

RESOLUTION NO. 599

A RESOLUTION ADOPTING ATTORNEY GENERAL'S MODEL PURCHASING RULES.

WHEREAS, the city staff has prepared a report on the above captioned subject which is attached hereto as Exhibit "A"; and

WHEREAS, the City Council has duly considered the subject and the recommendation(s) contained in the staff report; and

WHEREAS, interested parties, if any, have had an opportunity to be heard on the subject.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Wilsonville does hereby adopt the staff report attached hereto as Exhibit "A", with the recommendation(s) contained therein and further instructs that action appropriate to the recommendation(s) be taken.

ADOPTED by the City Council of the City of Wilsonville at a regular meeting thereof this 17th day of February, 1987 and filed with the Wilsonville City Recorder this same date.



WILLIAM E. STARK, Mayor

ATTEST:

Vera A. Rojas

VERA A. ROJAS, City Recorder

Summary of Votes:

Mayor Stark	<u>AYE</u>
Councilor Gardiner	<u>AYE</u>
Councilor Clarke	<u>AYE</u>
Councilor Edwards	<u>AYE</u>
Councilor Stokes	<u>ABSENT</u>

CITY

OF

Wilsonville

30000 S.W. Town Center Loop E. • P.O. Box 220 • 503-682-1011

Wilsonville, Oregon 97070

February 11, 1987

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: RAY SHORTEN, FINANCE DIRECTOR

RE: ADOPTION OF ATTORNEY GENERAL'S MODEL PUBLIC CONTRACT RULES

You have been provided with a copy of these rules for your review.

It is staff's opinion that the adoption of these rules would improve the current purchasing rules the City is operating under and provide for a more cost effective purchasing program for the City.

RECOMMENDATION:

Approve the Attorney General's Model Public Contract Rules as the City's rules for purchasing goods and services.

RS:nd

**ATTORNEY GENERAL'S
MODEL PUBLIC CONTRACT RULES**

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INTRODUCTION

Oregon law has long been concerned with striking a balance between the need to be sure that the public receives the most value for the public funds expended and the need to assure a fair and open competitive process in procurement of goods and services by public agencies. Practically all recent legislative sessions have considered or enacted proposals and changes which continue to shape the law of public procurement and public improvement.

Oregon Laws 1983, chapter 690 is the most recent action reflective of legislative activity. That law also amended ORS 279.049 calling upon the Attorney General to prepare and maintain model rules of procedure appropriate for use by all public contracting agencies governing bid procedure, advertisements, the awarding of bids, retainage, claim, liens, bid security, payment and performance bonds and other matters involving public contracts. Pursuant to that statute, the Department of Justice has worked with a committee consisting of representatives of the Department of General Services, the Director of the Department of Transportation, representatives of county, city, and school districts, and other knowledgeable persons, including vendors and contractors, to formulate these model rules. After public hearing and comments were received, I adopted the model rules effective October 1, 1984. The use of these rules should assist in achieving uniformity in the public competitive bidding process and minimize expenses and delays. Public agencies (both state and local) and private contractors alike, should find the use of uniform standards will better fulfill legislative objectives in the public procurement field.

This first edition of the Attorney General's model public contracting manual has as its centerpiece a copy of the Attorney General's Model Public Contract Rules. It also includes the Department of General Service's Public Contract Review Exemption Rules, reprints of applicable portions of Oregon constitutional and statutory provisions pertinent to public contracting as well as a short summary giving a flavor for interpretations of the law rendered by Oregon appellate courts. This is a first edition and comments and suggestions from users of this manual will be of great assistance in preparing future editions.

In addition to the committee which helped advise me relative to the model rules, the substantial assistance of David A. Aamodt, Assistant Attorney General, in preparing the model rules and this manual is gratefully acknowledged.


DAVE FROHNMAYER
Attorney General

Division 30 Public Bidding Rules

137-30-000 DEFINITIONS

For purposes of these rules the following definitions apply:

(1) **Bid:** A competitive offer in which price, delivery (or project completion) and conformance to specification will be the predominant award criteria. Bid also includes a proposal when authorized by the public contract review entity where a solicitation of competitive proposals or offers is utilized for procurement when specification and price will not necessarily be the predominant award criteria;

(2) **Bidding Period:** The span of time between the date of the invitation to bid and the time and date set for receipt of bids. A minimum of fourteen (14) calendar days shall be provided, unless a shorter time is deemed necessary in the public interest for a particular procurement;

(3) **Bid Opening:** The date, time and place set for opening of competitive bids;

(4) **Bid Closing:** The date and time announced as the deadline for the receipt of bids;

(5) **Lowest Responsible Bidder:** The lowest bidder who has substantially complied with all prescribed public bidding procedures and requirements and who has not been disqualified by the public contracting agency under ORS 279.037. (ORS 279.029(1));

(6) **Addenda to the Bid Documents:** Additions or changes to the bid documents defined as addenda shall be labeled as such and distributed in accordance with these rules;

(7) **Descriptive Literature:** Materials submitted by prospective vendors to provide information concerning the products available in response to the bid;

(8) **Bid Sample:** A representative specimen of the item that will be available in response to the bid;

(9) **Contract Release Order:** The document authorizing an additional purchase on an existing requirements contract;

137-30-005 COMPETITIVE BIDDING

Contracts issued by the public agency shall be awarded by competitive bidding except as otherwise exempted under the provisions of ORS 279.015, 279.053 or 279.056.

137-30-010 BID DOCUMENTS

(1) **The Bid Documents Shall Include the Following:**

(a) Instructions and information to bidders concerning the bid submission requirements, including the time and date set for opening of bids, the address of the office to which bids are to be delivered, and any other special information;

(b) Where applicable, the purchase description, specifications, delivery or performance schedule, inspection and acceptance requirements, and special evaluation factors; and

(c) The contract terms and conditions, including warranty and bonding or other bid security requirements, as applicable.

(d) All addenda issued by the public agency.

(2) **Determination of Contractual Terms and Conditions.**

(a) The public agency is authorized to determine the contractual provisions, and terms and conditions of solicitations and contracts, provided such provisions, terms and conditions are not contrary to statutory or regulatory requirements.

(3) Terms and Conditions Applicable to Public Contracts.

(a) In addition to the Oregon preference requirement in ORS 279.021(1), the public agency shall establish standard terms and conditions including those applicable as prescribed by ORS 279.310 to ORS 279.575:

(i) Payment of laborers and materialmen; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279.312);

(ii) Payment of claims by public officers (ORS 279.314);

(iii) Hours of labor (ORS 279.316 and 279.338);

(iv) Environmental and natural resources regulations (ORS 279.318);

(v) Payment for medical care and attention to employes (ORS 279.320);

(vi) Voluntary termination of the contract (ORS 279.326);

(vii) Suspension of the work (ORS 279.328 - 279.333);

(viii) Maximum hours and overtime (ORS 279.334);

(ix) Claims for overtime (ORS 279.336);

(x) Overtime requirement for local governments (ORS 279.340 and 279.342);

(xi) Prevailing wage rates (ORS 279.348 - 279.365);

(xii) Retainage (ORS 279.400 - 279.430 and ORS 279.575);

(xiii) Contractor's bond (ORS 279.526 and 279.536);

(xiv) Notice of claim (ORS 279.528);

(xv) Labor and material liens (ORS 279.538 and 279.540);

(xvi) Liability in absence of bond (ORS 279.542);

(xvii) Progress payments (ORS 279.575).

