C.570 and 279C.600 to 279C.625. The contracting agency shall reduce the moneys the contracting agency holds as retainage in an amount equal to the value of the bond and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Whenever a contracting agency accepts a surety bond from a contractor in lieu of retainage, the contractor shall accept like bonds from a subcontractor or supplier from which the contractor has retainage. The contractor shall then reduce the moneys the contractor holds as retainage in an amount equal to the value of the bond and pay the amount of the reduction to the subcontractor or supplier. [2003 c.794 §148; 2009 c.568 §1]

[no rule]

279C.565 Limitation on retainage requirements. Unless otherwise specifically included by statute, the provisions of ORS 279C.560 or 279C.625 apply only as between the contracting agency or public body and the party with whom it contracts. [2003 c.794 §149]

[no rule]

279C.570 Prompt payment policy; progress payments; retainage; interest; exception; settlement of compensation disputes. (1) It is the policy of the State of Oregon that all payments due on a public improvement contract and owed by a contracting agency shall be paid promptly. No contracting agency is exempt from the provisions of this section.

(2) Contracting agencies shall make progress payments on the contract monthly as work progresses on a public improvement contract. Payments shall be based upon estimates of work completed that are approved by the contracting agency. A progress payment is not considered acceptance or approval of any work or waiver of any defects therein. The contracting agency shall pay to the contractor interest on the progress payment, not including retainage, due the contractor. The interest shall commence 30 days after receipt of the invoice from the contractor or 15 days after the payment is approved by the contracting agency, whichever is the earlier date. The rate of interest charged to the contracting agency on the amount due shall equal three times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date that is 30 days after receipt of the invoice from the contractor or 15 days after the payment is approved by the contracting agency, whichever is the earlier date, but the rate of interest may not exceed 30 percent.

(3) Interest shall be paid automatically when payments become overdue. The contracting agency shall document, calculate and pay any interest due when payment is made on the principal. Interest payments shall accompany payment of net due on public improvement

contracts. The contracting agency may not require the contractor to petition, invoice, bill or wait additional days to receive interest due.

(4) When an invoice is filled out incorrectly, when there is any defect or impropriety in any submitted invoice or when there is a good faith dispute, the contracting agency shall so notify the contractor within 15 days stating the reason or reasons the invoice is defective or improper or the reasons for the dispute. A defective or improper invoice, if corrected by the contractor within seven days of being notified by the contracting agency, may not cause a payment to be made later than specified in this section unless interest is also paid.

(5) If requested in writing by a first-tier subcontractor, the contractor, within 10 days after receiving the request, shall send to the first-tier subcontractor a copy of that portion of any invoice, request for payment submitted to the contracting agency or pay document provided by the contracting agency to the contractor specifically related to any labor or materials supplied by the first-tier subcontractor.

(6) Payment of interest may be postponed when payment on the principal is delayed because of disagreement between the contracting agency and the contractor. Whenever a contractor brings formal administrative or judicial action to collect interest due under this section, the prevailing party is entitled to costs and reasonable attorney fees.

(7) A contracting agency may reserve as retainage from any progress payment on a public improvement contract an amount not to exceed five percent of the payment. As work progresses, a contracting agency may reduce the amount of the retainage and the contracting agency may eliminate retainage on any remaining monthly contract payments after 50 percent of the work under the contract is completed if, in the contracting agency's opinion, such work is progressing satisfactorily. Elimination or reduction of retainage shall be allowed only upon written application by the contractor, and the application shall include written approval of the contractor's surety. However, when the contract work is 97.5 percent completed the contracting agency may, at the contracting agency's discretion and without application by the contractor, reduce the retained amount to 100 percent of the value of the contract work remaining to be done. Upon receipt of a written application by the contractor, the contracting agency shall respond in writing within a reasonable time.

(8) The retainage held by a contracting agency shall be included in and paid to the contractor as part of the final payment of the contract price. The contracting agency shall pay to the contractor interest at the rate of 1.5 percent per month on the final payment due the contractor, interest to commence 30 days after the work under the contract has been completed and accepted and to run until the date when the final payment is tendered to the contractor. The contractor shall notify the contracting agency in writing when the contractor considers the work complete and the contracting agency shall, within 15 days after receiving the written notice, either accept the work or notify the contractor of work yet to be performed on the contract. If the contracting agency does not, within the time allowed, notify the contractor of work yet to be performed to fulfill contractual obligations, the interest provided by this subsection shall commence to run 30 days after the end of the 15-day period.

(9)(a) The contracting agency shall pay, upon settlement or judgment in favor of the contractor regarding any dispute as to the compensation due a contractor for work performed under the terms of a public improvement contract, the amount due plus interest at the rate of two times the discount rate, but not to exceed 30 percent, on 90-day commercial paper in effect at the

Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date of the settlement or judgment, and accruing from the later of:

(A) The due date of any progress payment received under the contract for the period in which such work was performed; or

(B) Thirty days after the date on which the claim for the payment under dispute was presented to the contracting agency by the contractor in writing or in accordance with applicable provisions of the contract.

(b) Interest shall be added to and not made a part of the settlement or judgment. [2003 c.794 §150; 2005 c.103 §33]

[no rule]

Subcontractors

279C.580 Contractor's relations with subcontractors. (1) A contractor may not request payment from the contracting agency of any amount withheld or retained in accordance with subsection (5) of this section until such time as the contractor has determined and certified to the contracting agency that the subcontractor has determined and certified to the contracting agency that the subcontractor is entitled to the payment of such amount.

(2) A dispute between a contractor and first-tier subcontractor relating to the amount or entitlement of a first-tier subcontractor to a payment or a late payment interest penalty under a clause included in the subcontract under subsection (3) or (4) of this section does not constitute a dispute to which the contracting agency is a party. The contracting agency may not be included as a party in any administrative or judicial proceeding involving such a dispute.

(3) Each public improvement contract awarded by a contracting agency shall include a clause that requires the contractor to include in each subcontract for property or services entered into by the contractor and a first-tier subcontractor, including a material supplier, for the purpose of performing a construction contract:

(a) A payment clause that obligates the contractor to pay the first-tier subcontractor for satisfactory performance under its subcontract within 10 days out of such amounts as are paid to the contractor by the contracting agency under the contract; and

(b) An interest penalty clause that obligates the contractor, if payment is not made within 30 days after receipt of payment from the contracting agency, to pay to the first-tier subcontractor an interest penalty on amounts due in the case of each payment not made in accordance with the payment clause included in the subcontract under paragraph (a) of this subsection. A contractor or first-tier subcontractor may not be obligated to pay an interest penalty if the only reason that the contractor or first-tier subcontractor did not make payment when payment was due is that the contractor or first-tier subcontractor did not receive payment from the contracting agency or contractor when payment was due. The interest penalty shall be:

(A) For the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

(B) Computed at the rate specified in ORS 279C.515 (2).

(4) The contract awarded by the contracting agency shall require the contractor to include in each of the contractor's subcontracts, for the purpose of performance of such contract condition, a provision requiring the first-tier subcontractor to include a payment clause and an interest

penalty clause conforming to the standards of subsection (3) of this section in each of the first-tier subcontractor's subcontracts and to require each of the first-tier subcontractor's subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.

(5)(a) The clauses required by subsections (3) and (4) of this section are not intended to impair the right of a contractor or a subcontractor at any tier to negotiate, and to include in the subcontract, provisions that:

(A) Permit the contractor or a subcontractor to retain, in the event of a good faith dispute, an amount not to exceed 150 percent of the amount in dispute from the amount due a subcontractor under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties consider appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond;

(B) Permit the contractor or subcontractor to make a determination that part or all of the subcontractor's request for payment may be withheld in accordance with the subcontract agreement; and

(C) Permit such withholdings without incurring any obligation to pay a late payment interest penalty if:

(i) A notice conforming to the standards of subsection (8) of this section has been previously furnished to the subcontractor; and

(ii) A copy of any notice issued by a contractor under sub-subparagraph (i) of this subparagraph has been furnished to the contracting agency.

