

Chapter 279C

2017 EDITION

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GENERAL PROVISIONS

279C.005 Definitions. ORS 279A.010 (1) contains general definitions applicable throughout this chapter. [2003 c.794 §88]

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

**ARCHITECTURAL, ENGINEERING,
PHOTOGRAMMETRIC MAPPING,
TRANSPORTATION PLANNING,
LAND SURVEYING AND
RELATED SERVICES**

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

(1) “Architect” has the meaning given that term in ORS 671.010.

(2) “Architectural, engineering, photogrammetric mapping, transportation planning or land surveying services” means professional services that are required to be performed by an architect, engineer, photogrammetrist, transportation planner or land surveyor.

(3) “Engineer” means a person who is registered and holds a valid certificate in the practice of engineering in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002 (2).

(4) “Land surveyor” means a person who is registered and holds a valid certificate in the practice of land surveying in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002 (5).

(5) “Personal services” means the services of a person or persons that are designated by a state contracting agency with procurement authority under ORS 279A.050 or a local contracting agency as personal services. “Personal services” includes architectural, engineering, photogrammetric mapping, transportation planning or land surveying services procured under ORS 279C.105 or 279C.110 and related services procured under ORS 279C.120.

(6) “Photogrammetric mapping” has the meaning given that term in ORS 672.002.

(7) “Photogrammetrist” has the meaning given that term in ORS 672.002.

(8) “Related services” means personal services, other than architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, that are related to planning, designing, engineering or overseeing public improvement proj-

ects or components of public improvement projects, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, hazardous substances or hazardous waste or toxic substances testing services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner’s representation services or land-use planning services.

(9) “Transportation planning services” means transportation planning services for projects that require compliance with the National Environmental Policy Act, 42 U.S.C. 4321 et seq. [2003 c.794 §89; 2005 c.103 §10; 2005 c.445 §12; 2011 c.458 §1; 2013 c.196 §20]

279C.105 Contracts for architectural, engineering, photogrammetric mapping, transportation planning or land surveying and related services; procedures. (1) Except as provided in ORS 279A.140, a contracting agency may enter into a contract for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services and related services. The Oregon Department of Administrative Services shall enter into a contract for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services and related services on behalf of a state contracting agency that is subject to ORS 279A.140. The provisions of this section do not relieve the contracting agency of the duty to comply with ORS 279A.140, other law applicable to the state contracting agency or applicable city or county charter provisions. A contracting agency that is authorized to enter into a contract for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services and related services shall adopt procedures to screen and select persons to perform architectural, engineering, photogrammetric mapping, transportation planning or land surveying services and related services under ORS 279C.110 or 279C.120.

(2) A state contracting agency with procurement authority under ORS 279A.050 or a local contract review board by ordinance, resolution, administrative rule or other regulation may, consistent with the provisions of ORS 279C.100 to 279C.125, designate certain personal services contracts or classes of personal service contracts as contracts for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or related services. [2003 c.794 §90; 2005 c.103 §11; 2011 c.458 §2]

279C.107 Public disclosure of contents of proposals for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services; treatment of trade secrets and confidential information. (1) Notwithstanding the public records law, ORS 192.311 to 192.478, if a contracting agency solicits a contract for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or related services by a competitive proposal:

(a) The contracting agency may open proposals so as to avoid disclosing contents to competing proposers during, when applicable, the process of negotiation.

(b) The contracting agency need not open proposals for public inspection until after the contracting agency executes a contract.

(2) Notwithstanding any requirement to open proposals to public inspection after the contracting agency executes a contract, a contracting agency shall withhold from disclosure to the public trade secrets, as defined in ORS 192.345, and information submitted to a public body in confidence, as described in ORS 192.355, that are contained in a proposal. Opening a proposal at a public meeting, as defined in ORS 192.610, does not make the contents of the proposal subject to disclosure, regardless of whether the public body that opens the proposal fails to give notice of or provide for an executive session for the purpose of opening proposals. If a request for proposals is canceled after proposals are received, the contracting agency shall, subject to ORS 192.345 and 192.355, return a proposal and all copies of the proposal to the proposer that made the proposal. The contracting agency shall keep a list of returned proposals in the file for the solicitation. [2007 c.764 §41; 2011 c.458 §3]

279C.110 Selection procedure for consultants to provide services; compensation; applicability. (1) A contracting agency shall select consultants to provide architectural, engineering, photogrammetric mapping, transportation planning or land surveying services on the basis of the consultant's qualifications for the type of professional service required. A contracting agency may solicit or use pricing policies and proposals or other pricing information, including the number of hours proposed for the service required, expenses, hourly rates and overhead, to determine consultant compensation only after the contracting agency has selected a candidate pursuant to subsection (2) of this section.

(2) Subject to the requirements of subsection (1) of this section, the procedures that a contracting agency creates to screen and select consultants and to select a candi-

date under this section are at the contracting agency's sole discretion. The contracting agency may adjust the procedures to accommodate the contracting agency's scope, schedule or objectives for a particular project if the estimated cost of the architectural, engineering, photogrammetric mapping, transportation planning or land surveying services for the project does not exceed \$250,000.

(3) A contracting agency's screening and selection procedures under this section, regardless of the estimated cost of the architectural, engineering, photogrammetric mapping, transportation planning or land surveying services for a project, may include considering each candidate's:

(a) Specialized experience, capabilities and technical competence, which the candidate may demonstrate with the candidate's proposed approach and methodology to meet the project requirements;

(b) Resources committed to perform the work and the proportion of the time that the candidate's staff would spend on the project, including time for specialized services, within the applicable time limits;

(c) Record of past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control and contract administration;

(d) Ownership status and employment practices regarding disadvantaged business enterprises, minority-owned businesses, woman-owned businesses, businesses that service-disabled veterans own, emerging small businesses or historically underutilized businesses;

(e) Availability to the project locale;

(f) Familiarity with the project locale; and

(g) Proposed project management techniques.

(4) If the screening and selection procedures a contracting agency creates under subsection (2) of this section result in the contracting agency's determination that two or more candidates are equally qualified, the contracting agency may select a candidate through any process the contracting agency adopts that is not based on the candidate's pricing policies, proposals or other pricing information.

(5) The contracting agency and the selected candidate shall mutually discuss and refine the scope of services for the project and shall negotiate conditions, including but not limited to compensation level and performance schedule, based on the scope of services. The compensation level paid must

be reasonable and fair to the contracting agency as determined solely by the contracting agency. Authority to negotiate a contract under this section does not supersede any provision of ORS 279A.140 or 279C.520.

(6) If the contracting agency and the selected candidate are unable for any reason to negotiate a contract at a compensation level that is reasonable and fair to the contracting agency, the contracting agency shall, either orally or in writing, formally terminate negotiations with the selected candidate. The contracting agency may then negotiate with the next most qualified candidate. The negotiation process may continue in this manner through successive candidates until an agreement is reached or the contracting agency terminates the consultant contracting process.

(7) It is the goal of this state to promote a sustainable economy in the rural areas of the state. In order to monitor progress toward this goal, a state contracting agency shall keep a record of the locations in which architectural, engineering, photogrammetric mapping, transportation planning or land surveying services contracts and related services contracts are performed throughout the state, the locations of the selected consultants and the direct expenses on each contract. This record must include the total number of contracts awarded to each consultant firm over a 10-year period. The record of direct expenses must include all personnel travel expenses as a separate and identifiable expense on the contract. Upon request, the state contracting agency shall make these records available to the public.

(8) Notwithstanding the provisions of subsection (1) of this section, a contracting agency may directly appoint a consultant if the estimated cost of the architectural, engineering, photogrammetric mapping, transportation planning or land surveying services for the project does not exceed \$100,000.

(9) Notwithstanding the provisions of subsections (1) and (8) of this section, a contracting agency may directly appoint a consultant for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services in an emergency. [2003 c.794 §91; 2003 c.794 §92; 2005 c.509 §§1,3; 2011 c.458 §4; 2015 c.565 §15]

279C.115 Direct contracts for services of consultants. (1) As used in this section, "consultant" means an architect, engineer, photogrammetrist, transportation planner or land surveyor.

(2) A contracting agency may enter into a contract for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or re-

lated services directly with a consultant if the project described in the contract consists of work that has been substantially described, planned or otherwise previously studied or rendered in an earlier contract with the consultant that was awarded under rules adopted under ORS 279A.065 and the new contract is a continuation of the project.

(3) A contracting agency may adopt criteria for determining when this section applies to a contract for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or related services. [2003 c.794 §94; 2011 c.458 §5]

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

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

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

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

(2) Subject to the requirements of subsection (1) of this section, the procedures that a contracting agency adopts for the screening and selection of consultants and the selection of a candidate under this section is within the sole discretion of the contracting agency and may be adjusted to accommodate the contracting agency's scope, schedule and budget objectives for a particular project. Adjustments to accommodate a contracting agency's objectives may include provision for the direct appointment of a consultant if the value of the project does not exceed a threshold amount as determined by the contracting agency. [2003 c.794 §95]

279C.125 Architectural, engineering, photogrammetric mapping, transportation planning and land surveying services selection process for local public improvements procured through state agency; rules. (1) The Department of Transportation, the Oregon Department of Administrative Services or any other state contracting agency shall adopt rules establishing a two-tiered selection process for contracts with architects, engineers, photogrammetrists, transportation planners and land surveyors to perform personal services

contracts. The selection process shall apply only if:

(a) A public improvement is owned and maintained by a local government; and

(b) The Department of Transportation, the Oregon Department of Administrative Services or another state contracting agency will serve as the lead state contracting agency and will execute personal services contracts with architects, engineers, photogrammetrists, transportation planners and land surveyors for work on the public improvement project.

(2) The selection process required by subsection (1) of this section must require the lead state contracting agency to select no fewer than the three most qualified consultants when feasible in accordance with ORS 279C.110.

(3) The local government is responsible for the final selection of the consultant from the list of qualified consultants selected by the lead state contracting agency or through an alternative process adopted by the local government.

(4) Nothing in this section applies to the selection process used by a local contracting agency when the contracting agency executes a contract directly with architects, engineers, photogrammetrists, transportation planners or land surveyors. [2003 c.794 §96; 2011 c.458 §6]

PROMPT PAYMENT PILOT PROGRAM

Note: Sections 1 to 4, chapter 216, Oregon Laws 2017, provide:

Sec. 1. (1) The Department of Transportation shall conduct a pilot program on the prompt payment of certain contracts as described in this section.

(2) When the department receives an invoice or other demand for payment for qualified services from a contractor that is a small business, the department shall pay the invoice or demand within 15 days after the later of:

(a) The date the department receives the invoice or demand; or

(b) The date that payment is due on the invoice or demand.

(3) Subsection (2) of this section applies only if the contractor certifies to the department that the contractor is a small business in accordance with this subsection. A certification under this subsection must:

(a) State the number of employees currently employed by the contractor;

(b) Be in writing, signed and dated; and

(c) Be transmitted to the department as an attachment to the invoice or demand.

(4) Subsection (2) of this section applies only to amounts due for services completed and accepted under the terms of the applicable contract.

(5) Subsection (2) of this section applies only to invoices or demands that are:

(a) Pursuant to contracts executed on or after January 1, 2018; and

(b) Received by the department before June 30, 2019.

(6) If the department does not timely pay amounts due to a contractor as required by subsection (2) of this section, the department shall pay interest to the contractor at the rate of 1.5 percent per month on any amounts not timely paid.

(7) Nothing in this section affects the contractual rights or obligations of any party.

(8) As used in this section:

(a) "Qualified services" means architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or related services, as those terms are defined in ORS 279C.100.

(b) "Small business" means a business that employs not more than 50 employees. [2017 c.216 §1]

Sec. 2. A person who knowingly supplies false information to the Department of Transportation in connection with a certification under section 1 (3) of this 2017 Act commits a Class A misdemeanor. [2017 c.216 §2]

Sec. 3. No later than March 31, 2019, the Department of Transportation shall report to the Legislative Assembly in the manner provided under ORS 192.245 on the results of the pilot program described in section 1 of this 2017 Act. [2017 c.216 §3]

Sec. 4. Sections 1 to 3 of this 2017 Act are repealed on January 2, 2020. [2017 c.216 §4]

PROCUREMENT OF CONSTRUCTION SERVICES

(General Policies)

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

279C.305 Least-cost policy for public improvements; requirement to file list of planned projects and estimated costs and to identify projects contracting agency intends to complete with own personnel and resources; required analysis; exceptions. (1) The policy of the State of Oregon is that contracting agencies shall make every effort to construct public improvements at the least cost to the contracting agency.

(2)(a) Not less than 30 days before adopting a budget for the subsequent budget period or before starting to construct a public improvement, each contracting agency shall prepare and file with the Commissioner of the Bureau of Labor and Industries a list of every public improvement that the contracting agency plans to fund in the budget period, identifying each improvement by name and estimating the total on-site construction costs. The list must also state whether the contracting agency intends to perform the construction through a private contractor.

(b) If the contracting agency intends to use the contracting agency's own equipment

or personnel to perform construction work on a public improvement, and the estimated value of the construction work that the contracting agency intends to perform with the contracting agency's own equipment or personnel exceeds \$200,000, the contracting agency shall file with the commissioner not later than 180 days before construction begins on the public improvement an analysis that shows that the contracting agency's decision conforms to the policy stated in subsection (1) of this section. The list and the analysis are public records and the contracting agency may periodically revise the list or analysis.

(3) As part of the analysis required under subsection (2)(b) of this section, a contracting agency shall:

(a) Estimate the cost of contracting with a private contractor to construct the public improvement, including in the estimate all necessary and related costs that the private contractor would incur to construct the public improvement;

(b) Estimate the costs the contracting agency would incur in constructing the public improvement with the contracting agency's own equipment or personnel and include in the estimate:

(A) The cost of labor, including all benefits the contracting agency pays to or on behalf of employees of the contracting agency who will work on the public improvement, workers' compensation insurance premiums and the cost of traveling to and from the site of the public improvement;

(B) The cost of equipment, including costs associated with leasing, renting or acquiring and owning the equipment, costs for transporting the equipment to and from the site of the public improvement, costs for depreciation and costs for insuring, operating, storing, repairing and maintaining the equipment;

(C) The costs of administration and overhead the contracting agency will incur, including insurance, shop and office costs that are allocable to the public improvement;

(D) The cost of tools and materials;

(E) The costs associated with any contracts into which the contracting agency must enter;

(F) The commercially reasonable value of quality control testing if the contracting agency would require quality control testing for the work that a private contractor performed on the public improvement; and

(G) Any other necessary and related costs that the contracting agency will incur to construct the public improvement with the

contracting agency's own equipment or personnel; and

(c) Compare the cost the contracting agency estimates under paragraph (a) of this subsection with the cost the contracting agency estimates under paragraph (b) of this subsection.

(4) Before a contracting agency constructs a public improvement with the contracting agency's own equipment or personnel, the contracting agency shall:

(a) Prepare plans, specifications and estimates of the unit cost of each classification of construction work that are sufficient to control the performance of the construction work and ensure satisfactory construction quality, if the estimated cost of the public improvement exceeds \$200,000; and

(b) Prepare and preserve a full, true and accurate account of the actual costs of performing the work, including all categories of costs described in subsection (3)(b) of this section. The final account of the costs is a public record.

(5) Subsections (2) to (4) of this section do not apply to a contracting agency if:

(a) The public improvement is for distributing or transmitting electric power; or

(b) The contracting agency did not receive a responsive bid or proposal for constructing the public improvement from a responsible bidder or proposer after soliciting bids or proposals for constructing the public improvement, if the solicitation:

(A) Occurred within one year before the date on which construction began; and

(B) Allowed a commercially reasonable time in which to perform the construction.

(6)(a) Except as provided in paragraph (b) of this subsection, for purposes of this section, resurfacing highways, roads or streets at a depth of two or more inches and at an estimated cost that exceeds \$125,000 is a public improvement that is subject to the listing, analysis and accounting provisions of subsections (2) to (4) of this section.

(b) A public improvement does not include placing maintenance patching, chip seals or other seals as a maintenance treatment on highways, roads, streets or bridges.

(c) A contracting agency shall prepare and preserve a full, true and accurate account of the actual costs of performing road or street resurfacing if the actual or estimated cost of the highway, road or street resurfacing exceeds \$125,000.

(7)(a) The Bureau of Labor and Industries shall conduct a review of:

(A) The costs described in subsection (3) of this section to determine whether con-

tracting agencies must adjust the methodology for calculating the costs;

(B) The threshold amounts specified for conducting the analysis described in subsection (2)(b) of this section and preparing the specifications and cost estimates described in subsection (4) of this section to determine whether to adjust the threshold amounts; and

(C) Other aspects of the implementation of the policy set forth in subsection (1) of this section.

(b) The bureau shall conduct the review described in paragraph (a) of this subsection every four years, beginning in the last calendar quarter of 2021, and in consultation with affected contracting agencies, contractors and trade associations. The bureau shall communicate the results of the review to all contracting agencies, shall make the results available to interested persons upon request and shall report the results to the Legislative Assembly not later than January 1 of the calendar year that follows the year in which the bureau conducted the review. [2003 c.794 §98; 2017 c.715 §1]

279C.306 Administrative enforcement of least-cost policy for public improvements; procedure; civil action. (1)(a) A contractor, or a trade association of contractors acting on behalf of a member of the trade association, may allege in a complaint to the Commissioner of the Bureau of Labor and Industries that a contracting agency has violated ORS 279C.305 with respect to a public improvement that a contractor was eligible to construct.

(b) A complaint under paragraph (a) of this subsection must set forth the acts or omissions that constitute the alleged violation. The contractor or trade association must file the complaint with the commissioner within one year after the contractor or trade association discovered or should have known that the violation occurred.

(c) The contractor or trade association must submit along with a complaint under paragraph (a) of this subsection a filing fee of \$250. If the commissioner finds substantial evidence of a violation, the commissioner shall refund the filing fee. The commissioner by rule may specify other circumstances in which the commissioner will refund the filing fee.

(d) The commissioner shall dismiss a complaint under this subsection if the contractor or trade association brings an action in a court of this state or initiates another proceeding that alleges an act or omission that is the same or substantially similar to an act or omission the contractor or trade association alleged in the complaint.

(2)(a) The commissioner shall investigate a violation of ORS 279C.305 that is alleged in a complaint under subsection (1) of this section or that the commissioner discovers or otherwise has reason to believe occurred unless the commissioner reasonably concludes that the facts alleged do not constitute a violation or that the complaint is frivolous or was filed to harass the contracting agency or for purposes other than to enforce the requirements of ORS 279C.305.

(b) In the course of an investigation under this subsection, to the extent reasonably necessary, the commissioner may:

(A) Compel attendance from witnesses, receive testimony and examine the witnesses under oath;

(B) Require a contracting agency or an employee of a contracting agency to produce books, records, files and other documents; and

(C) Take any other action the commissioner deems necessary to conduct the investigation.

(3)(a) The commissioner must conclude an investigation under subsection (2) of this section within 60 days after beginning the investigation and must either find substantial evidence of a violation of ORS 279C.305 or end the investigation and dismiss any complaint. If the commissioner finds substantial evidence of a violation, the commissioner shall:

(A) Notify the contracting agency in writing that the commissioner has found substantial evidence of a violation of ORS 279C.305, describe the nature of the violation and, if the commissioner has not found substantial evidence of a violation in the five years preceding the date on which the commissioner began the investigation, state that for future violations, the commissioner will require the contracting agency to negotiate an agreement under paragraph (b) of this subsection.

(B) Provide a copy of any notice the commissioner issued under subparagraph (A) of this paragraph to any contractor or trade association that filed a complaint concerning the violation under subsection (1) of this section.

(b) If the commissioner in the course of an investigation under subsection (2) of this section finds substantial evidence that the contracting agency violated ORS 279C.305 within the five years preceding the date on which the commissioner began the investigation, the commissioner shall specify a period of time within which the contracting agency must negotiate an agreement with the contractor or the trade association to

remedy the violation and prevent future violations.

(c) If the contracting agency and the contractor or trade association enter into an agreement within the specified period, the commissioner in an order shall set forth, and direct the contracting agency to comply with, the terms of the agreement.

(d) If negotiations between the contracting agency and the contractor or trade association do not result in an agreement within the time the commissioner specifies, the commissioner may:

(A) Extend the time period for negotiations;

(B) End negotiations and dismiss the complaint, provided that the commissioner states the commissioner's reasons for the dismissal in an order to dismiss the complaint; or

(C) End negotiations and initiate a contested case hearing against the contracting agency under ORS chapter 183.

(4)(a) If a contracting agency that is a party to an agreement set forth in accordance with an order of the commissioner under subsection (3)(c) of this section breaches the agreement, a contractor or trade association that is a party to the agreement may submit a complaint to the commissioner that asks the commissioner to enforce the agreement. The contractor or trade association must file the complaint within 180 days after the date the contractor or trade association discovered or should have known of the breach.

(b) The commissioner shall investigate a complaint that a contractor or trade association files under paragraph (a) of this subsection as provided in subsection (2) of this section. If the commissioner finds substantial evidence that the contracting agency materially breached the agreement, the commissioner may:

(A) Issue an order to cease and desist from the contracting agency's material breach and to perform actions that the commissioner determines will carry out the purposes of ORS 279C.305 and remedy the effects of the breach; or

(B) Conduct a contested case hearing in accordance with ORS chapter 183.