(b) Such terms and conditions shall become an integral part of each contract.

(4) Special Terms and Conditions.

The public agency may also establish special terms and conditions applicable to specified categories of contracts. Any special terms and conditions shall be included in the bid documents and become an integral part of those contracts.

(5) Compliance and Exceptions to Terms and Conditions.

(a) Bidders are responsible for noting the terms and conditions included as applicable to each set of bid documents.

(b) By signing and returning the bid proposal form, the bidder is acknowledging acceptance of and the intent to abide by the terms and conditions.

(c) Any exceptions to the terms and conditions must be clearly stated in writing by the bidder in the signed returned proposal. The public agency reserves the right to reject any bid which takes exception to the terms and conditions. Exceptions to the terms and conditions become contractual obligations only upon written acceptance by the public agency.

Commentary

In compliance with the provisions of ORS 279.318, the following is a list of federal, state and local agencies of which the Owner has knowledge that have enacted ordinances or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that may affect the performance of the Contract:

Federal Agencies:

Agriculture, Department of
Forest Service
Soil Conservation Service

Defense, Department of
Army Corps of Engineers

Environmental Protection Agency

Interior, Department of
Bureau of Sport Fisheries and Wildlife
Bureau of Outdoor Recreation
Bureau of Land Management
Bureau of Indian Affairs
Bureau of Reclamation

Labor, Department of
Occupational Safety and Health Administration

Transportation, Department of
Coast Guard
Federal Highway Administration

State Agencies:

Agriculture, Department of
Environmental Quality, Department of
Fish and Wildlife, Department of
Forestry, Department of
Geology and Mineral Industries, Department of
Human Resources, Department of
Land Conservation and Development Commission
Soil and Water Conservation Commission
State Engineer
State Land Board
Water Resources Board

Local Agencies:

City Council
County Court
County Commissioners, Board of
Port Districts
Metropolitan Service Districts
County Service Districts
Sanitary Districts
Water Districts
Fire Protection Districts

137-30-015 PUBLIC NOTICE

(1) **Distribution.** Bid documents and notices of the availability of bid documents shall be mailed or otherwise furnished to a sufficient number of bidders for the purpose of securing competition. Notices of availability shall indicate where, when, and for how long the bid documents may be obtained; generally

describe the supply, service or construction desired; and may contain other appropriate information. The public agency may charge a fee or require a deposit for the bid documents.

(2) Advertising.

(a) Unless exempted every formal solicitation of bids shall be advertised. An advertisement for bids shall 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 public agency may determine to be necessary or desirable to ensure competition.

(b) All advertisements for bids shall state:

(i) The date and time after which bids will not be received which date shall not be less than five (5) days after the date of the last publication of the advertisement.

(ii) The date that prequalification applications must be filed if prequalification is a requirement;

(iii) The character of the work to be done or the items to be purchased;

(iv) The office where specifications may be seen;

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

(vi) The date, time, and place that bids will be publicly opened.

(3) Posting of Bid Advertisement. A copy of each bid advertisement shall be posted at the business office of the public agency. Bidders may obtain a copy upon request.

137-30-020 BID PREPARATION

Bid Preparation Instructions

(1) Bids shall be typed or prepared in ink and shall be signed in ink by the bidder or an authorized representative of the bidder.

(2) Bids shall be made on the bid form provided.

(3) Alterations or erasures, if any, shall be initialed in ink by the person signing the bid.

(4) Bids shall contain a fully executed bid package, including all required documents and descriptive literature.

137-30-025 BIDDER PREQUALIFICATION

A public agency may require mandatory prequalification of bidders on forms prescribed by the Director of the State Department of General Services. When prequalification is required by the bid documents as a condition for bidding, the agency shall not consider the bid(s) of any prospective bidder who is not prequalified in accordance with the public agency's adopted rules and regulations.

If a bidder is currently prequalified by either the State Department of Transportation or the State Department of General Services to perform contracts, the bidder shall be rebuttably presumed qualified to perform similar work for other public agencies. (ORS 279.047).

137-30-030 BIDDER SUBMISSIONS

(1) **Bid Samples and Descriptive Literature.** Bid samples or descriptive literature may be required when it is necessary to evaluate required characteristics of the items bid. Bid samples will be returned in accordance with provisions contained in the bid documents.

(2) **Identification of Bids.** Bids shall be submitted in a sealed envelope appropriately marked or in the envelope provided by the agency, whichever is applicable, to ensure proper identification and special

handling. The public agency shall not be responsible for the proper identification and handling of any bids not submitted in the designated envelope.

(3) **Receipt of Bid.** It is the bidder's responsibility to ensure that bids are received by the public agency prior to the stated bid closing time.

137-30-035 BID SECURITY

(1) **Public Improvement Contracts.** Bid security not to exceed 10 percent of the base bid(s) shall be required for public improvement contracts where the amount of the contract exceeds \$10,000. The bid security shall be forfeited if the bidder fails to execute the contract promptly and properly if awarded. (ORS 279.031).

(2) **Other Public Contracts.** Bid security not to exceed 10 percent of the bid may be required by the public agency for other contracts in order to guarantee acceptance of the award. This requirement shall be stated in the bid documents.

(3) **Contracts Under \$10,000.** Bid security for contracts of less than \$10,000 shall be required only in critical circumstances, so as not to discourage competition.

(4) **Form of Bid Security.** The following forms of bid security will be accepted by the public agency:

- (a) Surety bond from a surety company authorized to do business in the State of Oregon;
- (b) Cashier's check, certified check, or savings and loan secured check; or
- (c) Annual surety bond filed with the public agency (except for public improvements contracts).

(5) **Return of Bid Security.** The bid security of all unsuccessful bidders shall be returned after a contract has been executed, or all bids have been rejected. The public agency may return the bid security of unsuccessful bidders after bid opening but prior to award, if the return does not prejudice bid award and provided that the security of at least the three lowest bidders is retained pending the execution of a contract.

Commentary

A number of agencies have established procedures whereby an annual surety bond is filed with the public agency for bidding purposes in an amount sufficient to provide adequate bid security pursuant to ORS 279.027 for all bids during the year for a particular bidder. The common practice is to file a surety bond for bid bond purposes in an amount of \$50,000 to \$100,000 which will cover 10 percent of the amount of the bid for the contract for any given number of bids that are outstanding with that agency at any given time. Public agencies are encouraged to develop procedures such as this which facilitate vendors submitting bids and not having to provide new bid bonds each time. This is especially true when vendors are doing a volume of business with a public agency such as the Department of General Services.

