

Enrolled House Bill 2214

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Attorney General Hardy Myers for Department of Justice)

CHAPTER

AN ACT

Relating to Public Contracting Code; creating new provisions; amending ORS 200.170, 279A.010, 279A.020, 279A.025, 279A.055, 279A.105, 279A.205, 279B.005, 279B.015, 279B.020, 279B.065, 279B.075, 279B.085, 279B.215, 279B.235, 279B.400, 279C.010, 279C.100, 279C.105, 279C.335, 279C.360, 279C.365, 279C.370, 279C.375, 279C.380, 279C.385, 279C.400, 279C.410, 279C.430, 279C.450, 279C.505, 279C.515, 279C.520, 279C.530, 279C.540, 279C.550, 279C.570, 279C.580, 279C.625, 530.050 and 530.500 and sections 105 and 336, chapter 794, Oregon Laws 2003; and declaring an emergency.

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

SECTION 1. ORS 200.170 is amended to read:

200.170. (1) Subject to subsection (2) of this section, in order to be eligible for assistance under ORS 200.005 and 200.150 to 200.200, the applicant must:

- (a) Be determined to be an emerging small business pursuant to ORS 200.150;
- (b) Have not been found to be eligible for such assistance in more than seven calendar years;
- (c) Show that the applicant’s place of business and the work in which the applicant seeks to participate are located in this state; and
- (d) Show that the applicant is in compliance with applicable licensing and registration requirements.

(2) The Department of Transportation may limit eligibility for assistance on a specific project or contract to emerging small businesses that are located in or draw a part of their workforce from economically [*depressed*] **distressed** areas in this state, as designated by the Economic and Community Development Department in consultation with the Employment Department.

(3) The applicant for assistance under ORS 200.005 and 200.150 to 200.200 must perform at least 51 percent of the labor on any public improvement or maintenance project for which assistance is received using the applicant’s own workforce.

SECTION 1a. ORS 279A.010 is amended to read:

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

- (a) “Bidder” means a person that submits a bid in response to an invitation to bid.
- (b) “Contracting agency” means a public body authorized by law to conduct a procurement. “Contracting agency” includes, but is not limited to, the Director of the Oregon Department of Administrative Services and any person authorized by a contracting agency to conduct a procurement on the contracting agency’s behalf. “Contracting agency” does not include the judicial department or the legislative department.

- (c) "Days" means calendar days.
- (d) "Department" means the Oregon Department of Administrative Services.
- (e) "Director" means the Director of the Oregon Department of Administrative Services or a person designated by the director to carry out the authority of the director under the Public Contracting Code.
- (f) "Emergency" means circumstances that:
 - (A) Could not have been reasonably foreseen;
 - (B) Create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and
 - (C) Require prompt execution of a contract to remedy the condition.
- (g) "Energy savings performance contract" means a public contract between a contracting agency and a qualified energy service company for the identification, evaluation, recommendation, design and construction of energy conservation measures, including a design-build contract, that guarantee energy savings or performance.
- (h) "Executive department" has the meaning given that term in ORS 174.112.
- (i)(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.
- (j) "Industrial oil" means any compressor, turbine or bearing oil, hydraulic oil, metal-working oil or refrigeration oil.
- (k) "Judicial department" has the meaning given that term in ORS 174.113.
- (L) "Legislative department" has the meaning given that term in ORS 174.114.
- (m) "Local contract review board" means a local contract review board described in ORS 279A.060.
- (n) "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.
- (o) "Local government" has the meaning given that term in ORS 174.116.
- (p) "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.

(q) "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.

(r) "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.

(s) "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.

(t) "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.

(u) "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.

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

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

(x) "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.

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

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

(aa) "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.

(bb) "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.

(cc) "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.

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

(ee) "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.

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

(gg) "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.

(hh) “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.

(ii) “Special government body” has the meaning given that term in ORS 174.117.

(jj) “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.

(kk) “State contracting agency” means an executive department entity authorized by law to conduct a procurement.

(LL) “State government” has the meaning given that term in ORS 174.111.

(mm) “Used oil” has the meaning given that term in ORS 459A.555.

