Chapter 279B

2013 EDITION

Public Contracting - Public Procurements

GENERAL PROVISIONS

279B.005 Definitions

279B.010 Policy

279B.015 Applicability

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

279B.025 Procurement practices regarding recyclable and reusable goods

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

279B.033 Contents of cost analysis; conditions under which procurement may proceed; exceptions

279B.036 Determination of feasibility of procurement

279B.040 Prohibition on accepting bid or proposal from contractor that advised or assisted contracting agency to develop specifications or solicitation documents; exception

SOURCE SELECTION

(Methods of Source Selection)

279B.050 Methods of source selection

279B.055 Competitive sealed bidding

279B.060 Competitive sealed proposals

279B.065 Small procurements

279B.070 Intermediate procurements

279B.075 Sole-source procurements

279B.080 Emergency procurements

279B.085 Special procurements

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

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

(Qualifications)

279B.110 Responsibility of bidders and proposers

279B.112 Personnel deployment disclosure; contents; preference for bidder or proposer that will employ more workers in state; rules; exception

279B.115 Qualified products lists

279B.120 Prequalification of prospective bidders and proposers

279B.125 Application for prequalification

279B.130 Debarment of prospective bidders and proposers

(Notice of Intent to Award)

279B.135 Notice of intent to award

(Price Agreements)

279B.140 Price agreements

(Determinations)

279B.145 Finality of determinations

SPECIFICATIONS

(General Provisions)

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

279B.205 Specifications to encourage reasonable competition

279B.210 Policy; development of specifications

279B.215 Brand name or equal specification; brand name specification

279B.220 Conditions concerning payment, contributions, liens, withholding

279B.225 Condition concerning salvaging, recycling, composting or mulching yard waste material

279B.230 Condition concerning payment for medical care and providing workers' compensation

279B.235 Condition concerning hours of labor

279B.240 Exclusion of recycled oils prohibited

(Specifications in State Contracts)

279B.270 State contracting agencies to use recovered resources and recycled materials; notice to prospective contractors

279B.275 Purchase of goods containing recycled polyethylene material

279B.280 Use of recycled products when economically feasible

LEGAL REMEDIES

279B.400 Protests and judicial review of approvals of special procurements

279B.405 Protests and judicial review of solicitations

279B.410 Protests of contract award

279B.415 Judicial review of protests of contract award

279B.420 Judicial review of other violations

279B.425 Review of prequalification and debarment decisions

GENERAL PROVISIONS

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

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

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

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

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

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

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

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

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

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

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

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

279B.020 Maximum hours of labor on public contracts; holidays; exceptions; liability to workers; rules. (1) When labor is employed by a contracting agency through a contractor, a person may not be required or permitted to labor more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity or emergency or when the public policy absolutely requires it, in which event, the person so employed for excessive hours shall receive at least time and a half pay:

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

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

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

(A) Each Sunday.

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

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

(D) Independence Day on July 4.

(E) Labor Day on the first Monday in September.

(F) Thanksgiving Day on the fourth Thursday in November.

(G) Christmas Day on December 25.

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

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

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

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

(6) Subsections (1) and (2) of this section do not apply to contracts for services at a county fair or for other events authorized by a county fair board if persons employed under the contract receive at least time and a

half for work in excess of 10 hours in any one day or 40 hours in any one week.

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

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

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

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

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

(11) This section does not apply to:

(a) Financial institutions as defined in ORS 706.008.

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

(c) Public contracts for goods or personal property.

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

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

279B.030 Demonstration that procurement will cost less than performing service or that performing service is not feasible; exemptions. (1) Except as provided in ORS 279B.036, before conducting a procurement for services with an estimated contract price that exceeds $250,000, a contracting agency shall:

(a) Demonstrate, by means of a written cost analysis in accordance with ORS 279B.033, that the contracting agency would incur less cost in conducting the procurement than in performing the services with the contracting agency's own personnel and resources; or

(b) Demonstrate, in accordance with ORS 279B.036, that performing the services with the contracting agency's own personnel and resources is not feasible.

(2) If a local contracting agency authorizes a department, bureau, office or other subdivision of the local contracting agency to conduct a procurement on behalf of another department, bureau, office or subdivision of the local contracting agency, the department, bureau, office or subdivision on whose behalf the procurement is conducted shall comply with the requirement set forth in subsection (1) of this section.