137-30-040 PRE-BID CONFERENCES

Pre-bid conferences may be held by the public agency to explain the procurement requirements or conduct site inspections. The public agency may require attendance at the pre-bid conference as a condition for bidding. Such conferences shall be announced to all prospective bidders in the bid documents. The pre-bid conference shall be held within a reasonable time after the bid documents have been issued to allow bidders to become aware of it, but sufficiently before bid closing to allow consideration of the conference results in preparing bids. Statements at the pre-bid conference shall not change the bid documents unless confirmed to all prospective bidders by means of a written addendum to the bid documents.

137-30-045 BRAND NAME PRODUCTS

(1) **Product Requirement by Brand Name Prohibited.** Specifications for public contracts shall not expressly or implicitly require any product by any brand name or mark, nor the product of any

particular manufacturer or seller except pursuant to exemptions authorized by Oregon Administrative Rule, including but not limited to:

- (a) OAR 125-310-060 and 125-340-020, Copyrighted Materials.
- (b) OAR 125-310-120 and 125-340-030, Single Seller of Product Required and Single Manufacturer or Compatible Products.
- (c) OAR 125-340-010, Specification of Particular Brand Names or Products.
- (d) Public agencies may identify products by brand names so long as "approved equal" or "or equal" is included in the bid documents.

Commentary

Some agencies have developed procedures for approved equals and also made an effort to obtain exemptions authorized by the Oregon Administrative Rules as outlined in this rule. It is recognized that there is tension between setting forth an approved equal or exempting certain products from the public bidding process or from the requirement that no specification of brand name or mark be made.

This tension is caused by the statutory policy in ORS 279.029 that the bids be awarded to the lowest responsible bidder. There is also public policy expressed in ORS 279.023 that public agencies shall make every effort to construct public improvements at the least cost to the public agency. This least cost policy also carries over in all other types of public contracts where the interests of the public agency and the citizens of Oregon who support it with their tax dollars, desire to get the most value for the public dollar spent. However, in some circumstances it is necessary in order to get the kind of quality demanded by the public to either exempt certain classes of materials or to set forth preapproved equals, that will ensure an available market for the item desired by the public entity.

137-30-050 PROTEST OF BID SPECIFICATIONS

(1) **Time for Submission of Protest.** Protests of bid specifications shall be presented to the public agency in writing in accordance with the following timelines:

- (a) Public Improvement Contract — ten (10) calendar days prior to bid closing;
- (b) Other Public Contracts — five (5) calendar days prior to bid closing;

Such protest shall include the reasons for protest and any proposed changes to specifications. No protest against award because of the content of bid specifications shall be considered after the deadline established for submitting such protest.

(2) **Extension of Opening Date.** If any bid specification protest is received in accordance with section (1) above, the bid opening date may be extended if necessary to allow consideration of the protest and issuance of any addenda to the bid documents.

(3) **Identification of Protest.** Envelopes containing protests of bid specifications shall be marked as follows:

Bid Specification Protest
Bid Number or Other Identification

137-30-055 ADDENDA TO BID DOCUMENTS

(1) **Form.** Changes to bid documents shall be accomplished by addenda. The bidder shall acknowledge receipt of all addenda issued, either with the bid or separately prior to bid opening.

(2) **Distribution.** Addenda shall be sent to all prospective bidders known to have obtained the bid documents or attending any mandatory pre-bid conferences.

(3) **Timeliness.** Addenda shall be issued within a reasonable time (five (5) days prior to bid closing) to allow prospective bidders to consider them in preparing their bids, but in no case less than 72 hours before

the bid closing. If necessary, the public agency may notify prospective bidders by telegram or telephone, followed by a confirming written addendum.

137-30-060 PRE-OPENING MODIFICATION OR WITHDRAWAL OF BIDS

(1) **Modifications.** Bids once submitted may be modified in writing prior to the time and date set for bid closing. Any modifications shall be prepared on the company letterhead, signed by an authorized officer, and state that the new document supersedes or modifies the prior bid. Telegraphic modification shall not be accepted unless authorized in the bid documents. To ensure the integrity of the bidding process, the envelope containing any modifications to a bid shall be marked as follows:

Bid Modification
Bid Number or Other Identification

(2) **Withdrawals.**

(a) Bids may be withdrawn by written notification on company letterhead signed by an authorized person and received prior to the time and date set for bid closing. Bids also may be withdrawn in person prior to the scheduled bid closing upon presentation of appropriate identification.

(b) Unopened bids withdrawn under subsection (a) above, may be released to the bidder after voiding any date and time stamp used.

(c) Requests to withdraw mailed bids shall be marked as follows:

Bid Withdrawal
Bid Number or Other Identification

(3) **Documentation.** All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate bid file.

Commentary

All of the rules on submission of bids by vendors recognize that the burden of submitting information and the bid on time, is on the vendor. No exceptions can be allowed to this requirement since one of the fundamentals of the public competitive bidding process is that all vendors be treated fairly. It is recognized that sometimes harsh results can occur due to unforeseen circumstances such as car accidents, plane wrecks, or other personal emergencies. However, once an exception is made to allow submission of a bid after the scheduled bid closing there is no way to narrow that exception in such a manner that it will be applied fairly to all vendors. Therefore, a strict rule must be applied that prevents acceptance of any kind of bid or other pre-bid submission that is received after the time and date listed in the notification.

Public agencies are encouraged to use a date and time stamp in order to verify the time and day of receipt of the bids. The official clock should be that of a purchasing officer in charge of opening the bids, or some other identifiable time piece located in the purchasing office of the public agency.

137-30-065 RECEIPT, OPENING, AND RECORDING OF BIDS

(1) **Receipt.** Upon its receipt, each bid and modification shall be time-stamped or marked by hand but not opened and shall be stored in a secure place until bid opening. If bids or modifications are opened inadvertently or are opened prior to the time and date set for bid opening because they were improperly identified by the bidder, the bids or authorized modification documents shall be resealed and stored for opening at the correct time. When this occurs, documentation of this procedure shall be placed in the bid file.

(2) **Opening and Recording.** Bids and modifications shall be opened publicly, at the time, date, and place designated in the bid documents. If witnesses are present at the bid opening, and to the extent

practicable, the name of each bidder, the bid price(s), and such other information as considered appropriate, shall be read aloud. On voluminous bids, the public agency may advise bidders as part of the bid documents that the bid items and prices will not be read aloud.

(3) **Availability.** The opened bids shall be available for public inspection prior to award except to the extent the bidder designates trade secrets or other proprietary data to be confidential. ORS 192.500(1)(b). The public agency shall verify and determine that the confidential information claimed to be exempt is in fact exempt from disclosure under the Oregon Public Records Law. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment shall be publicly available regardless of any designation to the contrary.

Commentary

After opening the bids, public agencies need time prior to award to evaluate the bids that were submitted. This requirement is especially true in cases where a large number of specifications have been included and the bids have been submitted in an alternative or deductive basis.