(nn) “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:

“Adequate”	ORS 279C.305
“Administering contracting agency”	ORS 279A.200
“Affirmative action”	ORS 279A.100
“Architect”	ORS 279C.100
“Architectural, engineering and land surveying services”	ORS 279C.100
“Bid documents”	ORS 279C.400
“Bidder”	ORS 279B.415
“Bids”	ORS 279C.400
“Brand name”	ORS 279B.405
“Brand name or equal specification”	ORS 279B.200
“Brand name specification”	ORS 279B.200
“Class special procurement”	ORS 279B.085
“Consultant”	ORS 279C.115
“Contract-specific special procurement”	ORS 279B.085
“Cooperative procurement”	ORS 279A.200
“Cooperative procurement group”	ORS 279A.200
“Donee”	ORS 279A.250
“Engineer”	ORS 279C.100
[“Established catalog price”	ORS 279B.005]
“Findings”	ORS 279C.330
“Fire protection equipment”	ORS 279A.190
“Flagger”	ORS 279C.810
“Fringe benefits”	ORS 279C.800
“Funds of a public agency”	ORS 279C.810
“Good cause”	ORS 279C.585
“Good faith dispute”	ORS 279C.580

“Goods”	ORS 279B.115
“Goods and services” or “goods or services”	ORS 279B.005
“Interstate cooperative procurement”	ORS 279A.200
“Invitation to bid”	ORS 279B.005 and 279C.400
“Joint cooperative procurement”	ORS 279A.200
“Labor dispute”	ORS 279C.650
“Land surveyor”	ORS 279C.100
“Legally flawed”	ORS 279B.405
“Locality”	ORS 279C.800
“Nonprofit organization”	ORS 279C.810
“Nonresident bidder”	ORS 279A.120
“Not-for-profit organization”	ORS 279A.250
“Original contract”	ORS 279A.200
“Permissive cooperative procurement”	ORS 279A.200
“Person”	ORS 279C.500 and 279C.815
“Personal services”	ORS 279C.100
“Prevailing rate of wage”	ORS 279C.800
“Procurement description”	ORS 279B.005
“Property”	ORS 279A.250
“Public agency”	ORS 279C.800
“Public contract”	ORS 279A.190
“Public contract for goods or services”	ORS 279B.005
“Public works”	ORS 279C.800
“Purchasing contracting agency”	ORS 279A.200
“Regularly organized fire department”	ORS 279A.190
“Related services”	ORS 279C.100
“Request for proposals”	ORS 279B.005
“Resident bidder”	ORS 279A.120
“Responsible bidder”	ORS 279A.105 and 279B.005
“Responsible proposer”	ORS 279B.005
“Responsive bid”	ORS 279B.005
“Responsive proposal”	ORS 279B.005
“Retainage”	ORS 279C.550
“Special procurement”	ORS 279B.085
“Specification”	ORS 279B.200
“State agency”	ORS 279A.250
“Substantial completion”	ORS 279C.465
“Surplus property”	ORS 279A.250
“Unnecessarily restrictive”	ORS 279B.405

SECTION 2. ORS 279A.020 is amended to read:

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

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

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

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

SECTION 3. ORS 279A.025 is amended to read:

279A.025. (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 contracting agencies or between contracting agencies and the federal government;

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

(c) Grants;

(d) 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;

(e) Acquisitions or disposals of real property or interest in real property;

(f) Sole-source expenditures when rates are set by law or ordinance for purposes of source selection;

(g) Contracts for the procurement or distribution of textbooks;

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

(i) The procurement, transportation or distribution of distilled liquor, as defined in ORS 471.001, or the appointment of agents under ORS 471.750 by the Oregon Liquor Control Commission;

(j) Contracts entered into under ORS chapter 180 between the Attorney General and private counsel or special legal assistants;

[(k) Contracts for the sale of forest products, as defined in ORS 321.005, from lands owned or managed by the State Board of Forestry and the State Forestry Department;]

(k) Contracts for the sale of timber from lands owned or managed by the State Board of Forestry and the State Forestry Department;

(L) Contracts for forest protection or forest related activities, as described in ORS 477.406, by the State Forester or the State Board of Forestry;

(m) Sponsorship agreements entered into by the Director of the Oregon State Fair and Exposition Center in accordance with ORS 565.080 (4);

(n) Contracts entered into by the Housing and Community Services Department in exercising the department's duties prescribed in ORS chapters 456 and 458, except that the department's public contracting for goods and services, as defined in ORS 279B.005, is subject to ORS chapter 279B;