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

(a) A local contracting agency or a local contract review board for a city that has a population of not more than 15,000 or a county that has a population of not more than 30,000;

(b) A community college that enrolls not more than 1,000 full-time equivalent students, as defined in ORS 341.005;

(c) A special district, as defined in ORS 198.010, a diking district formed under ORS chapter 551 and a soil and water conservation district organized under ORS 568.210 to 568.808;

(d) The Port of Portland; or

(e) Procurements for client services, as defined in OAR 125-246-0110. [2009 c.880 §2]

279B.033 Contents of cost analysis; conditions under which procurement may proceed; exceptions. (1) In the cost analysis required under ORS 279B.030, a contracting agency shall:

(a) Estimate the contracting agency's cost of performing the services, including:

(A) Salary or wage and benefit costs for contracting agency employees who are directly involved in performing the services, including employees who inspect, supervise or monitor the performance of the services.

(B) Material costs, including costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies.

(C) Costs incurred in planning for, training for, starting up, implementing, transporting and delivering the services and costs related to stopping and dismantling a project or operation because the contracting agency intends to procure a limited quantity of services or procure the services within a defined or limited period of time.

(D) Miscellaneous costs related to performing the services. The contracting agency may not include in the cost analysis the contracting agency's indirect overhead costs for existing salaries or wages and benefits for administrators or for rent, equipment, utilities and materials except to the extent that the costs are attributable solely to performing the services and would not exist unless the contracting agency performs the services.

(b) Estimate the cost a potential contractor would incur in performing the services, including:

(A) Average or actual salary or wage and benefit costs for contractors and employees who:

(i) Work in the industry or business most closely involved in performing the services that the contracting agency intends to procure; and

(ii) Would be necessary and directly involved in performing the services or who would inspect, supervise or monitor the performance of the services;

(B) Material costs, including costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies; and

(C) Miscellaneous costs related to performing the services, including but not limited to reasonably foreseeable fluctuations in the costs for the items identified in this subsection over the expected duration of the procurement.

(2)(a) After comparing the difference between the costs estimated as provided in subsection (1)(a) of this section with the costs estimated as provided in subsection (1)(b) of this section, except as provided in paragraph (b) of this subsection, the contracting agency may proceed with the procurement only if the contracting agency would incur more cost in performing the services with the contracting agency's own personnel and resources than the contracting agency would incur in procuring the services from a contractor. The contracting agency may not proceed with the procurement if the sole reason that the costs estimated in subsection (1)(b) of this section are lower than the costs estimated in subsection (1)(a) of this section is because the costs estimated in subsection (1)(b)(A) of this section are lower than the costs estimated in subsection (1)(a)(A) of this section.

(b) A contracting agency may proceed with a procurement even if the contracting agency determines that the contracting agency would incur less cost in providing the services with the contracting agency's own personnel and resources if at the time the contracting agency intends to conduct a procurement, the contracting agency lacks personnel and resources that are necessary to perform the services within the time in which the services are required. If the contracting agency conducts a procurement under the conditions described in this paragraph, the contracting agency shall:

(A) Keep a record of the cost analysis and findings that the contracting agency makes for each procurement the contracting agency conducts under this section, along with the basis for the contracting agency's decision to proceed with the procurement; and

(B) Collect and provide copies of the records described in subparagraph (A) of this paragraph each calendar quarter to the local contract review board, if the contracting agency is a local contracting agency, or to the Emergency Board, if the contracting agency is a state contracting agency.

(c) If the contracting agency is a state contracting agency, in addition to complying with the provisions of paragraph (b) of this subsection the contracting agency shall prepare a request to the Governor for an appropriation and any authority that is necessary for the contracting agency to hire personnel and obtain resources necessary to perform the services that the contracting agency procured under the conditions described in paragraph (b) of this subsection. The request must include a copy of the records that the contracting agency provided to the Emergency Board under paragraph (b)(B) of this subsection.

(3) A cost analysis, record, documentation or determination made under this section is a public record. [2009 c.880 §3]

279B.036 Determination of feasibility of procurement. (1) Notwithstanding the provisions of ORS 279B.033 (2)(a), a contracting agency may proceed with a procure-

ment if the contracting agency reasonably determines in writing that using the contracting agency's own personnel or resources to perform the services that the contracting agency intends to procure is not feasible. The contracting agency may make the determination described in this subsection without conducting a cost analysis under ORS 279B.033 if the contracting agency finds that:

(a) The contracting agency lacks the specialized capabilities, experience or technical or other expertise necessary to perform the services. In making the finding, the contracting agency shall compare the contracting agency's capability, experience or expertise in the field most closely involved in performing the services with a potential contractor's capability, experience or expertise in the same or a similar field.