However, recognition must be made by the public agency that open bids shall be available for public inspection following bid closing to the extent the bids do not contain trade secrets that fall within the parameters of ORS 192.500(1)(b). Submitted bids are a matter of public record and public agencies should make every effort to make these available to interested members of the public.

137-30-070 LATE BIDS, LATE WITHDRAWALS, AND LATE MODIFICATIONS

(1) **Definition.** Any bid received after the time and date set in the bid documents for receipt of bids is late. Any request for bid withdrawal or modification received after the time and date set for bid closing is late.

(2) **Disposition.** Late bids, late modifications, or late withdrawals shall not be considered.

137-30-075 MISTAKES IN BIDS

(1) **General.** Clarification or withdrawal of a bid because of an inadvertent, nonjudgmental mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system, and to assure fairness. Except as provided in this rule, if the mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of a nonjudgmental mistake is permissible but only to the extent it is not contrary to the interest of the public agency or the fair treatment of other bidders.

(2) **Mistakes Discovered After Bid Closing but Before Award.** This subsection prescribes procedures to be applied in situations where mistakes in bids are discovered after the time and date set for bid closing but before award.

(a) **Minor Informalities.** Minor informalities are matters of form rather than substance that are evident from the bid documents, or insignificant mistakes that can be waived or corrected promptly without prejudice to other bidders or the public agency; that is, the informality does not affect price, quantity, quality, delivery, or contractual conditions except in the case of informalities involving unit price. Examples include, but are not limited to, the failure of a bidder to:

(i) Return the number of signed bids or the number of other documents required by the bid documents;

(ii) Sign the bid form in the designated block so long as a signature appears in the bid documents evidencing an intent to be bound;

(iii) Acknowledge receipt of an addendum to the bid documents, but only if:

(A) It is clear from the bid that the bidder received the addendum and intended to be bound by its terms; or

(B) The addendum involved did not affect price, quantity, quality, or delivery.

(b) **Mistakes Where Intended Correct Bid is Evident.** If the mistake and the intended correct bid are clearly evident on the face of the bid form, or can be substantiated from accompanying documents, the public agency may accept the bid. Examples of mistakes that may be clearly evident on the face of the bid form are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors. For discrepancies between unit prices and extended prices, unit prices shall prevail.

(c) **Mistakes Where Intended Correct Bid is Not Evident.** The public agency may not accept a bid in which a mistake is clearly evident on the face of the bid form but the intended correct bid is not clearly evident or cannot be substantiated from accompanying documents.

137-30-080 TIME FOR ACCEPTANCE

Bids shall be valid for thirty (30) days unless otherwise specified in the bid documents.

137-30-085 EXTENSION OF TIME FOR ACCEPTANCE OF BID

Notwithstanding OAR 137-30-080, after opening bids, the public agency may request orally or in writing that bidders extend the time in writing during which the public agency may accept their bids.

137-30-090 BID EVALUATION AND AWARD

(1) **General.** The contract, if awarded, is to be awarded to the lowest responsible bidder. Consistent with the provisions of the bid documents, awards may be made by item, groups of items, or entire bid in the public interest as determined by the public agency. The public agency reserves the right to reject any bid not in compliance with the bid documents or all bids pursuant to ORS 279.035 when it is in the public interest to do so.

(2) **Special Requirements.** The bid documents shall set forth any special requirements and criteria which will be used to determine the lowest responsible bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the bid documents or public agency regulation.

(3) **Product Acceptability.**

(a) The bid documents shall set forth the evaluation criteria to be used in determining product acceptability. The public agency may require the submission of bid samples, descriptive literature, technical data, or other material, and may also provide for accomplishing any of the following prior to award:

(i) Demonstration, inspection or testing of a product prior to award for such characteristics as quality or workmanship;

(ii) Examination of such elements as appearance, finish, taste, or feel; or

(iii) Other examinations to determine whether the product conforms with specifications.

(b) The acceptability evaluation is conducted only to determine that a bidder's offering is acceptable as provided in the bid documents. Any bidder's product which does not meet the minimum requirements shall be rejected. Product rejections are not considered bidder disqualifications and are not grounds for appeal under ORS 279.043.

(4) **Determination of Lowest Responsible Bidder.** Following determination of product acceptability as set forth in subsection (3) if any is required, bids will be evaluated to determine which bidder offers

137-30-100 REJECTION OF INDIVIDUAL BIDS OR PROPOSALS

(1) **General.** This section applies to rejections, in whole or in part, of individual bids or proposals. In accordance with ORS 279.035, the public agency may reject in whole or in part, any bid not in compliance with all prescribed bidding procedures and requirements. No bid shall be considered unless the bid security, properly executed, has been submitted with the bid as required by the bid documents.

(2) **Reasons for Rejection.** Reasons for rejecting a bid include but are not limited to:

(a) The bidder has not prequalified under ORS 279.039, or has been disqualified under ORS 279.037; or

(b) The bidder has been declared ineligible by the Commissioner of the Bureau of Labor and Industries under ORS 279.361; or

(c) The bid is not responsive, that is, it does not conform in all material respects to bid documents; or

(d) The supply, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the bid documents or permissible alternates or other acceptability criteria set forth in the bid documents.

137-30-105 NEGOTIATION WITH BIDDERS PROHIBITED

Unless a request for proposal is used, the public agency shall not negotiate with any bidder prior to award of a contract. After award of the contract, modifications to the contract shall be made with change orders or addenda to the contract and in accordance with the exemption rules of the applicable public contract review authority.

137-30-110 BIDDER DISQUALIFICATION

(1) **Grounds for Disqualification.** As provided in ORS 279.037, the following are grounds for bidder disqualification:

(a) The person does not have sufficient financial ability to perform the contract. If a bond is required to ensure performance of a contract, evidence that the person can acquire a surety bond in the amount and type required shall be sufficient to establish financial ability;

(b) The person does not have equipment available to perform the contract;

(c) The person does not have key personnel available of sufficient experience to perform the contract; or

(d) The person has repeatedly breached contractual obligations to public and private contracting agencies.

(2) **Investigation.** The public agency may make such investigation as is necessary to determine whether a person is qualified. If a bidder or prospective bidder fails to supply information promptly as requested by the public agency, such failure is grounds for disqualification.

(3) **Trade Secret.** Any information voluntarily submitted by a bidder or prospective bidder pursuant to an investigation under subsection (2) of this section or in a prequalification statement required by ORS 279.039 or in a prequalification request submitted pursuant to ORS 279.041 shall be deemed a trade secret pursuant to ORS 192.500(1)(b) and (e) if requested by the person submitting the information and verified to be a trade secret by the public agency.

(4) **Notice of Disqualification.** The bidder or prospective bidder will be notified in writing by personal service or certified mail of the public agency's decision to disqualify the person from bidding with the public agency. The notice shall contain:

- (a) The effective date of the disqualification and the effective period of disqualification;
- (b) The grounds for disqualification from bidding; and
- (c) A statement of the contractor's appeal rights and applicable appeal deadlines.