(o) Contracts entered into by the State Treasurer in exercising the powers of that office prescribed in ORS chapters 178, 286, 287, 288, 289, 293, 294 and 295, including but not limited to investment contracts and agreements, banking services, clearing house services and collateralization agreements, bond documents, certificates of participation and other debt repayment agreements, and any associated contracts, agreements and documents, regardless of whether the obligations that the contracts, agreements or documents establish are general, special or limited, except that the State Treasurer's public contracting for goods and services, as defined in ORS 279B.005, is subject to ORS chapter 279B;

[(p) Energy savings performance contracts;]

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

(A) The incurring of debt by a public body, including but not limited to the issuance of bonds, certificates of participation and other debt repayment obligations, and any associated contracts,

agreements or other documents, regardless of whether the obligations that the contracts, agreements or other documents establish are general, special or limited;

(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)] (q) 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; or

[(s)] (r) Any other public contracting of a public body specifically exempted from the code by another provision of law.

(3) The Public Contracting Code does not apply to the public contracting activities of:

(a) The Oregon State Lottery Commission;

(b) The Oregon University System and member institutions, except as provided in ORS 351.086;

(c) The legislative department;

(d) The judicial department;

(e) Semi-independent state agencies listed in ORS 182.451, 182.452 and 182.454, except as provided in ORS 279.835 to 279.855 and 279A.250 to 279A.290;

(f) Oregon Corrections Enterprises;

(g) The Oregon Film and Video Office, except as provided in ORS 279A.100 and 279A.250 to 279A.290;

(h) The Travel Information Council, except as provided in ORS 279A.250 to 279A.290;

(i) The Appraiser Certification and Licensure Board, except as provided in ORS 279.835 to 279.855 and 279A.250 to 279A.290; or

(j) Any other 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 disabled individuals under ORS 279.835 to 279.855.

SECTION 4. ORS 279A.055 is amended to read:

279A.055. (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.

SECTION 5. ORS 279A.105 is amended to read:

279A.105. (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.

(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 its workforce from economically [*depressed*] **distressed** areas, as designated by the Economic and Community 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).

SECTION 6. ORS 279A.205 is amended to read:

279A.205. (1) A contracting agency may participate in, sponsor, conduct or administer a **joint** 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.

SECTION 7. ORS 279B.005 is amended to read:

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

[(a) “Established catalog price” means the price included in a catalog, price list, schedule or other form that:]

[(A) Is regularly maintained by a manufacturer or contractor;]

[(B) Is either published or otherwise available for inspection by customers; and]

[(C) States prices at which sales are currently or were last made to a significant number of any category of buyers or to buyers constituting the general market, including public bodies, for the goods or services involved.]

[(b)] (a) “Goods and services” or “goods or services” means supplies, equipment, materials and services other than personal services designated under ORS 279A.055 and any personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, that a contracting agency is authorized by law to procure. “Goods and services” or “goods or services” includes combinations of any of the items identified in this paragraph.

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

[(d)] (c) “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.

[(e)] (d) “Public contract for goods or services” includes, for state **contracting agencies with procurement authority under ORS 279A.050**, contracts for personal services as designated [under ORS 279A.055] **by the state contracting agencies.**

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

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

[(h)] (g) “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 (1) contains general definitions applicable throughout this chapter.

SECTION 8. ORS 279B.015 is amended to read:

279B.015. [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.

SECTION 8a. ORS 279B.020 is amended to read:

279B.020. [(1) A contractor on a public contract, other than a contract for services at a county fair or for other events authorized by a county fair board, shall pay employees for overtime work performed under the public contract in accordance with ORS 653.010 to 653.261 and the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).]

[(2) A contractor on a contract for services at a county fair or for other events authorized by a county fair board shall pay persons employed under the contract at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week.]

(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.

[3] (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.

[(4)] (10) An action to enforce liability to employees under subsection [(3)] (9) of this section may be brought as an action on the contractor's payment bond as provided for in ORS 279C.610.

[(5)] (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.**

[(6)] (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.

SECTION 8b. ORS 279B.065 is amended to read:

279B.065. (1) Any procurement of goods or services not exceeding \$5,000 may be awarded in accordance with small procurement procedures established by rules adopted under ORS 279A.070. A contract **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.

SECTION 8c. ORS 279B.075 is amended to read:

279B.075. (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.

SECTION 8d. ORS 279B.085 is amended to read:

279B.085. (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 for the acquisition of a specified class of goods or services.