(c) An order to cease and desist that the commissioner issues under paragraph (b)(A) of this subsection may not include an award of attorney fees. The remedy that the commissioner orders may include requiring the contracting agency to enter into a contract with a contractor to perform any remaining construction on the public improvement that

is the subject of the contracting agency's violation.

(5)(a) If the commissioner finds by a preponderance of the evidence in a contested case hearing under subsection (3)(d)(C) of this section that a local contracting agency violated the least cost policy set forth in ORS 279C.305 (1), or in a contested case hearing under subsection (4)(b)(B) of this section that a local contracting agency materially breached the agreement described in subsection (3)(c) of this section, the commissioner shall order the contracting agency to cease and desist from the conduct that constitutes the breach and may impose a civil penalty of not more than \$5,000 for the violation or breach or a civil penalty of not more than \$20,000 if the commissioner determines that the local contracting agency willfully engaged in a violation of the least cost policy set forth in ORS 279C.305 (1).

(b) The commissioner shall impose a civil penalty under paragraph (a) of this subsection in accordance with ORS 183.745 and shall apply the proceeds of the civil penalty first to the costs of the commissioner's investigation and any administrative proceedings that result from the investigation. The commissioner shall deposit any remaining proceeds in the State Treasury to the credit of the General Fund.

(6) In addition to other available remedies for violations of orders of the commissioner, a contractor or trade association may bring a civil action to enforce a cease and desist order issued under subsection (5)(a) of this section through writ of mandamus or specific performance. [2017 c.715 §3]

Note: 279C.306 was added to and made a part of ORS chapter 279C by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

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

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

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

(2) Subsection (1) of this section does not apply to a procurement for construction manager/general contractor services or to a design-build procurement, as defined in rules the Attorney General or a contracting agency adopts under ORS 279A.065. [2009 c.880 §11; 2013 c.522 §6]

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

279C.310 Limitation on contracting agency constructing public improvement. If a contracting agency fails to adopt and apply a cost accounting system that substantially complies with the model cost accounting guidelines developed by the Oregon Department of Administrative Services pursuant to section 3, chapter 869, Oregon Laws 1979, as determined by an accountant qualified to perform audits required by ORS 297.210 and 297.405 to 297.555 (Municipal Audit Law), the contracting agency may not construct a public improvement with the contracting agency's own equipment or personnel if the cost exceeds \$5,000. [2003 c.794 §99]

279C.315 Waiver of damages for unreasonable delay by contracting agency against public policy. (1) Any clause in a public improvement contract that purports to waive, release or extinguish the rights of a contractor to damages or an equitable adjustment arising out of unreasonable delay in performing the contract, if the delay is caused by acts or omissions of the contracting agency or persons acting therefor, is against public policy and is void and unenforceable.

(2) Subsection (1) of this section is not intended to render void any contract provision that:

- (a) Requires notice of any delay;
- (b) Provides for arbitration or other procedures for settlement of contract disputes; or
- (c) Provides for reasonable liquidated damages. [2003 c.794 §100]

279C.320 Contracts for construction other than public improvements. (1) Contracting agencies shall enter into contracts for emergency work, minor alteration, ordinary repair or maintenance of public improvements, as well as any other construction contract that is not defined as a public improvement under ORS 279A.010, in accordance with the provisions of ORS chapter 279B. Contracts for emergency work are regulated under ORS 279B.080.

(2) Nothing in this section relieves contracting agencies or contractors of any other relevant requirements under this chapter,

including payment of prevailing wage rates when applicable.

(3) When construction services are not considered to be a public improvement under this chapter because no funds of a public agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection, the benefiting public body may nonetheless condition acceptance of the services on receipt of such protections as the public body considers to be in the public interest, including a performance bond, a payment bond and appropriate insurance. [2003 c.794 §101; 2007 c.764 §13]

279C.325 Limitation on contracting agency awarding contract to nonresident education service district. A contracting agency may not award a public improvement contract, a contract for a public works, as defined in ORS 279C.800, or a contract for personal services, as defined in ORS 279C.100, to a nonresident bidder, as defined in ORS 279A.120, that is an education service district. [2005 c.413 §2]

**(Competitive Bidding;
Contract Specifications;
Exceptions; Exemptions)**

279C.330 "Findings" defined. (1) As used in ORS 279C.345 and 279C.350, "findings" means the justification for a contracting agency conclusion that includes, but is not limited to, information regarding:

- (a) Operational, budget and financial data;
- (b) Public benefits;
- (c) Value engineering;
- (d) Specialized expertise required;
- (e) Public safety;
- (f) Market conditions;
- (g) Technical complexity; and
- (h) Funding sources.

(2) As used in ORS 279C.335, "findings" means the justification for a conclusion that a contracting agency or state agency, in seeking an exemption from the competitive bidding requirement of ORS 279C.335 (1), reaches based on the considerations set forth in ORS 279C.335 (2). [2003 c.794 §102; 2013 c.522 §7]

279C.332 Definitions for ORS 279A.065, 279C.307, 279C.335, 279C.337 and 279C.380. As used in this section and ORS 279A.065, 279C.307, 279C.335, 279C.337 and 279C.380:

(1) "Affiliate" means a person that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with another person.

(2) “Construction manager/general contractor” means a person that provides construction manager/general contractor services to a contracting agency under a public improvement contract.

(3)(a) “Construction manager/general contractor services” means construction-related services that a contracting agency procures by means of an alternative contracting method under ORS 279C.335 and that:

(A) Include a construction manager/general contractor’s:

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

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

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

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

(III) Improve the value and quality of the public improvement; and

(IV) Reduce the time necessary to complete the public improvement; and

(B) May include, depending on the specific terms of the public improvement contract and on whether the contracting agency decides to proceed with construction, a construction manager/general contractor’s:

(i) Devising a schedule for constructing the public improvement;

(ii) Estimating construction, materials, labor and other costs for the public improvement;

(iii) Establishing a fixed price, a guaranteed maximum price or other maximum price;

(iv) Constructing portions of the public improvement and subcontracting portions to other contractors;

(v) Coordinating and overseeing the construction process; or

(vi) Performing other services related to constructing a public improvement in accordance with the terms of the public improvement contract.

(b) “Construction manager/general contractor services” does not include services

related to constructing a public improvement under the terms of:

(A) A public improvement contract that a contracting agency awards on the basis of a competitive bidding process that does not require an exemption under ORS 279C.335;

(B) A public improvement contract that results from a design-build procurement, as defined in rules the Attorney General or a contracting agency adopts under ORS 279A.065, and that is exempt from the competitive bidding requirement under ORS 279C.335;

(C) An energy savings performance contract;

(D) A public improvement contract for a transportation project that:

(i) Is exempt from the competitive bidding requirement under ORS 279C.335;

(ii) Requires the contractor to construct the project according to plans and specifications that a design professional provides under a separate contract with the contracting agency and without significant participation from the contractor; and

(iii) The contracting agency awards on the basis of the contracting agency’s evaluation of:

(I) The contractor’s qualifications, the price to perform the work on the project and the amount of time the contractor will take to perform the work; or

(II) The contractor’s qualifications, past experience with similar projects, the price to perform the work on the project and the contractor’s planned approach to the project; or

(E) A public improvement contract that is otherwise exempt or excepted from the competitive bidding requirement under ORS 279C.335.

(4) “Guaranteed maximum price” means the total price at which a construction manager/general contractor agrees to provide construction manager/general contractor services to a contracting agency in accordance with the terms and conditions and scope of work for a specific public improvement contract and within which are:

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

(b) Any contingent costs, fees or other charges specifically identified in the public improvement contract. [2013 c.522 §2]

Note: 279C.332 was added to and made a part of ORS chapter 279C by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

279C.335 Competitive bidding; exceptions; exemptions. (1) All public improvement contracts shall be based upon competitive bids except:

(a) A public improvement contract with a qualified nonprofit agency that provides employment opportunities for individuals with disabilities under ORS 279.835 to 279.855.

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

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

(d) A public improvement contract with a contract price that does not exceed \$100,000 made under procedures for competitive quotes in ORS 279C.412 and 279C.414.

(e) A contract to repair, maintain, improve or protect property the Department of Veterans' Affairs obtains under ORS 407.135 and 407.145 (1).

(f) An energy savings performance contract that a contracting agency enters into in accordance with rules of procedure adopted under ORS 279A.065.

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

(a) The exemption is unlikely to encourage favoritism in awarding public improvement contracts or substantially diminish competition for public improvement contracts.

(b) Awarding a public improvement contract under the exemption will likely result in substantial cost savings and other substantial benefits to the contracting agency or the state agency that seeks the exemption or, if the contract is for a public improvement described in ORS 279A.050 (3)(b), to the contracting agency or the public. In approving a finding under this paragraph, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board shall consider the type, cost and amount of the contract and, to the extent

applicable to the particular public improvement contract or class of public improvement contracts, the following:

(A) How many persons are available to bid;

(B) The construction budget and the projected operating costs for the completed public improvement;

(C) Public benefits that may result from granting the exemption;

(D) Whether value engineering techniques may decrease the cost of the public improvement;

(E) The cost and availability of specialized expertise that is necessary for the public improvement;

(F) Any likely increases in public safety;

(G) Whether granting the exemption may reduce risks to the contracting agency, the state agency or the public that are related to the public improvement;

(H) Whether granting the exemption will affect the sources of funding for the public improvement;

(I) Whether granting the exemption will better enable the contracting agency to control the impact that market conditions may have on the cost of and time necessary to complete the public improvement;

(J) Whether granting the exemption will better enable the contracting agency to address the size and technical complexity of the public improvement;

(K) Whether the public improvement involves new construction or renovates or remodels an existing structure;

(L) Whether the public improvement will be occupied or unoccupied during construction;

(M) Whether the public improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions; and

(N) Whether the contracting agency or state agency has, or has retained under contract, and will use contracting agency or state agency personnel, consultants and legal counsel that have necessary expertise and substantial experience in alternative contracting methods to assist in developing the alternative contracting method that the contracting agency or state agency will use to award the public improvement contract and to help negotiate, administer and enforce the terms of the public improvement contract.

(c) As an alternative to the finding described in paragraph (b) of this subsection, if a contracting agency or state agency seeks an exemption that would allow the contracting agency or state agency to use an alter-

native contracting method that the contracting agency or state agency has not previously used, the contracting agency or state agency may make a finding that identifies the project as a pilot project for which the contracting agency or state agency intends to determine whether using the alternative contracting method actually results in substantial cost savings to the contracting agency, to the state agency or, if the contract is for a public improvement described in ORS 279A.050 (3)(b), to the contracting agency or the public. The contracting agency or state agency shall include an analysis and conclusion regarding actual cost savings, if any, in the evaluation required under ORS 279C.355.

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

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

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

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

(c) Require a contracting agency or state agency that procures construction manager/general contractor services to conduct the procurement in accordance with model rules the Attorney General adopts under ORS 279A.065 (3).

(5)(a) A contracting agency or state agency shall hold a public hearing before

approving the findings required by subsection (2) of this section and before the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board grants an exemption from the competitive bidding requirement for a public improvement contract or a class of public improvement contracts.

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

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

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

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

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

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

(8) A public improvement contract that is excepted from the competitive bidding requirement under subsection (1)(a), (c), (d), (e) or (f) of this section is not subject to the exemption requirements of subsection (2) of this section. [2003 c.794 §103; 2003 c.794 §§104,105a;

2005 c.103 §§12,13,14; 2005 c.625 §§58,59,60; 2007 c.70 §§69,70,71; 2007 c.764 §§14,15,17; 2013 c.522 §8]

279C.337 Procurement of construction manager/general contractor services. (1) A contracting agency that intends to procure construction manager/general contractor services shall procure the construction manager/general contractor services in accordance with model rules the Attorney General adopts under ORS 279A.065 (3).

(2) A contracting agency shall, in documents the contracting agency uses to procure construction manager/general contractor services:

(a) Describe the criteria the contracting agency will use to evaluate proposals for the construction manager/general contractor services the contracting agency seeks and what weight the contracting agency will give each criterion in the evaluation;

(b) Describe how the contracting agency will use interviews in the contracting agency's procurement and how the contracting agency will evaluate information the contracting agency obtains from interviews, if the contracting agency uses interviews in the procurement;

(c) Describe any other criteria the contracting agency may consider in selecting a construction manager/general contractor;

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

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

(f) Specify terms and conditions that govern how the fixed price, guaranteed maximum price or other maximum price set forth in the public improvement contract will be determined and whether the price includes or is based on unit pricing or allows for work that is constructed in phases;

(g) State that the contracting agency will not pay any amount that exceeds a fixed price, guaranteed maximum price or other maximum price specified in the public improvement contract unless the amount results from material changes to the scope of work set forth in the public improvement contract and the parties to the public improvement contract agree in writing to the material changes;

(h) State that the contracting agency will conduct the procurement in accordance with

model rules the Attorney General adopts under ORS 279A.065 (3); and

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

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

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

(C) The date by which the contracting agency plans to indicate an intent to award the public improvement contract; and

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

(3) By the earlier of the date on which a contracting agency and a construction manager/general contractor agree on a fixed price, guaranteed maximum price or other maximum price or the date on which the construction manager/general contractor begins to solicit offers for construction services from subcontractors, the public improvement contract that the contracting agency negotiates with the construction manager/general contractor must:

(a) Describe the methods the construction manager/general contractor will use to qualify and select subcontractors. The methods must be competitive and should provide prospective subcontractors with a reasonable opportunity to participate in the construction manager/general contractor's qualification and selection process.

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

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

(B) The process the construction manager/general contractor will use to qualify and select prospective subcontractors for the portions of the construction work that are not subject to the qualification and selection process described in paragraph (a) of this subsection.

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

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

(e) Describe the conditions under which the construction manager/general contractor will discuss the qualification and selection process described in this subsection with a prospective subcontractor that the construction manager/general contractor did not select for a subcontract if the construction manager/general contractor receives a request from the prospective subcontractor to discuss the process.

(4) As used in this section, "savings" means a positive difference between a fixed price, a guaranteed maximum price or other maximum price set forth in a public improvement contract and the actual cost of the work, including costs for which a contracting agency reimburses a construction manager/general contractor and fees or profits the construction manager/general contractor earns. [2013 c.522 §3]

Note: 279C.337 was added to and made a part of ORS chapter 279C by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

279C.340 Contract negotiations. If a public improvement contract is competitively bid and all responsive bids from responsible bidders exceed the contracting agency's cost estimate, the contracting agency, in accordance with rules adopted by the contracting agency, may negotiate with the lowest responsive, responsible bidder, prior to awarding the contract, in order to solicit value engineering and other options to attempt to bring the contract within the contracting agency's cost estimate. A negotiation with the lowest responsive, responsible bidder under this section may not result in the award of the contract to that bidder if the scope of the project is significantly changed from the original bid proposal. Notwithstanding any other provision of law, the records of a bidder used in contract negotiation under this section are not subject to public inspection until after the negotiated contract has been

awarded or the negotiation process has been terminated. [2003 c.794 §106]

279C.345 Specifications for contracts; exemptions. (1) Specifications for public improvement contracts may not expressly or implicitly require any product by any brand name or mark, nor the product of any particular manufacturer or seller unless the product is exempt under subsection (2) of this section.

(2) The Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation may exempt certain products or classes of products from subsection (1) of this section upon any of the following findings:

(a) It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts;

(b) The specification of a product by brand name or mark, or the product of a particular manufacturer or seller, would result in substantial cost savings to the contracting agency;

(c) There is only one manufacturer or seller of the product of the quality required; or

(d) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies. [2003 c.794 §107; 2007 c.764 §19]

279C.350 Exemption procedure; appeal.

(1) Exemptions granted by the Director of the Oregon Department of Administrative Services under ORS 279C.335 (2) or 279C.345 (2) constitute rulemaking and not contested cases under ORS chapter 183. However, an exemption granted with regard to a specific public improvement contract by the Director of the Oregon Department of Administrative Services, or an exemption granted by the Director of Transportation with regard to a specific public improvement contract or class of public improvement contracts described in ORS 279A.050 (3)(b), shall be granted by order. The order shall set forth findings supporting the decision to grant or deny the request for the exemption. The order is reviewable under ORS 183.484 and does not constitute a contested case order. Jurisdiction for review of the order is with the Circuit Court of Marion County. The court may award costs and attorney fees to the prevailing party.

(2) Any person except the contracting agency or anyone representing the contracting agency may bring a petition for a declaratory judgment to test the validity of

any rule adopted by the Director of the Oregon Department of Administrative Services under ORS 279C.335 or 279C.345 in the manner provided in ORS 183.400.

(3) Any person except the contracting agency or anyone representing the contracting agency may bring an action for writ of review under ORS chapter 34 to test the validity of an exemption granted under ORS 279C.335 or 279C.345 by a local contract review board. [2003 c.794 §108; 2003 c.794 §109; 2007 c.764 §20]

279C.355 Evaluation of public improvement projects not contracted by competitive bidding. (1) Upon completion of and final payment for any public improvement contract, or class of public improvement contracts, in excess of \$100,000 for which the contracting agency did not use the competitive bidding process, the contracting agency shall prepare and deliver to the Director of the Oregon Department of Administrative Services, the local contract review board or, for public improvement contracts described in ORS 279A.050 (3)(b), the Director of Transportation an evaluation of the public improvement contract or the class of public improvement contracts.

(2) The evaluation must include but is not limited to the following matters:

(a) The actual project cost as compared with original project estimates;

(b) The amount of any guaranteed maximum price;

(c) The number of project change orders issued by the contracting agency;

(d) A narrative description of successes and failures during the design, engineering and construction of the project; and

(e) An objective assessment of the use of the alternative contracting process as compared to the findings required by ORS 279C.335.

(3) The evaluations required by this section:

(a) Must be made available for public inspection; and

(b) Must be completed within 30 days of the date the contracting agency accepts:

(A) The public improvement project; or

(B) The last public improvement project if the project falls within a class of public improvement contracts. [2003 c.794 §111; 2003 c.794 §112; 2007 c.764 §§22,23]

(Solicitation; Contract Award; Rejection)

279C.360 Requirement for public improvement advertisements. (1) An advertisement for public improvement contracts must be published at least once in at least

one newspaper of general circulation in the area where the contract is to be performed and in as many additional issues and publications as the contracting agency may determine. The Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation, by rule or order, may authorize advertisements for public improvement contracts to be published electronically instead of in a newspaper of general circulation if the director or board determines that electronic advertisements are likely to be cost-effective. If the public improvement contract has an estimated cost in excess of \$125,000, the advertisement must be published in at least one trade newspaper of general statewide circulation. The Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board may, by rule or order, require an advertisement to be published more than once or in one or more additional publications.

(2) All advertisements for public improvement contracts must state:

(a) The public improvement project;

(b) The office where the specifications for the project may be reviewed;

(c) The date that prequalification applications must be filed under ORS 279C.430 and the class or classes of work for which bidders must be prequalified if prequalification is a requirement;

(d) The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement;

(e) The name and title of the person designated for receipt of bids;

(f) The date, time and place that the contracting agency will publicly open the bids; and

(g) If the contract is for a public works subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 et seq.). [2003 c.794 §114; 2005 c.103 §14a; 2007 c.844 §1]

279C.365 Requirements for solicitation documents and bids and proposals. (1) A contracting agency that prepares solicitation documents for a public improvement contract shall, at a minimum, include in the solicitation documents:

(a) A designation for or description of the public improvement project;

(b) The office where the specifications for the project may be reviewed;

(c) The date that prequalification applications must be filed under ORS 279C.430 and the class or classes of work for which

bidders must be prequalified if prequalification is a requirement;

(d) The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement, and may, in the sole discretion of the contracting agency, direct or permit bidders to submit and the contracting agency to receive bids by electronic means;

(e) The name and title of the person designated to receive bids;

(f) The date on which and the time and place at which the contracting agency will publicly open the bids;

(g) A statement that, if the contract is for a public works project subject to the state prevailing rates of wage under ORS 279C.800 to 279C.870, the federal prevailing rates of wage under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) or both the state and federal prevailing rates of wage, the contracting agency will not receive or consider a bid unless the bid contains a statement by the bidder that the bidder will comply with ORS 279C.838 or 279C.840 or 40 U.S.C. 3141 et seq.;

(h) A statement that each bid must identify whether the bidder is a resident bidder, as defined in ORS 279A.120;

(i) A statement that the contracting agency may reject a bid that does not comply with prescribed public contracting procedures and requirements, including the requirement to demonstrate the bidder's responsibility under ORS 279C.375 (3)(b), and that the contracting agency may reject for good cause all bids after finding that doing so is in the public interest;

(j) Information addressing whether a contractor or subcontractor must be licensed under ORS 468A.720; and

(k) A statement that the contracting agency may not receive or consider a bid for a public improvement contract unless the bidder is licensed by the Construction Contractors Board or the State Landscape Contractors Board.

(2) A contracting agency may provide solicitation documents by electronic means.

(3) A bid made to the contracting agency under ORS 279C.335 or 279C.400 must be:

(a) In writing;

(b) Filed with the person the contracting agency designates to receive bids; and

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

(4) After the contracting agency opens the bids, the contracting agency shall make the bids available for public inspection.