(5) **Appeal of Disqualification.** If a contractor wishes to appeal the public agency decision to disqualify, the contractor must notify the public agency in writing within three (3) business days after receipt of the notification.

137-30-115 CANCELLATION OF INVITATIONS TO BID

(1) **Cancellation in the Public Interest.** An invitation to bid may be cancelled, in whole or in part, and all bids may be rejected when it is in the public interest as determined by the public agency. The reasons therefor shall be made part of the bid file.

(2) **Notice of Cancellation.** When an invitation to bid is cancelled prior to bid opening, notice of cancellation shall be sent to all holders of bid documents. When an invitation to bid is cancelled after bid opening, notice shall be sent to those bidders who submitted a bid. The notice of cancellation shall:

- (a) Identify the invitation to bid;
- (b) Briefly explain the reason for cancellation; and
- (c) Where appropriate, explain that an opportunity will be given to compete on any resolicitation.

(ORS 279.035)

Commentary

A public agency may reject all bids if in the judgment of the agency it is in the public interest to do so pursuant to ORS 279.035. This does not allow arbitrary or discriminatory action on the part of the public agency, but it does provide an escape hatch to situations where flaws exist in the award criteria or other defects in the specifications which have been discovered pursuant to the scrutiny generated by the bidding process.

Public agencies are encouraged to utilize this escape hatch sparingly, only in cases where the public interest does call for rejection of all bids. Commonly, where all the bids come in higher than the budgeted and allocated funds this allows the public agency to reject the bids and wait for a time when the price may be lower or more funds may be available. Furthermore, ORS 279.035 also allows public contracting agencies to reject any bid not in compliance to prescribed public bidding procedures and the requirements of the bid documents.

137-30-120 DISPOSITION OF BIDS OR PROPOSALS IF BID CANCELLED

(1) **Prior to Bid Opening.** When an invitation for bids is cancelled prior to bid opening, all bids received will be returned to bidders unopened, if submitted with a clearly visible return address. If there is no return address on the envelope, the bid will be opened to determine the source and then returned to sender.

(2) **After Bid Opening.** When all bids are rejected, the bids received shall be retained and become part of the public agency's permanent file.

137-30-125 DOCUMENTATION OF AWARD

(1) **Basis of Award.** Following award, a record showing the basis for determining the successful bidder shall be made a part of the bid file.

(2) **Contents of Award Record.** The record shall consist of:

- (a) Completed bid tabulation sheet.
- (b) Written justification for any rejection of lower bids.

137-30-130 FOREIGN CONTRACTOR (ORS 279.021)

If the amount of the contract exceeds \$10,000 and the contractor is a "foreign contractor," the contractor shall promptly report to the Oregon Department of Revenue on forms to be provided by the Department of Revenue the total contract price, terms of payment, length of contract and such other information as the Department of Revenue may require before final payment can be received on the contract. A copy of the report shall be forwarded to the agency. The public agency shall satisfy itself that the above requirements have been complied with before it issues final payment on the contract. For the purposes of this rule, a foreign contractor is one who is not domiciled in or registered to do business in the State of Oregon.

Commentary

The submission of statements regarding the status of foreign contractors is recommended to be made as promptly as possible to the Oregon Department of Revenue. This should normally be accomplished within 60 days from the date of the execution of a contract. The Oregon Department of Revenue should be consulted for information in this regard. In order to avoid a claim for back corporate income taxes or appropriate withholding of wages to the State of Oregon, a prompt execution of this form is required.

137-30-135 AVAILABILITY OF AWARD DECISIONS

(1) **Contract Documents.** A signed purchase order, price agreement, or contract document, as applicable, shall be sent to the successful bidder.

(2) **Notification to Unsuccessful Bidders.** Unsuccessful bidders need not be notified. Tabulations of awarded bids may be obtained for a nominal charge in person or by submitting to the public agency a written request stating the bid number and a self-addressed, stamped envelope.

(3) **Availability of Bid Files.** Completed bid files shall be available for public review at the public agency.

(4) **Copies from Bid Files.** Copies of material from bid files, other than previously described tabulation sheets, may be obtained upon payment of a reasonable copying charge.

Commentary

The Secretary of State rule OAR 166-40-060(2) includes the following requirements on retention of contract documents after award:

1. For all service contracts the original must be kept for two years after the contract has been completely executed;
2. Capital contracts must be kept permanently;
3. Goods contracts must be kept for seven years after maturity;
4. Intergovernmental and interagency agreements must be kept permanently.

Any copies of the originals must be kept for two years after maturity in all of the categories listed above. These rules are binding on all state agencies and all political subdivisions of the State of Oregon.

137-30-140 PERFORMANCE SECURITY

(1) **Public Improvements Contract.** Except in emergencies, when the requirement may be waived pursuant to ORS 279.029(3), a performance bond in a sum equal to the contract price shall be required for all public improvement contracts in excess of \$10,000.

(2) **Other Public Contracts.** The public agency may require performance security for other public contracts. Such requirements shall be stated in the bid documents.

(3) **Contracts Under \$10,000.** Performance bonds for a contract under \$10,000 shall be utilized only in critical circumstances, so as not to discourage competition.

(4) **Requirement for Surety Bond.** A surety bond furnished by a surety company authorized to do business in Oregon is the only acceptable form of performance security unless specified in the bid documents.

(5) **Time for Submission.** Upon request by the public agency, the apparent successful bidder must furnish the required performance bond within 10 days. Prompt submittal of the performance bond is required to ensure timely project initiation. Failure to furnish the bond prior to the deadline may result in rejection of the bid, and forfeiture of bid security and award to the next lowest responsible bidder.

Commentary

Public agencies are encouraged to provide sufficient information in the bid documents regarding the requirements for acceptable security. ORS 279.029 requires that all contracts for public improvements include a performance bond. An exception from this requirement for state agencies was authorized under OAR 125-360-020 if the amount of the contract for the public improvement is less than \$10,000. The bond can be waived only in cases where an emergency exists.

If such an emergency is declared and concurred in by all members of the governing board of the public contracting agency, the standard for declaring such an emergency is when the public contracting agency or public would suffer material injury by delay or other cause. Public agencies are advised to be cautious in this regard since under ORS 279.542 whenever a bond is not executed there is joint liability on the part of both the officers of the public which let the contract as well as the public body itself for payment of any liens which may be filed. This can include personal liability of the public officials. Extreme caution is recommended in the declaration of an emergency pursuant to ORS 279.029(3). All public agencies should be advised of the liability requirements imposed under Oregon law.

137-30-145 RIGHT TO AUDIT RECORDS

(1) **Audit of Cost or Pricing Data.** The public agency may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data according to the terms of a contract to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, for which cost or pricing data are required, shall maintain such books and records that relate to such cost or pricing data for three (3) years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

(2) **Contract Audit.** The public agency shall be entitled to audit the books and records of a contractor or any subcontractor under any contract or subcontract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of three (3) years from the date of final payment under the prime contract and by the subcontractor for a period of three (3) years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing.

