

# Chapter 279B

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**GENERAL PROVISIONS**

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

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

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

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

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

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

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

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

(2) ORS 279A.010 (1) contains general definitions applicable throughout this chapter. [2003 c.794 §47; 2005 c.103 §7]

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

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

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

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

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

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

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

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

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

(A) Each Sunday.

(B) New Year’s Day on January 1.

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

(D) Independence Day on July 4.

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

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

(G) Christmas Day on December 25.

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

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

(4) When specifically agreed to under a written labor-management negotiated labor agreement, an employee may be paid at least time and a half pay for work performed on

any legal holiday specified in ORS 187.010 and 187.020 that is not listed in subsection (1) of this section.

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

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

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

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

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

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

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

(11) This section does not apply to:

(a) Financial institutions as defined in ORS 706.008.

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

(c) Public contracts for goods or personal property.

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

**279B.025 Procurement practices regarding recyclable and reusable goods.**

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

**SOURCE SELECTION**

**(Methods of Source Selection)**

**279B.050 Methods of source selection.**

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

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

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

(4) Notwithstanding that the term "goods and services" as defined in ORS 279B.005 does not include personal services:

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

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

**279B.055 Competitive sealed bidding.**

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

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

(a) A time and date by which the bids must be received and a place at which the bids must be submitted, and may, in the sole discretion of the contracting agency, direct or permit the submission and receipt of bids by electronic means;

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

(c) A procurement description;

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

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

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

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

(h) All contractual terms and conditions applicable to the procurement.

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

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

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

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

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

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

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

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

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

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

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

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

(6)(a) The contracting agency shall evaluate all bids that are received before the time and date indicated for bid opening in the invitation to bid. The contracting agency shall evaluate the bids based on the require-

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

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

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

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

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

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

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

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

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

public procurement procedures and requirements; and

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

(11) The successful bidder shall promptly execute a contract. The successful bidder's duty to promptly execute a contract includes the duty to take all action that is necessary to the formation of a contract in accordance with the invitation to bid, including the posting of performance security and the submission of proof of insurance when required by the invitation to bid.

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

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

#### **279B.060 Competitive sealed proposals.**

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

(2) The request for proposals must include:

(a) A time and date by which sealed proposals must be received, and a place at which the proposals must be submitted, and may, in the sole discretion of the contracting agency, direct or permit the submission and receipt of proposals by electronic means;

(b) The name and title of the person designated for receipt of proposals and the person designated by the contracting agency as the contact person for the procurement, if different;

(c) A procurement description;

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

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

(f) A statement that “Contractors shall use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this document.” if the request for proposals is issued by a state contracting agency;

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

(h) All contractual terms and conditions applicable to the procurement. 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;

(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;

(D) Announce the method of contractor selection that may include, but is not limited to, 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; and

(E) Contain a description of the manner in which proposals will be evaluated, including the relative importance of price and any other evaluation factors used to rate the proposals in the first tier of competition, and if more than one tier of competitive evaluation may be used, a description of the process under which the proposals will be evaluated in the subsequent tiers.

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

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

(c) The contracting agency shall retain the proposal security if a proposer who is awarded a contract fails to promptly and properly execute the contract. For purposes of this paragraph, prompt and proper exe-

cution of the contract includes all action by a proposer that is necessary to the formation of a contract in accordance with the request for proposals, including the posting of performance security and the submission of proof of insurance when required by the request for proposals. If contract negotiations or competitive negotiations are conducted, the failure, prior to award, of a contracting agency and a proposer to reach agreement does not constitute grounds for the retention of proposal security.

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

(5)(a) Notwithstanding ORS 192.410 to 192.505, proposals may be opened in a manner to avoid disclosure of contents to competing proposers during, when applicable, the process of negotiation, but the contracting agency shall record and make available the identity of all proposers as part of the contracting agency’s public records from and after the opening of the proposals. Notwithstanding ORS 192.410 to 192.505, proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued. The fact that proposals are opened at a meeting, as defined in ORS 192.610, does not make their 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.

(b) 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 materials included in a proposal that are exempt or conditionally exempt from disclosure under ORS 192.501 or 192.502.

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

(6)(a) As provided in the request for proposals or in written addenda issued thereunder, the contracting agency may conduct site tours, demonstrations, individual or group discussions and other informational activities with proposers before or after the opening of proposals for the purpose of clarification to ensure full understanding of, and responsiveness to, the solicitation requirements or to consider and respond to requests for modifications of the proposal requirements. The

contracting agency shall use procedures designed to accord proposers fair and equal treatment with respect to any opportunity for discussion and revision of proposals.