(b) As used in this subsection, "good faith dispute" means a documented dispute concerning:

(A) Unsatisfactory job progress.

(B) Defective work not remedied.

(C) Third-party claims filed or reasonable evidence that claims will be filed.

(D) Failure to make timely payments for labor, equipment and materials.

(E) Damage to the prime contractor or subcontractor.

(F) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.

(6) If, after making application to a contracting agency for payment under a contract but before making a payment to a subcontractor for the subcontractor's performance covered by such application, a contractor discovers that all or the Portion of the payment otherwise due the subcontractor is subject to withholding from the subcontractor in accordance with the subcontract agreement, the contractor shall:

(a) Furnish to the subcontractor a notice conforming to the standards of subsection (8) of this section as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the due date for subcontractor payment;

(b) Furnish to the contracting agency, as soon as practicable, a copy of the notice furnished to the subcontractor under paragraph (a) of this subsection;

(c) Reduce the subcontractor's progress payment by an amount not to exceed the amount specified in the notice of withholding furnished under paragraph (a) of this subsection;

(d) Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency;

(e) Make such payment within:

(A) Seven days after correction of the identified subcontract performance deficiency unless the funds therefor must be recovered from the contracting agency because of a reduction under paragraph (f)(A) of this subsection; or

(B) Seven days after the contractor recovers such funds from the contracting agency;

(f) Notify the contracting agency upon:

(A) Reduction of the amount of any subsequent certified application for payment; or

(B) Payment to the subcontractor of any withheld amounts of a progress payment, specifying:

(i) The amounts of the progress payments withheld under paragraph (a) of this subsection;

and

(ii) The dates that such withholding began and ended; and

(g) Be obligated to pay to the contracting agency an amount equal to interest on the withheld payments computed in the manner provided in ORS 279C.570 from the 11th day after receipt of the withheld amounts from the contracting agency until:

(A) The day the identified subcontractor performance deficiency is corrected; or

(B) The date that any subsequent payment is reduced under paragraph (f)(A) of this subsection.

(7)(a) If a contractor, after making payment to a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor a written notice asserting a deficiency in such first-tier subcontractor's performance under the contract for which the contractor may be ultimately liable and the contractor determines that all or the Portion of future payments otherwise due such first-tier subcontractor is subject to withholding in accordance with the subcontract agreement, the contractor may, without incurring an obligation to pay a late payment interest penalty under subsection (6)(e) of this section:

(A) Furnish to the first-tier subcontractor a notice conforming to the standards of subsection (8) of this section as soon as practicable upon making such determination; and

(B) Withhold from the first-tier subcontractor's next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under subparagraph (A) of this paragraph.

(b) As soon as practicable, but not later than 10 days after receipt of satisfactory written notification that the identified subcontract performance deficiency has been corrected, the contractor shall pay the amount withheld under paragraph (a)(B) of this subsection to such first-tier subcontractor, or shall incur an obligation to pay a late payment interest penalty to such first-tier subcontractor computed at the rate specified in ORS 279C.570.

(8) A written notice of any withholding shall be issued to a subcontractor, with a copy to the contracting agency of any such notice issued by a contractor, specifying:

(a) The amount to be withheld;

(b) The specified causes for the withholding under the terms of the subcontract; and

(c) The remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

(9) Except as provided in subsection (2) of this section, this section does not limit or impair any contractual, administrative or judicial remedies otherwise available to a contractor or a subcontractor in the event of a dispute involving late payment or nonpayment by a contractor or deficient performance or nonperformance by a subcontractor.

(10) A contractor's obligation to pay a late payment interest penalty to a subcontractor under the clause included in a subcontract under subsection (3) or (4) of this section is not intended to

be an obligation of the contracting agency. A contract modification may not be made for the purpose of providing reimbursement of such late payment interest penalty. A cost reimbursement claim may not include any amount for reimbursement of such late payment interest penalty. [2003 c.794 §151; 2005 c.103 §34]

[no rule]

279C.585 Authority to substitute undisclosed first-tier subcontractor; circumstances; rules. A contractor whose bid is accepted may substitute a first-tier subcontractor that was not disclosed under ORS 279C.370 by submitting the name of the new subcontractor and the reason for the substitution in writing to the contracting agency. A contractor may substitute a first-tier subcontractor under this section in the following circumstances:

(1) When the subcontractor disclosed under ORS 279C.370 fails or refuses to execute a written contract after having had a reasonable opportunity to do so after the written contract, which must be reasonably based upon the general terms, conditions, plans and specifications for the public improvement project or the terms of the subcontractor's written bid, is presented to the subcontractor by the contractor.

(2) When the disclosed subcontractor becomes bankrupt or insolvent.

(3) When the disclosed subcontractor fails or refuses to perform the subcontract.

(4) When the disclosed subcontractor fails or refuses to meet the bond requirements of the contractor that had been identified prior to the bid submittal.

(5) When the contractor demonstrates to the contracting agency that the subcontractor was disclosed as the result of an inadvertent clerical error.

(6) When the disclosed subcontractor does not hold a license from, or has a license that is not properly endorsed by, the Construction Contractors Board and is required to be licensed by the board.

(7) When the contractor determines that the work performed by the disclosed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications or that the subcontractor is substantially delaying or disrupting the progress of the work.

(8) When the disclosed subcontractor is ineligible to work on a public improvement contract under applicable statutory provisions.

(9) When the substitution is for good cause. The Construction Contractors Board shall define "good cause" by rule. "Good cause" includes but is not limited to the financial instability of a subcontractor. The definition of "good cause" must reflect the least-cost policy for public improvements established in ORS 279C.305.

(10) When the substitution is reasonably based on the contract alternates chosen by the contracting agency. [2003 c.794 §152; 2007 c.836 §45]

[no rule]

279C.590 Complaint process for substitutions of subcontractors; civil penalties. (1)(a) A subcontractor disclosed under ORS 279C.370 may file a complaint based on the subcontractor disclosure requirements under ORS 279C.370 with the Construction Contractors Board about a contractor if the contractor has substituted another subcontractor for the complaining subcontractor.

(b) If more than one subcontractor files a complaint with the board under paragraph (a) of this subsection relating to a single subcontractor disclosure, the board shall consolidate the complaints into one proceeding. If the board imposes a civil penalty under this section against a contractor, the amount collected by the board shall be divided evenly among all of the complaining subcontractors.

(c) Each subcontractor filing a complaint under paragraph (a) of this subsection shall post a deposit of \$500 with the board upon filing the complaint.

(d) If the board determines that a contractor's substitution was not in compliance with ORS 279C.585, the board shall return the full amount of the deposit posted under paragraph (c) of this subsection to the complaining subcontractor.

(e) If the board determines that a contractor has not substituted a subcontractor or that the contractor's substitution was in compliance with ORS 279C.585, the board shall award the contractor \$250 of the deposit and shall retain the other \$250, which may be expended by the board.

(2) Upon receipt of a complaint under subsection (1) of this section, the board shall investigate the complaint. If the board determines that a contractor has substituted a subcontractor in a manner not in compliance with ORS 279C.585, the board may impose a civil penalty against the contractor under subsections (3) to (5) of this section. Civil penalties under this section shall be imposed in the manner provided under ORS 183.745.

(3) If the board imposes a civil penalty under subsection (2) of this section and it is the first time the board has imposed a civil penalty under subsection (2) of this section against the contractor during a three-year period, the board shall:

(a) Impose a civil penalty on the contractor of up to 10 percent of the amount of the subcontract bid submitted by the complaining subcontractor to the contractor or \$15,000, whichever is less. Amounts collected by the board under this paragraph shall be awarded to the complaining subcontractor or subcontractors; and

(b) Impose a civil penalty on the contractor of up to \$1,000. Amounts collected by the board under this paragraph shall be retained by the board and may be expended by the board.