(b) Special circumstances require the contracting agency to procure the services by contract. Special circumstances may include, but are not limited to, circumstances in which:

(A) The terms under which the contracting agency receives a grant or other funds for use in a procurement require the contracting agency to obtain services through an independent contractor;

(B) Other state or federal law requires the contracting agency to procure services through an independent contractor;

(C) The procurement is for services that are incidental to a contract for purchasing or leasing real or personal property, including service and maintenance agreements for equipment that is leased or rented;

(D) The contracting agency cannot accomplish policy, administrative or legal goals, including but not limited to avoiding conflicts of interest or ensuring independent or unbiased findings in cases when using the contracting agency's existing personnel or persons the contracting agency could hire through a regular or ordinary process would not be suitable;

(E) The procurement is for services to which the provisions of ORS 279B.080 apply;

(F) The procurement is for services, the need for which is so urgent, temporary or occasional that attempting to perform the services with the contracting agency's own personnel or resources would cause a delay that would frustrate the purpose for obtaining the services; or

(G) The services that the contracting agency intends to procure will be completed within six months after the date on which the contract for the services is executed.

(2) A finding or determination and supporting documentation for a finding or determination made under this section is a public record. [2009 c.880 §4]

279B.040 Prohibition on accepting bid or proposal from contractor that advised or assisted contracting agency to develop specifications or solicitation documents; exception. (1) Except as provided in subsection (2) of this section, a state contracting agency that procures personal services for the purpose of advising or assisting the state contracting agency in developing specifications, a scope or statement of work, an invitation to bid, a request for proposals or other solicitation documents and materials related to a procurement may not accept from the contractor, or an affiliate of the contractor, that advised or assisted the state contracting agency a bid or proposal for the goods or services described, specified or identified in the solicitation documents or materials if a reasonable person would believe that, by giving the advice or assistance, the contractor or affiliate would have or would appear to have an advantage in obtaining the public contract that is the subject of the solicitation.

(2)(a) If a state contracting agency anticipates that the state contracting agency will or must seek advice or assistance of the type described in subsection (1) of this section from a contractor that is also engaged in providing goods or services that will be described or identified in the solicitation documents and materials that result from the advice or assistance, and the state contracting agency wishes to accept a bid or proposal from the contractor, the state contracting agency, before awarding a contract for the advice or assistance, shall apply to the Director of the Oregon Department of Administrative Services for an exception to the prohibition set forth in subsection (1) of this section.

(b) The state contracting agency in the application for the exception shall include findings and justifications, along with sufficient facts to support the findings and justifications, that will enable the director to make an independent judgment as to whether:

(A) The state contracting agency needs advice or assistance from a contractor to develop the solicitation documents and materials described in subsection (1) of this section;

(B) Accepting a bid or proposal from the contractor that gives the advice or assistance is the only practicable way in which the state contracting agency can conduct the procurement successfully; and

(C) Approving the exception:

(i) Is unlikely to encourage favoritism in awarding public contracts or to substantially

diminish competition for public contracts; and

(ii)(I) Is reasonably expected to result in substantial cost savings to the state contracting agency or the public; or

(II) Otherwise substantially promotes the public interest in a manner that could not be practicably realized by complying with the prohibition described in subsection (1) of this section.

(c)(A) If the director approves the state contracting agency's application, the director shall prepare written findings and justifications for the approval. The state contracting agency's findings, justifications and facts and the director's findings, justifications and approval are public records that are subject to disclosure as provided in ORS 192.410 to 192.505.

(B) If the director disapproves the state contracting agency's application, the director shall state the director's reasons for the disapproval in a written notice to the state contracting agency and shall indicate whether the disapproval extends only to the state contracting agency's acceptance of a bid or proposal from a contractor that gives advice or assistance in preparing solicitation documents and other materials or whether the director also disagrees with the state contracting agency's stated need for advice or assistance from a contractor.

(C) The director's approval or disapproval is final.