(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 for the acquisition of specified goods or services 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 proposed contracting procedure, the goods or services or the class of goods or services to be acquired through the special procurement and the circumstances that justify the use of a special procurement under the standards set forth in subsection [(3)] (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 proposed contracting procedure, the goods or services or the class of goods or services to be acquired through 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)] (4) The director, [or] a local contract review board, **the Secretary of State or the State Treasurer** may approve a special procurement if the director, [or] 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, [or] board, **Secretary of State or State Treasurer**, will:

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

(b)(A) Result in substantial cost savings to the contracting agency or to the public; or

(B) Otherwise substantially promote 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.

[(4)] (5) Public notice of the approval [*process for*] of a proposed special procurement must be given in the same manner as provided in ORS 279B.055 [(4)(b)] (4).

[(5)] (6) If a contract is awarded through a special procurement, the contracting agency shall award the contract to the offeror whose offer the contracting agency determines in writing to be the most advantageous to the contracting agency.

[(6)] (7) When the director, [or] 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 [*director's or the board's*] approval without making a subsequent request for a special procurement.

SECTION 8e. ORS 279B.215 is amended to read:

279B.215. (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.400] **279B.405**.

SECTION 8f. ORS 279B.235 is amended to read:

279B.235. *[(1) Every public contract, other than a contract for services at a county fair or for other events authorized by a county fair board, must contain a condition that the contractor shall pay employees for overtime work performed under the public contract in accordance with ORS 653.010 to 653.261 and the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).]*

(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.

[(2)] **(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.

SECTION 8g. ORS 279B.400 is amended to read:

279B.400. (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.

SECTION 9. ORS 279C.010 is amended to read:

279C.010. [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.

SECTION 10. ORS 279C.100 is amended to read:

279C.100. As used in ORS 279C.100 to 279C.125:

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

(2) "Architectural, engineering 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 (4).

(5) "Personal services" mean the services of a person or persons that are designated by [the Oregon Department of Administrative Services] **a state contracting agency with procurement authority under ORS 279A.050** or a local contract review board as personal services [under ORS 279A.055]. "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.

SECTION 11. ORS 279C.105 is amended to read:

279C.105. (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 Oregon Department of Administrative Services shall enter into contracts for architectural, engineering and land surveying services and related services on behalf of state contracting agencies that are subject to ORS 279A.140. The provisions of this section do not relieve the contracting agency of the duty to comply with ORS 279A.140, any other law applicable to 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 proce-

dures for the screening and selection of persons to perform those services under ORS 279C.110 or 279C.120.

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

SECTION 12. ORS 279C.335 is amended to read:

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

(a) Contracts made with qualified nonprofit agencies providing employment opportunities for disabled individuals under ORS 279.835 to 279.855.

(b) A public improvement contract exempt under subsection (2) of this section.

[(c) A contract for goods or services if the value of the contract is less than \$5,000.]

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

(d) A contract not to exceed \$100,000, or not to exceed \$50,000 in the case of a contract for a highway, bridge or other transportation project, made under procedures for competitive quotes in sections 132 and 133, chapter 794, Oregon Laws 2003.

(e) Contracts for repair, maintenance, improvement or protection of property obtained by the Director 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.

(g) A public improvement contract awarded under subsection (6) of this section in response to an emergency.

(2) Subject to subsection *[(3)(b)]* **(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 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; and

(b) The awarding of public improvement contracts under the exemption will result in substantial cost savings to the contracting agency 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.

(3) In making findings to support an exemption for a class of public improvement contracts, the contracting 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 contracting agency's overall construction program. The contracting 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.

[(3)] **(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 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.

~~[(4)(a)]~~ **(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 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 contracting agency's 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, 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 shall offer an opportunity for any interested party to appear and present comment.

(e) If a contracting agency is required to act promptly due to circumstances beyond the contracting agency's control that do not constitute an emergency, notification of the public hearing may be published simultaneously with the contracting 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.

[(5) A public improvement contract may be exempted from the requirement of subsection (1) of this section if emergency conditions require prompt execution of the contract. In accordance with rules adopted under ORS 279A.065, a contracting agency may declare that an emergency exists. If an emergency is declared, any contract awarded under this subsection must be awarded within 60 days following declaration of the emergency, unless the Director of the Oregon Department of Administrative Services or the local contract review board grants an extension.]

(6) After declaring that an emergency exists in accordance with rules adopted under ORS 279A.065, a contracting agency may award a public improvement contract in response to the emergency without using a competitive solicitation.