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

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

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

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

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

(E) Competitive simultaneous negotiations;

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

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

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

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

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

tion in accordance with rules adopted under ORS 279A.065.

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

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

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

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

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

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

(2) A procurement may not be artificially divided or fragmented so as to constitute a small procurement under this section. [2003 c.794 §53; 2005 c.64 §1; 2005 c.103 §8b]

**279B.070 Intermediate procurements.** (1) Any procurement of goods or services exceeding \$5,000 but not exceeding \$150,000 may be awarded in accordance with interme-



mediate procurement procedures. A contract awarded under this section may be amended to exceed \$150,000 only in accordance with rules adopted under ORS 279A.065.

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

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

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

**279B.075 Sole-source procurements.** (1)

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

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

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

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

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

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

(3) To the extent reasonably practical, the contracting agency shall negotiate with

the sole source to obtain contract terms advantageous to the contracting agency. [2003 c.794 §55; 2005 c.103 §8c]

**279B.080 Emergency procurements.**

The head of a contracting agency, or a person designated under ORS 279A.075, may make or authorize others to make emergency procurements of goods or services in an emergency. The contracting agency shall document the nature of the emergency and describe the method used for the selection of the particular contractor. [2003 c.794 §56]

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

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

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

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

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

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

(4) The director, a local contract review board, the Secretary of State or the State

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

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

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

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

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

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

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

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

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

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

**(Qualifications)**

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

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

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

(b) A satisfactory record of performance. The contracting agency shall document the record of performance of a bidder or proposer if the contracting agency finds the bidder or proposer nonresponsible under this paragraph;

(c) A satisfactory record of integrity. The contracting agency shall document the record of integrity of a bidder or proposer if the contracting agency finds the bidder or proposer nonresponsible under this paragraph;

(d) Qualified legally to contract with the contracting agency;

(e) Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder or proposer fails to promptly supply information requested by the contracting agency concerning responsibility, the contracting agency shall base the determination of responsibility upon any available information or may find the bidder or proposer nonresponsible; and

(f) Not been debarred by the contracting agency under ORS 279B.130.

(3) A contracting agency may refuse to disclose outside of the contracting agency confidential information furnished by a bidder or proposer under this section when the bidder or proposer has clearly identified in

writing the information the bidder or proposer seeks to have treated as confidential and the contracting agency has authority under ORS 192.410 to 192.505 to withhold the identified information from disclosure. [2003 c.794 §59]

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

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

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

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

**279B.120 Prequalification of prospective bidders and proposers.** (1) A contracting agency may prequalify prospective bidders or proposers to submit bids or proposals for public contracts to provide particular types of goods or services. The method of submitting prequalification applications, the information required in order to be pre-

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

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

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

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

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

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

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

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

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

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

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

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

(d) The prospective bidder or proposer has committed a violation of a contract provision and debarment for such a violation was listed in the contract terms and conditions as a potential penalty. A violation may include but is not limited to a failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a failure to perform or an unsatisfactory performance caused by acts beyond the control of the contractor may not be considered to be a basis for debarment.

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

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

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

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

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

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

#### (Notice of Intent to Award)

**279B.135 Notice of intent to award.** At least seven days before the award of a public contract, unless the contracting agency determines that seven days is impractical un-

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

#### (Price Agreements)

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

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

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

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

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

#### (Determinations)

**279B.145 Finality of determinations.** The determinations under ORS 279B.055 (3) and (7), 279B.060 (3) and (10), 279B.075, 279B.080, 279B.085 and 279B.110 (1) are final and conclusive unless they are clearly erro-

neous, arbitrary, capricious or contrary to law. [2003 c.794 §71]

### SPECIFICATIONS (General Provisions)

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

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

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

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

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

**279B.210 Policy; development of specifications.** It is the policy of the State of Oregon to encourage the development of clear, precise and accurate specifications in solicitations for public contracts. To that end, in developing specifications, contracting agencies may consult, under contract or otherwise, with technical experts, suppliers, prospective contractors and representatives of the industries with which the contracting agencies contract. However, a contracting agency shall take reasonable measures to ensure that no person who prepares or as-

sists in the preparation of solicitation documents, specifications, plans or scopes of work, and no business with which the person is associated, realizes a material competitive advantage in a procurement that arises from the agency's use of the solicitation documents, specifications, plans or scopes of work. The policy against the realization of a material competitive advantage from the character of the specifications developed in conjunction with persons outside the contracting agency does not proscribe advantages that result incidentally from a contracting agency's specification of the characteristics of a product or work to meet the contracting agency's needs. [2003 c.794 §75]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

279A.055, the employee shall be paid at least time and a half pay:

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

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

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

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

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

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

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

(b) An employer shall give notice in writing to employees who work on a contract for services, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of

hours per day and days per week that the employees may be required to work.