(5) A bidder shall submit or post a surety bond, irrevocable letter of credit issued by an insured institution as defined in ORS 706.008, cashier's check or certified check for all bids as bid security unless the contracting agency has exempted the contract for which the bidder submits a bid from this requirement under ORS 279C.390. The security may not exceed 10 percent of the amount bid for the contract.

(6) Subsection (5) of this section applies only to public improvement contracts with a value, estimated by the contracting agency, of more than \$100,000 or, in the case of contracts for highways, bridges and other transportation projects, more than \$50,000. [2003 c.794 §115; 2005 c.103 §15; 2007 c.764 §25; 2007 c.844 §2; 2009 c.368 §1]

279C.370 First-tier subcontractor disclosure. (1)(a) Within two working hours after the date and time of the deadline when bids are due to a contracting agency for a public improvement contract, a bidder shall submit to the contracting agency a disclosure of the first-tier subcontractors that:

(A) Will be furnishing labor or will be furnishing labor and materials in connection with the public improvement contract; and

(B) Will have a contract value that is equal to or greater than five percent of the total project bid or \$15,000, whichever is greater, or \$350,000 regardless of the percentage of the total project bid.

(b) For each contract to which this subsection applies, the contracting agency shall designate a deadline for submission of bids that has a date on a Tuesday, Wednesday or Thursday and a time between 2 p.m. and 5 p.m., except that this paragraph does not apply to public contracts for maintenance or construction of highways, bridges or other transportation facilities.

(c) This subsection applies only to public improvement contracts with a value, estimated by the contracting agency, of more than \$100,000.

(d) This subsection does not apply to public improvement contracts that have been exempted from competitive bidding requirements under ORS 279C.335 (2).

(2) The disclosure of first-tier subcontractors under subsection (1) of this section must include the name of each subcontractor, the category of work that each subcontractor will perform and the dollar value of each subcontract. The information shall be disclosed in substantially the following form:

FIRST-TIER SUBCONTRACTOR
DISCLOSURE FORM

PROJECT NAME: _____
 BID #: _____
 BID CLOSING: Date: _____ Time: _____

This form must be submitted at the location specified in the Invitation to Bid on the advertised bid closing date and within two working hours after the advertised bid closing time.

List below the name of each subcontractor that will be furnishing labor or will be furnishing labor and materials and that is required to be disclosed, the category of work that the subcontractor will be performing and the dollar value of the subcontract. Enter "NONE" if there are no subcontractors that need to be disclosed. (ATTACH ADDITIONAL SHEETS IF NEEDED.)

NAME	DOLLAR VALUE	CATEGORY OF WORK
1) _____	\$ _____	_____
2) _____	\$ _____	_____
3) _____	\$ _____	_____
4) _____	\$ _____	_____

Failure to submit this form by the disclosure deadline will result in a nonresponsive bid. A nonresponsive bid will not be considered for award.

Form submitted by (bidder name): _____

Contact name: _____
 Phone no.: _____

(3) A contracting agency shall accept the subcontractor disclosure. The contracting agency shall consider the bid of any contractor that does not submit a subcontractor disclosure to the contracting agency to be a nonresponsive bid and may not award the contract to the contractor. A contracting agency is not required to determine the accuracy or the completeness of the subcontractor disclosure.

(4) After the bids are opened, the subcontractor disclosures must be made available for public inspection.

(5) A contractor may substitute a first-tier subcontractor under the provisions of ORS 279C.585.

(6) A subcontractor may file a complaint under ORS 279C.590 based on the disclosure

requirements of subsection (1) of this section. [2003 c.794 §116; 2005 c.103 §16]

279C.375 Award and execution of contract; determination of responsibility of bidder; bonds; impermissible exclusions. (1) After a contracting agency has opened bids and determined that the contracting agency will award a public improvement contract, the contracting agency shall award the contract to the lowest responsible bidder.

(2) At least seven days before awarding a public improvement contract, unless the contracting agency determines that seven days is impractical under rules adopted under ORS 279A.065, the contracting agency shall issue to each bidder or post, electronically or otherwise, a notice of the contracting agency's intent to award a contract. This subsection does not apply to a contract to which competitive bidding does not apply under ORS 279C.335 (1)(c) or (d). The notice and the manner in which the notice is posted or issued must conform to rules adopted under ORS 279A.065.

(3) In determining the lowest responsible bidder, a contracting agency shall do all of the following:

(a) Check the list created by the Construction Contractors Board under ORS 701.227 for bidders who are not qualified to hold a public improvement contract.

(b) Determine whether the bidder is responsible. A responsible bidder must demonstrate to the contracting agency that the bidder:

(A) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or has the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.

(B) Holds current licenses that businesses or service professionals operating in this state must hold in order to undertake or perform the work specified in the contract.

(C) Is covered by liability insurance and other insurance in amounts the contracting agency requires in the solicitation documents.

(D) Qualifies as a carrier-insured employer or a self-insured employer under ORS 656.407 or has elected coverage under ORS 656.128.

(E) Has made the disclosure required under ORS 279C.370.

(F) Completed previous contracts of a similar nature with a satisfactory record of performance. For purposes of this subparagraph, a satisfactory record of performance means that to the extent that the costs asso-

ciated with and time available to perform a previous contract remained within the bidder's control, the bidder stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. The contracting agency shall document the bidder's record of performance if the contracting agency finds under this subparagraph that the bidder is not responsible.

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

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

(I) Possesses an unexpired certificate that the Oregon Department of Administrative Services issued under ORS 279A.167, if the bidder employs 50 or more full-time workers and submitted a bid for a procurement with an estimated contract price that exceeds \$500,000 in response to an advertisement or solicitation from a state contracting agency.

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

(c) Document the contracting agency's compliance with the requirements of paragraphs (a) and (b) of this subsection in substantially the following form:

RESPONSIBILITY DETERMINATION FORM

Project Name: _____
Bid Number: _____
Business Entity Name: _____
CCB License Number: _____
Form Submitted By (Contracting Agency): _____

Form Submitted By (Contracting Agency Representative's Name): _____
Title: _____
Date: _____

(The contracting agency must submit this form with attachments, if any, to the Construction Contractors Board within 30 days after the date of contract award.)

The contracting agency has (check all of the following):

- Checked the list created by the Construction Contractors Board under ORS 701.227 for bidders who are not qualified to hold a public improvement contract.
- Determined whether the bidder has met the standards of responsibility. In so doing, the contracting agency has found that the bidder demonstrated that the bidder:
 - Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.
 - Holds current licenses that businesses or service professionals operating in this state must hold in order to undertake or perform the work specified in the contract.
 - Is covered by liability insurance and other insurance in amounts required in the solicitation documents.
 - Qualifies as a carrier-insured employer or a self-insured employer under ORS 656.407 or has elected coverage under ORS 656.128.
 - Has disclosed the bidder's first-tier subcontractors in accordance with ORS 279C.370.
 - Has a satisfactory record of performance.
 - Has a satisfactory record of integrity.
 - Is legally qualified to contract with the contracting agency.
 - Possesses a certificate that the Oregon Department of Administrative Services issued under ORS 279A.167.
 - Has supplied all necessary information in connection with the inquiry concerning responsibility.
- Determined the bidder to be (check one of the following):
 - Responsible under ORS 279C.375 (3)(a) and (b).
 - Not responsible under ORS 279C.375 (3)(a) and (b).

(Attach documentation if the contracting agency finds the bidder not to be responsible.)

(d) Submit the form described in paragraph (c) of this subsection, with any attachments, to the Construction Contractors Board within 30 days after the date the contracting agency awards the contract.

- (4) The successful bidder shall:
 - (a) Promptly execute a formal contract; and

(b) Execute and deliver to the contracting agency a performance bond and a payment bond when required under ORS 279C.380.

(5) Based on competitive bids, a contracting agency may award a public improvement contract or may award multiple public improvement contracts when specified in the invitation to bid.

(6) A contracting agency may not exclude a commercial contractor from competing for a public contract on the basis that the license issued by the Construction Contractors Board is endorsed as a level 1 or level 2 license. As used in this section, "commercial contractor" has the meaning given that term in ORS 701.005. [2003 c.794 §117; 2005 c.103 §§17,18; 2005 c.376 §1; 2007 c.764 §§26,27; 2007 c.836 §§42,43; 2009 c.880 §§9,9a; 2015 c.454 §5]

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

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

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

(2) If the public improvement contract is with a single person to provide construction manager/general contractor services, in

which a guaranteed maximum price may be established by an amendment authorizing construction period services following pre-construction period services, the contractor shall provide the bonds required by subsection (1) of this section upon execution of an amendment establishing the guaranteed maximum price. The contracting agency shall also require the contractor to provide bonds equal to the value of construction services authorized by any early work amendment in advance of the guaranteed maximum price amendment. Such bonds must be provided before construction starts.

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

(4) In cases of emergency, or when the interest or property of the contracting agency or the public agency or agencies for whose benefit the contract was awarded probably would suffer material injury by delay or other cause, the requirement of furnishing a good and sufficient performance bond and a good and sufficient payment bond for the faithful performance of any public improvement contract may be excused, if a declaration of such emergency is made in accordance with rules adopted under ORS 279A.065.

(5) This section applies only to public improvement contracts with a value, estimated by the contracting agency, of more than \$100,000 or, in the case of contracts for highways, bridges and other transportation projects, more than \$50,000. [2003 c.794 §118; 2005 c.103 §20; 2013 c.522 §9]

279C.385 Return or retention of bid security. (1) A contracting agency shall return the bid security of the successful bidder to the bidder after the bidder:

(a) Executes the public improvement contract; and

(b) Delivers a good and sufficient performance bond, a good and sufficient payment bond and any required proof of insurance.

(2) A bidder who is awarded a contract and who fails promptly and properly to execute the contract and to deliver the performance bond, the payment bond and the proof of insurance, when bonds or insurance

are required, shall forfeit the bid security that accompanied the successful bid. The bid security shall be taken and considered as liquidated damages and not as a penalty for failure of the bidder to execute the contract and deliver the bonds and proof of insurance.

(3) The contracting agency may return the bid security of unsuccessful bidders to them when the bids have been opened and the contract has been awarded, and may not retain the bid security after the contract has been duly signed. [2003 c.794 §119; 2005 c.103 §21]

279C.390 Exemption of contracts from bid security and bonds. (1) Subject to the provisions of subsection (2) of this section, the Director of the Oregon Department of Administrative Services, a state contracting agency with procurement authority under ORS 279A.050, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation may exempt certain contracts or classes of contracts from all or a portion of the requirement for bid security and from all or a portion of the requirement that good and sufficient bonds be furnished to ensure performance of the contract and payment of obligations incurred in the performance.

(2) The contracting agency may require bid security and a good and sufficient performance bond, a good and sufficient payment bond, or any combination of such bonds, even though the public improvement contract is of a class exempted under subsection (1) of this section.

(3) The Director of Transportation may:

(a) Exempt contracts or classes of contracts financed from the proceeds of bonds issued under ORS 367.620 (3)(a) from the requirement for bid security and from the requirement that a good and sufficient bond be furnished to ensure performance of the contract; or

(b) Reduce the amount of the required performance bond for contracts or classes of contracts financed from the proceeds of the bonds issued under ORS 367.620 (3)(a) to less than 100 percent of the contract price.

(4) Any recoverable damages that exceed the amount of the performance bond required under subsection (3) of this section shall be the sole responsibility of the Department of Transportation. [2003 c.794 §120; 2003 c.794 §120a; 2007 c.764 §28]

279C.395 Rejection of bids. A contracting agency may reject any bid not in compliance with all prescribed public bidding procedures and requirements, and may, for good cause, reject all bids upon a finding of the contracting agency it is in the public interest to do so. In any case where competitive bids are required and all bids are

rejected, and the proposed project is not abandoned, new bids may be called for as in the first instance. [2003 c.794 §121]

(Competitive Proposals)

279C.400 Competitive proposals; procedure. (1) When authorized or required by an exemption granted under ORS 279C.335, a contracting agency may solicit and award a public improvement contract, or may award multiple public improvement contracts when specified in the request for proposals, by requesting and evaluating competitive proposals. A contract awarded under this section may be amended only in accordance with rules adopted under ORS 279A.065.

(2) Except as provided in ORS 279C.330 to 279C.355, 279C.360 to 279C.390, 279C.395 and 279C.430 to 279C.450, competitive proposals shall be subject to the following requirements of competitive bidding:

(a) Advertisement under ORS 279C.360;

(b) Requirements for solicitation documents under ORS 279C.365;

(c) Disqualification due to a Construction Contractors Board listing as described in ORS 279C.375 (3)(a);

(d) Contract execution and bonding requirements under ORS 279C.375 and 279C.380;

(e) Determination of responsibility under ORS 279C.375 (3)(b);

(f) Rejection of bids under ORS 279C.395; and

(g) Disqualification and prequalification under ORS 279C.430, 279C.435 and 279C.440.

(3) For the purposes of applying the requirements listed in subsection (2) of this section to competitive proposals, when used in the sections listed in subsection (2) of this section, "bids" includes proposals, and "bid documents" and "invitation to bid" include requests for proposals.

(4) Competitive proposals are not subject to the following requirements of competitive bidding:

(a) First-tier subcontractor disclosure under ORS 279C.370; and

(b) Reciprocal preference under ORS 279A.120.

(5) The contracting agency may require proposal security that serves the same function with respect to proposals as bid security serves with respect to bids under ORS 279C.365 (5) and 279C.385, as follows:

(a) The contracting agency may require proposal security in a form and amount as may be determined to be reasonably necessary or prudent to protect the interests of the contracting agency.

(b) The contracting agency shall retain the proposal security if a proposer who is awarded a contract fails to promptly and properly execute the contract and provide any required bonds or insurance.

(c) The contracting agency shall return the proposal security to all proposers upon the execution of the contract, or earlier in the selection process.

(6) In all other respects, and subject to rules adopted under ORS 279A.065, references in this chapter to invitations to bid, bids or bidders shall, to the extent practicable within the proposal process, be deemed equally applicable to requests for proposals, proposals or proposers. However, notwithstanding ORS 279C.375 (1), a contracting agency may not be required to award a contract advertised under the competitive proposal process based on price, but may award the contract in accordance with ORS 279C.410 (8). [2003 c.794 §129; 2005 c.103 §23; 2007 c.764 §29]

279C.405 Requests for information, interest or qualifications; requirements for requests for proposals. (1) A contracting agency may issue a request for information, a request for interest, a request for qualifications or other preliminary documents to obtain information useful in the preparation or distribution of a request for proposals.

(2) In addition to the general requirements of ORS 279C.365, a contracting agency preparing a request for proposals shall include:

(a) All required contractual terms and conditions. The request for proposals also may:

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

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

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

(b) The method of contractor selection, which may include but is not limited to award without negotiation, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed either to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers, or any combination of methods, as authorized or pre-

scribed by rules adopted under ORS 279A.065.

(c) All evaluation factors that will be considered by the contracting agency when evaluating the proposals, including the relative importance of price and any other evaluation factors. [2003 c.794 §130; 2007 c.764 §30]

279C.410 Receipt of proposals; evaluation and award. (1) Notwithstanding the public records law, ORS 192.311 to 192.478:

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

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

(2) For each request for proposals, the contracting agency shall prepare a list of proposals.

(3) Notwithstanding any requirement to make proposals open to public inspection after the contracting agency's issuance of notice of intent to award a contract, a contracting agency may withhold from disclosure to the public trade secrets, as defined in ORS 192.345, and information submitted to a public body in confidence, as described in ORS 192.355, that are contained in a proposal. The fact that proposals are opened at a public meeting as defined in ORS 192.610 does not make their contents subject to disclosure, regardless of whether the public body opening the proposals fails to give notice of or provide for an executive session for the purpose of opening proposals. If a request for proposals is canceled after proposals are received, the contracting agency may return a proposal to the proposer that made the proposal. The contracting agency shall keep a list of returned proposals in the file for the solicitation.

(4) As provided in the request for proposals, a contracting agency may conduct discussions with proposers who submit proposals the agency has determined to be closely competitive or to have a reasonable chance of being selected for award. The discussions may be conducted for the purpose of clarification to ensure full understanding of, and responsiveness to, the solicitation requirements. The contracting agency shall accord proposers fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions of proposals may be permitted after the submission of proposals and before award for the purpose of obtaining best and final offers. In conducting discussions, the contracting agency may not disclose information derived from proposals submitted by competing proposers.

(5) When provided for in the request for proposals, the contracting agency may employ methods of contractor selection including but not limited to award based solely on the ranking of proposals, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers, or any combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065. When applicable, in any instance in which the contracting agency determines that impasse has been reached in negotiations with a highest ranked proposer, the contracting agency may terminate negotiations with that proposer and commence negotiations with the next highest ranked proposer.

(6) The cancellation of requests for proposals and the rejection of proposals shall be in accordance with ORS 279C.395.

(7) At least seven days before the award of a public improvement contract, unless the contracting agency determines that seven days is impractical under rules adopted under ORS 279A.065, the contracting agency shall issue to each proposer or post, electronically or otherwise, a notice of intent to award.

(8) If a public improvement contract is awarded, the contracting agency shall award a public improvement contract to the responsible proposer whose proposal is determined in writing to be the most advantageous to the contracting agency based on the evaluation factors set forth in the request for proposals and, when applicable, the outcome of any negotiations authorized by the request for proposals. Other factors may not be used in the evaluation. [2003 c.794 §131; 2005 c.103 §24; 2007 c.764 §31]

279C.412 Competitive quotes for intermediate procurements. (1) A public improvement contract estimated by the contracting agency not to exceed \$100,000 may be awarded in accordance with intermediate procurement procedures for competitive quotes established by rules adopted under ORS 279A.065. A contract awarded under this section may be amended to exceed \$100,000 only in accordance with rules adopted under ORS 279A.065.

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

(3) Intermediate procurements under this section need not be made through competitive bidding. However, nothing in this section may be construed as prohibiting a

contracting agency from conducting a procurement that does not exceed \$100,000 under competitive bidding procedures. [2003 c.794 §132; 2007 c.764 §32]

279C.414 Requirements for competitive quotes. (1) Rules adopted under ORS 279A.065 to govern competitive quotes shall require the contracting agency to seek at least three informally solicited competitive price quotes from prospective contractors. The contracting agency shall keep a written record of the sources and amounts of the quotes received. If three quotes are not reasonably available, fewer will suffice, but in that event the contracting agency shall make a written record of the effort made to obtain the quotes.

(2) If a contract is to be awarded by competitive quotes, the contracting agency shall award the contract to the prospective contractor whose quote will best serve the interests of the contracting agency, taking into account price as well as any other applicable factors such as, but not limited to, experience, specific expertise, availability, project understanding, contractor capacity and responsibility. If an award is not made to the prospective contractor offering the lowest price quote, the contracting agency shall make a written record of the basis for award. [2003 c.794 §133]

(Prequalification and Disqualification)

279C.430 Prequalification of bidders; rules. (1) A contracting agency may adopt a rule, resolution, ordinance or other regulation requiring mandatory prequalification for all persons desiring to bid for public improvement contracts that are to be let by the agency. The rule, resolution, ordinance or other regulation authorized by this section must include the time for submitting prequalification applications and a general description of the type and nature of the contracts that may be let. The prequalification application must be in writing on a standard form prescribed under the authority of ORS 279A.050.

(2) When a contracting agency permits or requires prequalification of bidders, a person who wishes to prequalify shall submit a prequalification application to the contracting agency on a standard form prescribed under subsection (1) of this section. Within 30 days after receipt of a prequalification application, the contracting agency shall investigate the applicant as necessary to determine if the applicant is qualified. The determination shall be made in less than 30 days, if practicable, if the applicant requests an early decision to allow the applicant as much time as possible to prepare a bid on a contract that has been advertised. In making

its determination, the contracting agency shall consider only the applicable standards of responsibility listed in ORS 279C.375 (3)(b). The agency shall promptly notify the applicant whether or not the applicant is qualified.

(3) If the contracting agency finds that the applicant is qualified, the notice must state the nature and type of contracts that the person is qualified to bid on and the period of time for which the qualification is valid under the contracting agency's rule, resolution, ordinance or other regulation. If the contracting agency finds the applicant is not qualified as to any contracts covered by the rule, resolution, ordinance or other regulation, the notice must specify the reasons found under ORS 279C.375 (3)(b) for not prequalifying the applicant and inform the applicant of the right to a hearing under ORS 279C.445 and 279C.450.

(4) If a contracting agency has reasonable cause to believe that there has been a substantial change in the conditions of a prequalified person and that the person is no longer qualified or is less qualified, the agency may revoke or may revise and reissue the prequalification after reasonable notice to the prequalified person. The notice shall state the reasons found under ORS 279C.375 (3)(b) for revocation or revision of the prequalification of the person and inform the person of the right to a hearing under ORS 279C.445 and 279C.450. A revocation or revision does not apply to any public improvement contract for which publication of an advertisement, in accordance with ORS 279C.360, commenced before the date the notice of revocation or revision was received by the prequalified person. [2003 c.794 §123; 2005 c.103 §25]

279C.435 Effect of prequalification by Department of Transportation or Oregon Department of Administrative Services.