(4) If the board imposes a civil penalty under subsection (2) of this section and it is the second time the board has imposed a civil penalty under subsection (2) of this section against the contractor during a three-year period, the board may:

(a) Impose a civil penalty on the contractor of up to 10 percent of the amount of the subcontract bid submitted by the complaining subcontractor to the contractor or \$15,000, whichever is less. Amounts collected by the board under this paragraph shall be awarded to the complaining subcontractor or subcontractors; and

(b) Impose a civil penalty on the contractor of up to \$1,000 and shall place the contractor on the list established under ORS 701.227 for up to six months. Amounts collected by the board under this paragraph shall be retained by the board and may be expended by the board.

(5) If the board imposes a civil penalty under subsection (2) of this section and the board has imposed a civil penalty under subsection (2) of this section against the contractor three or more times during a three-year period, the board may:

(a) Impose a civil penalty on the contractor of up to 10 percent of the amount of the subcontract bid submitted by the complaining subcontractor to the contractor or \$15,000, whichever is less. Amounts collected by the board under this paragraph shall be awarded to the complaining subcontractor or subcontractors; and

(b) Impose a civil penalty on the contractor of up to \$1,000 and shall place the contractor on the list established under ORS 701.227 for up to one year. Amounts collected by the board under this paragraph shall be retained by the board and may be expended by the board.

(6) Within 10 working days after receiving a complaint under subsection (1) of this section, the board shall notify, in writing, any contracting agency that is a party to the contract for which the complaint has been filed that the complaint has been filed. [2003 c.794 §153]

[no rule]

Action on Payment Bonds and Public Works Bonds

279C.600 Right of action on payment bond or public works bond of contractor or subcontractor; notice of claim. (1) A person claiming to have supplied labor or materials for the performance of the work provided for in a public contract, including any person having a direct contractual relationship with the contractor furnishing the payment bond or a direct contractual relationship with any subcontractor, or an assignee of such person, or a person claiming moneys due the State Accident Insurance Fund Corporation, the Unemployment Compensation Trust Fund or the Department of Revenue in connection with the performance of the contract, has a right of action on the contractor's payment bond as provided for in ORS 279C.380 and 279C.400 only if:

(a) The person or the assignee of the person has not been paid in full; and

(b) The person gives written notice of claim, as prescribed in ORS 279C.605, to the contractor and the contracting agency.

(2) When, upon investigation, the Commissioner of the Bureau of Labor and Industries has received information indicating that one or more workers providing labor on a public works have not been paid in full at the prevailing rate of wage or overtime wages, the commissioner has a right of action first on the contractor's public works bond required under ORS 279C.836 and then, for any amount of a claim not satisfied by the public works bond, on the contractor's payment bond, as provided in ORS 279C.380 and 279C.400. When an investigation indicates that a subcontractor's workers have not been paid in full at the prevailing rate of wage or overtime wages, the commissioner has a right of action first on the subcontractor's public works bond and then, for any amount of a claim not satisfied by the subcontractor's public works bond, on the contractor's payment bond. The commissioner's right of action exists without necessity of an assignment and extends to workers on the project who are not identified when the written notice of claim is given, but for whom the commissioner has received information indicating that the workers have provided labor on the public works and have not been paid in full. The commissioner shall give written notice of the claim, as prescribed in ORS 279C.605, to the contracting agency, the Construction Contractors Board, the contractor and, if applicable, the subcontractor. The commissioner may not make a claim for the same unpaid wages against more than one bond under this section. [2003 c.794 §154; 2005 c.360 §3]

[no rule]

279C.605 Notice of claim. (1) The notice of claim required by ORS 279C.600 must be sent by registered or certified mail or hand delivered no later than 180 days after the day the person

last provided labor or furnished materials or 180 days after the worker listed in the notice of claim by the Commissioner of the Bureau of Labor and Industries last provided labor. The notice may be sent or delivered to the contractor or subcontractor at any place the contractor or subcontractor maintains an office or conducts business or at the residence of the contractor or subcontractor.

(2) Notwithstanding subsection (1) of this section, if the claim is for a required contribution to a fund of an employee benefit plan, the notice required by ORS 279C.600 must be sent or delivered within 200 days after the employee last provided labor or materials.

(3) The notice must be in writing substantially as follows:

To (here insert the name of the contractor or subcontractor and the name of the public body):
 Notice hereby is given that the undersigned (here insert the name of the claimant) has a claim for (here insert a brief description of the labor or materials performed or furnished and the person by whom performed or furnished; if the claim is for other than labor or materials, insert a brief description of the claim) in the sum of (here insert the amount) dollars against the (here insert public works bond or payment bond, as applicable) taken from (here insert the name of the principal and, if known, the surety or sureties upon the public works bond or payment bond) for the work of (here insert a brief description of the work concerning which the public works bond or payment bond was taken). Such material or labor was supplied to (here insert the name of the contractor or subcontractor).

(here to be signed)

(4) When notice of claim is given by the commissioner and if the claim includes a worker who is then unidentified, the commissioner shall include in the notice a statement that the claim includes an unidentified worker for whom the commissioner has received information indicating that the worker has not been paid in full at the prevailing rate of wage required by ORS 279C.840 or overtime wages required by ORS 279C.540.

(5) The person making the claim or giving the notice shall sign the notice. [2003 c.794 §155; 2005 c.360 §4; 2009 c.160 §1]

[no rule]

279C.610 Action on contractor's public works bond or payment bond; time limitation.

(1) The Commissioner of the Bureau of Labor and Industries or a person who has a right of action on the public works bond or the payment bond under ORS 279C.600 and, where required, who has filed and served the notice or notices of claim, as required under ORS 279C.600 and 279C.605, or that person's assignee, may institute an action on the contractor's public works bond or payment bond in a circuit court of this state or the federal district court of the district.

(2) The action shall be on the relation of the commissioner, the claimant, or that person's assignee, as the case may be, and shall be in the name of the contracting agency that let the contract or, when applicable, the public agency or agencies for whose benefit the contract was

let. It may be prosecuted to final judgment and execution for the use and benefit of the commissioner or the claimant, or that person's assignee, as the fact may appear.

(3) The action shall be instituted no later than two years after the person last provided labor or materials or two years after the worker listed in the commissioner's notice of claim last provided labor. [2003 c.794 §156; 2005 c.360 §5]

[no rule]

279C.615 Preference for labor and material liens. All labor and material liens have preference and are superior to all other liens and claims of any kind or nature created by ORS 279C.500 to 279C.530 and 279C.600 to 279C.625. [2003 c.794 §157]

[no rule]

279C.620 Rights of person providing medical care to employees of contractor. A person providing medical, surgical or hospital care services or other needed care and attention, incident to sickness or injury, to the employees of a contractor or subcontractor on a public contract is deemed to have performed labor on the public contract for the purposes of ORS 279C.600 to 279C.625. [2003 c.794 §158]

[no rule]

279C.625 Joint liability when payment bond not executed. If the public improvement contract is one for which a payment bond as provided for in ORS 279C.380 and 279C.400 is required and the contractor fails to pay for labor or materials or to pay claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund or the Department of Revenue and the officers of the public body that authorized the contract fail or neglect to require the person entering into the contract to execute the payment bond:

(1) The State of Oregon and the officers authorizing the contract shall be jointly liable for the labor and materials used in the performance of any work under the contract, and for claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund and the Department of Revenue, if the contract was entered into with the State of Oregon.