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

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

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

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

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

#### (Specifications in State Contracts)

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

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

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

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

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

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

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

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

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

**279B.280 Use of recycled products when economically feasible.** The Oregon Department of Administrative Services shall review and work with state agencies to develop procurement specifications that encourage the use of recycled products whenever economically feasible, if the quality of a recycled product is functionally equal to the same product manufactured with virgin resources, including but not limited to recycled paper, recycled oil and recycled PETE products. Except for specifications that have been established to preserve the public health and safety, all procurement specifications shall be established in a manner that encourages the procurement of recycled products. [2003 c.794 §81]

## LEGAL REMEDIES

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

(2) The approval of a class special procurement by the director under ORS 279B.085 constitutes rulemaking and not a contested case under ORS chapter 183. Any affected person, except the state contracting agency that requested the approval or anyone representing the state contracting agency, may petition the Court of Appeals in the manner provided in ORS 183.400 to test the validity of a class special procurement approved by the director. A proceeding under ORS 183.400 does not affect the validity

of a contract executed pursuant to a class special procurement before the petition is filed. Notwithstanding ORS 183.400 (1), before seeking judicial review under this subsection, a person must file a protest with the director as described in subsection (1) of this section.

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

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

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

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

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



ing agency's determination of the existence of a compelling governmental interest in proceeding with contract execution, or the contracting agency's determination that the goods or services were urgently needed, was not supported by substantial evidence or constituted a manifest abuse of discretion. In granting a stay, the court may require the person seeking the stay to post a bond in an amount sufficient to protect the contracting agency and the public from costs associated with delay in contract performance.

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

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

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

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

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

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

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

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

(2)(a) A prospective bidder, proposer or offeror for a public contract solicited under ORS 279B.055, 279B.060 or 279B.085 may file a protest with the contracting agency if the

prospective bidder, proposer or offeror believes that the procurement process is contrary to law or that a solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand name. If a prospective bidder, proposer or offeror fails to timely file such a protest, the prospective bidder, proposer or offeror may not challenge the contract on grounds under this subsection in any future legal or administrative proceeding.

(b) Notwithstanding paragraph (a) of this subsection, a contract-specific special procurement under ORS 279B.085 may not be protested, challenged or reviewed unless the approval of the special procurement by the Director of the Oregon Department of Administrative Services or a local contract review board, as applicable, has been invalidated by a reviewing circuit court under ORS 279B.400.

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

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

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

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

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

(d) The relief sought.

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

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

circumstances exist that require a shorter time limit.

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

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

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

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

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

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

urement process in light of the court's decision.

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

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

#### **279B.410 Protests of contract award.**

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

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

(b) The reason for the protest is that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**279B.420 Judicial review of other violations.** (1) Any violation of ORS chapter 279A by a contracting agency for which no judicial remedy is otherwise provided by ORS chapter 279A, 279B or 279C is subject to judicial review only as provided in this section.

(2) Any violation of this chapter, except ORS 279B.270, 279B.275, 279B.280 and 279B.400 to 279B.425, by a contracting agency for which no judicial remedy is otherwise provided by this chapter or ORS chapter 279A is subject to judicial review only as provided in this section.

(3) Judicial review is available under this section only if:

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

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

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

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

(e) The person seeking judicial review gave written notice describing the alleged violation to the contracting agency no later than 10 days after the date on which the alleged violation occurred and in no event more than 10 days after the date of execution of the contract;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) At the hearing the director or board shall consider de novo the notice of denial, revocation or revision of a prequalification or the notice of debarment, the standards of responsibility listed in ORS 279B.110 (2) on which the contracting agency based the denial, revocation or revision of the prequalification or the reasons listed in ORS 279B.130 (2) on which the contracting agency based the debarment, and any evidence provided by the parties. In all other respects, a hearing before the director shall be conducted in the same manner as a contested case under ORS 183.415 (3) to (6) and (9), 183.425, 183.440, 183.450 and 183.452. Hearings before a board shall be conducted under rules of procedure adopted by the board.

(6) The director or board may allocate the director's or board's costs for the hearing

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

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

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

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

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

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

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

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

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