If a person is prequalified with the Department of Transportation or with the Oregon Department of Administrative Services, the person is rebuttably presumed qualified with any other contracting agency for the same kind of work. When qualifying for the same kind of work with another contracting agency, the person may submit proof of the prequalification in lieu of a prequalification application as required by ORS 279C.430. [2003 c.794 §128]

279C.440 Disqualification from consideration for award of contracts.

(1)(a) A contracting agency may disqualify a person from consideration for award of the contracting agency's contracts for the reasons listed in subsection (2) of this section after providing the person with notice and a reasonable opportunity to be heard.

(b) In lieu of the disqualification process described in paragraph (a) of this subsection, a contracting agency contracting for a public improvement may petition the Construction Contractors Board to disqualify a person from consideration for award of the contracting agency's public improvement contracts for the reasons listed in subsection (2) of this section. The Construction Contractors Board shall provide the person with notice and a reasonable opportunity to be heard.

(c) A contracting agency or the Construction Contractors Board may not disqualify a person under this section for a period of more than three years.

(2) A person may be disqualified from consideration for award of a contracting agency's contracts for any of the following reasons:

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

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

(c) The person has been convicted under state or federal antitrust statutes.

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

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

(3) A contracting agency or the Construction Contractors Board shall issue a written decision to disqualify a person under this section. The decision shall:

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

(b) Inform the disqualified person of the appeal right of the person under:

(A) ORS 279C.445 and 279C.450 if the decision to disqualify was issued by a contracting agency; or

(B) ORS chapter 183 if the decision to disqualify was issued by the Construction Contractors Board.

(4) A copy of the decision issued under subsection (3) of this section must be mailed or otherwise furnished immediately to the disqualified person. [2003 c.794 §122]

279C.445 Appeal of disqualification.

Any person who wishes to appeal disqualification shall, within three business days after receipt of notice of disqualification, notify the contracting agency that the person appeals the disqualification. Immediately upon receipt of the notice of appeal:

(1) A state contracting agency shall notify the Director of the Oregon Department of Administrative Services.

(2) All contracting agencies other than state contracting agencies shall notify the appropriate local contract review board. [2003 c.794 §124]

279C.450 Appeal procedure for decision to deny, revoke or revise prequalification; hearing; costs; judicial review. (1) An appeal from a contracting agency's disqualification or denial, revocation or revision of a prequalification is subject to the procedures set forth in this section and is not subject to ORS chapter 183 except when specifically provided in this section.

(2) Promptly upon receiving notice of appeal from a contracting agency as provided in ORS 279C.445, the Director of the Oregon Department of Administrative Services or the local contract review board shall notify the person appealing and the contracting agency of the time and place of the hearing. The director or board shall conduct the hearing and decide the appeal within 30 days after receiving the notification from the contracting agency unless the person appealing and the contracting agency mutually agree to a different period of time. The director or board shall set forth in writing the reasons for the decision.

(3) In the hearing the director or board shall consider de novo the notice of disqualification or denial, revocation or revision of a prequalification, the reasons listed in ORS 279C.440 (2) on which the contracting agency based the disqualification or the standards of responsibility listed in ORS 279C.375 (3)(b) on which the contracting agency based the denial, revocation or revision of the prequalification and any evidence provided by the parties. In all other respects, a hearing before the director shall be conducted in the same manner as a contested case under ORS 183.417 (1) to (4) and (7), 183.425, 183.440, 183.450 and 183.452.

(4) The director may allocate the director's cost for the hearing between the

person appealing and the contracting agency whose disqualification or prequalification decision is being appealed. The director shall base the allocation upon facts the director finds in the record and states in the final order that, in the director's opinion, warrant such allocation of the costs. If the final order does not allocate the director's costs for the hearing, the costs must be paid as follows:

(a) If the director upholds the decision to disqualify or deny, revoke or revise a prequalification of a person, the person appealing the disqualification or prequalification decision shall pay the director's costs.

(b) If the director reverses the decision to disqualify or deny, revoke or revise a prequalification of a person, the contracting agency whose disqualification or prequalification decision is the subject of the appeal shall pay the director's costs.

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

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

(b) There was evident partiality or corruption on the part of the director or board or any of the members of the board.

(c) There was an evident material miscalculation of figures or an evident material mistake in the description of a person, thing or property referred to in the decision.

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

(7) The circuit court may, in the court's discretion, stay the letting of the contract that is the subject of the petition in the same manner as the court may issue a stay in a suit in equity. If the court determines that an improper disqualification or denial, revocation or revision of a prequalification occurred and the contract has been let, the court may proceed to take evidence to determine the damages, if any, the petitioner suffered and award such damages as the court may find as a judgment against the director or board. The court may award costs and attorney fees to the prevailing party. [2003 c.794 §125; 2005 c.103 §26; 2007 c.288 §13; 2009 c.149 §1]

(Remedies)

279C.460 Action by or on behalf of adversely affected bidder or proposer; exception for personal services contract. (1) Any bidder or proposer adversely affected or any trade association of construction contractors acting on behalf of a member of the association to protect interests common to construction contractor members may commence an action in the circuit court for the county where the principal offices of a contracting agency are located, for the purpose of requiring compliance with, or prevention of violations of, ORS 279C.300 to 279C.470 or to determine the applicability of ORS 279C.300 to 279C.470 to matters or decisions of the contracting agency.

(2) The court may order such equitable relief as the court considers appropriate in the circumstances. In addition to or in lieu of any equitable relief, the court may award an aggrieved bidder or proposer any damages suffered by the bidder or proposer as a result of violations of ORS 279C.300 to 279C.470 for the reasonable cost of preparing and submitting a bid or proposal. A decision of the contracting agency may not be voided if other equitable relief is available.

(3) If the contracting agency is successful in defending the contracting agency's actions against claims of violation or potential violation of ORS 279C.300 to 279C.470, the court may award to the aggrieved contracting agency any damages suffered as a result of the court action.

(4) The court may order payment of reasonable attorney fees and costs on trial and on appeal to a successful party in an action brought under this section.

(5) This section does not apply to personal services contracts under ORS 279C.100 to 279C.125. [2003 c.794 §134; 2007 c.764 §33]

279C.465 Action against successful bidder; amount of damages; when action to be commenced; defenses. (1) Any person that loses a competitive bid or proposal for a contract involving the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement or renovation of a building or structure may bring an action for damages against another person who is awarded the contract for which the bid or proposal was made if the person making the losing bid or proposal can establish that the other person knowingly violated ORS 279C.840, 656.017, 657.505, 701.021 or 701.026 while performing the work under the contract, or knowingly failed to pay to the Department of Revenue all sums withheld from employees under ORS 316.167.

(2) A person bringing an action under this section must establish a violation of

ORS 279C.840, 316.167, 656.017, 657.505, 701.021 or 701.026 by a preponderance of the evidence.

(3) Upon establishing that the violation occurred, the person shall recover, as liquidated damages, 10 percent of the total amount of the contract or \$5,000, whichever is greater.

(4) In any action under this section, the prevailing party is entitled to an award of reasonable attorney fees.

(5) An action under this section must be commenced within two years of the substantial completion of the construction, repair, remodeling, alteration, conversion, modernization, improvement, rehabilitation, replacement or renovation. For the purposes of this subsection, "substantial completion" has the meaning given that term in ORS 12.135.

(6) A person may not recover any amounts under this section if the defendant in the action establishes by a preponderance of the evidence that the plaintiff:

(a) Was in violation of ORS 701.021 or 701.026 at the time of making the bid or proposal on the contract;

(b) Was in violation of ORS 316.167, 656.017 or 657.505 with respect to any employees of the plaintiff as of the time of making the bid or proposal on the contract; or

(c) Was in violation of ORS 279C.840 with respect to any contract performed by the plaintiff within one year before making the bid or proposal on the contract at issue in the action. [2003 c.794 §135; 2007 c.836 §44]

279C.470 Compensation for contractor on contract declared void by court; exceptions; applicability. (1) If a court determines that a public improvement contract is void because the contracting agency letting the contract failed to comply with any statutory or regulatory competitive bidding or other procurement requirements, and the contractor entered into the contract without intentionally violating the laws regulating public improvement contracts, then, unless the court determines that substantial injustice would result, the contractor is entitled to reimbursement for work performed under the contract as follows:

(a) If the work under the public improvement contract is substantially complete, the contracting agency shall ratify the contract.

(b) If the work under the public improvement contract is not substantially complete, the contracting agency shall ratify the contract and the contract shall be deemed terminated. Upon termination, the contractor shall be paid in accordance with ORS 279C.660, unless the court determines that

payment under ORS 279C.660 would be a substantial injustice to the contracting agency or the contractor, in which case the contractor shall be paid as the court deems equitable.

(c) For the purposes of this section, a ratified contract shall be deemed valid, binding and legally enforceable, and the contractor's payment and performance bonds shall remain in full force and effect.

(2) Notwithstanding subsection (1) of this section, if a court determines that a public improvement contract is void as a result of fraudulent or criminal acts or omissions of the contractor or of both the contracting agency letting the contract and the contractor, the contractor is not entitled to reimbursement for work performed under the contract.

(3) This section does not apply to a public improvement contract if:

(a) The contracting agency's employee that awarded the public improvement contract did not have the authority to do so under law, ordinance, charter, contract or agency rule; or

(b) Payment is otherwise prohibited by Oregon law.

(4) The contractor and all subcontractors under a public improvement contract are prohibited from asserting that the public improvement contract is void for any reason described in this section. [2003 c.794 §136]

CONSTRUCTION CONTRACTS GENERALLY

(Required Contract Conditions)

279C.500 "Person" defined. As used in ORS 279C.500 to 279C.530, unless the context otherwise requires, "person" includes the State Accident Insurance Fund Corporation and the Department of Revenue. [2003 c.794 §137]

279C.505 Conditions concerning payment, contributions, liens, withholding, drug testing. (1) Every public improvement contract shall contain a condition that the contractor shall:

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

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

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

(d) Pay to the Department of Revenue all sums withheld from employees under ORS 316.167.

(2) In addition to the conditions specified in subsection (1) of this section, every public improvement contract shall contain a condition that the contractor shall demonstrate that an employee drug testing program is in place. [2003 c.794 §138; 2005 c.103 §27]

279C.510 Demolition contracts to require material salvage; lawn and landscape maintenance contracts to require composting or mulching. (1) Every public improvement contract for demolition shall contain a condition requiring the contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective.

(2) Every public improvement contract for lawn and landscape maintenance shall contain a condition requiring the contractor to compost or mulch yard waste material at an approved site, if feasible and cost-effective. [2003 c.794 §139]

279C.515 Conditions concerning payment of claims by public officers, payment to persons furnishing labor or materials and complaints. (1) Every public improvement contract must contain a clause or condition that, if the contractor fails, neglects or refuses to pay promptly a person's claim for labor or services that the person provides to the contractor or a subcontractor in connection with the public improvement contract as the claim becomes due, the proper officer that represents the state or a county, school district, municipality or municipal corporation or a subdivision of the state, county, school district, municipality or municipal corporation may pay the amount of the claim to the person that provides the labor or services and charge the amount of the payment against funds due or to become due the contractor by reason of the contract.

(2) Every public improvement contract must contain a clause or condition that, if the contractor or a first-tier subcontractor fails, neglects or refuses to pay a person that provides labor or materials in connection with the public improvement contract within 30 days after receiving payment from the contracting agency or a contractor, the contractor or first-tier subcontractor owes the person the amount due plus interest charges that begin at the end of the 10-day period within which payment is due under ORS 279C.580 (4) and that end upon final payment, unless payment is subject to a good faith dispute as defined in ORS 279C.580. The rate of interest on the amount due is nine percent per annum. The amount of interest may not be waived.

(3) Every public improvement contract and every contract related to the public improvement contract must contain a clause or condition that, if the contractor or a subcontractor fails, neglects or refuses to pay a person that provides labor or materials in connection with the public improvement contract, the person may file a complaint with the Construction Contractors Board, unless payment is subject to a good faith dispute as defined in ORS 279C.580.

(4) Paying a claim in the manner authorized in this section does not relieve the contractor or the contractor's surety from obligation with respect to an unpaid claim. [2003 c.794 §140; 2005 c.103 §28; 2012 c.4 §1]

279C.520 Condition concerning hours of labor; compliance with pay equity provisions; employee discussions of rate of pay or benefits. (1) Every public contract subject to this chapter must provide that:

(a) A contractor may not employ an employee 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 otherwise, and in such cases, except in cases of contracts for personal services as defined in ORS 279C.100, the contractor shall pay the employee at least time and a half pay for:

(A)(i) All overtime in excess of eight hours in any one day or 40 hours in any one week if the work week is five consecutive days, Monday through Friday; or

(ii) All overtime in excess of 10 hours in any one day or 40 hours in any one week if the work week is four consecutive days, Monday through Friday; and

(B) All work the employee performs on Saturday and on any legal holiday specified in ORS 279C.540.

(b) The contractor shall comply with the prohibition set forth in ORS 652.220, that compliance is a material element of the contract and that a failure to comply is a breach that entitles the contracting agency to terminate the contract for cause.

(c) The contractor may not prohibit any of the contractor's employees from discussing the employee's rate of wage, salary, benefits or other compensation with another employee or another person and may not retaliate against an employee who discusses the employee's rate of wage, salary, benefits or other compensation with another employee or another person.

(2) A contractor shall give notice in writing to employees who work on a public contract, either at the time of hire or before work begins 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 contractor may require the employees to work.

(3) A public contract for personal services, as defined in ORS 279C.100, must provide that the contractor shall pay the contractor's employees who work under the public contract at least time and a half for all overtime the employees work in excess of 40 hours in any one week, except for employees under a personal services public contract who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(4) A public contract for services at a county fair, or for another event that a county fair board authorizes, must provide that the contractor shall pay employees who work under the public contract at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week. A contractor shall notify employees who work under the public contract, either at the time of hire or before work begins on the public 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 contractor may require the employees to work.

(5)(a) Except as provided in subsection (4) of this section, a public contract for services must provide that the contractor shall pay employees at least time and a half pay for work the employees perform under the public contract on the legal holidays specified in a collective bargaining agreement or in ORS 279C.540 (1)(b)(B) to (G) and for all time the employees work in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) A contractor shall notify in writing employees who work on a public contract for services, either at the time of hire or before work begins on the public 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 contractor may require the employees to work. [2003 c.794 §141; 2005 c.103 §29; 2015 c.454 §6]

279C.525 Provisions concerning environmental and natural resources laws; remedies. (1) Solicitation documents for a public improvement contract shall make specific reference to federal, state and local agencies that have enacted ordinances, rules or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that affect the performance of the contract. If the successful bidder awarded the project is delayed or must undertake additional work by reason of existing ordinances, rules or regulations of agencies not cited in the public improvement contract or due to the enactment of new or

the amendment of existing statutes, ordinances, rules or regulations relating to the prevention of environmental pollution and the preservation of natural resources occurring after the submission of the successful bid, the contracting agency may:

- (a) Terminate the contract;
- (b) Complete the work itself;
- (c) Use nonagency forces already under contract with the contracting agency;
- (d) Require that the underlying property owner be responsible for cleanup;
- (e) Solicit bids for a new contractor to provide the necessary services under the competitive bid requirements of this chapter; or

(f) Issue the contractor a change order setting forth the additional work that must be undertaken.

(2) In addition to the obligation imposed under subsection (1) of this section to refer to federal, state and local agencies with ordinances, rules or regulations dealing with the prevention of environmental pollution and the preservation of natural resources, a solicitation document must also make specific reference to known conditions at the construction site that may require the successful bidder to comply with the ordinances, rules or regulations identified under subsection (1) of this section.

(3) If the successful bidder encounters a condition not referred to in the solicitation documents, not caused by the successful bidder and not discoverable by a reasonable prebid visual site inspection, and the condition requires compliance with the ordinances, rules or regulations referred to under subsection (1) of this section, the successful bidder shall immediately give notice of the condition to the contracting agency.

(4) Except in the case of an emergency and except as may otherwise be required by any environmental or natural resource ordinance, rule or regulation, the successful bidder may not commence work nor incur any additional job site costs in regard to the condition encountered and described in subsection (3) of this section without written direction from the contracting agency.

(5) Upon request by the contracting agency, the successful bidder shall estimate the emergency or regulatory compliance costs as well as the anticipated delay and costs resulting from the encountered condition. This cost estimate shall be promptly delivered to the contracting agency for resolution.

(6) Within a reasonable period of time following delivery of an estimate under subsection (5) of this section, the contracting agency may:

- (a) Terminate the contract;
- (b) Complete the work itself;
- (c) Use nonagency forces already under contract with the contracting agency;
- (d) Require that the underlying property owner be responsible for cleanup;
- (e) Solicit bids for a new contractor to provide the necessary services under the competitive bid requirements of this chapter; or
- (f) Issue the contractor a change order setting forth the additional work that must be undertaken.

(7)(a) If the contracting agency chooses to terminate the contract under subsection (1)(a) or (6)(a) of this section, the successful bidder shall be entitled to all costs and expenses incurred to the date of termination, including overhead and reasonable profits, on the percentage of the work completed. The contracting agency shall have access to the contractor's bid documents when making the contracting agency's determination of the additional compensation due to the contractor.

(b) If the contracting agency causes work to be done by another contractor under subsection (1)(c) or (e) or (6)(c) or (e) of this section, the initial contractor may not be held liable for actions or omissions of the other contractor.

(c) The change order under subsection (1)(f) or (6)(f) of this section shall include the appropriate extension of contract time and compensate the contractor for all additional costs, including overhead and reasonable profits, reasonably incurred as a result of complying with the applicable statutes, ordinances, rules or regulations. The contracting agency shall have access to the contractor's bid documents when making the contracting agency's determination of the additional compensation due to the contractor.

(8) Notwithstanding subsections (1) to (7) of this section, a contracting agency:

(a) May allocate all or a portion of the known environmental and natural resource risks to a contractor by listing such environmental and natural resource risks with specificity in the solicitation documents; and

(b) In a local improvement district, may allocate all or a portion of the known and unknown environmental and natural resource risks to a contractor by so stating in the solicitation documents. [2003 c.794 §142]

279C.527 Inclusion of amount for green energy technology or woody biomass energy technology in public improvement contract; written determination of appropriateness; exemptions and limitations. (1) As used in this section and ORS 279C.528:

(a)(A) “Green energy technology” means a system that employs:

(i) Solar or geothermal energy directly for space or water heating or to generate electricity; or

(ii) Building design that uses solar energy passively to reduce energy use from other sources by at least 20 percent from a level required under ORS 276.900 to 276.915 or achieved in buildings constructed according to state building code standards that the Department of Consumer and Business Services approves under ORS 455.496.

(B) “Green energy technology” does not include a system that:

(i) Uses water, groundwater or the ground as a heat source at temperatures less than 140 degrees Fahrenheit, or less than 128 degrees Fahrenheit if the system is used for a public school building; or

(ii) Incorporates solar energy indirectly into other methods for generating energy, such as from the action of waves on water, from hydroelectric facilities or from wind-powered turbines.

(b) “Public building” means a building that a public body, as defined in ORS 174.109, owns or controls, and that is:

(A) Used or occupied by employees of the public body; or

(B) Used for conducting public business.

(c)(A) “Woody biomass energy technology” means a system that, for space or water heating or as a combined heat and power system, uses a boiler with a lower heating value combustion efficiency of at least 80 percent and that uses as fuel material from trees and woody plants, such as limbs, tops, needles, leaves and other woody parts, that:

(i) Grows in a forest, a woodland, a farm, a rangeland or a wildland that borders on an urban area; and

(ii) Is a by-product of forest management, agriculture, ecosystem restoration or fire prevention or related activities.

(B) “Woody biomass energy technology” does not include a system that uses for fuel:

(i) Wood pieces that have been treated with creosote, pentachlorophenol, chromated copper arsenate or other chemical preservatives; or

(ii) Municipal solid waste.

(2)(a) Except as otherwise provided in this section, a contracting agency that intends to enter into a public improvement contract for constructing a public building or for reconstructing or performing a major renovation of a public building, if the cost of the reconstruction or major renovation exceeds 50 percent of the value of the public building, shall first make a determination under subsection (3) of this section as to whether green energy technology is appropriate for the public building and, if the contracting agency determines that green energy technology is appropriate, shall ensure that the public improvement contract provides an amount equal to at least 1.5 percent of the total contract price for the purpose of including appropriate green energy technology as part of the construction, reconstruction or major renovation of the public building.

(b) A public improvement contract to construct, reconstruct or renovate a public building may provide for constructing green energy technology at a site that is located away from the site of the public building if:

(A) Constructing green energy technology away from the site of the public building and using the energy from the green energy technology at the site of the public building is more cost-effective, taking into account additional costs associated with transmitting generated energy to the site of the public building, than is constructing and using green energy technology at the site of the public building;

(B) The green energy technology that is located away from the site of the public building is located within this state and in the same county as, or in a county adjacent to, the site of the public building; and

(C) The public improvement contract provides that all of the moneys for constructing green energy technology away from the site of the public building must fund new energy generating capacity that does not replace or constitute a purchase and use of energy generated from green energy technology that:

(i) Employs solar energy and that existed on the date that the original building permit for the public building was issued; or

(ii) Employs geothermal energy and for which construction was completed before January 1, 2013.