(2) The public body and the officers authorizing the contract shall be jointly liable for the labor and materials used in the performance of any work under the contract and for claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund and the Department of Revenue, if the contract was entered into on behalf of a public body other than the state. [2003 c.794 §159; 2005 c.103 §35]

[no rule]

Termination or Suspension of Contract for Public Interest Reasons

279C.650 "Labor dispute" defined. As used in ORS 279C.650 to 279C.670, "labor dispute" has the meaning given that term in ORS 662.010. [2003 c.794 §160]

[no rule]

279C.655 Extension and compensation when work suspended. If a public contract is not terminated but work under the contract is suspended by an order of a contracting agency for any reason considered to be in the public interest other than a labor dispute or any third-party judicial proceeding relating to the work other than a suit or action filed in regards to a labor dispute, the contractor is entitled to a reasonable extension of the contract time and reasonable compensation for all costs resulting from the suspension plus a reasonable allowance for overhead with respect to such costs. [2003 c.794 §161]

[no rule]

279C.660 Compensation when contract terminated due to public interest. When a public contract is terminated by mutual agreement, provision shall be made for the payment of compensation to the contractor. In addition to a reasonable amount of compensation for preparatory work and for all costs and expenses arising out of termination, the amount to be paid to the contractor:

- (1) Shall be determined on the basis of the contract price in the case of any fully completed separate item or portion of the work for which there is a separate or unit contract price; and
- (2) May, with respect to any other work, be a percent of the contract price equal to the percentage of the work completed. [2003 c.794 §162]

[no rule]

279C.665 Contractual provisions for compensation when contract terminated due to public interest. A contracting agency may provide in a public improvement contract detailed provisions under which the contractor shall be entitled, as a matter of right, to compensation upon termination of the contract on account of any reason considered to be in the public interest. [2003 c.794 §163]

[no rule]

279C.670 Application of ORS 279C.650 to 279C.670. ORS 279C.650 to 279C.670 do not apply to suspension of the work or termination of the contract that occurs as a result of the contractor's violation of federal, state or local statutes, ordinances, rules or regulations in existence at the time the contract was executed or as a result of violations of the terms of the contract. [2003 c.794 §164]

[no rule]

Prevailing Wage Rate

279C.800. As used in ORS 279C.800 to 279C.870:

- (1) "Fringe benefits" means the amount of:

(a) The rate of contribution a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program; and

(b) The rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing the following items, except for items that federal, state or local law requires the contractor or subcontractor to provide:

(A) Benefits to workers pursuant to an enforceable written commitment to the workers to carry out a financially responsible plan or program for:

(i) Medical or hospital care;

(ii) Pensions on retirement or death; or

(iii) Compensation for injuries or illness that result from occupational activity;

(B) Insurance to provide the benefits described in subparagraph (A) of this paragraph;

(C) Unemployment benefits;

(D) Life insurance;

(E) Disability and sickness insurance or accident insurance;

(F) Vacation and holiday pay;

(G) Costs of apprenticeship or other similar programs; or

(H) Other bona fide fringe benefits.

(2) "Housing" has the meaning given that term in ORS 456.055.

(3) "Locality" means the following district in which the public works, or the major portion thereof, is to be performed:

(a) District 1, composed of Clatsop, Columbia and Tillamook Counties;

(b) District 2, composed of Clackamas, Multnomah and Washington Counties;

(c) District 3, composed of Marion, Polk and Yamhill Counties;

(d) District 4, composed of Benton, Lincoln and Linn Counties;

(e) District 5, composed of Lane County;

(f) District 6, composed of Douglas County;

(g) District 7, composed of Coos and Curry Counties;

(h) District 8, composed of Jackson and Josephine Counties;

(i) District 9, composed of Hood River, Sherman and Wasco Counties;

(j) District 10, composed of Crook, Deschutes and Jefferson Counties;

(k) District 11, composed of Klamath and Lake Counties;

(L) District 12, composed of Gilliam, Grant, Morrow, Umatilla and Wheeler Counties;

(m) District 13, composed of Baker, Union and Wallowa Counties; and

(n) District 14, composed of Harney and Malheur Counties.

(4) "Prevailing rate of wage" means the rate of hourly wage, including all fringe benefits, that the Commissioner of the Bureau of Labor and Industries determines is paid in the locality to the majority of workers employed on projects of a similar character in the same trade or occupation.

(5) "Public agency" means the State of Oregon or a political subdivision of the State of Oregon, or a county, city, district, authority, public corporation or public entity organized and existing under law or charter or an instrumentality of the county, city, district, authority, public corporation or public entity.

(6)(a) "Public works" includes, but is not limited to:

(A) Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest;

(B) A project that uses funds of a private entity and \$750,000 or more of funds of a public agency for constructing, reconstructing, painting or performing a major renovation on a privately owned road, highway, building, structure or improvement of any type;

(C) A project that uses funds of a private entity for constructing a privately owned road, highway, building, structure or improvement of any type in which a public agency will use or occupy 25 percent or more of the square footage of the completed project; or

(D) Notwithstanding the provisions of ORS 279C.810 (2)(a), (b) and (c), a device, structure or mechanism, or a combination of devices, structures or mechanisms, that:

(i) Uses solar radiation as a source for generating heat, cooling or electrical energy; and

(ii) Is constructed or installed, with or without using funds of a public agency, on land, premises, structures or buildings that a public body, as defined in ORS 174.109, owns.

(b) "Public works" does not include:

(A) The reconstruction or renovation of privately owned property that a public agency leases; or

(B) The renovation of publicly owned real property that is more than 75 years old by a private nonprofit entity if:

(i) The real property is leased to the private nonprofit entity for more than 25 years;

(ii) Funds of a public agency used in the renovation do not exceed 15 percent of the total cost of the renovation; and

(iii) Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 13, 2007. [2003 c.794 §165; 2007 c.764 §34; 2010 Enrolled House Bill 3651 (2010 Special Session; see Note below)]

Note: The amendments to 279C.800 by Enrolled House Bill 3651, 2010 Special Session, become operative January 1, 2011; see section 3 of such bill. The text that is operative until January 1, 2011, is set forth below for the user's convenience.

279C.800 Definitions for ORS 279C.800 to 279C.870. As used in ORS 279C.800 to 279C.870, unless the context requires otherwise:

(1) "Fringe benefits" means the amount of:

(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person under a plan, fund or program; and

(b) The rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program that is committed in writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only when the contractor or subcontractor is not required by other federal, state or local law to provide any of these benefits.

(2) "Housing" has the meaning given that term in ORS 456.055.

(3) "Locality" means the following district in which the public works, or the major portion thereof, is to be performed:

(a) District 1, composed of Clatsop, Columbia and Tillamook Counties;

(b) District 2, composed of Clackamas, Multnomah and Washington Counties;

(c) District 3, composed of Marion, Polk and Yamhill Counties;

(d) District 4, composed of Benton, Lincoln and Linn Counties;

(e) District 5, composed of Lane County;

- (f) District 6, composed of Douglas County;
- (g) District 7, composed of Coos and Curry Counties;
- (h) District 8, composed of Jackson and Josephine Counties;
- (i) District 9, composed of Hood River, Sherman and Wasco Counties;
- (j) District 10, composed of Crook, Deschutes and Jefferson Counties;
- (k) District 11, composed of Klamath and Lake Counties;
- (L) District 12, composed of Gilliam, Grant, Morrow, Umatilla and Wheeler Counties;
- (m) District 13, composed of Baker, Union and Wallowa Counties; and
- (n) District 14, composed of Harney and Malheur Counties.

(4) "Prevailing rate of wage" means the rate of hourly wage, including all fringe benefits, paid in the locality to the majority of workers employed on projects of similar character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries.

(5) "Public agency" means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any instrumentality thereof organized and existing under law or charter.

(6)(a) "Public works" includes, but is not limited to:

(A) Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest;

(B) A project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and \$750,000 or more of funds of a public agency; or

(C) A project for the construction of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency.