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

(4) This section does not apply to the Secretary of State or the State Treasurer. [2012 c.53 §2]

SOURCE SELECTION

(Methods of Source Selection)

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

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

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

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

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

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

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

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

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

(c) Describe the procurement. In the description, the contracting agency shall identify the scope of work included within the procurement, outline the contractor's anticipated duties and set expectations for the contractor's performance. Unless the contracting agency for good cause specifies otherwise, the scope of work shall require the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the appropriate goods or services.

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

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

(f) State that "Contractors shall use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this document." if a state contracting agency issues the invitation to bid.

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

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

(A) Reducing or withholding payment;

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

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

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

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

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

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

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

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

(d) In addition to the modes of publication authorized by paragraphs (b) and (c) of this subsection, the contracting agency may use any other medium reasonably calculated to reach prospective bidders or proposers.

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

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

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

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

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

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

ceived after the bid time and date indicated in the invitation to bid.

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

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

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

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

(10) If a contracting agency awards a contract, the contracting agency shall award the contract:

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

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

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

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

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

(12) If a contracting agency determines that preparing a procurement description to support an award based on price is impractical, the contracting agency may issue a multistep invitation to bid that requests bidders to submit unpriced submittals, and then later issue an invitation to bid limited to the bidders that the contracting agency officer has determined are eligible to submit a priced bid under the criteria set forth in the initial solicitation of unpriced submittals.

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

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

(2) The request for proposals must:

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

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

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

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

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

(f) State that "Contractors shall use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this

document." if a state contracting agency issues the request for proposals.

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

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

(A) Reducing or withholding payment;

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

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

(3) The request for proposals also may:

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

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

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

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

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

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

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

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

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

(6)(a) Notwithstanding ORS 192.410 to 192.505, proposals may be opened in a manner to avoid disclosing contents to competing proposers during, when applicable, the process of negotiation, but the contracting agency shall record and make available the identity of all proposers as part of the contracting agency's public records after the proposals are opened. Notwithstanding ORS 192.410 to 192.505, proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued. The fact that proposals are opened at a meeting, as defined in ORS 192.610, does not make the contents of the proposals subject to disclosure, regardless of whether the public body opening the proposals fails to give notice of or provide for an executive session for the purpose of opening proposals.

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

(c) If a request for proposals is canceled under ORS 279B.100 after proposals are received or if a proposal is rejected, the contracting agency may return a proposal to the proposer that made the proposal. The con-

tracting agency shall keep a list of returned proposals in the file for the solicitation.

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

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

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

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

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

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

(e) Competitive simultaneous negotiations;

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

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

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

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

(10) After the opening of proposals, a contracting agency may issue or electronically post an addendum to the request for proposals that modifies the criteria, rating process and procedure for any tier of competition before the start of the tier to which the addendum applies. The contracting agency shall send an addendum that is issued by a method other than electronic posting to all proposers who are eligible to compete under the addendum. The contracting agency shall issue or post the addendum at least five days before the start of the subject tier of competition or as the contracting agency otherwise determines is adequate to allow eligible proposers to prepare for the competition in accordance with rules adopted under ORS 279A.065.

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

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

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

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

(15) The contracting agency may issue a request for information, a request for interest, a request for qualifications or other preliminary documents to obtain information useful in preparing a request for proposals.

(16) Before executing a contract solicited under this section, a contracting agency shall obtain the proposer's agreement to perform the scope of work and meet the performance standards set forth in the final negotiated scope of work. [2003 c.794 §52; 2009 c.880 §6; 2011 c.458 §12]

279B.065 Small procurements. (1) A contracting agency may award a procurement of goods or services that does not exceed $10,000 in any manner the contracting agency deems practical or convenient, including by direct selection or award. A contract awarded under this section may be amended to exceed $10,000 only in accordance with rules adopted under ORS 279A.065.

(2) A contracting agency may not artificially divide or fragment a procurement so as to constitute a small procurement under this section. [2003 c.794 §53; 2005 c.64 §1; 2005 c.103 §8b; 2013 c.66 §1]

279B.070 Intermediate procurements. (1) A contracting agency may award a procurement of goods or services that exceeds $10,000 but does not exceed $150,000 in accordance with intermediate procurement procedures. A contract awarded under this section may be amended to exceed $150,000 only in accordance with rules adopted under ORS 279A.065.

(2) A contracting agency may not artificially divide or fragment a procurement so as to constitute an intermediate procurement under this section.