137-30-150 RIGHT TO INSPECT PLANT

(1) **Time for Inspection.** The public agency may, at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded.

(2) **Access to Plant or Place of Business.** As a condition of bidding, bidders agree that the public agency may enter a contractor's or subcontractor's plant or place of business during normal business hours for the following purposes:

(a) Inspect and/or test supplies or services for acceptance by the public agency pursuant to the terms of the bid;

(b) Investigate in connection with a bidder's application, a minority business certification, or bidder qualification;

(3) **Contractual Provisions.** Contracts may provide that the public agency may inspect supplies and services at the contractor's or subcontractor's facility and perform tests to determine whether they conform to the bid documents, or, after award, to contract requirements, and are therefore acceptable. Such inspections and tests shall be conducted in accordance with the terms of the contract.

(4) **Procedures for Trial Use and Testing.** The public agency may establish operational procedures governing the testing and trial use of equipment, materials, and the application of resulting information and data to specifications or procurements.

(5) **Conduct of Inspections.**

(a) **Inspectors.** Inspections or tests shall be performed so as not to unduly delay the work of the contractor or subcontractor. No change of any provision of the specifications or the contract may be required by the inspector without written authorization of the public agency, unless otherwise specified in the bid documents. The presence or absence of an inspector shall not relieve the contractor or subcontractor from any requirement of the contract.

(b) **Location.** When an inspection is made in the plant or place of business of a contractor or subcontractor, such contractor or subcontractor shall provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing.

(c) **Time of Testing or Inspection.** Inspection or testing of supplies and services performed at the plant or place of business of any contractor or subcontractor shall be performed at reasonable times during normal business hours.

(6) **Inspection of Construction Projects.** On-site inspection of construction shall be performed in accordance with the terms of the contract.

137-30-155 CONTRACT CANCELLATION PROCEDURES

Grounds for Cancellation. A contract may be cancelled by the public agency for any violation of the provisions of the contract. Such provisions generally include, but are not limited to:

- (1) Standard terms and conditions included in all contracts;
- (2) Product or service specifications;
- (3) Delivery or completion requirements;
- (4) Contracted pricing and price escalation/de-escalation clauses.

Division 40 Public Improvement Contracts

137-40-000 APPLICATION

In addition to the requirements set forth in Division 30 of these rules the following rules apply to public improvement contracts.

137-40-005 COMPETITIVE BIDDING

Public improvement contracts, if awarded, shall be awarded by the public agency to the lowest responsible bidder as defined by statute unless otherwise exempt under ORS 279.015, 279.053 or 279.056.

137-40-010 PUBLIC NOTICE

(1) **Trade Newspaper Advertisement.** In addition to the requirements of OAR 137-30-015, public improvements having an estimated cost in excess of \$50,000 shall be advertised for bids in at least one trade newspaper of general state-wide circulation.

(2) **Prevailing Wage Rate Notice.** If the following conditions apply, the public agency shall include in the public notice a statement that the bidder shall comply with the requirements of the prevailing wage law in ORS 279.350:

(a) The bid must be for public works as defined in ORS 279.348(3) which includes construction, reconstruction, major renovation or painting of roads, highways, buildings, structures and improvements of all types;

(b) The contract price for the project exceeds \$10,000; and

(c) The project is not regulated under the Davis-Bacon Act (40 USC 276a). (ORS 279.357).

137-40-015 BID EVALUATION AND AWARD

Award of a public improvement contract shall be to the lowest responsible bidder on the basis of total bid price. If the bid includes unit prices and extensions for estimated quantities, the total bid price for the purpose of comparing bids will be the total sum computed from bid quantities and the unit prices entered thereon by the bidder with due adjustments being made for alternate items and any specified or authorized reductions, additions or changes. In case of conflict between a unit price and the corresponding extended amount, the unit price shall govern.

137-40-020 CONTRACT CANCELLATION PROCEDURES

(1) **Termination Due to Circumstances Beyond the Control of the Contractor (ORS 279.326, 279.328, 279.330, 279.332).**

(a) **Reasons for Termination.** The agency may, by written order or upon written request from the contractor, terminate the contract or a portion thereof if any of the following occur:

(i) The contractor is prevented from completing the work for reasons beyond the control of the public agency;

(ii) Completion of the project is beyond control of the contractor;

(iii) Or for any reason considered by the public agency to be in the public interest (other than a labor dispute or reason of any third party judicial proceeding relating to the work other than a suit or action filed in regards to a labor dispute). These reasons may include, but are not necessarily limited to, non-availability of materials, phenomenon of nature of catastrophic proportions or intensity, executive orders of the President related to national defense, congressional or state acts related to funding.

(b) **Payment When Contract is Terminated.** When the contract, or any portion thereof, is terminated before completion of all items of work in the contract, payment will be made for the actual items of work completed under the contract, or by mutual agreement, for items of work partially completed. No claim for loss of anticipated profits will be allowed.

(c) **Responsibility for Completed Work if Contract Terminated.** Termination of the contract or a portion thereof shall not relieve the contractor of responsibility for the work completed, nor shall it relieve the surety of its obligation for any just claims arising from the work performed.

(2) **Termination of Contract for Default (ORS 279.333).**

(a) If the contractor should persistently or repeatedly refuse to or fail to supply enough properly skilled workmen or proper materials for the efficient execution of the project, or should fail to make prompt payment to subcontractors for material or labor, or persistently disregard laws, ordinances or the instructions of the public agency, or otherwise be guilty of a substantial violation of any provision of the contract, then the public agency, without prejudice to any other right or remedy and after giving the

contractor or the surety seven (7) days' written notice, may terminate the employment of the contractor and take possession of the premises and of all materials, tools and appliances thereon as well as all other materials whether on the premises or not, on which the contractor has received partial payment. The public agency may finish the work by whatever method it may deem expedient.

(b) **Required Response to Declaration of Default.** If the above action is taken, the contractor or the surety shall provide the public agency with immediate and peaceful possession of all of the materials, tools and appliances located on the premises, as well as all other materials whether on the premises or not, on which the contractor has received any progress payment. Further, the contractor shall not be entitled to receive any further payment until the work is completed. On the completion of the work, determination shall be made by the public agency of the total amount the contractor would have been entitled to receive for the work, under the terms of the contract, had the contractor completed the work. If the difference between said total amount and the sum of all amounts previously paid to the contractor, which difference will hereinafter be called the "unpaid balance," exceeds the expense incurred by the public agency in completing the work, including expense for additional managerial and administrative services, such excess will be paid to the contractor, with the consent of the surety. If, instead, the expense incurred by the public agency exceeds the unpaid balance, the amount of the excess shall be paid to the public agency by the contractor or the surety.

(c) **Expense of Completion.** The expense incurred by the public agency shall be as determined and certified by the public agency.

(d) **Refusal to Perform.** In addition to and apart from the above-mentioned right of the public agency to terminate the employment of the contractor, the contract may be cancelled by the public agency for any willful failure or refusal on the part of the contractor to perform faithfully the contract according to all of its terms and conditions; however, in such event neither the contractor nor the surety shall be relieved from damages or losses suffered by the public agency on account of the contractor's breach of contract.