(b) "Public works" does not include:

(A) The reconstruction or renovation of privately owned property that is leased by a public agency; or

(B) The renovation of publicly owned real property that is more than 75 years old by a private nonprofit entity if:

(i) The real property is leased to the private nonprofit entity for more than 25 years;

(ii) Funds of a public agency used in the renovation do not exceed 15 percent of the total cost of the renovation; and

(iii) Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 13, 2007. [2003 c.794 §165; 2007 c.764 §34]

[no rule]

279C.805 Policy. The Legislative Assembly declares that the purposes of the prevailing rate of wage law are:

(1) To ensure that contractors compete on the ability to perform work competently and efficiently while maintaining community-established compensation standards.

(2) To recognize that local participation in publicly financed construction and family wage income and benefits are essential to the protection of community standards.

(3) To encourage training and education of workers to industry skills standards.

(4) To encourage employers to use funds allocated for employee fringe benefits for the actual purchase of those benefits. [2003 c.794 §166]

[no rule]

279C.807 Workforce diversity for public works projects. * * *

[no rule]

279C.808 Rules. * * *

[no rule]

279C.810 Exemptions; rules. (1) As used in this section:

(a) “Funds of a public agency” does not include:

(A) Funds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction, reconstruction, major renovation or painting;

(B) Building and development permit fees paid or waived by the public agency;

(C) Tax credits or tax abatements;

(D) Land that a public agency sells to a private entity at fair market value;

(E) The difference between:

(i) The value of land that a public agency sells to a private entity as determined at the time of the sale after taking into account any plan, requirement, covenant, condition, restriction or other limitation, exclusive of zoning or land use regulations, that the public agency imposes on the development or use of the land; and

(ii) The fair market value of the land if the land is not subject to the limitations described in subparagraph (i) of this paragraph;

(F) Staff resources of the public agency used to manage a project or to provide a principal source of supervision, coordination or oversight of a project;

(G) Staff resources of the public agency used to design or inspect one or more components of a project;

(H) Moneys derived from the sale of bonds that are loaned by a state agency to a private entity, unless the moneys will be used for a public improvement;

(I) Value added to land as a consequence of a public agency’s site preparation, demolition of real property or remediation or removal of environmental contamination, except for value added in excess of the expenses the public agency incurred in the site preparation, demolition or remediation or removal when the land is sold for use in a project otherwise subject to ORS 279C.800 to 279C.870; or

(J) Bonds, or loans from the proceeds of bonds, issued in accordance with ORS chapter 289 or ORS 441.525 to 441.595, unless the bonds or loans will be used for a public improvement.

(b) “Nonprofit organization” means an organization or group of organizations described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.

(2) ORS 279C.800 to 279C.870 do not apply to:

(a) Projects for which the contract price does not exceed \$50,000. In determining the price of a project, a public agency:

(A) May not include the value of donated materials or work performed on the project by individuals volunteering to the public agency without pay; and

(B) Shall include the value of work performed by every person paid by a contractor or subcontractor in any manner for the person's work on the project.

(b) Projects for which no funds of a public agency are directly or indirectly used. In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries shall adopt rules to carry out the provisions of this paragraph.

(c) Projects:

(A) That are privately owned;

(B) That use funds of a private entity;

(C) In which less than 25 percent of the square footage of a completed project will be occupied or used by a public agency; and

(D) For which less than \$750,000 of funds of a public agency are used.

(d) Projects for residential construction that are privately owned and that predominantly provide affordable housing. As used in this paragraph:

(A) "Affordable housing" means housing that serves occupants whose incomes are no greater than 60 percent of the area median income or, if the occupants are owners, whose incomes are no greater than 80 percent of the area median income.

(B) "Predominantly" means 60 percent or more.

(C) "Privately owned" includes:

(i) Affordable housing provided on real property owned by a public agency if the real property and related structures are leased to a private entity for 50 or more years; and

(ii) Affordable housing owned by a partnership, nonprofit corporation or limited liability company in which a housing authority, as defined in ORS 456.005, is a general partner, director or managing member and the housing authority is not a majority owner in the partnership, nonprofit corporation or limited liability company.

(D) "Residential construction" includes the construction, reconstruction, major renovation or painting of single-family houses or apartment buildings not more than four stories in height and all incidental items, such as site work, parking areas, utilities, streets and sidewalks, pursuant to the United States Department of Labor's "All Agency Memorandum No. 130: Application of the Standard of Comparison "Projects of a Character Similar" Under Davis-Bacon and Related Acts," dated March 17, 1978. However, the commissioner may consider different definitions of residential construction in determining whether a project is a residential construction project for purposes of this paragraph, including definitions that:

(i) Exist in local ordinances or codes; or

(ii) Differ, in the prevailing practice of a particular trade or occupation, from the United States Department of Labor's description of residential construction. [2003 c.794 §172; 2005 c.153 §1; 2005 c.360 §8; 2007 c.764 §35]

[no rule]

279C.815 Determination of prevailing wage; sources of information; comparison of state and federal prevailing wage; other powers of commissioner. (1) As used in this section, "person" includes any employer, labor organization or any official representative of an employee or employer association.

(2)(a) The Commissioner of the Bureau of Labor and Industries shall determine the prevailing rate of wage for workers in each trade or occupation in each locality described in ORS

279C.800 at least once each year by means of an independent wage survey and make this information available at least twice each year. The commissioner may amend the rate at any time.

(b) If it appears to the commissioner that the data derived only from the survey described in paragraph (a) of this subsection are insufficient to determine the prevailing rate of wage, the commissioner also shall consider additional information such as collective bargaining agreements, other independent wage surveys and the prevailing rates of wage determined by appropriate federal agencies or agencies of adjoining states. If there is not a majority in the same trade or occupation paid at the same rate, the average rate of hourly wage, including all fringe benefits, paid in the locality to workers in the same trade or occupation shall be the prevailing rate. If the wage paid by any contractor or subcontractor to workers on any public works is based on some period of time other than an hour, the hourly wage shall be mathematically determined by the number of hours worked in that period of time.

(c) The commissioner shall compare the prevailing rate of wage determined under paragraph (a) of this subsection with the federal prevailing rate of wage required under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) and determine which rate is higher for workers in each trade or occupation in each locality. The commissioner shall make this information, showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality, available at the same time as the commissioner makes information available under paragraph (a) of this subsection.

(3) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

(4) Notwithstanding ORS 192.410 to 192.505, all reports and returns or other information provided to the commissioner under this section are confidential and not available for inspection by the public.

(5) In order to assist the commissioner in making determinations of the prevailing rates of wage, the commissioner may enter into contracts with public or private parties to obtain relevant data and information. Any such contract may include provisions for the manner and extent of the market review of affected trades and occupations and such other requirements regarding timelines of reports, accuracy of data and information and supervision and review as the commissioner may prescribe. [2003 c.794 §173; 2005 c.360 §9; 2007 c.764 §36; 2007 c.844 §3]

[no rule]

279C.817 Determination of applicability of prevailing wage rate; time limitation; hearing; rules. (1) The Commissioner of the Bureau of Labor and Industries shall, upon the request of a public agency or other interested person, make a determination about whether a project or proposed project is or would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840.

(2) The requester shall provide the commissioner with information necessary to enable the commissioner to make the determination.

(3) The commissioner shall make the determination within 60 days after receiving the request or 60 days after the requester has provided the commissioner with the information necessary to

enable the commissioner to make the determination, whichever is later. The commissioner may take additional time to make the determination if the commissioner and the requester mutually agree that the commissioner may do so.

(4) The commissioner shall afford the requester or a person adversely affected or aggrieved by the commissioner's determination a hearing in accordance with ORS 183.413 to 183.470. An order the commissioner issues under ORS 183.413 to 183.470 is subject to judicial review as provided in ORS 183.482.