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

(4) If a contracting agency awards a contract, the contracting agency shall award the contract to the offeror whose quote or proposal will best serve the interests of the contracting agency, taking into account price as well as considerations including, but not limited to, experience, expertise, product functionality, suitability for a particular purpose and contractor responsibility under ORS 279B.110. [2003 c.794 §54; 2013 c.66 §2]

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

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

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

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

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

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

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

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

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

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

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

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

(c) "Special procurement" means, unless the context requires otherwise, a class special procurement, a contract-specific special procurement or both.

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

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

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

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

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

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

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

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

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

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

279B.100 Cancellation, rejection, delay of invitations for bids or requests for proposals. (1) Any solicitation or procurement described in a solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part, when the cancellation or rejection is in the best interest of the contracting agency as determined by the contracting agency. The reasons for the cancellation or rejection must be made part of the solicitation file. A contracting agency is not liable to any bidder or proposer for any loss or expense caused by or resulting from the cancellation or rejection of a solicitation, bid, proposal or award.

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

(Qualifications)

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

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

(a) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or has the ability to obtain the resources and expertise,

necessary to meet all contractual responsibilities.

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

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

(d) Is legally qualified to contract with the contracting agency.

(e) Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder or proposer fails to promptly supply information concerning responsibility that the contracting agency requests, the contracting agency shall determine the bidder's or proposer's responsibility based on available information or may find that the bidder or proposer is not responsible.

(f) Was not debarred by the contracting agency under ORS 279B.130.

(3) A contracting agency may refuse to disclose outside of the contracting agency confidential information furnished by a bidder or proposer under this section when the bidder or proposer has clearly identified in writing the information the bidder or proposer seeks to have treated as confidential and the contracting agency has authority under ORS 192.410 to 192.505 to withhold the identified information from disclosure. [2003 c.794 §59; 2009 c.880 §7]

279B.112 Personnel deployment disclosure; contents; preference for bidder or proposer that will employ more workers in state; rules; exception. (1) A bidder or proposer that submits a bid or proposal for a public contract may submit with the bid or proposal a personnel deployment disclosure. A personnel deployment disclosure that a bidder or proposer submits under this section must state:

(a) The number of workers that the bidder or proposer and the bidder or proposer's subcontractors plan to deploy to perform the work described in the invitation to bid or the request for proposals;

(b) The number of workers that the bidder or proposer and the bidder's or proposer's first-tier subcontractors will employ within this state; and

(c) The number of jobs in each of the categories described in paragraphs (a) and (b) of this subsection that would be a newly created job.

(2) A state contracting agency that receives a personnel deployment disclosure from a bidder or proposer under subsection (1) of this section may consider the personnel deployment disclosure in evaluating a bid or proposal if the contracting agency states in the solicitation documents for a procurement that the state contracting agency will consider a personnel deployment disclosure. The state contracting agency may give a preference to a bid or proposal that states that the bidder or proposer will employ more workers within this state than a competing bid or proposal if the bids or proposals otherwise suit the state contracting agency's specifications for the procurement equally well.

(3) The Director of the Oregon Department of Administrative Services, the Attorney General and a state contracting agency that adopts rules under ORS 279A.065 may adopt rules to prescribe the form and contents of a personnel deployment disclosure and otherwise to implement the provisions of this section.

(4) This section does not apply to the Secretary of State or the State Treasurer. [2012 c.53 §6]

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

(2) In the initial development of any qualified products list, a contracting agency shall give public notice, in accordance with ORS 279B.055 (4), of the opportunity for potential contractors, sellers or suppliers to

submit goods for testing and examination to determine their acceptability for inclusion on the list and may solicit in writing representative groups of potential contractors, sellers or suppliers to submit goods for the testing and examination. Any potential contractor, seller or supplier, even though not solicited, may offer its goods for consideration.

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

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

279B.120 Prequalification of prospective bidders and proposers. (1) A contracting agency may prequalify prospective bidders or proposers to submit bids or proposals for public contracts to provide particular types of goods or services. The method of submitting prequalification applications, the information required in order to be prequalified and the forms to be used for submitting prequalification information shall be determined by the contracting agency unless otherwise prescribed by rule adopted by the Director of the Oregon Department of Administrative Services or the local contract review board.