(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), (f) or (g) of this section are not subject to the exemption requirements of subsection (2) of this section.

SECTION 13. ORS 279C.335, as amended by section 104, chapter 794, Oregon Laws 2003, is amended to read:

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

(a) Contracts made with qualified nonprofit agencies providing employment opportunities for disabled individuals under ORS 279.835 to 279.855.

(b) A public improvement contract exempt under subsection (2) of this section.

[(c) A contract for goods or services if the value of the contract is less than \$5,000.]

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

(d) Contracts for repair, maintenance, improvement or protection of property obtained by the Director of Veterans' Affairs under ORS 407.135 and 407.145 (1).

(e) Energy savings performance contracts entered into in accordance with rules of procedure adopted under ORS 279A.065.

(f) A public improvement contract awarded under subsection (6) of this section in response to an emergency.

(2) Subject to subsection [(3)(b)] **(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 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; and

(b) The awarding of public improvement contracts under the exemption will result in substantial cost savings to the contracting agency 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.

(3) In making findings to support an exemption for a class of public improvement contracts, the contracting 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 contracting agency's overall construction program. The contracting 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.

[(3)] **(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 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.

[(4)(a)] **(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 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 contracting agency's 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, 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 shall offer an opportunity for any interested party to appear and present comment.

(e) If a contracting agency is required to act promptly due to circumstances beyond the contracting agency's control that do not constitute an emergency, notification of the public hearing may be published simultaneously with the contracting 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.

[(5) A public improvement contract may be exempted from the requirement of subsection (1) of this section if emergency conditions require prompt execution of the contract. In accordance with rules adopted under ORS 279A.065, a contracting agency may declare that an emergency exists. If an emergency is declared, any contract awarded under this subsection must be awarded within 60 days following declaration of the emergency, unless the Director of the Oregon Department of Administrative Services or the local contract review board grants an extension.]

(6) After declaring that an emergency exists in accordance with rules adopted under ORS 279A.065, a contracting agency may award a public improvement contract in response to the emergency without using a competitive solicitation.

(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.

SECTION 14. ORS 279C.335, as amended by sections 104 and 105a, chapter 794, Oregon Laws 2003, is amended to read:

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

(a) Contracts made with qualified nonprofit agencies providing employment opportunities for disabled individuals under ORS 279.835 to 279.855.

(b) A public improvement contract exempt under subsection (2) of this section.

[(c) A contract for goods or services if the value of the contract is less than \$5,000.]

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

(d) Contracts for repair, maintenance, improvement or protection of property obtained by the Director of Veterans' Affairs under ORS 407.135 and 407.145 (1).

(e) Energy savings performance contracts entered into in accordance with rules of procedure adopted under ORS 279A.065.

(f) A public improvement contract awarded under subsection (6) of this section in response to an emergency.

(2) Subject to subsection *[(3)(b)]* **(4)(b)** of this section, the Director of the Oregon Department of Administrative Services or a local contract review board 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 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; and

(b) The awarding of public improvement contracts under the exemption will result in substantial cost savings to the contracting agency. In making the finding, the director 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.

(3) In making findings to support an exemption for a class of public improvement contracts, the contracting 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 contracting agency's overall construction program. The contracting 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.

[(3)] **(4)** In granting exemptions under subsection (2) of this section, the director 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 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.

~~[(4)(a)]~~ **(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 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 contracting agency's 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, 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 shall offer an opportunity for any interested party to appear and present comment.

(e) If a contracting agency is required to act promptly due to circumstances beyond the contracting agency's control that do not constitute an emergency, notification of the public hearing may be published simultaneously with the contracting 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.

[(5) A public improvement contract may be exempted from the requirement of subsection (1) of this section if emergency conditions require prompt execution of the contract. In accordance with rules adopted under ORS 279A.065, a contracting agency may declare that an emergency exists. If an emergency is declared, any contract awarded under this subsection must be awarded within 60 days following declaration of the emergency, unless the director or the local contract review board grants an extension.]

(6) After declaring that an emergency exists in accordance with rules adopted under ORS 279A.065, a contracting agency may award a public improvement contract in response to the emergency without using a competitive solicitation.

(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.

SECTION 14a. ORS 279C.360 is amended to read:

279C.360. (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, *[or]* 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 Ser-**

vices, 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. 276a).