(e) **Remedies are Cumulative.** The public agency may, at its discretion, avail itself of any or all of the above rights or remedies and invoke any one of the above rights or remedies without prejudice or preclude the public agency from subsequently invoking any other right or remedy set forth above or elsewhere in the contract.

137-40-025 RETAINAGE (ORS 279.420, 279.575)

(1) **Retainage of Five Percent.** Unless the charter of the public agency contains provisions requiring retainage by the public agency of more than five percent of the contract price of the work completed, the amount to be retained from any given progress payment will be such that when added to the sum of amounts previously retained will equal not more than five percent of the value of completed work except if the contract work is 50 percent completed and the work is progressing satisfactorily, the retainage may be reduced or eliminated on the remaining progress payments. Any reduction or elimination of retainage shall be allowed only upon written application of the contractor, which application shall include written approval of the contractor's surety; except that when the contract work is 97 1/2 percent completed, the public agency may without application by the contractor, reduce the retained amount to 100 percent of the value of the contract work remaining to be done. If retainage has been reduced or eliminated, the public agency reserves the right in protecting its interests to reinstate at any time retainage from further progress payments.

(2) **Alternatives to Cash Retainage.** In lieu of cash retainage to be held by the agency, the contractor may select one of the following options:

(a) **Deposit of Securities.** The contractor may deposit bonds or securities with the agency or in any bank or trust company to be held for the benefit of the public agency. In such event, the public agency

shall reduce the retainage in an amount equal to the value of the bonds and securities. This reduction in retainage will be made in the progress payments made subsequent to the time the contractor deposits the bonds and securities.

The value of the bonds and securities will be determined periodically by the public agency and the amount retained on progress payments will be adjusted accordingly. The bonds and securities deposited by the contractor shall be fully assigned to the public agency or be payable to the public agency on demand and shall be of a character approved by the Director of the Department of General Services, including but not limited to the following:

- (i) Bills, certificates, notes or bonds of the United States.
- (ii) Other obligations of the United States or its agencies.
- (iii) Obligations of any corporation wholly owned by the Federal Government.
- (iv) Indebtedness of the Federal National Mortgage Association.
- (v) Time certificates of deposit or savings account passbooks issued by a commercial bank, savings and loan association, or mutual savings bank, duly authorized to do business in Oregon.
- (vi) Corporation bonds rated A or better by a recognized rating service.
- (vii) General obligation bonds of the State of Oregon or any political subdivision thereof.
- (viii) General obligation improvement warrants issued pursuant to ORS 287.502.
- (ix) Irrevocable letters of credit from a bank doing business in Oregon.

At the time the public agency determines that all requirements for the protection of the public agency's interest have been fulfilled, all bonds and securities deposited as above provided will be released to the contractor.

(b) **Deposit in Interest-Bearing Accounts.** Upon written request of the contractor, the public agency shall deposit any amounts withheld as retainage in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the public agency. Interest earned on such account shall accrue to the contractor.

(3) **Recovery of Costs.** If the public agency incurs additional costs as a result of the exercise of any of the options for retainage described herein, the public agency may recover such costs from the contractor by reduction of the final payment. As work on the contract progresses, the public agency shall, upon request, inform the contractor of all accrued costs.

Commentary

(1) When a contractor elects to deposit securities with a bank or trust company in lieu of retainage on public contracts, the securities will be held by the custodian in fully transferable form and under the control of the public agency.

(2) Non-negotiable securities so deposited shall have proper instruments attached to enable the public agency to effect transfer of title should the contractor be unable to fulfill the contract obligations.

(3) The custodian bank or trust company will issue a safekeeping receipt for the securities to the public agency. The receipt will describe the securities, the par value, the name of the contractor, and project number or other project identification.

(4) Unless otherwise mutually agreed, the value placed upon said securities shall be market value.

(5) Securities deposited in the manner described above will be released by the bank or trust company only upon the written instructions and authorization of the public agency.

(6) In lieu of the above, an escrow agreement mutually acceptable to the contractor and the public agency and the bank or trust company may be used.

137-40-030 PROGRESS PAYMENTS (ORS 279.575)

(1) **Request for Progress Payments.** At a regular time each month, the contractor shall, if required by the contract documents, submit to the public agency a request for payment based upon an estimate of the amount of work completed and of the value of such completed work. This request shall also include an estimate of the amount and value of acceptable material to be incorporated in the completed work which has been delivered and acceptably stored. Upon verification and approval of the public agency, the sum of these values will be referred to the "value of completed work." With these estimates as a base, a progress payment will be made to the contractor, which progress payment shall be equal to the value of completed work, less such amounts as may have been previously paid, less such other amounts as may be deductible or as may be owing and due to the public agency for any cause, and less an amount to be retained in protection of the public agency's interests.

(2) **Progress Payments Do Not Mean Acceptance of Work.** Progress payments shall not be construed as an acceptance or approval of any part of the work covered thereby, and they shall in no manner relieve the contractor of responsibility for defective workmanship or material.

(3) **Estimates for Progress Payments.** The estimates upon which progress payments are based are not represented to be accurate estimates, and all quantities shown therein are subject to correction in the final estimate. If the contractor uses such estimates as a basis for making payments to subcontractors, this is at the contractor's own risk, and the contractor shall bear all loss that may result.

137-40-035 FINAL INSPECTION (ORS 279.575(3))

(1) **Notification of Completion.** When the contractor determines that all construction work on the project has been completed, the contractor shall so notify the public agency in writing. The public agency shall make an inspection of the project and project records within 15 days of receiving said notice. If, at such inspection, all construction provided for and ordered under the contract is complete and satisfactory to the public agency, and all certifications, bills, forms and documents have been submitted properly, such inspection shall constitute the final inspection.

(2) **Instructions to Complete the Work.** If, however, at any inspection, any work in whole or in part is found unsatisfactory, or it is found that all certifications, bills, forms and documents have not been submitted properly, the public agency shall within 15 days provide instructions to the contractor on outstanding requirements to complete the project. At such time as the contractor determines full compliance with, and the execution of such instructions, the contractor shall notify the public agency in writing. The public agency shall make another inspection within 15 days after such notice and this inspection shall constitute the final inspection provided construction work has been completed satisfactorily.

(3) **Acknowledgment of Acceptance.** Upon satisfactory completion of all work required under the contract, the public agency shall acknowledge acceptance of the work in writing.

137-40-040 FINAL ESTIMATE AND FINAL PAYMENT (ORS 279.575(3))

(1) **Submission of Final Estimate.** As soon as practicable after final inspection of the work under the contract, if unit prices were applicable, the public agency shall prepare a final estimate of the quantities of the various classes of work performed. Following a determination of the total amount due the contractor, and following final acceptance of the work by the agency, final payment shall be made to the contractor.