(5) The commissioner shall adopt rules establishing the process for requesting and making the determinations described in this section. [2007 c.764 §43]

Rule C.817 Requests for Determination of Applicability of Prevailing Wage Rate

All requests for a determination of the applicability of the prevailing wage rate under ORS 279C.817(1) will be made by the Manager of Contracts and Procurement, if such Manager determines that a request is appropriate. In determining the appropriateness of a request, the Manager may require the preparation of written findings describing the matter.

279C.820 Advisory committee to assist commissioner. (1) The Commissioner of the Bureau of Labor and Industries shall appoint an advisory committee to assist the commissioner in the administration of ORS 279C.800 to 279C.870.

(2) The advisory committee must include equal representation of members from management and labor in the building and construction industry who perform work on public works contracts and such other interested parties as the commissioner shall appoint. [2003 c.794 §179]

[no rule]

279C.825 Fees; rules. (1)(a) The Commissioner of the Bureau of Labor and Industries, by order, shall establish a fee to be paid by the public agency that awards a public works contract subject to ORS 279C.800 to 279C.870. The commissioner shall use the fee to pay the costs of:

(A) Surveys to determine the prevailing rates of wage;

(B) Administering and providing investigations under and enforcement of ORS 279C.800 to 279C.870; and

(C) Providing educational programs on public contracting law under the Public Contracting Code.

(b) The commissioner shall establish the fee at 0.1 percent of the contract price. However, in no event may a fee be charged and collected that is less than \$250 or more than \$7,500.

(2) The commissioner shall pay moneys received under this section into the State Treasury. The moneys shall be credited to the Prevailing Wage Education and Enforcement Account created by ORS 651.185.

(3) The public agency shall pay the fee at the time the public agency notifies the commissioner under ORS 279C.835 a contract subject to the provisions of ORS 279C.800 to 279C.870 has been awarded. [2003 c.794 §178; 2007 c.844 §7; 2009 c.161 §1; 2009 c.788 §1]

[no rule]

279C.827 Division of public works project; applicability of prevailing wage rate to divided projects. (1)(a) A public agency may not divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.

(b) When the Commissioner of the Bureau of Labor and Industries determines that a public agency has divided a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner shall issue an order compelling compliance.

(c) In making determinations under this subsection, the commissioner shall consider:

(A) The physical separation of the project structures;

(B) The timing of the work on project phases or structures;

(C) The continuity of project contractors and subcontractors working on project parts or phases;

(D) The manner in which the public agency and the contractors administer and implement the project;

(E) Whether a single public works project includes several types of improvements or structures; and

(F) Whether the combined improvements or structures have an overall purpose or function.

(2) If a project is a public works of the type described in ORS 279C.800 (6)(a)(B) or (C), the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsection (1)(c) of this section to separate the parts of the project that include funds of a public agency or that will be occupied or used by a public agency from the parts of the project that do not include funds of a public agency and that will not be occupied or used by a public agency. If the commissioner divides the project, any part of the project that does not include funds of a public agency and that will not be occupied or used by a public agency is not subject to ORS 279C.800 to 279C.870.

(3) If a project includes parts that are owned by a public agency and parts that are owned by a private entity, the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsections (1)(c) and (2) of this section to separate the parts of the project that are public works from the parts of the project that are not public works. If the commissioner divides the project, parts of the project that are not public works are not subject to ORS 279C.800 to 279C.870. [2007 c.764 §44]

[no rule]

279C.829 Agreement with other state to pay less than prevailing rate of wage.

Notwithstanding any other provision of law, a contracting agency may not enter into an agreement with another state or a political subdivision or agency of another state in which the contracting agency agrees that a contractor or subcontractor may pay less than the prevailing rate of wage determined in accordance with ORS 279C.815 under the terms of a contract for public works to which the contracting agency is a party or of which the contracting agency is a beneficiary. [2009 c.322 §2]

[no rule]

279C.830 Provisions concerning prevailing rate of wage in specifications, contracts and subcontracts; applicability of prevailing wage; bond. (1)(a) Except as provided in paragraph (d) of this subsection, the specifications for every contract for public works shall contain a provision stating the existing state prevailing rate of wage and, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) that may be paid to workers in each trade or occupation required for the public works employed in the performance of the contract either by the contractor or subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract. When the prevailing rates of wage are available electronically or are accessible on the Internet, the rates may be incorporated into the specifications by referring to the electronically accessible or Internet-accessible rates and by providing adequate information about how to access the rates.

(b) If a public agency is required under paragraph (a) of this subsection to include the state and federal prevailing rates of wage in the specifications, the public agency also shall include in the specifications information showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality, as determined by the Commissioner of the Bureau of Labor and Industries under ORS 279C.815 (2)(c).

(c) Every contract and subcontract shall contain a provision that the workers shall be paid not less than the specified minimum hourly rate of wage in accordance with ORS 279C.838 and 279C.840.

(d) A public works project described in ORS 279C.800 (6)(a)(B) or (C) is subject to the existing state prevailing rate of wage or, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act that is in effect at the time a public agency enters into an agreement with a private entity for the project. After that time, the specifications for any contract for the public works shall include the applicable prevailing rate of wage.

(2) The specifications for every contract for public works shall contain a provision stating that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9). Every contract awarded by a contracting agency shall contain a provision requiring the contractor:

(a) To have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9).

(b) To include in every subcontract a provision requiring the subcontractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9). [2003 c.794 §168; 2005 c.360 §10; 2007 c.415 §2; 2007 c.764 §37; 2007 c.844 §4; 2009 c.161 §2]

[no rule]

279C.835 Notifying commissioner of public works contract subject to prevailing wage; payment of fee. Public agencies shall notify the Commissioner of the Bureau of Labor and Industries in writing, on a form prescribed by the commissioner, whenever a contract subject to the provisions of ORS 279C.800 to 279C.870 has been awarded. The notification shall be made within 30 days of the date that the contract is awarded. The notification shall include payment of the fee required under ORS 279C.825 and a copy of the disclosure of first-tier subcontractors that was submitted under ORS 279C.370. [2003 c.794 §175; 2009 c.161 §3]

[no rule]

279C.836 Public works bond; rules. (1) Except as provided in subsection (4), (7), (8) or (9) of this section, before starting work on a contract or subcontract for a public works project, a contractor or subcontractor shall file with the Construction Contractors Board a public works bond with a corporate surety authorized to do business in this state in the amount of \$30,000. The bond must provide that the contractor or subcontractor will pay claims ordered by the Bureau of Labor and Industries to workers performing labor upon public works projects. The bond must be a continuing obligation, and the surety's liability for the aggregate of claims that may be payable from the bond may not exceed the penal sum of the bond. The bond must remain in effect continuously until depleted by claims paid under this section, unless the surety sooner cancels the bond. The surety may cancel the bond by giving 30 days' written notice to the contractor or subcontractor, to the board and to the Bureau of Labor and Industries. When the bond is canceled, the surety is relieved of further liability for work performed on contracts entered into after the cancellation. The cancellation does not limit the surety's liability for work performed on contracts entered into before the cancellation.

(2) Before permitting a subcontractor to start work on a public works project, the contractor shall verify that the subcontractor has filed a public works bond as required under this section, has elected not to file a public works bond under subsection (7) or (8) of this section or is exempt under subsection (4) or (9) of this section.

(3) A contractor or subcontractor is not required under this section to file a separate public works bond for each public works project for which the contractor or subcontractor has a contract.

(4) A person that is not required under ORS 279C.800 to 279C.870 to pay prevailing rates of wage on a public works project is not required to file a public works bond under this section.

(5) A public works bond required by this section is in addition to any other bond the contractor or subcontractor is required to obtain.