SECTION 15. ORS 279C.365 is amended to read:

279C.365. (1) A contracting agency preparing solicitation documents for a public improvement contract shall, at a minimum, include:

(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, **and may, in the sole discretion of the contracting agency, direct or permit the submission and receipt of bids by electronic means;**

(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;

(g) A statement that, 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. 276a), no bid will be received or considered by the contracting agency unless the bid contains a statement by the bidder that ORS 279C.840 or 40 U.S.C. 276a 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 not in compliance with all prescribed public contracting procedures and requirements and may reject for good cause all bids upon a finding of the agency that it 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 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) All bids 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; and

(c) Opened publicly by the contracting agency immediately after the deadline for submission of bids.

(3) After having been opened, the bids must be made available for public inspection.

(4) 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 *[attached to]* **submitted with or posted for** all bids as bid security unless the contract for which 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.

(5) Subsection (4) 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.

SECTION 16. ORS 279C.370 is amended to read:

279C.370. (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*] a 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.

SECTION 17. ORS 279C.375 is amended to read:

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)(c) or (d) or (6). The notice and its manner of posting or issuance must conform to rules adopted under ORS 279A.065.

[(2)] (3) In determining the lowest responsible bidder, a contracting agency shall:

(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; and

(b) Determine whether the prospective bidder has met the standards of responsibility. In making the determination, the contracting agency shall consider whether a prospective 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 indicate the capability of the prospective bidder to meet all contractual responsibilities;

(B) A satisfactory record of performance. The contracting agency shall document the record of performance of a prospective bidder if the contracting agency finds the prospective 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 prospective bidder if the contracting agency finds the prospective bidder not to be responsible under this subparagraph;

(D) Qualified legally to contract with the contracting agency; and

(E) Supplied all necessary information in connection with the inquiry concerning responsibility. If a prospective 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 prospective bidder not to be responsible.

[(3)] (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 [*as described in*] **when required under** ORS 279C.380.

SECTION 18. ORS 279C.375, as amended by section 17 of this 2005 Act, is amended to read:

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)(c) [or (d)] or (6). 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:

(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; and

(b) Determine whether the prospective bidder has met the standards of responsibility. In making the determination, the contracting agency shall consider whether a prospective 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 indicate the capability of the prospective bidder to meet all contractual responsibilities;

(B) A satisfactory record of performance. The contracting agency shall document the record of performance of a prospective bidder if the contracting agency finds the prospective 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 prospective bidder if the contracting agency finds the prospective bidder not to be responsible under this subparagraph;

(D) Qualified legally to contract with the contracting agency; and

(E) Supplied all necessary information in connection with the inquiry concerning responsibility. If a prospective 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 prospective bidder not to be responsible.

(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.

SECTION 19. Section 105, chapter 794, Oregon Laws 2003, is amended to read:

Sec. 105. The amendments to [section 103 of this 2003 Act by section 104 of this 2003 Act] **ORS 279C.335 by section 104, chapter 794, Oregon Laws 2003, and the amendments to ORS 279C.375 by section 18 of this 2005 Act** become operative on July 1, 2009.

SECTION 20. ORS 279C.380 is amended to read:

279C.380. (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.

SECTION 21. ORS 279C.385 is amended to read:

279C.385. (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 *[may be returned]* to them when the bids have been opened and the contract has been awarded, and may not *[be retained by the contracting agency]* **retain the bid security** after the contract has been duly signed.

NOTE: Section 22 was deleted by amendment. Subsequent sections were not renumbered.

SECTION 23. ORS 279C.400 is amended to read:

279C.400. (1) When authorized or required by an exemption granted under ORS 279C.335, a contracting agency may award a public improvement contract by 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 [(2)(a)] **(3)(a)**;
- (d) Contract execution and bonding requirements under ORS 279C.375 and 279C.380;
- (e) Determination of responsibility under ORS 279C.375 [(2)(b)] **(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) When award of a public improvement contract advertised by the issuance of a request for proposals may be made without negotiation, 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 (4)[, 279C.380] 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).

SECTION 24. ORS 279C.410 is amended to read:

279C.410. (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.

(9) 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 or distribution of a request for proposals.

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

279C.430. (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 [(2)(b)] **(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 regu-

lation. 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 [(2)(b)] **(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 [(2)(b)] **(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.

SECTION 26. ORS 279C.450 is amended to read:

279C.450. (1) The procedure for appeal from a disqualification or denial, revocation or revision of a prequalification by a contracting agency shall be in accordance with this section and is not subject to ORS chapter 183 except when specifically provided by this section.