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

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

279B.125 Application for prequalification. (1) When a contracting agency permits or requires prequalification of bidders or proposers, a prospective bidder or proposer who wishes to prequalify shall submit a prequalification application to the contracting agency on a form prescribed under ORS 279B.120 (1). Upon receipt of a prequalification application, the contracting agency shall investigate the prospective bidder or proposer as necessary to determine whether the prospective bidder or proposer is qualified. The determination shall be made in less than 30 days, if practicable, if the prospective bidder or proposer requests an early decision to allow the prospective bidder or proposer as much time as possible to prepare a bid or proposal for a contract that has been advertised. In making its determination, the contracting agency shall consider only the applicable standards of responsibility listed in ORS 279B.110 (2). The contracting agency shall promptly notify the prospective bidder or proposer whether the prospective bidder or proposer is qualified.

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

(3) If a contracting agency has reasonable cause to believe that there has been a substantial change in the conditions of a

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

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

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

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

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

(b) The prospective bidder or proposer has been convicted under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the prospective bidder's or proposer's responsibility as a contractor.

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

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

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

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

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

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

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

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

(Notice of Intent to Award)

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

(Price Agreements)

279B.140 Price agreements. (1) A price agreement constitutes a firm offer by the contractor regardless of whether any order or purchase has been made or any performance has been tendered under the price agreement. Unless the price agreement otherwise provides, a price agreement is en-

forceable for the period stated in the price agreement and, notwithstanding ORS 72.2050, obligations thereunder are not revocable by the contractor.

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

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

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

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

(Determinations)

279B.145 Finality of determinations. The determinations under ORS 279B.030, 279B.033, 279B.036, 279B.055 (3) and (7), 279B.060 (4) and (14), 279B.075, 279B.080, 279B.085 and 279B.110 are final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law. [2003 c.794 §71; 2009 c.880 §8]

SPECIFICATIONS

(General Provisions)

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

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

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

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

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

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

279B.215 Brand name or equal specification; brand name specification. (1)(a) A brand name or equal specification may be used when the use of a brand name or equal specification is advantageous to the contracting agency, because the brand name describes the standard of quality, performance,

functionality and other characteristics of the product needed by the contracting agency.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Specifications in State Contracts)

279B.270 State contracting agencies to use recovered resources and recycled materials; notice to prospective contractors. (1) A state contracting agency procuring goods or personal services shall:

(a) Review the contracting agency's current procurement specifications in order to eliminate, wherever economically feasible, discrimination against the procurement of recovered resources or recycled materials.

(b) Provide incentives, wherever economically feasible, in all procurement specifications issued by the contracting agency for the maximum possible use of recovered resources and recycled materials.

(c) Develop procurement practices that, to the maximum extent economically feasible, ensure the procurement of materials that are recycled or that may be recycled or reused when discarded.

(d) Establish management practices that minimize the volume of solid waste generated by reusing paper, envelopes, containers and all types of packaging and by limiting the amount of materials consumed and discarded.

(e) Use, or require persons with whom the contracting agency contracts to use in the performance of the contract work, to the maximum extent economically feasible, recycled paper and recycled PETE products as well as other recycled plastic resin products.

(2) An invitation to bid or a request for proposals issued by a state contracting agency under this chapter shall include the following language: "Vendors shall use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this document."

(3) Each state contracting agency shall strive to meet a recycled product procurement level established by rule by the Oregon Department of Administrative Services. [2003 c.794 §79; 2007 c.764 §10]

279B.275 Purchase of goods containing recycled polyethylene material. The Oregon Department of Administrative Services, in consultation with the Department of Environmental Quality, shall revise its procedures and specifications for state procurement of goods containing recycled PETE, as well as other recycled plastic resins, to encourage the procurement of such goods, provided similarities in quality and price exist between recycled PETE products and products not qualifying as recycled PETE products. [2003 c.794 §80]

279B.280 Use of recycled products when economically feasible. The Oregon Department of Administrative Services shall review and work with state agencies to de-

velop procurement specifications that encourage the use of recycled products whenever economically feasible, if the quality of a recycled product is functionally equal to the same product manufactured with virgin resources, including but not limited to recycled paper, recycled oil and recycled PETE products. Except for specifications that have been established to preserve the public health and safety, all procurement specifications shall be established in a manner that encourages the procurement of recycled products. [2003 c.794 §81]

LEGAL REMEDIES

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

tract, the court shall remand the procurement to the contracting agency for a determination whether to continue with the procurement process in light of the court's decision.

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

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

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

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

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

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

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

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

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

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

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

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

(d) The relief sought.