(6) The board may, by rule, require a contractor or subcontractor to obtain a new public works bond if a surety pays a claim out of an existing public works bond. The new bond must be in the amount of \$30,000. The board may allow a contractor or subcontractor to obtain, instead of a new bond, a certification that the surety remains liable for the full penal sum of the existing bond, notwithstanding payment by the surety on the claim.

(7)(a) A disadvantaged, minority, women or emerging small business enterprise certified under ORS 200.055 may, for up to four years after certification, elect not to file a public works bond as required under subsection (1) this section. If a business enterprise elects not to file a public works bond, the business enterprise shall give the board written verification of the certification and written notice that the business enterprise elects not to file the bond.

(b) A business enterprise that elects not to file a public works bond under this subsection shall notify the public agency for whose benefit the contract was awarded or, if the business enterprise is a subcontractor, the contractor of the election before starting work on a public works project. When a business enterprise elects not to file a public works bond under this subsection, a claim for unpaid wages may be made against the payment bond of the business enterprise or, if the business enterprise is a subcontractor, the payment bond of the contractor.

(c) An election not to file a public works bond expires four years after the date the business enterprise is certified. After an election has expired and before starting or continuing work on a contract or subcontract for a public works project, the business enterprise shall file a public works bond with the board as required under subsection (1) of this section.

(8) A contractor or subcontractor may elect not to file a public works bond as required under subsection (1) of this section for any public works project for which the contract price does not exceed \$100,000.

(9) In cases of emergency, or when the interest or property of the public agency for whose benefit the contract was awarded probably would suffer material injury by delay or other cause, the requirement for filing a public works bond may be excused, if a declaration of the emergency is made in accordance with rules adopted under ORS 279A.065.

(10) The board shall make available on a searchable public website information concerning public works bonds filed with the board, claims made on those bonds, elections made by certified business enterprises not to file those bonds and the expiration date of each election. The board may adopt rules necessary to perform the duties required of the board by this section.

(11) The Commissioner of the Bureau of Labor and Industries, with approval of the board, shall adopt rules that establish language for public works bonds. [2005 c.360 §2; 2007 c.415 §1; 2007 c.764 §38]

[no rule]

279C.838 Applicability of state and federal rates of wage; determination of site of project; determination of applicability of wage to transportation workers; waiver. When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.):

(1) If the state prevailing rate of wage is higher than the federal prevailing rate of wage, the contractor and every subcontractor on the project shall pay at least the state prevailing rate of wage as determined under ORS 279C.815;

(2) The Commissioner of the Bureau of Labor and Industries shall determine the site of the project in a manner consistent with the term “site of the work” as that term is used in federal law and in regulations adopted or guidelines issued in accordance with the Davis-Bacon Act;

(3) The commissioner shall determine in a manner that is consistent with federal law and regulations adopted or guidelines issued in accordance with the Davis-Bacon Act whether workers transporting materials and supplies to and from the site of the project are subject to the Davis-Bacon Act and are entitled to be paid the prevailing rate of wage;

(4) Except as provided in subsection (1) of this section, the commissioner, in consultation with the advisory committee appointed under ORS 279C.820, may administer and enforce ORS 279C.800 to 279C.870 in a manner that is consistent with federal law and regulations adopted or guidelines issued in accordance with the Davis-Bacon Act. The commissioner may provide a waiver from a requirement set forth in ORS 279C.800 to 279C.870 if necessary to achieve consistency with the Davis-Bacon Act and to further the purposes of ORS 279C.805; and

(5) ORS 279C.800 to 279C.870 do not apply to workers enrolled in skill training programs that are certified by the United States Secretary of Transportation under the Federal-Aid Highway Act (23 U.S.C. 113(c)). [2005 c.360 §7; 2007 c.844 §5]

[no rule]

279C.840 Payment of prevailing rate of wage; posting of rates and fringe benefit plan provisions. (1) The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where the labor is performed. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash, by the making of contributions of a type referred to in ORS 279C.800 (1)(a), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in ORS 279C.800 (1)(b), or any combination thereof, where the aggregate of any such payments, contributions and costs is not less than the prevailing rate of wage. The contractor or subcontractor shall pay all wages due and owing to the contractor's or subcontractor's workers upon public works on the regular payday established and maintained under ORS 652.120.

(2) After a contract for public works is executed with any contractor or work is commenced upon any public works, the amount of the prevailing rate of wage is not subject to attack in any legal proceeding by any contractor or subcontractor in connection with that contract.

(3) It is not a defense in any legal proceeding that the prevailing rate of wage is less than the amount required to be in the specifications of a contract for public works, or that there was an agreement between the employee and the employer to work at less than the wage rates required to be paid under this section.

(4) Every contractor or subcontractor engaged on a project for which there is a contract for a public works shall keep the prevailing rates of wage for that project posted in a conspicuous and accessible place in or about the project. The Commissioner of the Bureau of Labor and Industries shall furnish without charge copies of the prevailing rates of wage to contractors and subcontractors.

(5) Every contractor or subcontractor engaged on a project for which there is a contract for a public works to which the prevailing wage requirements apply that also provides or contributes to a health and welfare plan or a pension plan, or both, for the contractor or subcontractor's employees on the project shall post a notice describing the plan in a conspicuous and accessible place in or about the project. The notice preferably shall be posted in the same place as the notice required under subsection (4) of this section. In addition to the description of the plan, the notice shall contain information on how and where to make claims and where to obtain further information.

(6)(a) Except as provided in paragraph (c) of this subsection, no person other than the contractor or subcontractor may pay or contribute any portion of the prevailing rate of wage paid by the contractor or subcontractor to workers employed in the performance of a public works contract.

(b) For the purpose of this subsection, the prevailing rate of wage is the prevailing rate of wage specified in the contract.

(c) This subsection is not intended to prohibit payments to a worker who is enrolled in any government-subsidized training or retraining program.

(7) A person may not take any action that circumvents the payment of the prevailing rate of wage to workers employed on a public works contract, including, but not limited to, reducing an employee's regular rate of pay on any project not subject to ORS 279C.800 to 279C.870 in a

manner that has the effect of offsetting the prevailing rate of wage on a public works project.
[2003 c.794 §167; 2009 c.161 §4]

[no rule]

279C.845 Certified statements regarding payment of prevailing rates of wage; retainage. (1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public agency in writing, on a form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:

(a) The hourly rate of wage paid each worker whom the contractor or the subcontractor has employed upon the public works; and

(b) That no worker employed upon the public works has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract.

(2) The certified statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read the certified statement, that the contractor or subcontractor knows the contents of the certified statement and that to the contractor or subcontractor's knowledge the certified statement is true.

(3) The certified statements shall set out accurately and completely the contractor's or subcontractor's payroll records, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked and the gross wages the worker earned upon the public works during each week identified in the certified statement.

(4) The contractor or subcontractor shall deliver or mail each certified statement required by subsection (1) of this section to the public agency. Certified statements for each week during which the contractor or subcontractor employs a worker upon the public works shall be submitted once a month, by the fifth business day of the following month. Information submitted on certified statements may be used only to ensure compliance with the provisions of ORS 279C.800 to 279C.870.

(5) Each contractor or subcontractor shall preserve the certified statements for a period of three years from the date of completion of the contract.

(6) Certified statements received by a public agency are public records subject to the provisions of ORS 192.410 to 192.505.

(7) Notwithstanding ORS 279C.555 or 279C.570 (7), if a contractor is required to file certified statements under this section, the public agency shall retain 25 percent of any amount earned by the contractor on the public works until the contractor has filed with the public agency certified statements as required by this section. The public agency shall pay the contractor the amount retained under this subsection within 14 days after the contractor files the certified statements as required by this section, regardless of whether a subcontractor has failed to file certified statements as required by this section. The public agency is not required to verify the truth of the contents of certified statements filed by the contractor under this section.