(2) Promptly upon receipt of notice of appeal from a contracting agency as provided for by 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. 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 [(2)(b)] **(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 183.415 (3) to (6) and (9), 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 allocation shall be based upon facts found by the director and stated 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 be paid as follows:

(a) If 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.

(b) If 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.

(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 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 on the part of the director or board or any of its members.

(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.

(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 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 its discretion, 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 disqualification 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 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.

SECTION 27. ORS 279C.505 is amended to read:

279C.505. (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.

SECTION 28. ORS 279C.515 is amended to read:

279C.515. (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.

SECTION 29. ORS 279C.520 is amended to read:

279C.520. (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, ex-

cept 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.

SECTION 30. ORS 279C.530 is amended to read:

279C.530. (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.

SECTION 31. ORS 279C.540 is amended to read:

279C.540. (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.

SECTION 32. ORS 279C.550 is amended to read:

279C.550. 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.

SECTION 33. ORS 279C.570 is amended to read:

279C.570. (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.

SECTION 34. ORS 279C.580 is amended to read:

279C.580. (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 a 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 subcontract 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 a 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.

SECTION 35. ORS 279C.625 is amended to read:

279C.625. 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.

SECTION 36. The amendments to ORS 200.170, 279A.010, 279A.020, 279A.025, 279A.055, 279A.105, 279A.205, 279B.005, 279B.015, 279B.020, 279B.065, 279B.075, 279B.085, 279B.215, 279B.235, 279B.400, 279C.010, 279C.100, 279C.105, 279C.335, 279C.360, 279C.365, 279C.370, 279C.375, 279C.380, 279C.385, 279C.400, 279C.410, 279C.430, 279C.450, 279C.505, 279C.515, 279C.520, 279C.530, 279C.540, 279C.550, 279C.570, 279C.580 and 279C.625 by sections 1 to 12, 14a, 15 to 17 and 20 to 35 of this 2005 Act apply only to public contracts first advertised, but if not advertised then entered into, on or after the effective date of this 2005 Act.

SECTION 37. ORS 530.050 is amended to read:

530.050. Under the authority and direction of the State Board of Forestry except as otherwise provided for the sale of forest products, the State Forester shall manage the lands acquired pursuant to ORS 530.010 to 530.040 so as to secure the greatest permanent value of *[such]* **those** lands to the state, and to that end may:

(1) Protect the lands from fire, disease and insect pests, cooperate with the counties and with persons owning lands within the state in *[such]* **the protection of the lands** and enter into all agreements necessary or convenient *[therefor]* **for the protection of the lands**.

(2) Sell forest products from the lands, and execute mining leases and contracts as provided for in ORS 273.551.

(3) Enter into and administer contracts for the sale of timber from lands owned or managed by the State Board of Forestry and the State Forestry Department.

[(3)] (4) Permit the use of the lands for other purposes, including but not limited to forage and browse for domestic livestock, fish and wildlife environment, landscape effect, protection against floods and erosion, recreation, and protection of water supplies when, in the opinion of the board, *[such]* **the** use is not detrimental to the best interest of the state.

[(4)] (5) Grant easements, permits and licenses over, through and across the lands~~;~~ *[also,]*. **The State Forester** may require and collect reasonable fees or charges relating to the location and establishment of easements, permits and licenses granted by the state over *[such lands, which moneys]* **the lands. The fees and charges collected** shall be used **exclusively** for the expenses of *[such location and establishment. Any moneys derived hereunder]* **locating and establishing the easements, permits and licenses under this subsection and** shall be placed in the State Forestry Department Account *[and used exclusively for such purposes]*.

[(5)] (6) Require and collect fees or charges for the use of state forest roads~~;~~ *[which moneys]*. **The fees or charges collected** shall be used **exclusively** for purposes of maintenance and improvements of *[such]* **the** roads~~.~~ *[Any moneys derived hereunder]* **and** shall be placed in the State Forestry Department Account *[and used exclusively for such purposes]*.

[(6)] (7) Reforest the lands and cooperate with the counties, and with persons owning timberlands within the state, in *[such]* **the** reforestation, and make all agreements necessary or convenient *[therefor]* **for the reforestation**.

[(7)] (8) Require such undertakings as in the opinion of the board are necessary or convenient to secure performance of any contract entered into under the terms of this section~~,~~ or ORS 273.551.