(c) In evaluating whether a contracting agency can construct green energy technology at a site away from the site of the public building in accordance with paragraph (b)(A) of this subsection, the contracting agency shall compare the costs of constructing green energy technology that employs a particular

fuel source or method of energy generation at the site of the public building only with the corresponding costs of green energy technology that employs the same fuel source or method of energy generation at a location away from the site of the public building.

(d)(A) As an alternative to including appropriate green energy technology as part of the construction, reconstruction or major renovation of a public building, a contracting agency may include woody biomass energy technology as part of constructing, reconstructing or performing a major renovation on the public building if the woody biomass energy technology creates new energy generation capacity that did not exist on the date on which the original building permit for the public building was issued, the contracting agency has considered the potential costs of the woody biomass energy technology and:

(i) The facility that uses woody biomass energy technology is located in an area of the state that complies with standards that the Department of Environmental Quality has adopted for emissions of particulate matter; or

(ii) The contracting agency demonstrates to the Department of Environmental Quality, if the facility that uses woody biomass energy technology is located in an area that does not comply with standards the department has adopted for emissions of particulate matter, that one of the following two conditions applies:

(I) The fuel that the woody biomass energy technology uses is pelletized; or

(II) The woody biomass energy technology produces particulate matter emissions at the same level as, or a lower level than, a functionally equivalent system that is capable of producing the same energy output and that uses fuel that is pelletized.

(B) Notwithstanding a contracting agency's demonstrations in accordance with subparagraph (A)(ii) of this paragraph, the Department of Environmental Quality may require additional emissions control technologies or specifications before the contracting agency may include woody biomass energy technology in the construction, reconstruction or major renovation of a public building.

(3) In making a determination as to whether green energy technology is appropriate, or whether woody biomass energy technology is a suitable alternative to green energy technology, in constructing, reconstructing or performing a major renovation of a public building, a contracting agency shall list in the determination the total contract price and specify the amount the

agency intends to expend on including green energy technology or woody biomass energy technology as part of the construction, reconstruction or major renovation. The State Department of Energy shall develop a form that a contracting agency may use to prepare the written determination described in this subsection.

(4)(a) If the contracting agency determines that green energy technology is not appropriate for the public building, subsection (2) of this section does not apply to the public improvement contract, except that if the contracting agency determines that woody biomass energy technology is a suitable alternative, the contracting agency will make the determination specified in subsection (3) of this section for the woody biomass energy technology. A contracting agency's determination under this paragraph must consider whether constructing green energy technology or woody biomass energy technology at the site of the public building is appropriate and whether constructing green energy technology or woody biomass energy technology away from the site of the public building and in accordance with subsection (2)(b) and (c) of this section, or with subsection (2)(d) of this section, as applicable, is appropriate.

(b) If subsection (2) of this section does not apply to the public improvement contract:

(A) The contracting agency shall spend an amount equal to at least 1.5 percent of the total contract price to include appropriate green energy technology or woody biomass energy technology as part of a future public building project; and

(B) The amount the contracting agency spends on the future public building project in accordance with subparagraph (A) of this paragraph is in addition to any amount required under subsection (2) of this section for including appropriate green energy technology or woody biomass energy technology as part of the future public building project.

(5)(a) A contracting agency need not set aside the amount described in subsection (4)(b) of this section in an account or otherwise reserve moneys for a future public building at the time the contracting agency makes the determination described in subsection (3) of this section, but the contracting agency shall report the amount described in subsection (4)(b) of this section to the State Department of Energy as provided in ORS 279C.528 (2).

(b) Subsection (4)(b) of this section does not apply to a public improvement contract for which state funds are not directly or indirectly used.

(6)(a) This section does not exempt an authorized state agency, as defined in ORS 276.905, from complying with ORS 276.900 to 276.915, except that an authorized state agency, without complying with ORS 276.900 to 276.915, may determine that green energy technology or woody biomass energy technology is appropriate to include as part of constructing, reconstructing or performing a major renovation of a public building.

(b) A contracting agency may not use an amount described in subsection (4)(b) of this section to comply with requirements set forth in ORS 276.900 to 276.915 or with a state building code standard that the Department of Consumer and Business Services approves under ORS 455.496.

(7) Notwithstanding the provisions of ORS 174.108 (3), this section applies to intergovernmental entities described in ORS 174.108 (3). [2007 c.310 §2; 2012 c.83 §1; 2013 c.612 §1; 2015 c.262 §1; 2015 c.424 §1; 2017 c.735 §1]

Note: 279C.527 and 279C.528 were added to and made a part of 279C.005 to 279C.670 by legislative action but were not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

279C.528 State Department of Energy requirements and specifications; record keeping requirements; rules. (1) Each contracting agency, in soliciting, awarding and administering public improvement contracts that are subject to ORS 279C.527, is subject to rules the State Department of Energy adopts that include, but are not limited to, requirements and specifications for:

(a) Using particular green energy technologies in public improvements;

(b) Determining the cost-effectiveness of green energy technologies;

(c) Submitting documents required under ORS 279C.527 to the department for review; and

(d) Determining whether a structure is a public building subject to the requirements of ORS 279C.527.

(2)(a) Each contracting agency shall collect and maintain information concerning the contracting agency's compliance with ORS 279C.527, which must include, at a minimum:

(A) Records that show how the contracting agency spent moneys the contracting agency used in including appropriate green energy technology or woody biomass energy technology as part of constructing, reconstructing or performing a major renovation of a public building;

(B) An identification of each public improvement contract for which the contracting agency spent moneys to include appropriate green energy technology or woody biomass energy technology as part of

constructing, reconstructing or performing a major renovation of a public building;

(C) An identification of each public improvement contract for which the contracting agency determined that including green energy technology or woody biomass energy technology as part of constructing, reconstructing or performing a major renovation of a public building was not appropriate;

(D) The total amount the contracting agency would have spent on each public improvement contract identified in subparagraph (C) of this paragraph and the total aggregated amount that the contracting agency must spend to include green energy technology or woody biomass energy technology as part of constructing, reconstructing or performing a major renovation of a future public building; and

(E) An identification of each public improvement contract that uses moneys the contracting agency did not spend in a previous public improvement contract for including appropriate green energy technology or woody biomass energy technology as part of constructing, reconstructing or performing a major renovation of a public building.

(b) Each contracting agency shall compile the information the contracting agency collected under paragraph (a) of this subsection and report the information to the department at times, in a manner and on forms that the department specifies by rule.

(c) The department shall:

(A) Compile and summarize the information the department receives under paragraph (b) of this subsection and, in the department's compilation and summary, specifically:

(i) Identify contracting agencies that have not complied with the requirements of ORS 279C.527 or the reporting requirements set forth in paragraph (b) of this subsection;

(ii) Identify public improvement contracts for which contracting agencies have determined that including green energy technology or woody biomass energy technology as part of constructing, reconstructing or performing a major renovation of a public building was not appropriate; and

(iii) Identify public improvement contracts that use moneys a contracting agency did not spend in a previous public improvement contract on including appropriate green energy technology or woody biomass energy technology as part of constructing, reconstructing or performing a major renovation of a public building.

(B) Deliver annually to the Legislative Assembly, on or before the date on which each regular session of the Legislative As-

sembly begins, a report concerning contracting agency compliance with this section and ORS 279C.527 that includes the compilation and summary the department prepared under subparagraph (A) of this paragraph. [2007 c.310 §3; 2012 c.83 §2; 2013 c.612 §2; 2015 c.424 §2; 2017 c.735 §2]

Note: See note under 279C.527.

279C.530 Condition concerning payment for medical care and providing workers' compensation. (1) Every public improvement contract shall contain a condition that the contractor shall promptly, as due, make payment to any person, copartnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the contractor, of all sums that the contractor agrees to pay for the services and all moneys and sums that the contractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services.

(2) Every public contract subject to this chapter shall contain a clause or condition that all subject employers working under the contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126. [2003 c.794 §143; 2005 c.103 §30]

279C.533 Condition concerning employment of apprentices to perform percentage of work hours that workers in apprenticeable occupations perform on public improvements. (1) As used in this section:

(a) "Apprentice" has the meaning given that term in ORS 660.010.

(b) "Apprenticeable occupation" has the meaning given that term in ORS 660.010.

(c) "Apprenticeship agreement" has the meaning given that term in ORS 660.010.

(d) "Apprenticeship training program" means the total system of apprenticeship that a particular local joint committee, as defined in ORS 660.010, operates, including the local joint committee's registered standards and all other terms and conditions for qualifying, recruiting, selecting, employing and training apprentices in an apprenticeable occupation.

(2) A state contracting agency shall provide in each public improvement contract for which the contract price exceeds \$5 million that the contractor shall:

(a) Employ apprentices to perform 10 percent of the work hours that workers in apprenticeable occupations perform on the public improvement; and

(b) Require in each subcontract for which the contract price exceeds the lesser of \$1

million or 25 percent of the price of the contract that the subcontractor employ apprentices to perform 10 percent of the work hours that workers in apprenticeable occupations perform on the subcontract.

(3) A contractor or subcontractor shall pay an apprentice for work on the public improvement at the hourly rate to which the apprentice is entitled under an apprenticeship agreement or that the apprenticeship training program specifies.

(4) Subject to the terms of the public improvement contract, a contractor on a public improvement may decide the locations in which, the types of work for which and other details concerning how the contractor employs apprentices for work on the public improvement. The contractor may meet the requirement set forth in subsection (2) of this section by requiring one or more subcontractors to employ apprentices for work on the public improvement.

(5) A contractor shall report the extent of the contractor's compliance with this section to the state contracting agency on forms, with contents the state contracting agency specifies by rule, and at regular intervals that the state contracting agency specifies in the public improvement contract. The forms and the contents that the state contracting agency specifies must include, at a minimum, a report in which the contractor provides a detailed accounting of the total number of work hours each month and the cumulative total number of work hours since the public improvement contract term began in which:

(a) Workers in apprenticeable occupations performed work on the public improvement; and

(b) Apprentices performed work on the public improvement.

(6) At least 30 days before making any final payment to a contractor under a public improvement contract, a state contracting agency shall determine the extent of the contractor's compliance with the requirement in subsection (2) of this section. The state contracting agency shall base the determination on the ratio between the actual number of work hours that workers in apprenticeable occupations performed on the public improvement and the actual number of work hours that apprentices performed on the public improvement, as shown in reports the state contracting agency receives under subsection (5) of this section.

(7) This section does not apply to:

(a) The Department of Transportation or a public improvement contract that a contractor enters into with the department; or

(b) A public contract that a state contracting agency enters into under ORS 279B.080. [2017 c.416 §2]

Note: The amendments to 279C.533 by section 3, chapter 416, Oregon Laws 2017, become operative January 1, 2022. See section 6, chapter 416, Oregon Laws 2017. The text that is operative on and after January 1, 2022, is set forth for the user's convenience.

279C.533. (1) As used in this section:

(a) "Apprentice" has the meaning given that term in ORS 660.010.

(b) "Apprenticeable occupation" has the meaning given that term in ORS 660.010.

(c) "Apprenticeship agreement" has the meaning given that term in ORS 660.010.

(d) "Apprenticeship training program" means the total system of apprenticeship that a particular local joint committee, as defined in ORS 660.010, operates, including the local joint committee's registered standards and all other terms and conditions for qualifying, recruiting, selecting, employing and training apprentices in an apprenticeable occupation.

(2) A state contracting agency shall provide in each public improvement contract for which the contract price exceeds \$3 million that the contractor shall:

(a) Employ apprentices to perform 12 percent of the work hours that workers in apprenticeable occupations perform on the public improvement; and

(b) Require in each subcontract for which the contract price exceeds the lesser of \$1 million or 25 percent of the price of the contract that the subcontractor employ apprentices to perform 12 percent of the work hours that workers in apprenticeable occupations perform on the subcontract.

(3) A contractor or subcontractor shall pay an apprentice for work on the public improvement at the hourly rate to which the apprentice is entitled under an apprenticeship agreement or that the apprenticeship training program specifies.

(4) Subject to the terms of the public improvement contract, a contractor on a public improvement may decide the locations in which, the types of work for which and other details concerning how the contractor employs apprentices for work on the public improvement. The contractor may meet the requirement set forth in subsection (2) of this section by requiring one or more subcontractors to employ apprentices for work on the public improvement.

(5) A contractor shall report the extent of the contractor's compliance with this section to the state contracting agency on forms, with contents the state contracting agency specifies by rule, and at regular intervals that the state contracting agency specifies in the public improvement contract. The forms and the contents that the state contracting agency specifies must include, at a minimum, a report in which the contractor provides a detailed accounting of the total number of work hours each month and the cumulative total number of work hours since the public improvement contract term began in which:

(a) Workers in apprenticeable occupations performed work on the public improvement; and

(b) Apprentices performed work on the public improvement.

(6) At least 30 days before making any final payment to a contractor under a public improvement contract, a state contracting agency shall determine the extent of the contractor's compliance with the requirement in subsection (2) of this section. The state contracting agency shall base the determination on the ratio between the actual number of work hours that workers in apprenticeable occupations performed on the public improvement and the actual number of work

hours that apprentices performed on the public improvement, as shown in reports the state contracting agency receives under subsection (5) of this section.

(7) This section does not apply to:

(a) The Department of Transportation or a public improvement contract that a contractor enters into with the department; or

(b) A public contract that a state contracting agency enters into under ORS 279B.080.

Note: 279C.533 was added to and made a part of ORS chapter 279C by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

279C.534 Advisory committee for monitoring implementation of apprenticeship condition in public improvement contracts. (1) The Bureau of Labor and Industries shall establish and provide staffing for an advisory committee to monitor the implementation of, to advise state contracting agencies on compliance with, and to advise the Legislative Assembly on changes needed for better implementation of the requirements set forth in ORS 279C.533.

(2) The advisory committee consists of six members appointed by the Governor for a term of four years, with equal representation from construction contractors that have completed public improvement contracts for the state, or from an association of construction contractors, and from workers who have performed labor on public improvement contracts for the state, or from labor organizations that represent the workers. The Governor may reappoint a member.

(3) The advisory committee may:

(a) Request reports from state contracting agencies concerning compliance with ORS 279C.533, either regularly or in instances when the advisory committee believes a state contracting agency has failed to comply;

(b) Conduct inspections of public improvement contract project sites to determine how state contracting agencies and contractors have implemented the requirements of ORS 279C.533; and

(c) Make recommendations to the Commissioner of the Bureau of Labor and Industries concerning changes that the advisory committee believes necessary to better implement the requirements of ORS 279C.533.

(4) A majority of the members of the advisory committee constitutes a quorum for transacting business and a majority of the members of the advisory committee must approve any official action.

(5) The Governor shall appoint a member to replace any member that leaves a vacancy on the advisory committee. The appointment is immediately effective.

(6) The advisory committee shall meet at least once each calendar quarter and may

adopt procedures necessary to carry out the committee's functions.

(7) Members of the advisory committee are not entitled to compensation, but may be reimbursed for actual and necessary travel and other expenses the members incur in performing the members' official duties. The Bureau of Labor and Industries shall pay the expenses out of funds appropriated to the bureau for the advisory committee. [2017 c.416 §4]

Note: 279C.534 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 279C or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

279C.535 Condition concerning steel material; rules. The Department of Transportation shall adopt rules to require that public improvement contracts entered into by the department include a price escalation and de-escalation clause relating to steel material. As used in this section, "steel material" includes structural and reinforcing steel, steel studs, sheet piling, guardrail, ductile iron pipe and other steel products used for the construction, reconstruction or major renovation of a road or highway. [2005 c.557 §6]

(Hours of Labor)

279C.540 Maximum hours of labor on public contracts; holidays; exceptions; liability to workers; rules. (1) When labor is employed by the state or a county, school district, municipality, municipal corporation or subdivision thereof through a contractor, a person may not be required or permitted to labor more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity or emergency or when the public policy absolutely requires it, in which event, the person so employed for excessive hours shall receive at least time and a half pay:

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

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

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

(A) Each Sunday.

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

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

(D) Independence Day on July 4.

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

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

(G) Christmas Day on December 25.

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

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

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

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

(6) This section does not apply to contracts for personal services as defined in ORS 279C.100, provided that persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in subsection (1)(b)(B) to (G) of this section and for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

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

(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 results from willful falsification of payroll records, the contractor or subcontractor or contractor's or subcontractor's surety is liable to the affected employees in the amount of their unpaid overtime wages and an additional amount equal to twice the unpaid overtime wages as liquidated damages.

(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) In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries may adopt rules to carry out the provisions of this section. [2003 c.794 §144; 2005 c.103 §31]

279C.545 Time limitation on claim for overtime; posting of circular by contractor. When labor is employed by the state or a county, school district, municipality, municipal corporation or subdivision thereof through another as a contractor, any worker employed by the contractor shall be foreclosed from the right to collect for any overtime provided in ORS 279C.540 unless a claim for payment is filed with the contractor within 90 days from the completion of the contract, providing the contractor has:

(1) Caused a circular clearly printed in boldfaced 12-point type and containing a copy of this section to be posted in a prominent place alongside the door of the timekeeper's office or in a similar place that is readily available and freely visible to workers employed on the work.

(2) Maintained the circular continuously posted from the inception to the completion of the contract on which workers are or have been employed. [2003 c.794 §145]

(Retainage and Payments)

279C.550 "Retainage" defined. As used in ORS 279C.550 to 279C.570, "retainage" means the difference between the amount earned by a contractor on a public improve-

ment contract and the amount paid on the contract by the contracting agency. [2003 c.794 §146; 2005 c.103 §32]

279C.555 Withholding of retainage. The withholding of retainage by a contractor or subcontractor on public improvement contracts shall be in accordance with ORS 701.420. [2003 c.794 §147; 2013 c.410 §1]

279C.560 Form of retainage; procedures for holding and payment. (1) Unless a contracting agency that reserves an amount as retainage under ORS 279C.570 (7) finds in writing that accepting a bond or instrument described in paragraph (a) or (b) of this subsection poses an extraordinary risk that is not typically associated with the bond or instrument, the contracting agency in lieu of withholding moneys from payment shall accept from a contractor:

(a) Bonds, securities or other instruments of a character described in subsection (6) of this section that are deposited as provided in subsection (4) of this section; or

(b) A surety bond deposited as provided in subsection (7) of this section.

(2) A contracting agency that holds moneys as retainage under ORS 279C.570 (7) shall:

(a) Hold the moneys in a fund and pay the moneys to the contractor in accordance with ORS 279C.570; or

(b) At the election of the contractor, pay the moneys to the contractor in accordance with subsection (4) or (5) of this section and in a manner authorized by the Director of the Oregon Department of Administrative Services.

(3) If the contracting agency incurs additional costs as a result of the exercise of an option described in subsection (1) or (5) of this section, the contracting agency may recover the costs from the contractor by reducing the final payment. As work on the contract progresses, the contracting agency shall, upon demand, inform the contractor of all accrued costs.

(4) The contractor may deposit bonds, securities or other instruments with the contracting agency or in a bank or trust company for the contracting agency to hold for the contracting agency's benefit in lieu of moneys held as retainage. If the contracting agency accepts bonds, securities or other instruments deposited as provided in this subsection, the contracting agency shall reduce the moneys held as retainage in an amount equal to the value of the bonds, securities and other instruments and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Interest or earnings on the bonds, securities or other instruments shall accrue to the contractor.

(5) If the contractor elects, the contracting agency shall deposit the retainage as accumulated in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the contracting agency. When the contracting agency is a state contracting agency, the account must be established through the State Treasurer. Earnings on the account accrue to the contractor.

(6) Bonds, securities and other instruments deposited or acquired in lieu of retainage, as permitted by this section, must be of a character approved by the Director of the Oregon Department of Administrative Services, including but not limited to:

(a) Bills, certificates, notes or bonds of the United States.

(b) Other obligations of the United States or agencies of the United States.

(c) Obligations of a corporation wholly owned by the federal government.

(d) Indebtedness of the Federal National Mortgage Association.

(e) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.

(f) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.

(7) The contractor, with the approval of the contracting agency, may deposit a surety bond for all or any portion of the amount of funds retained, or to be retained, by the contracting agency in a form acceptable to the contracting agency. The bond and any proceeds of the bond must be made subject to all claims and liens and in the same manner and priority as set forth for retainage under ORS 279C.550 to 279C.570 and 279C.600 to 279C.625. The contracting agency shall reduce the moneys the contracting agency holds as retainage in an amount equal to the value of the bond and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Whenever a contracting agency accepts a surety bond from a contractor in lieu of retainage, the contractor shall accept like bonds from a subcontractor or supplier from which the contractor has retainage. The contractor shall then reduce the moneys the contractor holds as retainage in an amount equal to the value of the bond and pay the amount of the reduction to the subcontractor or supplier. [2003 c.794 §148; 2009 c.568 §1]

279C.565 Limitation on retainage requirements. Unless otherwise specifically included by statute, the provisions of ORS 279C.560 or 279C.625 apply only as between the contracting agency or public body and

the party with whom it contracts. [2003 c.794 §149]

279C.570 Prompt payment policy; progress payments; retainage; interest; exception; settlement of compensation disputes. (1) It is the policy of the State of Oregon that all payments due on a public improvement contract and owed by a contracting agency shall be paid promptly. No contracting agency is exempt from the provisions of this section.