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

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

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

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

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

(9) If judicial review of a contracting agency's decision on a protest under this section is sought, the contracting agency may not proceed with contract execution unless the contracting agency determines that there is a compelling governmental interest in proceeding or that the goods and services are urgently needed. If the contracting agency makes such a determination, the contracting agency shall set forth the reasons for the determination in writing and immediately provide them to the prospective

bidder, proposer or offeror that filed the protest. Thereafter, after joining the contractor as a party to the litigation and upon motion from the person filing the protest, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination of the existence of a compelling governmental interest in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a manifest abuse of discretion. In granting a stay, the court may require the person seeking the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in contract performance.

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

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

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

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

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

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

(b) The reason for the protest is that:

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

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

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

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

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

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

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

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

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

(3) To obtain review, a complainant must commence an action before the contract that is the subject of the protest is approved by the Attorney General, if required by ORS 291.047, and executed by the contracting agency. In the complaint, the complainant shall state the nature of the complainant's interest, the facts showing how the complainant is adversely affected or aggrieved by the contracting agency's decision and the basis upon which the decision should be reversed or remanded. The complainant shall join as parties all bidders that would be in line for an award of the contract ahead of the complainant. If injunctive relief is sought, the court may require the person seeking a stay to post a bond in an amount sufficient to protect the contracting agency

and the public from costs associated with delay in execution of the contract.

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

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

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

(a) Substantial evidence does not exist to support the contracting agency's decision. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding;

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

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

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

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

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

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

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

279B.420 Judicial review of other violations. (1) If a contracting agency allegedly violates a provision of ORS chapter 279A and a judicial remedy is not otherwise available under ORS chapter 279A, 279B or 279C, the alleged violation is subject to judicial review only as provided in this section.

(2) If a contracting agency allegedly violates a provision of this chapter, except a provision of ORS 279B.030, 279B.033, 279B.036, 279B.270, 279B.275, 279B.280 or 279B.400 to 279B.425, and a judicial remedy is not otherwise provided in this chapter or ORS chapter 279A, the alleged violation is subject to judicial review only as provided in this section.

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

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

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

(c) The alleged violation deprived the person of the award of the contract or deprived the person of the opportunity to compete for the award of the contract;

(d) The person was qualified to receive the award of the contract under ORS 279B.110;

(e) The person gave written notice that described the alleged violation to the contracting agency not later than 10 days after the date on which the alleged violation occurred and, regardless of when the alleged violation occurred, not later than 10 days after the date of execution of the contract;

(f) The person has exhausted all administrative remedies the contracting agency provides; and

(g)(A) The alleged violation is a violation of a provision of ORS chapter 279A and no other section of ORS chapter 279A, 279B or 279C provides judicial review; or

(B) The alleged violation is a violation of a provision of this chapter, except a provision of ORS 279B.030, 279B.033, 279B.036, 279B.270, 279B.275, 279B.280 or 279B.400 to 279B.425, and no other section of this chapter or ORS chapter 279A provides judicial review.

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

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

(6) If a person gives the notice required under subsection (3)(e) of this section and timely seeks judicial review under this section, the contracting agency may not execute the contract unless the contracting agency determines that a compelling governmental interest exists in proceeding or that the goods and services are urgently needed. A contracting agency that makes such a determination shall set forth in writing the reasons for the determination and immediately provide the reasons to the person who filed the challenge. Thereafter, after joining the prospective contractor as a party to the litigation and upon motion by the person who filed the challenge, the court may nonetheless stay the performance of the contract if the court finds that the contracting agency's determination that a compelling governmental interest exists in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a manifest abuse of discretion. In granting a stay, the court may require the person who sought the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with a delay in contract performance.

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

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

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

(c) The court may award costs and attorney fees to the prevailing party. [2003 c.794 §86a; 2009 c.880 §8a; 2011 c.9 §33]

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

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

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

(a) If the contracting agency is a state contracting agency, notify the Director of

the Oregon Department of Administrative Services.

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

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

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

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

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

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

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

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

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

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

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

(9) The circuit court may stay the letting of the contract that is the subject of the petition in the same manner as a suit in equity. When the court determines that there has been an improper debarment or denial, revocation or revision of a prequalification and the contract has been let, the court may proceed to take evidence to determine the damages, if any, suffered by the petitioner and may award such damages as the court may find as a judgment against the director or board. The court may award costs and attorney fees to the prevailing party. [2003 c.794 §87; 2007 c.288 §12]