[(8)] (9) Sell rock, sand, gravel, pumice and other such materials from the lands~~;~~ *[such]*. **The** sale may be negotiated without bidding, provided the appraised value of *[such]* **the materials** does not exceed \$2,500.

[(9)] (10) Enter into agreements, each for not more than 10 years duration, for the production of minor forest products.

[(10)] (11) Establish a forestry carbon offset program to market, register, transfer or sell forestry carbon offsets. In establishing the program, the forester may:

(a) Execute any contracts or agreements necessary to create opportunities for the creation of forestry carbon offsets; and

(b) Negotiate prices that are at, or greater than, fair market value for the transfer or sale of forestry carbon offsets.

[(11)] (12) Do all things and make all rules, not inconsistent with law, necessary or convenient for the management, protection, utilization and conservation of the lands.

SECTION 38. ORS 530.500 is amended to read:

530.500. In order to accomplish the purposes of ORS 530.490, the State Forester may:

(1) Protect the lands from fire, disease and insect pests, cooperate with the counties and with persons owning lands within the state in *[such]* **the protection of the lands** and enter into all agreements necessary or convenient *[therefor]* **for the protection of the lands.**

[(2) Sell forest products from the lands and execute contracts thereby required.]

(2) Enter into and administer contracts for the sale of timber from lands owned or managed by the State Board of Forestry and the State Forestry Department.

(3) Permit the use of the lands for other purposes, including but not limited to fish and wildlife environment, landscape effect, protection against flood and erosion, recreation and production and protection of water supplies when *[such]* **the** use is not detrimental to the purpose for which *[such]* **the** lands are dedicated.

(4) Contract with other governmental bodies for the protection of water supplies to facilitate the multiple use of publicly owned water supplies for recreational purposes as well as a source of water for domestic and industrial use.

(5) Grant permits and licenses on, over and across the lands.

(6) Reforest the lands and cooperate with persons owning timberlands within the state in *[such]* **the** reforestation, and make all agreements necessary or convenient *[therefor]* **for the reforestation.**

(7) Establish a forestry carbon offset program to market, register, transfer or sell forestry carbon offsets. In establishing the program, the forester may:

(a) Execute any contracts or agreements necessary to create opportunities for the creation of forestry carbon offsets; and

(b) Negotiate prices that are at, or greater than, fair market value for the transfer or sale of forestry carbon offsets.

(8) Do all things and make all rules and regulations, not inconsistent with law, necessary or convenient for the management, protection, utilization and conservation of the lands.

(9) Require such undertakings as in the opinion of the State Forester are necessary or convenient to secure performance of any agreement authorized in ORS 530.450 to 530.520.

SECTION 39. Section 336, chapter 794, Oregon Laws 2003, is amended to read:

Sec. 336. (1) Sections 1 to 21, 23 to 91, 94 to 103, 106 to 108, 111, 114 to 125 and 128 to 192, **chapter 794, Oregon Laws 2003** *[of this 2003 Act]*, the amendments to statutes and uncodified law by sections 193 to 229 and 229b to 331d, **chapter 794, Oregon Laws 2003**, *[of this 2003 Act]* and the repeal of statutes by section 332, **chapter 794, Oregon Laws 2003**, *[of this 2003 Act]* apply only to public contracts first advertised, but if not advertised then entered into, on or after March 1, 2005.

(2)(a) Statutes repealed by section 332, chapter 794, Oregon Laws 2003, and rules that expire under or are repealed effective March 1, 2005, pursuant to section 334, chapter 794, Oregon Laws 2003, continue to apply to public contracts, and to the solicitation of public contracts, that are first advertised, but if not advertised then entered into, before March 1, 2005, to all protests concerning those solicitations, and to the judicial review of those solicitations and protests. However, an amendment or change to the work, made on or after March 1, 2005, of a public contract must comply with those provisions of chapter 794, Oregon

Laws 2003, and rules adopted thereunder that govern the authority to make those amendments or changes and that regulate those amendments or changes.

(b) As used in this subsection, "solicitation" means contracting processes that occur before contract formation.

SECTION 40. This 2005 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2005 Act takes effect March 1, 2005.

Passed by House February 10, 2005

Received by Governor:

Repassed by House May 17, 2005

.....M,....., 2005

Approved:

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Chief Clerk of House

.....M,....., 2005

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Speaker of House

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Governor

Passed by Senate May 10, 2005

Filed in Office of Secretary of State:

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President of Senate

.....M,....., 2005

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Secretary of State