(2) Contracting agencies shall make progress payments on the contract monthly as work progresses on a public improvement contract. Payments shall be based upon estimates of work completed that are approved by the contracting agency. A progress payment is not considered acceptance or approval of any work or waiver of any defects therein. The contracting agency shall pay to the contractor interest on the progress payment, not including retainage, due the contractor. The interest shall commence 30 days after receipt of the invoice from the contractor or 15 days after the payment is approved by the contracting agency, whichever is the earlier date. The rate of interest charged to the contracting agency on the amount due shall equal three times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date that is 30 days after receipt of the invoice from the contractor or 15 days after the payment is approved by the contracting agency, whichever is the earlier date, but the rate of interest may not exceed 30 percent.

(3) Interest shall be paid automatically when payments become overdue. The contracting agency shall document, calculate and pay any interest due when payment is made on the principal. Interest payments shall accompany payment of net due on public improvement contracts. The contracting agency may not require the contractor to petition, invoice, bill or wait additional days to receive interest due.

(4) When an invoice is filled out incorrectly, when there is any defect or impropriety in any submitted invoice or when there is a good faith dispute, the contracting agency shall so notify the contractor within 15 days stating the reason or reasons the invoice is defective or improper or the reasons for the dispute. A defective or improper invoice, if corrected by the contractor within seven days of being notified by the contracting agency, may not cause a payment to be made later than specified in this section unless interest is also paid.

(5) If requested in writing by a first-tier subcontractor, the contractor, within 10 days after receiving the request, shall send to the

first-tier subcontractor a copy of that portion of any invoice, request for payment submitted to the contracting agency or pay document provided by the contracting agency to the contractor specifically related to any labor or materials supplied by the first-tier subcontractor.

(6) Payment of interest may be postponed when payment on the principal is delayed because of disagreement between the contracting agency and the contractor. Whenever a contractor brings formal administrative or judicial action to collect interest due under this section, the prevailing party is entitled to costs and reasonable attorney fees.

(7) A contracting agency may reserve as retainage from any progress payment on a public improvement contract an amount not to exceed five percent of the payment. As work progresses, a contracting agency may reduce the amount of the retainage and the contracting agency may eliminate retainage on any remaining monthly contract payments after 50 percent of the work under the contract is completed if, in the contracting agency's opinion, such work is progressing satisfactorily. Elimination or reduction of retainage shall be allowed only upon written application by the contractor, and the application shall include written approval of the contractor's surety. However, when the contract work is 97.5 percent completed the contracting agency may, at the contracting agency's discretion and without application by the contractor, reduce the retained amount to 100 percent of the value of the contract work remaining to be done. Upon receipt of a written application by the contractor, the contracting agency shall respond in writing within a reasonable time.

(8) The retainage held by a contracting agency shall be included in and paid to the contractor as part of the final payment of the contract price. The contracting agency shall pay to the contractor interest at the rate of 1.5 percent per month on the final payment due the contractor, interest to commence 30 days after the work under the contract has been completed and accepted and to run until the date when the final payment is tendered to the contractor. The contractor shall notify the contracting agency in writing when the contractor considers the work complete and the contracting agency shall, within 15 days after receiving the written notice, either accept the work or notify the contractor of work yet to be performed on the contract. If the contracting agency does not, within the time allowed, notify the contractor of work yet to be performed to fulfill contractual obligations, the interest provided

by this subsection shall commence to run 30 days after the end of the 15-day period.

(9)(a) The contracting agency shall pay, upon settlement or judgment in favor of the contractor regarding any dispute as to the compensation due a contractor for work performed under the terms of a public improvement contract, the amount due plus interest at the rate of two times the discount rate, but not to exceed 30 percent, on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date of the settlement or judgment, and accruing from the later of:

(A) The due date of any progress payment received under the contract for the period in which such work was performed; or

(B) Thirty days after the date on which the claim for the payment under dispute was presented to the contracting agency by the contractor in writing or in accordance with applicable provisions of the contract.

(b) Interest shall be added to and not made a part of the settlement or judgment. [2003 c.794 §150; 2005 c.103 §33]

(Subcontractors)

279C.580 Contractor's relations with subcontractors. (1) A contractor may not request payment from the contracting agency of any amount withheld or retained in accordance with subsection (5) of this section until the contractor has determined and certified to the contracting agency that the subcontractor has determined and certified to the contracting agency that the subcontractor is entitled to the payment.

(2) A dispute between a contractor and first-tier subcontractor relating to the amount or entitlement of a first-tier subcontractor to a payment or a late payment interest penalty under a clause included in the subcontract under subsection (3) or (4) of this section does not constitute a dispute to which the contracting agency is a party. The contracting agency may not be included as a party in any administrative or judicial proceeding involving such a dispute.

(3) Each public improvement contract awarded by a contracting agency must include a clause that requires the contractor to include in each subcontract for property or services the contractor enters into with a first-tier subcontractor, including a material supplier, for the purpose of performing a construction contract:

(a) A payment clause that obligates the contractor to pay the first-tier subcontractor for satisfactory performance under the subcontract within 10 days out of amounts the

contracting agency pays to the contractor under the public improvement contract.

(b) A clause that requires the contractor to provide a first-tier subcontractor with a standard form that the first-tier subcontractor may use as an application for payment or as another method by which the subcontractor may claim a payment due from the contractor.

(c) A clause that requires the contractor, except as otherwise provided in this paragraph, to use the same form and regular administrative procedures for processing payments during the entire term of the subcontract. A contractor may change the form or the regular administrative procedures the contractor uses for processing payments if the contractor:

(A) Notifies the subcontractor in writing at least 45 days before the date on which the contractor makes the change; and

(B) Includes with the written notice a copy of the new or changed form or a description of the new or changed procedure.

(d) An interest penalty clause that obligates the contractor, if the contractor does not pay the first-tier subcontractor within 30 days after receiving payment from the contracting agency, to pay the first-tier subcontractor an interest penalty on amounts due in each payment the contractor does not make in accordance with the payment clause included in the subcontract under paragraph (a) of this subsection. A contractor or first-tier subcontractor is not obligated to pay an interest penalty if the only reason that the contractor or first-tier subcontractor did not make payment when payment was due is that the contractor or first-tier subcontractor did not receive payment from the contracting agency or contractor when payment was due. The interest penalty:

(A) Applies to the period that begins on the day after the required payment date and that ends on the date on which the amount due is paid; and

(B) Is computed at the rate specified in ORS 279C.515 (2).

(4) A public improvement contract that the contracting agency awards shall obligate the contractor, in each of the contractor's subcontracts, to require the first-tier subcontractor to include a payment clause and an interest penalty clause that conforms to the standards of subsection (3) of this section in each of the first-tier subcontractor's subcontracts and to require each of the first-tier subcontractor's subcontractors to include such clauses in the first-tier subcontractors' subcontracts with each lower-tier subcontractor or supplier.

(5)(a) The clauses required by subsections (3) and (4) of this section do not impair the right of a contractor or a subcontractor at any tier to negotiate, and to include in the subcontract, provisions that:

(A) Permit the contractor or a subcontractor to retain, in the event of a good faith dispute, an amount not to exceed 150 percent of the amount in dispute from the amount due a subcontractor under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions the parties to the subcontract agree upon, giving such recognition as the parties consider appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond;

(B) Permit the contractor or subcontractor to make a determination that part or all of the subcontractor's request for payment may be withheld in accordance with the subcontract; and

(C) Permit such withholdings without incurring any obligation to pay a late payment interest penalty if:

(i) A notice that conforms to the standards of subsection (8) of this section has been previously furnished to the subcontractor; and

(ii) A copy of any notice a contractor issues under sub-subparagraph (i) of this subparagraph has been furnished to the contracting agency.

(b) As used in this subsection, "good faith dispute" means a documented dispute concerning:

(A) Unsatisfactory job progress.

(B) Defective work not remedied.

(C) Third-party claims filed or reasonable evidence that claims will be filed.

(D) Failure to make timely payments for labor, equipment and materials.

(E) Damage to the contractor or subcontractor.

(F) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.

(6) If, after applying to a contracting agency for payment under a public improvement contract but before paying a subcontractor for the subcontractor's performance covered by the application, a contractor discovers that all or a portion of the payment otherwise due the subcontractor is subject to withholding from the subcontractor in accordance with the subcontract, the contractor shall:

(a) Furnish to the subcontractor a notice conforming to the standards of subsection (8) of this section as soon as practicable after

ascertaining the cause for the withholding, but before the due date for payment to the subcontractor;

(b) Furnish to the contracting agency, as soon as practicable, a copy of the notice furnished to the subcontractor under paragraph (a) of this subsection;

(c) Reduce the progress payment to the subcontractor by an amount not to exceed the amount specified in the notice of withholding furnished under paragraph (a) of this subsection;

(d) Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency;

(e) Make such payment within:

(A) Seven days after correction of the identified subcontract performance deficiency unless the funds for the payment must be recovered from the contracting agency because of a reduction under paragraph (f)(A) of this subsection; or

(B) Seven days after the contractor recovers the funds from the contracting agency;

(f) Notify the contracting agency upon:

(A) Reduction of the amount of any subsequent certified application for payment; or

(B) Payment to the subcontractor of any withheld amounts of a progress payment, specifying:

(i) The amounts of the progress payments withheld under paragraph (a) of this subsection; and

(ii) The dates on which the withholding began and ended; and

(g) Be obligated to pay to the contracting agency an amount equal to interest on the withheld payments computed in the manner provided in ORS 279C.570 from the 11th day after receiving the withheld amounts from the contracting agency until:

(A) The day the identified subcontractor performance deficiency is corrected; or

(B) The date that any subsequent payment is reduced under paragraph (f)(A) of this subsection.

(7)(a) If a contractor, after paying a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor a written notice asserting a deficiency in the first-tier subcontractor's performance under the public improvement contract for which the contractor may be ultimately liable and the contractor determines that all or a portion of future payments otherwise due the first-tier subcontractor is subject to withholding in accordance with the subcontract, the contractor may, without incurring an obligation to pay a late payment

interest penalty under subsection (6)(e) of this section:

(A) Furnish to the first-tier subcontractor a notice that conforms to the standards of subsection (8) of this section as soon as practicable after making the determination; and

(B) Withhold from the first-tier subcontractor's next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under subparagraph (A) of this paragraph.

(b) As soon as practicable, but not later than 10 days after receiving satisfactory written notice that the identified subcontract performance deficiency has been corrected, the contractor shall pay the amount withheld under paragraph (a)(B) of this subsection to the first-tier subcontractor, or shall incur an obligation to pay a late payment interest penalty to the first-tier subcontractor computed at the rate specified in ORS 279C.570.

(8) A written notice of any withholding must be issued to a subcontractor, with a copy to the contracting agency, that specifies:

(a) The amount to be withheld;

(b) The specified causes for the withholding under the terms of the subcontract; and

(c) The remedial actions the subcontractor must take in order to receive payment of the amounts withheld.

(9) Except as provided in subsection (2) of this section, this section does not limit or impair any contractual, administrative or judicial remedies otherwise available to a contractor or a subcontractor in the event of a dispute involving a contractor's late payment or nonpayment or a subcontractor's deficient performance or nonperformance.

(10) A contractor's obligation to pay a late payment interest penalty to a subcontractor under the clause included in a subcontract under subsection (3) or (4) of this section is not an obligation of the contracting agency. A contract modification may not be made for the purpose of providing reimbursement of a late payment interest penalty. A cost reimbursement claim may not include any amount for reimbursement of a late payment interest penalty. [2003 c.794 §151; 2005 c.103 §34; 2012 c.4 §2]

279C.585 Authority to substitute undisclosed first-tier subcontractor; circumstances; rules. A contractor whose bid is accepted may substitute a first-tier subcontractor that was not disclosed under ORS 279C.370 by submitting the name of the new subcontractor and the reason for the substitution in writing to the contracting agency.

A contractor may substitute a first-tier subcontractor under this section in the following circumstances:

(1) When the subcontractor disclosed under ORS 279C.370 fails or refuses to execute a written contract after having had a reasonable opportunity to do so after the written contract, which must be reasonably based upon the general terms, conditions, plans and specifications for the public improvement project or the terms of the subcontractor's written bid, is presented to the subcontractor by the contractor.

(2) When the disclosed subcontractor becomes bankrupt or insolvent.

(3) When the disclosed subcontractor fails or refuses to perform the subcontract.

(4) When the disclosed subcontractor fails or refuses to meet the bond requirements of the contractor that had been identified prior to the bid submittal.

(5) When the contractor demonstrates to the contracting agency that the subcontractor was disclosed as the result of an inadvertent clerical error.

(6) When the disclosed subcontractor does not hold a license from, or has a license that is not properly endorsed by, the Construction Contractors Board and is required to be licensed by the board.

(7) When the contractor determines that the work performed by the disclosed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications or that the subcontractor is substantially delaying or disrupting the progress of the work.

(8) When the disclosed subcontractor is ineligible to work on a public improvement contract under applicable statutory provisions.

(9) When the substitution is for good cause. The Construction Contractors Board shall define "good cause" by rule. "Good cause" includes but is not limited to the financial instability of a subcontractor. The definition of "good cause" must reflect the least-cost policy for public improvements established in ORS 279C.305.

(10) When the substitution is reasonably based on the contract alternates chosen by the contracting agency. [2003 c.794 §152; 2007 c.836 §45]

279C.590 Complaint process for substitutions of subcontractors; civil penalties. (1)(a) A subcontractor disclosed under ORS 279C.370 may file a complaint based on the subcontractor disclosure requirements under ORS 279C.370 with the Construction Contractors Board about a contractor if the

contractor has substituted another subcontractor for the complaining subcontractor.

(b) If more than one subcontractor files a complaint with the board under paragraph (a) of this subsection relating to a single subcontractor disclosure, the board shall consolidate the complaints into one proceeding. If the board imposes a civil penalty under this section against a contractor, the amount collected by the board shall be divided evenly among all of the complaining subcontractors.

(c) Each subcontractor filing a complaint under paragraph (a) of this subsection shall post a deposit of \$500 with the board upon filing the complaint.

(d) If the board determines that a contractor's substitution was not in compliance with ORS 279C.585, the board shall return the full amount of the deposit posted under paragraph (c) of this subsection to the complaining subcontractor.

(e) If the board determines that a contractor has not substituted a subcontractor or that the contractor's substitution was in compliance with ORS 279C.585, the board shall award the contractor \$250 of the deposit and shall retain the other \$250, which may be expended by the board.

(2) Upon receipt of a complaint under subsection (1) of this section, the board shall investigate the complaint. If the board determines that a contractor has substituted a subcontractor in a manner not in compliance with ORS 279C.585, the board may impose a civil penalty against the contractor under subsections (3) to (5) of this section. Civil penalties under this section shall be imposed in the manner provided under ORS 183.745.

(3) If the board imposes a civil penalty under subsection (2) of this section and it is the first time the board has imposed a civil penalty under subsection (2) of this section against the contractor during a three-year period, the board shall:

(a) Impose a civil penalty on the contractor of up to 10 percent of the amount of the subcontract bid submitted by the complaining subcontractor to the contractor or \$15,000, whichever is less. Amounts collected by the board under this paragraph shall be awarded to the complaining subcontractor or subcontractors; and

(b) Impose a civil penalty on the contractor of up to \$1,000. Amounts collected by the board under this paragraph shall be retained by the board and may be expended by the board.

(4) If the board imposes a civil penalty under subsection (2) of this section and it is the second time the board has imposed a civil penalty under subsection (2) of this sec-

tion against the contractor during a three-year period, the board may:

(a) Impose a civil penalty on the contractor of up to 10 percent of the amount of the subcontract bid submitted by the complaining subcontractor to the contractor or \$15,000, whichever is less. Amounts collected by the board under this paragraph shall be awarded to the complaining subcontractor or subcontractors; and

(b) Impose a civil penalty on the contractor of up to \$1,000 and shall place the contractor on the list established under ORS 701.227 for up to six months. Amounts collected by the board under this paragraph shall be retained by the board and may be expended by the board.

(5) If the board imposes a civil penalty under subsection (2) of this section and the board has imposed a civil penalty under subsection (2) of this section against the contractor three or more times during a three-year period, the board may:

(a) Impose a civil penalty on the contractor of up to 10 percent of the amount of the subcontract bid submitted by the complaining subcontractor to the contractor or \$15,000, whichever is less. Amounts collected by the board under this paragraph shall be awarded to the complaining subcontractor or subcontractors; and

(b) Impose a civil penalty on the contractor of up to \$1,000 and shall place the contractor on the list established under ORS 701.227 for up to one year. Amounts collected by the board under this paragraph shall be retained by the board and may be expended by the board.

(6) Within 10 working days after receiving a complaint under subsection (1) of this section, the board shall notify, in writing, any contracting agency that is a party to the contract for which the complaint has been filed that the complaint has been filed. [2003 c.794 §153]

(Action on Payment Bonds and Public Works Bonds)

279C.600 Right of action on payment bond or public works bond of contractor or subcontractor; notice of claim. (1) A person claiming to have supplied labor or materials for the performance of the work provided for in a public contract, including any person having a direct contractual relationship with the contractor furnishing the payment bond or a direct contractual relationship with any subcontractor, or an assignee of such person, or a person claiming moneys due the State Accident Insurance Fund Corporation, the Unemployment Compensation Trust Fund or the Department of

Revenue in connection with the performance of the contract, has a right of action on the contractor's payment bond as provided for in ORS 279C.380 and 279C.400 only if:

(a) The person or the assignee of the person has not been paid in full; and

(b) The person gives written notice of claim, as prescribed in ORS 279C.605, to the contractor and the contracting agency.

(2) When, upon investigation, the Commissioner of the Bureau of Labor and Industries has received information indicating that one or more workers providing labor on a public works have not been paid in full at the prevailing rate of wage or overtime wages, the commissioner has a right of action first on the contractor's public works bond required under ORS 279C.836 and then, for any amount of a claim not satisfied by the public works bond, on the contractor's payment bond, as provided in ORS 279C.380 and 279C.400. When an investigation indicates that a subcontractor's workers have not been paid in full at the prevailing rate of wage or overtime wages, the commissioner has a right of action first on the subcontractor's public works bond and then, for any amount of a claim not satisfied by the subcontractor's public works bond, on the contractor's payment bond. The commissioner's right of action exists without necessity of an assignment and extends to workers on the project who are not identified when the written notice of claim is given, but for whom the commissioner has received information indicating that the workers have provided labor on the public works and have not been paid in full. The commissioner shall give written notice of the claim, as prescribed in ORS 279C.605, to the contracting agency, the Construction Contractors Board, the contractor and, if applicable, the subcontractor. The commissioner may not make a claim for the same unpaid wages against more than one bond under this section. [2003 c.794 §154; 2005 c.360 §3]

279C.605 Notice of claim. (1) The notice of claim required by ORS 279C.600 must be sent by registered or certified mail or hand delivered no later than 180 days after the day the person last provided labor or furnished materials or 180 days after the worker listed in the notice of claim by the Commissioner of the Bureau of Labor and Industries last provided labor. The notice may be sent or delivered to the contractor or subcontractor at any place the contractor or subcontractor maintains an office or conducts business or at the residence of the contractor or subcontractor.

(2) Notwithstanding subsection (1) of this section, if the claim is for a required contribution to a fund of an employee benefit

plan, the notice required by ORS 279C.600 must be sent or delivered within 200 days after the employee last provided labor or materials.

(3) The notice must be in writing substantially as follows:

To (here insert the name of the contractor or subcontractor and the name of the public body):

Notice hereby is given that the undersigned (here insert the name of the claimant) has a claim for (here insert a brief description of the labor or materials performed or furnished and the person by whom performed or furnished; if the claim is for other than labor or materials, insert a brief description of the claim) in the sum of (here insert the amount) dollars against the (here insert public works bond or payment bond, as applicable) taken from (here insert the name of the principal and, if known, the surety or sureties upon the public works bond or payment bond) for the work of (here insert a brief description of the work concerning which the public works bond or payment bond was taken). Such material or labor was supplied to (here insert the name of the contractor or subcontractor).

(here to be signed)

(4) When notice of claim is given by the commissioner and if the claim includes a worker who is then unidentified, the commissioner shall include in the notice a statement that the claim includes an unidentified worker for whom the commissioner has received information indicating that the worker has not been paid in full at the prevailing rate of wage required by ORS 279C.840 or overtime wages required by ORS 279C.540.

(5) The person making the claim or giving the notice shall sign the notice. [2003 c.794 §155; 2005 c.360 §4; 2009 c.160 §1]

279C.610 Action on contractor's public works bond or payment bond; time limitation. (1) The Commissioner of the Bureau of Labor and Industries or a person who has a right of action on the public works bond or the payment bond under ORS 279C.600 and, where required, who has filed and served the notice or notices of claim, as required under ORS 279C.600 and 279C.605, or that person's assignee, may institute an action on the contractor's public works bond or payment bond in a circuit court of this state or the federal district court of the district.