(8) Notwithstanding ORS 279C.555, the contractor shall retain 25 percent of any amount earned by a first-tier subcontractor on a public works until the subcontractor has filed with the public agency certified statements as required by this section. The contractor shall verify that the first-tier subcontractor has filed the certified statements before the contractor may pay the subcontractor any amount retained under this subsection. The contractor shall pay the first-tier subcontractor the amount retained under this subsection within 14 days after the subcontractor

files the certified statements as required by this section. Neither the public agency nor the contractor is required to verify the truth of the contents of certified statements filed by a first-tier subcontractor under this section. [2003 c.794 §169; 2005 c.360 §11; 2009 c.7 §1]

[no rule]

279C.850 Inspection to determine whether prevailing rate of wage being paid; civil action for failure to pay prevailing rate of wage or overtime. (1) At any reasonable time the Commissioner of the Bureau of Labor and Industries may enter the office or business establishment of any contractor or subcontractor performing public works and gather facts and information necessary to determine whether the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works.

(2) Upon request by the commissioner, every contractor or subcontractor performing work on public works shall make available to the commissioner for inspection during normal business hours any payroll or other records in the possession or under the control of the contractor or subcontractor that are deemed necessary by the commissioner to determine whether the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works. The commissioner's request must be made a reasonable time in advance of the inspection.

(3) Notwithstanding ORS 192.410 to 192.505, any record obtained or made by the commissioner under this section is not open to inspection by the public.

(4) The commissioner may, without necessity of an assignment, initiate legal proceedings against employers to enjoin future failures to pay required prevailing rates of wage or overtime pay and to require the payment of prevailing rates of wage or overtime pay due employees. The commissioner is entitled to recover, in addition to other costs, such sum as the court or judge may determine reasonable as attorney fees. If the commissioner does not prevail in the action, the commissioner shall pay all costs and disbursements from the Bureau of Labor and Industries Account. [2003 c.794 §170]

[no rule]

279C.855 Liability for violations. (1) Any contractor or subcontractor or contractor's or subcontractor's surety that violates the provisions of ORS 279C.840 is liable to the workers affected in the amount of their unpaid minimum wages, including all fringe benefits, and in an additional amount equal to the unpaid wages as liquidated damages.

(2) Actions to enforce liability to workers under subsection (1) of this section may be brought as actions on contractors' bonds as provided for in ORS 279C.610.

(3) If a public agency fails to include a provision that the contractor and any subcontractor shall comply with ORS 279C.840 in the advertisement for bids, the request for bids, the contract specifications, the accepted bid or elsewhere in the contract documents, the liability of the public agency for unpaid minimum wages, as described in subsection (1) of this section, is joint and several with any contractor or subcontractor that had notice of the requirement to comply with ORS 279C.840.

(4) When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.) and a public agency fails to include the state and federal prevailing rates of wage in the

specifications for the contract for public works as required under ORS 279C.830 (1)(a), or fails to include in the specifications information showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality as required under ORS 279C.830 (1)(b), the public agency is liable to each affected worker for:

(a) The worker's unpaid minimum wages, including fringe benefits, in an amount that equals, for each hour worked, the difference between the applicable higher rate of wage and the lower rate of wage; and

(b) An additional amount, equal to the amount of unpaid minimum wages due under paragraph (a) of this subsection, as liquidated damages.

(5) The Commissioner of the Bureau of Labor and Industries may enforce the provisions of subsections (3) and (4) of this section by a civil action under ORS 279C.850 (4), by a civil action on an assigned wage claim under ORS 652.330, or by an administrative proceeding on an assigned wage claim under ORS 652.332. [2003 c.794 §171; 2007 c.844 §6]

[no rule]

279C.860 Ineligibility for public works contracts for failure to pay or post notice of prevailing rates of wage; certified payroll reports to commissioner. (1) A contractor, subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or subcontract for public works for a period of three years from the date on which the Commissioner of the Bureau of Labor and Industries publishes the contractor's or subcontractor's name on the list described in subsection (2) of this section. The commissioner shall add a contractor's or subcontractor's name to the list after determining, in accordance with ORS chapter 183, that:

(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works;

(b) The subcontractor has failed to pay to the subcontractor's employees amounts required by ORS 279C.840 and the contractor has paid those amounts on the subcontractor's behalf;

(c) The contractor or subcontractor has intentionally failed or refused to post the prevailing rates of wage as required by ORS 279C.840 (4); or

(d) The contractor or subcontractor has intentionally falsified information in the contractor's or subcontractor's certified statements submitted under ORS 279C.845.

(2) The commissioner shall maintain a written list of the names of those contractors and subcontractors determined to be ineligible under this section and the period of time for which they are ineligible. The commissioner shall publish a copy of the list, furnish the list upon request and make the list available to contracting agencies.

(3) When the contractor or subcontractor is a corporation, the provisions of this section apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing rate of wage, the failure to pay to a subcontractor's employees amounts required by ORS 279C.840 that are paid by the contractor on the subcontractor's behalf or the intentional falsification of information in the contractor's or subcontractor's certified statements submitted under ORS 279C.845.

(4) For good cause shown, the commissioner may direct the removal of the name of a contractor or subcontractor from the ineligible list.

(5) To assist the commissioner in determining whether the contractor or subcontractor is paying the prevailing rate of wage, when a prevailing rate of wage claim is filed, or evidence indicating a violation has occurred, a contractor or subcontractor required to pay the prevailing rate of wage to workers employed upon public works under ORS 279C.800 to 279C.870 shall send a certified copy of the payroll for those workers when the commissioner requests the certified copy. [2003 c.794 §174; 2009 c.107 §1]

[no rule]

279C.865 Civil penalties. (1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$5,000 for each violation of any provision of ORS 279C.800 to 279C.870 or any rule of the commissioner adopted thereunder.

(2) Civil penalties under this section shall be imposed as provided in ORS 183.745.

(3) All moneys collected as penalties under this section shall be first applied toward reimbursement of costs incurred in determining violations, conducting hearings and assessing and collecting the penalties. The remainder, if any, of moneys collected as penalties under this section shall be paid into the State Treasury and credited to the General Fund and are available for general governmental expenses. [2003 c.794 §177]

[no rule]

279C.870 Civil action to enforce payment of prevailing rates of wage. (1) The Commissioner of the Bureau of Labor and Industries or any other person may bring a civil action in any court of competent jurisdiction to require a public agency under a public contract with a contractor to withhold twice the wages in dispute if it is shown that the contractor or subcontractor on the contract has intentionally failed or refused to pay the prevailing rate of wage to workers employed on that contract and to require the contractor to pay the prevailing rate of wage and any deficiencies that can be shown to exist because of improper wage payments already made. In addition to other relief, the court may also enjoin the contractor or subcontractor from committing future violations. The contractor or subcontractor involved shall be named as a party in all civil actions brought under this section. In addition to other costs, the court may award the prevailing party reasonable attorney fees at the trial and on appeal. However, attorney fees may not be awarded against the commissioner under this section.

(2) The court shall require any party, other than the commissioner, that brings a civil action under this section to post a bond sufficient to cover the estimated attorney fees and costs to the public agency and to the contractor or subcontractor of any temporary restraining order, preliminary injunction or permanent injunction awarded in the action, in the event that the party bringing the action does not ultimately prevail.

(3) In addition to any other relief, the court in a civil action brought under this section may enjoin the public agency from contracting with the contractor or subcontractor if the court finds that the commissioner would be entitled to place the contractor or subcontractor on the ineligible list established under ORS 279C.860. If the court issues such an injunction, the commissioner shall place the contractor or subcontractor on the list for a period of three years, subject to the provision of ORS 279C.860 (4). [2003 c.794 §176; 2007 c.764 §39; 2009 c.107 §2]

[no rule]

[End of Division C]