(2) The action shall be on the relation of the commissioner, the claimant, or that person's assignee, as the case may be, and shall be in the name of the contracting agency that let the contract or, when applicable, the public agency or agencies for whose benefit the contract was let. It may be prosecuted to final judgment and execution for the use and benefit of the commissioner or the claimant, or that person's assignee, as the fact may appear.

(3) The action shall be instituted no later than two years after the person last provided labor or materials or two years after the worker listed in the commissioner's notice of claim last provided labor. [2003 c.794 §156; 2005 c.360 §5]

279C.615 Preference for labor and material liens. All labor and material liens have preference and are superior to all other liens and claims of any kind or nature created by ORS 279C.500 to 279C.530 and 279C.600 to 279C.625. [2003 c.794 §157]

279C.620 Rights of person providing medical care to employees of contractor.

A person providing medical, surgical or hospital care services or other needed care and attention, incident to sickness or injury, to the employees of a contractor or subcontractor on a public contract is deemed to have performed labor on the public contract for the purposes of ORS 279C.600 to 279C.625. [2003 c.794 §158]

279C.625 Joint liability when payment bond not executed. If the public improvement contract is one for which a payment bond as provided for in ORS 279C.380 and 279C.400 is required and the contractor fails to pay for labor or materials or to pay claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund or the Department of Revenue and the officers of the public body that authorized the contract fail or neglect to require the person entering into the contract to execute the payment bond:

(1) The State of Oregon and the officers authorizing the contract shall be jointly liable for the labor and materials used in the performance of any work under the contract, and for claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund and the Department of Revenue, if the contract was entered into with the State of Oregon.

(2) The public body and the officers authorizing the contract shall be jointly liable for the labor and materials used in the performance of any work under the contract and for claims due the Industrial Accident Fund, the Unemployment Compensation Trust Fund and the Department of Revenue, if the con-

tract was entered into on behalf of a public body other than the state. [2003 c.794 §159; 2005 c.103 §35]

(Termination or Suspension of Contract for Public Interest Reasons)

279C.650 “Labor dispute” defined. As used in ORS 279C.650 to 279C.670, “labor dispute” has the meaning given that term in ORS 662.010. [2003 c.794 §160]

279C.655 Extension and compensation when work suspended. If a public contract is not terminated but work under the contract is suspended by an order of a contracting agency for any reason considered to be in the public interest other than a labor dispute or any third-party judicial proceeding relating to the work other than a suit or action filed in regards to a labor dispute, the contractor is entitled to a reasonable extension of the contract time and reasonable compensation for all costs resulting from the suspension plus a reasonable allowance for overhead with respect to such costs. [2003 c.794 §161]

279C.660 Compensation when contract terminated due to public interest. When a public contract is terminated by mutual agreement, provision shall be made for the payment of compensation to the contractor. In addition to a reasonable amount of compensation for preparatory work and for all costs and expenses arising out of termination, the amount to be paid to the contractor:

(1) Shall be determined on the basis of the contract price in the case of any fully completed separate item or portion of the work for which there is a separate or unit contract price; and

(2) May, with respect to any other work, be a percent of the contract price equal to the percentage of the work completed. [2003 c.794 §162]

279C.665 Contractual provisions for compensation when contract terminated due to public interest. A contracting agency may provide in a public improvement contract detailed provisions under which the contractor shall be entitled, as a matter of right, to compensation upon termination of the contract on account of any reason considered to be in the public interest. [2003 c.794 §163]

279C.670 Application of ORS 279C.650 to 279C.670. ORS 279C.650 to 279C.670 do not apply to suspension of the work or termination of the contract that occurs as a result of the contractor’s violation of federal, state or local statutes, ordinances, rules or regulations in existence at the time the contract was executed or as a result of vio-

lations of the terms of the contract. [2003 c.794 §164]

PREVAILING WAGE RATE

279C.800 Definitions for ORS 279C.800 to 279C.870. As used in ORS 279C.800 to 279C.870:

(1) “Fringe benefits” means:

(a) Contributions that a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program; and

(b) Costs that a contractor or subcontractor may reasonably be anticipated to incur in providing the following items, except for items that federal, state or local law requires the contractor or subcontractor to provide:

(A) Benefits to workers pursuant to an enforceable written commitment to the workers to carry out a financially responsible plan or program for:

(i) Medical or hospital care;

(ii) Pensions on retirement or death; or

(iii) Compensation for injuries or illness that result from occupational activity;

(B) Insurance to provide the benefits described in subparagraph (A) of this paragraph;

(C) Unemployment benefits;

(D) Life insurance;

(E) Disability and sickness insurance or accident insurance;

(F) Vacation and holiday pay;

(G) Costs of apprenticeship or other similar programs; or

(H) Other bona fide fringe benefits.

(2) “Housing” has the meaning given that term in ORS 456.055.

(3) “Locality” means the following district in which the public works, or the major portion of the public works, is to be performed:

(a) District 1, composed of Clatsop, Columbia and Tillamook Counties;

(b) District 2, composed of Clackamas, Multnomah and Washington Counties;

(c) District 3, composed of Marion, Polk and Yamhill Counties;

(d) District 4, composed of Benton, Lincoln and Linn Counties;

(e) District 5, composed of Lane County;

(f) District 6, composed of Douglas County;

(g) District 7, composed of Coos and Curry Counties;

(h) District 8, composed of Jackson and Josephine Counties;

(i) District 9, composed of Hood River, Sherman and Wasco Counties;

(j) District 10, composed of Crook, Deschutes and Jefferson Counties;

(k) District 11, composed of Klamath and Lake Counties;

(L) District 12, composed of Gilliam, Grant, Morrow, Umatilla and Wheeler Counties;

(m) District 13, composed of Baker, Union and Wallowa Counties; and

(n) District 14, composed of Harney and Malheur Counties.

(4) "Prevailing rate of wage" means the rate of hourly wage, including all fringe benefits, that the Commissioner of the Bureau of Labor and Industries determines is paid in the locality to the majority of workers employed on projects of a similar character in the same trade or occupation.

(5) "Public agency" means the State of Oregon or a political subdivision of the State of Oregon, or a county, city, district, authority, public corporation or public entity organized and existing under law or charter or an instrumentality of the county, city, district, authority, public corporation or public entity.

(6)(a) "Public works" includes, but is not limited to:

(A) Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest;

(B) A project that uses \$750,000 or more of funds of a public agency for constructing, reconstructing, painting or performing a major renovation on a road, highway, building, structure or improvement of any type;

(C) A project that uses funds of a private entity for constructing a privately owned road, highway, building, structure or improvement of any type in which a public agency will use or occupy 25 percent or more of the square footage of the completed project;

(D) Notwithstanding the provisions of ORS 279C.810 (2)(a), (b) and (c), a device, structure or mechanism, or a combination of devices, structures or mechanisms, that:

(i) Uses solar radiation as a source for generating heat, cooling or electrical energy; and

(ii) Is constructed or installed, with or without using funds of a public agency, on land, premises, structures or buildings that

a public body, as defined in ORS 174.109, owns; or

(E) Notwithstanding paragraph (b)(A) of this subsection and ORS 279C.810 (2)(b) and (c), construction, reconstruction, painting or major renovation of a road, highway, building, structure or improvement of any type that occurs, with or without using funds of a public agency, on real property that a public university listed in ORS 352.002 owns.

(b) "Public works" does not include:

(A) Reconstructing or renovating privately owned property that a public agency leases; or

(B) A private nonprofit entity's renovation of publicly owned real property that is more than 75 years old if:

(i) The real property is leased to the private nonprofit entity for more than 25 years;

(ii) Funds of a public agency used in the renovation do not exceed 15 percent of the total cost of the renovation; and

(iii) Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 13, 2007. [2003 c.794 §165; 2007 c.764 §34; 2010 c.45 §1; 2013 c.203 §1; 2015 c.482 §1; 2015 c.767 §81]

279C.805 Policy. The Legislative Assembly declares that the purposes of the prevailing rate of wage law are:

(1) To ensure that contractors compete on the ability to perform work competently and efficiently while maintaining community-established compensation standards.

(2) To recognize that local participation in publicly financed construction and family wage income and benefits are essential to the protection of community standards.

(3) To encourage training and education of workers to industry skills standards.

(4) To encourage employers to use funds allocated for employee fringe benefits for the actual purchase of those benefits. [2003 c.794 §166]

279C.807 Workforce diversity for public works projects. (1) The Bureau of Labor and Industries shall develop and adopt a plan to increase diversity statewide among workers employed on projects subject to ORS 279C.800 to 279C.870. The bureau shall develop the plan after conducting a statewide public process to solicit proposals to increase diversity and shall adopt the plan after considering proposals submitted to the bureau.

(2) The bureau shall report each year to the Legislative Assembly or to the appropriate legislative interim committee concerning progress that results from the plan adopted

under this section and may submit recommendations for legislation or other measures that will improve diversity among workers employed on projects subject to ORS 279C.800 to 279C.870. The bureau shall submit the first report no later than January 1, 2009. [2007 c.844 §9]

Note: 279C.807 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 279C or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

279C.808 Rules. In accordance with applicable provisions of ORS chapter 183, the Commissioner of the Bureau of Labor and Industries shall adopt rules necessary to administer ORS 279C.800 to 279C.870. [2007 c.764 §45]

279C.810 Exemptions; rules. (1) As used in this section:

(a) “Funds of a public agency” does not include:

(A) Funds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction, reconstruction, major renovation or painting;

(B) Building and development permit fees paid or waived by the public agency;

(C) Tax credits or tax abatements;

(D) Land that a public agency sells to a private entity at fair market value;

(E) The difference between:

(i) The value of land that a public agency sells to a private entity as determined at the time of the sale after taking into account any plan, requirement, covenant, condition, restriction or other limitation, exclusive of zoning or land use regulations, that the public agency imposes on the development or use of the land; and

(ii) The fair market value of the land if the land is not subject to the limitations described in sub-subparagraph (i) of this subparagraph;

(F) Staff resources of the public agency used to manage a project or to provide a principal source of supervision, coordination or oversight of a project;

(G) Staff resources of the public agency used to design or inspect one or more components of a project;

(H) Moneys derived from the sale of bonds that are loaned by a state agency to a private entity, unless the moneys will be used for a public improvement;

(I) Value added to land as a consequence of a public agency’s site preparation, demolition of real property or remediation or removal of environmental contamination,

except for value added in excess of the expenses the public agency incurred in the site preparation, demolition or remediation or removal when the land is sold for use in a project otherwise subject to ORS 279C.800 to 279C.870; or

(J) Bonds, or loans from the proceeds of bonds, issued in accordance with ORS chapter 289 or ORS 441.525 to 441.595, unless the bonds or loans will be used for a public improvement.

(b) “Nonprofit organization” means an organization or group of organizations described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.

(2) ORS 279C.800 to 279C.870 do not apply to:

(a) Projects for which the contract price does not exceed \$50,000. In determining the price of a project, a public agency:

(A) May not include the value of donated materials or work performed on the project by individuals volunteering to the public agency without pay; and

(B) Shall include the value of work performed by every person paid by a contractor or subcontractor in any manner for the person’s work on the project.

(b) Projects for which no funds of a public agency are directly or indirectly used. In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries shall adopt rules to carry out the provisions of this paragraph.

(c) Projects:

(A) That are privately owned;

(B) That use funds of a private entity;

(C) In which less than 25 percent of the square footage of a completed project will be occupied or used by a public agency; and

(D) For which less than \$750,000 of funds of a public agency are used.

(d) Projects for residential construction that are privately owned and that predominantly provide affordable housing. As used in this paragraph:

(A) “Affordable housing” means housing that serves occupants whose incomes are no greater than 60 percent of the area median income or, if the occupants are owners, whose incomes are no greater than 80 percent of the area median income.

(B) “Predominantly” means 60 percent or more.

(C) “Privately owned” includes:

(i) Affordable housing provided on real property owned by a public agency if the real

property and related structures are leased to a private entity for 50 or more years; and

(ii) Affordable housing owned by a partnership, nonprofit corporation or limited liability company in which a housing authority, as defined in ORS 456.005, is a general partner, director or managing member and the housing authority is not a majority owner in the partnership, nonprofit corporation or limited liability company.

(D) "Residential construction" includes the construction, reconstruction, major renovation or painting of single-family houses or apartment buildings not more than four stories in height and all incidental items, such as site work, parking areas, utilities, streets and sidewalks, pursuant to the United States Department of Labor's "All Agency Memorandum No. 130: Application of the Standard of Comparison "Projects of a Character Similar" Under Davis-Bacon and Related Acts," dated March 17, 1978. However, the commissioner may consider different definitions of residential construction in determining whether a project is a residential construction project for purposes of this paragraph, including definitions that:

(i) Exist in local ordinances or codes; or

(ii) Differ, in the prevailing practice of a particular trade or occupation, from the United States Department of Labor's description of residential construction. [2003 c.794 §172; 2005 c.153 §1; 2005 c.360 §8; 2007 c.764 §35]

279C.815 Determination of prevailing wage; sources of information; comparison of state and federal prevailing wage; other powers of commissioner. (1) As used in this section, "person" means an employer, a labor organization or an official representative of an employee or employer association.

(2)(a) The Commissioner of the Bureau of Labor and Industries at least once each year shall determine the prevailing rate of wage for workers in each trade or occupation in each locality described in ORS 279C.800 by means of an independent wage survey and shall make this information available at least twice each year. The commissioner may amend the rate at any time.

(b) If the data derived only from the survey described in paragraph (a) of this subsection appear to the commissioner to be insufficient to determine the prevailing rate of wage, the commissioner shall consider additional information such as collective bargaining agreements, other independent wage surveys and the prevailing rates of wage determined by appropriate federal agencies or agencies of adjoining states. If there is not a majority in the same trade or occupation paid at the same rate, the average rate of

hourly wage, including all fringe benefits, paid in the locality to workers in the same trade or occupation is the prevailing rate. If the wage a contractor or subcontractor pays to workers on a public works is based on a period of time other than an hour, the hourly wage must be mathematically determined by the number of hours worked in that period of time.

(3) A person shall make reports and returns to the Bureau of Labor and Industries that the commissioner requires to determine the prevailing rates of wage, using forms the bureau provides and within the time the commissioner prescribes. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

(4) Notwithstanding ORS 192.311 to 192.478, reports and returns or other information provided to the commissioner under this section are confidential and not available for inspection by the public.

(5) The commissioner may enter into a contract with a public or private party to obtain data and information the commissioner needs to determine the prevailing rate of wage. The contract may provide for the manner and extent of the market review of affected trades and occupations and for other requirements regarding timelines of reports, accuracy of data and information and supervision and review as the commissioner prescribes. [2003 c.794 §173; 2005 c.360 §9; 2007 c.764 §36; 2007 c.844 §3; 2011 c.265 §1]

279C.817 Determination of applicability of prevailing wage rate; time limitation; hearing; rules. (1) The Commissioner of the Bureau of Labor and Industries shall, upon the request of a public agency or other interested person, make a determination about whether a project or proposed project is or would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840.

(2) The requester shall provide the commissioner with information necessary to enable the commissioner to make the determination.

(3) The commissioner shall make the determination within 60 days after receiving the request or 60 days after the requester has provided the commissioner with the information necessary to enable the commissioner to make the determination, whichever is later. The commissioner may take additional time to make the determination if the commissioner and the requester mutually agree that the commissioner may do so.

(4) The commissioner shall afford the requester or a person adversely affected or aggrieved by the commissioner's determi-

nation a hearing in accordance with ORS 183.413 to 183.470. An order the commissioner issues under ORS 183.413 to 183.470 is subject to judicial review as provided in ORS 183.482.

(5) The commissioner shall adopt rules establishing the process for requesting and making the determinations described in this section. [2007 c.764 §43]

279C.820 Advisory committee to assist commissioner. (1) The Commissioner of the Bureau of Labor and Industries shall appoint an advisory committee to assist the commissioner in the administration of ORS 279C.800 to 279C.870.

(2) The advisory committee must include equal representation of members from management and labor in the building and construction industry who perform work on public works contracts and such other interested parties as the commissioner shall appoint. [2003 c.794 §179]

279C.825 Fees; rules. (1)(a) The Commissioner of the Bureau of Labor and Industries, by order, shall establish a fee to be paid by the public agency that awards a public works contract subject to ORS 279C.800 to 279C.870. The commissioner shall use the fee to pay the costs of:

(A) Surveys to determine the prevailing rates of wage;

(B) Administering and providing investigations under and enforcement of ORS 279C.800 to 279C.870; and

(C) Providing educational programs on public contracting law under the Public Contracting Code.

(b) The commissioner shall establish the fee at 0.1 percent of the contract price. However, in no event may a fee be charged and collected that is less than \$250 or more than \$7,500.

(2) The commissioner shall pay moneys received under this section into the State Treasury. The moneys shall be credited to the Prevailing Wage Education and Enforcement Account created by ORS 651.185.

(3) The public agency shall pay the fee at the time the public agency notifies the commissioner under ORS 279C.835 a contract subject to the provisions of ORS 279C.800 to 279C.870 has been awarded. [2003 c.794 §178; 2007 c.844 §7; 2009 c.161 §1; 2009 c.788 §1]

279C.827 Division of public works project; applicability of prevailing wage rate to divided projects. (1)(a) A person or public agency may not divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.

(b) If the Commissioner of the Bureau of Labor and Industries determines that a person or public agency has divided a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner shall issue an order compelling compliance.

(c) In making determinations under this subsection, the commissioner shall consider:

(A) The physical separation of the project structures;

(B) The timing of the work on project phases or structures;

(C) The continuity of project contractors and subcontractors working on project parts or phases;

(D) The manner in which the public agency and the contractors administer and implement the project;

(E) Whether a single public works project includes several types of improvements or structures; and

(F) Whether the combined improvements or structures have an overall purpose or function.

(2)(a) The commissioner may apply the considerations set forth in subsection (1)(c) of this section to determine whether to divide a public works project into more than one contract, regardless of whether the commissioner believes that a person or public agency divided the public works project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.

(b) If a project is a public works project of the type described in ORS 279C.800 (6)(a)(B) or (C), the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsection (1)(c) of this section to separate the parts of the project that include funds of a public agency or that will be occupied or used by a public agency from the parts of the project that do not include funds of a public agency and that will not be occupied or used by a public agency. If the commissioner divides the project, any part of the project that does not include funds of a public agency and that will not be occupied or used by a public agency is not subject to ORS 279C.800 to 279C.870.

(3) If a project includes parts that are owned by a public agency and parts that are owned by a private entity, the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsections (1)(c) and (2)(b) of this section to separate the parts of the project that are public works from the parts of the project that are not public works. If the commissioner divides the project, parts of the proj-

ect that are not public works are not subject to ORS 279C.800 to 279C.870. [2007 c.764 §44; 2017 c.334 §1]

279C.829 Agreement with other state to pay less than prevailing rate of wage.

Notwithstanding any other provision of law, a contracting agency may not enter into an agreement with another state or a political subdivision or agency of another state in which the contracting agency agrees that a contractor or subcontractor may pay less than the prevailing rate of wage determined in accordance with ORS 279C.815 under the terms of a contract for public works to which the contracting agency is a party or of which the contracting agency is a beneficiary. [2009 c.322 §2]

279C.830 Provisions concerning prevailing rate of wage in specifications, contracts and subcontracts; applicability of prevailing wage; bond.

(1)(a) Except as provided in paragraph (e) of this subsection, the specifications for every contract for public works must state the existing state prevailing rate of wage and, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) that must be paid to workers in each trade or occupation that the contractor or subcontractor or other person who is a party to the contract uses in performing all or part of the contract. If the prevailing rates of wage are available electronically or are accessible on the Internet, the specifications may incorporate the rates by referring to the electronically accessible or Internet-accessible rates and by providing adequate information about how to access the rates.

(b) If a public agency under paragraph (a) of this subsection must state the state and federal prevailing rates of wage in the specifications, the public agency shall also require the contractor to pay the higher of the applicable state or federal prevailing rate of wage to all workers on the public works.

(c) Every contract and subcontract must provide that the workers must be paid not less than the specified minimum hourly rate of wage in accordance with ORS 279C.838 and 279C.840.

(d) If a public works project is subject both to ORS 279C.800 to 279C.870 and to the Davis-Bacon Act, every contract and subcontract must provide that workers on the public works must be paid not less than the higher of the applicable state or federal prevailing rate of wage.

(e) A public works project described in ORS 279C.800 (6)(a)(B) or (C) is subject to the existing state prevailing rate of wage or, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act that is in effect at the time a public agency

enters into an agreement with a private entity for the project. After that time, the specifications for a contract for the public works must state the applicable prevailing rate of wage.

(2)(a) The specifications for a contract for public works must provide that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work on the project, unless the contractor or subcontractor is exempt under ORS 279C.836 (4), (7), (8) or (9).

(b) Every contract that a contracting agency awards must require the contractor to:

(A) Have a public works bond filed with the Construction Contractors Board before starting work on the project, unless the contractor is exempt under ORS 279C.836 (4), (7), (8) or (9).

(B) Require, in every subcontract, that the subcontractor have a public works bond filed with the Construction Contractors Board before starting work on the project, unless the subcontractor is exempt under ORS 279C.836 (4), (7), (8) or (9).

(c) Every subcontract that a contractor or subcontractor awards in connection with a public works contract between a contractor and a public agency must require any subcontractor to have a public works bond filed with the Construction Contractors Board before starting work on the public works project, unless the subcontractor is exempt under ORS 279C.836 (4), (7), (8) or (9). [2003 c.794 §168; 2005 c.360 §10; 2007 c.415 §2; 2007 c.764 §37; 2007 c.844 §4; 2009 c.161 §2; 2011 c.265 §2; 2017 c.334 §2]

279C.835 Notifying commissioner of public works contract subject to prevailing wage; payment of fee.

Public agencies shall notify the Commissioner of the Bureau of Labor and Industries in writing, on a form prescribed by the commissioner, whenever a contract subject to the provisions of ORS 279C.800 to 279C.870 has been awarded. The notification shall be made within 30 days of the date that the contract is awarded. The notification shall include payment of the fee required under ORS 279C.825 and a copy of the disclosure of first-tier subcontractors that was submitted under ORS 279C.370. [2003 c.794 §175; 2009 c.161 §3]

279C.836 Public works bond; rules.

(1) Except as provided in subsection (4), (7), (8) or (9) of this section, before starting work on a contract or subcontract for a public works project, a contractor or subcontractor shall file with the Construction Contractors Board a public works bond with a corporate surety authorized to do business in this state in the amount of \$30,000. The bond must provide that the contractor or subcontractor will pay

claims ordered by the Bureau of Labor and Industries to workers performing labor upon public works projects. The bond must be a continuing obligation, and the surety's liability for the aggregate of claims that may be payable from the bond may not exceed the penal sum of the bond. The bond must remain in effect continuously until depleted by claims paid under this section, unless the surety sooner cancels the bond. The surety may cancel the bond by giving 30 days' written notice to the contractor or subcontractor, to the board and to the Bureau of Labor and Industries. Canceling the bond relieves the surety of further liability for work performed on contracts entered into after the cancellation. The cancellation does not limit the surety's liability for work performed on contracts entered into before the cancellation.

(2) Before permitting a subcontractor to start work on a public works project, the contractor shall verify that the subcontractor has filed a public works bond as required under this section, has elected not to file a public works bond under subsection (7) or (8) of this section or is exempt under subsection (4) or (9) of this section.

(3) This section does not require a contractor or subcontractor to file a separate public works bond for each public works project for which the contractor or subcontractor has a contract.

(4) This section does not require a person that is not required under ORS 279C.800 to 279C.870 to pay prevailing rates of wage on a public works project to file a public works bond under this section.

(5) A public works bond required by this section is in addition to any other bond the contractor or subcontractor is required to obtain.

(6) The board may, by rule, require a contractor or subcontractor to obtain a new public works bond if a surety pays a claim out of an existing public works bond. The new bond must be in the amount of \$30,000. The board may allow a contractor or subcontractor to obtain, instead of a new bond, a certification that the surety remains liable for the full penal sum of the existing bond, notwithstanding payment by the surety on the claim.

(7)(a) A disadvantaged business enterprise, a minority-owned business, a woman-owned business, a business that a service-disabled veteran owns or an emerging small business certified under ORS 200.055 may, for up to four years after certification, elect not to file a public works bond as required under subsection (1) this section. If an enterprise or a business elects not to file a public works bond, the enterprise or business

shall give the board written verification of the certification and written notice that the enterprise or business elects not to file the bond.

(b) Notwithstanding paragraph (a) of this subsection, if the Commissioner of the Bureau of Labor and Industries finds that an enterprise or a business has violated a provision of ORS 279C.800 to 279C.870 or an administrative rule adopted under ORS 279C.800 to 279C.870, the enterprise or business must file a public works bond in accordance with subsection (1) of this section.

(c) An enterprise or a business that elects not to file a public works bond under this subsection shall notify the public agency for whose benefit the contract was awarded or, if the enterprise or business is a subcontractor, the contractor of the election before starting work on a public works project. If an enterprise or a business elects not to file a public works bond under this subsection, a claim for unpaid wages may be made against the payment bond of the enterprise or business or, if the enterprise or business is a subcontractor, the payment bond of the contractor.

(d) An election not to file a public works bond expires four years after the date the enterprise or business is certified. After an election has expired and before starting or continuing work on a contract or subcontract for a public works project, the enterprise or business shall file a public works bond with the board in accordance with subsection (1) of this section.

(8) A contractor or subcontractor may elect not to file the public works bond required under subsection (1) of this section for any public works project for which the contract price does not exceed \$100,000.

(9) In cases of emergency, or if the interest or property of the public agency for whose benefit the contract was awarded probably would suffer material injury by delay or other cause, the requirement for filing a public works bond may be excused, if a declaration of the emergency is made in accordance with rules adopted under ORS 279A.065.

(10) The board shall make available on a searchable public website information concerning public works bonds filed with the board, claims made on those bonds, elections made by certified business enterprises not to file those bonds and the expiration date of each election. The board may adopt rules necessary to perform the duties required of the board by this section.

(11) The commissioner, with approval of the board, shall adopt rules that establish language for public works bonds. [2005 c.360

§2; 2007 c.415 §1; 2007 c.764 §38; 2015 c.565 §16; 2017 c.334 §3]

279C.838 Applicability of state and federal rates of wage; determination of site of project; determination of applicability of wage to transportation workers; waiver. When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.):

(1) If the state prevailing rate of wage is higher than the federal prevailing rate of wage, the contractor and every subcontractor on the project shall pay at least the state prevailing rate of wage as determined under ORS 279C.815;

(2) The Commissioner of the Bureau of Labor and Industries shall determine the site of the project in a manner consistent with the term "site of the work" as that term is used in federal law and in regulations adopted or guidelines issued in accordance with the Davis-Bacon Act;

(3) The commissioner shall determine in a manner that is consistent with federal law and regulations adopted or guidelines issued in accordance with the Davis-Bacon Act whether workers transporting materials and supplies to and from the site of the project are subject to the Davis-Bacon Act and are entitled to be paid the prevailing rate of wage;

(4) Except as provided in subsection (1) of this section, the commissioner, in consultation with the advisory committee appointed under ORS 279C.820, may administer and enforce ORS 279C.800 to 279C.870 in a manner that is consistent with federal law and regulations adopted or guidelines issued in accordance with the Davis-Bacon Act. The commissioner may provide a waiver from a requirement set forth in ORS 279C.800 to 279C.870 if necessary to achieve consistency with the Davis-Bacon Act and to further the purposes of ORS 279C.805; and

(5) ORS 279C.800 to 279C.870 do not apply to workers enrolled in skill training programs that are certified by the United States Secretary of Transportation under the Federal-Aid Highway Act (23 U.S.C. 113(c)). [2005 c.360 §7; 2007 c.844 §5]

279C.840 Payment of prevailing rate of wage; posting of rates and fringe benefit plan provisions. (1) The hourly rate of wage that a contractor or subcontractor must pay to workers upon all public works may not be less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where the labor is performed. A contractor or subcontractor may discharge the obligation to pay the prevailing rate of wage by making the payments in cash, by making contributions of a type described in ORS 279C.800 (1)(a), or by as-

suming an enforceable commitment to bear the costs of fringe benefits of a type described in ORS 279C.800 (1)(b), or any combination of payments, contributions and assumption of costs, where the aggregate of any such payments, contributions and assumption of costs is not less than the prevailing rate of wage. The contractor or subcontractor shall pay all wages due and owing to the contractor's or subcontractor's workers upon public works on the regular payday established and maintained under ORS 652.120.

(2) After a contract for public works is executed with any contractor or work is commenced upon any public works, a contractor or subcontractor may not subject the amount of the prevailing rate of wage to attack in any legal proceeding in connection with that contract.

(3) It is not a defense in any legal proceeding that the prevailing rate of wage is less than the amount required to be in the specifications of a contract for public works, or that the employee agreed with the employer to work at less than the wage rates required to be paid under this section.

(4) Every contractor or subcontractor engaged on a project for which there is a contract for a public works shall keep the prevailing rates of wage for that project posted in a conspicuous and accessible place in or about the project. The Commissioner of the Bureau of Labor and Industries shall furnish without charge copies of the prevailing rates of wage to contractors and subcontractors.

(5) Every contractor or subcontractor engaged on a project for which there is a contract for a public works to which the prevailing wage requirements apply that also provides or contributes to a health and welfare plan or a pension plan, or both, for the contractor or subcontractor's employees on the project shall post a notice describing the plan in a conspicuous and accessible place in or about the project. The notice preferably shall be posted in the same place as the notice required under subsection (4) of this section. In addition to the description of the plan, the notice shall contain information on how and where to make claims and where to obtain further information.

(6)(a) Except as provided in paragraph (d) of this subsection, a person other than the contractor or subcontractor may not pay or contribute any portion of the prevailing rate of wage paid by the contractor or subcontractor to workers employed in the performance of a public works contract.

(b) A contractor or subcontractor violates paragraph (a) of this subsection if a person other than the contractor or subcon-

tractor pays or contributes any portion of the prevailing rate of wage that the contractor or subcontractor owes or pays to workers who perform labor on a public works project or the person assumes an enforceable commitment to bear the costs of fringe benefits of a type described in ORS 279C.800 (1)(b) that the contractor or subcontractor provides.

(c) For the purpose of this subsection, the prevailing rate of wage is the prevailing rate of wage specified in the contract.

(d) This subsection does not prohibit:

(A) Payments to a worker who is enrolled in any government-subsidized training or re-training program; or

(B) A surety or public agency from paying the prevailing rate of wage.

(7) A person may not take any action that circumvents the payment of the prevailing rate of wage to workers employed on a public works contract, including, but not limited to, reducing an employee's regular rate of pay on any project that is not subject to ORS 279C.800 to 279C.870 in a manner that has the effect of offsetting the prevailing rate of wage on a public works project. [2003 c.794 §167; 2009 c.161 §4; 2017 c.334 §4]

279C.845 Certified statements regarding payment of prevailing rates of wage; retainage. (1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public agency in writing, on a form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:

(a) The hourly rate of wage paid each worker whom the contractor or the subcontractor has employed upon the public works; and

(b) That no worker employed upon the public works has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract.

(2) The certified statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read the certified statement, that the contractor or subcontractor knows the contents of the certified statement and that to the contractor or subcontractor's knowledge the certified statement is true.

(3) The certified statements shall set out accurately and completely the contractor's or subcontractor's payroll records, including the name and address of each worker, the worker's correct classification, rate of pay,

daily and weekly number of hours worked and the gross wages the worker earned upon the public works during each week identified in the certified statement.

(4) The contractor or subcontractor shall deliver or mail each certified statement required by subsection (1) of this section to the public agency. Certified statements for each week during which the contractor or subcontractor employs a worker upon the public works shall be submitted once a month, by the fifth business day of the following month. Information submitted on certified statements may be used only to ensure compliance with the provisions of ORS 279C.800 to 279C.870.

(5) Each contractor or subcontractor shall preserve the certified statements for a period of three years from the date of completion of the contract.

(6) Certified statements received by a public agency are public records subject to the provisions of ORS 192.311 to 192.478.

(7) Notwithstanding ORS 279C.555 or 279C.570 (7), if a contractor is required to file certified statements under this section, the public agency shall retain 25 percent of any amount earned by the contractor on the public works until the contractor has filed with the public agency certified statements as required by this section. The public agency shall pay the contractor the amount retained under this subsection within 14 days after the contractor files the certified statements as required by this section, regardless of whether a subcontractor has failed to file certified statements as required by this section. The public agency is not required to verify the truth of the contents of certified statements filed by the contractor under this section.

(8) Notwithstanding ORS 279C.555, the contractor shall retain 25 percent of any amount earned by a first-tier subcontractor on a public works until the subcontractor has filed with the public agency certified statements as required by this section. The contractor shall verify that the first-tier subcontractor has filed the certified statements before the contractor may pay the subcontractor any amount retained under this subsection. The contractor shall pay the first-tier subcontractor the amount retained under this subsection within 14 days after the subcontractor files the certified statements as required by this section. Neither the public agency nor the contractor is required to verify the truth of the contents of certified statements filed by a first-tier subcontractor under this section. [2003 c.794 §169; 2005 c.360 §11; 2009 c.7 §1]

279C.850 Inspection to determine whether prevailing rate of wage being paid; civil action for failure to pay prevailing rate of wage or overtime. (1) At any reasonable time the Commissioner of the Bureau of Labor and Industries may enter the office or business establishment of any contractor or subcontractor performing public works and gather facts and information necessary to determine whether the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works.

(2) Upon request by the commissioner, every contractor or subcontractor performing work on public works shall make available to the commissioner for inspection during normal business hours any payroll or other records in the possession or under the control of the contractor or subcontractor that are deemed necessary by the commissioner to determine whether the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works. The commissioner's request must be made a reasonable time in advance of the inspection.

(3) Notwithstanding ORS 192.311 to 192.478, any record obtained or made by the commissioner under this section is not open to inspection by the public.

(4) The commissioner may, without necessity of an assignment, initiate legal proceedings against employers to enjoin future failures to pay required prevailing rates of wage or overtime pay and to require the payment of prevailing rates of wage or overtime pay due employees. The commissioner is entitled to recover, in addition to other costs, such sum as the court or judge may determine reasonable as attorney fees. If the commissioner does not prevail in the action, the commissioner shall pay all costs and disbursements from the Bureau of Labor and Industries Account. [2003 c.794 §170]

279C.855 Liability for violations. (1) A contractor or subcontractor or contractor's or subcontractor's surety that violates the provisions of ORS 279C.840 is liable to the workers affected in the amount of the workers' unpaid minimum wages, including all fringe benefits, and in an additional amount equal to the unpaid wages as liquidated damages.

(2) Actions to enforce liability to workers under subsection (1) of this section may be brought as actions on contractors' bonds as provided for in ORS 279C.610.

(3) If a public agency fails to provide in the advertisement for bids, the request for bids, the contract specifications, the accepted

bid or elsewhere in the contract documents that the contractor and any subcontractor must comply with ORS 279C.840, the liability of the public agency for unpaid minimum wages, as described in subsection (1) of this section, is joint and several with a contractor or subcontractor that had notice of the requirement to comply with ORS 279C.840.

(4) If a public works project is subject to the Davis-Bacon Act, 40 U.S.C. 3141 et seq., and a public agency fails to include the state and federal prevailing rates of wage in the specifications for the contract for public works as required under ORS 279C.830 (1)(a), or fails to provide in the contract that workers on the public works must be paid not less than the higher of the applicable state or federal prevailing rate of wage as required under ORS 279C.830 (1)(d), the public agency is liable to each affected worker for:

(a) The worker's unpaid minimum wages, including fringe benefits, in an amount that equals, for each hour worked, the difference between the applicable higher rate of wage and the lower rate of wage; and

(b) An additional amount, equal to the amount of unpaid minimum wages due under paragraph (a) of this subsection, as liquidated damages.

(5) The Commissioner of the Bureau of Labor and Industries may enforce the provisions of subsections (3) and (4) of this section by a civil action under ORS 279C.850 (4), by a civil action on an assigned wage claim under ORS 652.330, or by an administrative proceeding on an assigned wage claim under ORS 652.332. [2003 c.794 §171; 2007 c.844 §6; 2011 c.265 §3]

279C.860 Ineligibility for public works contracts for failure to pay or post notice of prevailing rates of wage; certified payroll reports to commissioner. (1) A contractor or a subcontractor or a firm, corporation, partnership, limited liability company or association in which the contractor or subcontractor has a financial interest may not receive a contract or subcontract for public works for a period of three years after the date on which the Commissioner of the Bureau of Labor and Industries publishes the contractor's or subcontractor's name on the list described in subsection (2) of this section. The commissioner shall add a contractor's or subcontractor's name to the list after determining, in accordance with ORS chapter 183, that:

(a) The contractor or subcontractor intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works;

(a) The contractor or subcontractor intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works;

(b) The contractor failed to pay to the contractor's employees amounts required under ORS 279C.840 and a surety or another person paid the amounts on the contractor's behalf;

(c) The subcontractor failed to pay to the subcontractor's employees amounts required under ORS 279C.840 and the contractor, a surety or another person paid the amounts on the subcontractor's behalf;

(d) The contractor or subcontractor intentionally failed or refused to post the prevailing rates of wage as required under ORS 279C.840 (4); or

(e) The contractor or subcontractor intentionally falsified information in the certified statements the contractor or subcontractor submitted under ORS 279C.845.

(2) The commissioner shall maintain a written list of the names of contractors and subcontractors the commissioner determines are ineligible under this section and the period of time for which the contractors and subcontractors are ineligible. The commissioner shall publish the list, furnish a copy of the list upon request and make the list available to contracting agencies.

(3) If a contractor or subcontractor is a corporation or a limited liability company, the provisions of this section apply to any corporate officer or agent of the corporation or any member or manager of the limited liability company who is responsible for failing or refusing to pay or post the prevailing rate of wage, failing to pay to the contractor's employees amounts required under ORS 279C.840 that a surety or other person pays on the contractor's behalf, failing to pay to a subcontractor's employees amounts required under ORS 279C.840 that the contractor, a surety or another person pays on the subcontractor's behalf or intentionally falsifying information in the certified statements the contractor or subcontractor submits under ORS 279C.845.

(4) For good cause shown, the commissioner may remove the name of a contractor or subcontractor from the ineligible list.

(5) If a prevailing rate of wage claim is filed or the commissioner receives evidence indicating that a violation has occurred, a contractor or subcontractor required to pay the prevailing rate of wage to workers employed upon public works under ORS 279C.800 to 279C.870 shall send a certified copy of the payroll for workers employed upon public works when the commissioner requests the certified copy. [2003 c.794 §174; 2009 c.107 §1; 2013 c.239 §1; 2017 c.334 §5]

279C.865 Civil penalties. (1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$5,000 for each violation of any provision of ORS 279C.800 to 279C.870 or any rule the commissioner adopted under ORS 279C.800 to 279C.870.

(2) For purposes of this section, a failure to pay the required prevailing rate of wage and a failure to pay required fringe benefits are separate violations.

(3) Civil penalties under this section must be imposed as provided in ORS 183.745.

(4) All moneys collected as penalties under this section must be applied first toward reimbursing costs incurred in determining violations, conducting hearings and assessing and collecting the penalties. The remainder, if any, of moneys collected as penalties under this section must be paid into the State Treasury and credited to the General Fund and are available for general governmental expenses. [2003 c.794 §177; 2017 c.334 §6]

279C.870 Civil action to enforce payment of prevailing rates of wage. (1) The Commissioner of the Bureau of Labor and Industries or any other person may bring a civil action in any court of competent jurisdiction to require a public agency under a public contract with a contractor to withhold twice the wages in dispute if it is shown that the contractor or subcontractor on the contract has intentionally failed or refused to pay the prevailing rate of wage to workers employed on that contract and to require the contractor to pay the prevailing rate of wage and any deficiencies that can be shown to exist because of improper wage payments already made. In addition to other relief, the court may also enjoin the contractor or subcontractor from committing future violations. The contractor or subcontractor involved shall be named as a party in all civil actions brought under this section. In addition to other costs, the court may award the prevailing party reasonable attorney fees at the trial and on appeal. However, attorney fees may not be awarded against the commissioner under this section.

(2) The court shall require any party, other than the commissioner, that brings a civil action under this section to post a bond sufficient to cover the estimated attorney fees and costs to the public agency and to the contractor or subcontractor of any temporary restraining order, preliminary injunction or permanent injunction awarded in the action, in the event that the party bringing the action does not ultimately prevail.

(3) In addition to any other relief, the court in a civil action brought under this

section may enjoin the public agency from contracting with the contractor or subcontractor if the court finds that the commissioner would be entitled to place the contractor or subcontractor on the ineligible list established under ORS 279C.860. If the court issues such an injunction, the commissioner shall place the contractor or subcontractor on the list for a period of three years, subject to the provision of ORS 279C.860 (4). [2003 c.794 §176; 2007 c.764 §39; 2009 c.107 §2]

279C.875 Criminal liability for intentional failure to pay prevailing wage; rules. (1) A contractor or subcontractor, or an agent of a contractor or subcontractor, may not intentionally:

(a) Fail to pay an employee of the contractor or subcontractor the prevailing rate of wage as provided in ORS 279C.840;

(b) Reduce the rate of wage that an employee would ordinarily receive for work that is not subject to ORS 279C.800 to 279C.870 in order to recoup wages the contractor, subcontractor or agent paid in accordance with ORS 279C.840;

(c) Withhold, deduct or divert any portion of an employee's wages except as provided in ORS 652.610 (3);

(d) Enter into an agreement with an employee under the terms of which the employee performs work on a public works project at less than the prevailing rate of wage; or

(e) Otherwise deprive an employee, permanently or indefinitely, of wages due to an employee under ORS 279C.840 in an amount that equals or exceeds 25 percent of wages due to the employee under ORS 279C.840 or \$1,000 in a single pay period, whichever is greater.

(2) A violation of subsection (1) of this section is a Class C felony.

(3) In addition to and not in lieu of any action the Commissioner of the Bureau of Labor and Industries may bring under ORS 279C.870, the commissioner may:

(a) Refer a violation of subsection (1) of this section to a district attorney or the Attorney General for prosecution; and

(b) Adopt rules necessary to implement the provisions of this section. [2016 c.115 §4]

Note: 279C.875 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 279C or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