(2) **Set-off of Prior Payments.** All prior partial estimates and payments shall be subject to correction in the final estimate and payment.

(3) **Interest.** Beginning 30 days after the date of final acceptance of the project by the public agency, the public agency shall pay to the contractor interest at the rate established by state statute on any money due and payable to the contractor.

137-40-045 CLAIMS FOR UNPAID LABOR OR SUPPLIES

(1) **Right of Action.** As provided in ORS 279.526 a person claiming to have supplied labor or materials for work on a public improvement contract let by the public agency for which the person has not been paid by the prime contractor or any subcontractor has a right of action on the contractor's bond, if a notice of such claim has been filed prior to the expiration of six (6) months following the acceptance of the work by the public agency.

(2) **Notice of Claim.** To initiate a claim against the contractor's bond, a person should file with the auditor or clerk of the public agency a Notice of Claim in the form and manner attached as Exhibit A (see page 21).

Any notice of claim should include the following information:

- (a) Name and address of the claimant;
- (b) Name of prime contractor;
- (c) Title of project and contract date;
- (d) Name of the public agency;
- (e) Name of bonding company (may be obtained from public agency).

(3) **Response to Notice of Claim.** Upon receipt of such Notice of Claim, the public agency shall:

- (a) Send acknowledgment to claimant;
- (b) Send copy of notice to contractor;
- (c) File copy of Notice with Secretary of State.
- (d) File copy of Notice with bonding (surety) company.

(4) **Referral to Surety Company.** If the contract has been completed and all funds disbursed to the prime contractor, the public agency shall refer all claims to the surety company for resolution. The public agency shall not arrange for second payments directly to subcontractors or suppliers for work already paid for by the public agency.

(5) **Discretionary Payment of Claim.** If the contract is still in force, the public body may, in accordance with ORS 279.314, pay a valid claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due to the contractor under the contract.

(6) **Liability for Claim.** If the public body chooses to make such a payment as provided in ORS 279.314, the contractor or the contractor's surety shall not be relieved from obligation with respect to any unpaid claims.

Commentary

One of the methods that may be utilized by a public agency in the event of unpaid materialmen and laborers, is to refer those claims to the surety for disposition. This procedure should be done with the consent of all parties. However, this will allow an expeditious manner of settling the validity of the claims, and avoid the situation where a public agency is ruling on whether a claim is valid without knowing the underlying circumstances regarding both delivery and performance of the subcontractor.

To: (insert name of the public body)

NOTICE IS HEREBY GIVEN that the undersigned, (insert name of subcontractor or supplier), a (corporation, partnership, sole proprietorship, etc.), as claimant, has a claim for (labor performed by the claimant, materials supplied by the claimant, etc.), generally consisting of (brief description) in the sum of \$_____ against the bond taken from (name of prime contractor), as principal, and (name of bonding company), as surety, for the construction of the (title of project) at (name of agency), (city), Oregon, said contract dated (insert date) by and between the public agency, as Agent of the State, and (name of prime contractor), as Contractor.

(Insert a brief description of the work concerning which the bond was taken.)

DATED this _____ day of _____, 19_____.

By _____
(claimant's name and title)

APPENDIX A
PROVISIONS OF THE OREGON CONSTITUTION
APPLICABLE TO PUBLIC CONTRACTS

ARTICLE I

Section 21. Ex-post facto laws; laws impairing contracts; laws depending on authorization in order to take effect; laws submitted to electors. No ex-post facto law, or law impairing the obligation of contracts shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution; provided, that laws locating the Capitol of the State, locating County Seats, and submitting town, and corporate acts, and other local, and Special laws may take effect, or not, upon a vote of the electors interested.-

ARTICLE XI

Section 6. State not to be stockholder in company; exception of gifts for higher education purposes. The state shall not subscribe to, or be interested in the stock of any company, association or corporation. However, as provided by law the state may hold and dispose of stock, including stock already received, that is donated or bequeathed; and may invest, in the stock of any company, association or corporation, any funds or moneys that:

- (1) Are donated or bequeathed for higher education purposes; or
- (2) Are the proceeds from the disposition of stock that is donated or bequeathed for higher education purposes, including stock already received; or
- (3) Are dividends paid with respect to stock that is donated or bequeathed for higher education purposes, including stock already received. [Constitution of 1859; Amendment proposed by H.J.R. No. 11, 1955, and adopted by people Nov. 6, 1956; Amendment proposed by H.J.R. 27, 1969, and adopted by people Nov. 3, 1970]

Section 7. Credit of State not to be loaned—limitation upon power of contracting debts. The Legislative Assembly shall not lend the credit of the state nor in any manner create any debt or liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of fifty thousand dollars, except in case of war or to repel invasion or suppress insurrection or to build and maintain permanent roads; and the Legislative Assembly shall not lend the credit of the state nor in any manner create any debts or liabilities to build and maintain permanent roads which shall singly or in the aggregate with previous debts or liabilities incurred for that purpose exceed one percent of the true cash value of all the property of the state taxed on an ad valorem basis; and every contract of indebtedness entered into or assumed by or on behalf of the state in violation of the provisions of this section shall be void and of no effect. This section does not apply to any agreement entered into pursuant to law by the state or any agency thereof for the lease of real property to the state or agency for any period not exceeding 20 years and for a public purpose. [Constitution of 1859; Amendment proposed by initiative petition filed July 2, 1912, and adopted by people Nov. 5, 1912; Amendment proposed by H.J.R. No. 11, 1920 (a.s.), and adopted by people May 21, 1920; Amendment proposed by S.J.R. No. 4, 1961, and adopted by people Nov. 6, 1962; Amendment proposed by S.J.R. 19, 1963, and adopted by people Nov. 3, 1964]

ARTICLE XII
STATE PRINTING

Section 1. State printing; State Printer. Laws may be enacted providing for the state printing and binding, and for the election or appointment of a state printer, who shall have had not less than ten years' experience in the art of printing. The state printer shall receive such compensation as may from time to time be provided by law. Until such laws shall be enacted the state printer shall be elected, and the printing done as heretofore provided by this constitution and the general laws. [Constitution of 1859; Amendment proposed by S.J.R. No. 1, 1901, and adopted by people June 6, 1904; Amendment proposed by initiative petition filed Feb. 3, 1906, and adopted by people June 4, 1906]

APPENDIX B
Chapter 279
1983 REPLACEMENT PART
Public Contracts and Purchasing

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PURCHASING AND BIDS AND BIDDING IN GENERAL

279.008 [Repealed by 1975 c.771 § 33]

279.010 [Repealed by 1975 c.771 § 33]

279.011 Definitions for ORS 279.011 to 279.061. As used in ORS 279.011 to 279.061:

- (1) "Board" means a local contract review board created pursuant to ORS 279.055.
- (2) "Department" means the Department of General Services.
- (3) "Director" means the Director of the Department of General Services.
- (4) "Public contract" means any purchase, lease or sale by a public agency of personal property, public improvements or services other than agreements which are for personal service.
- (5) "Public agency" or "public contracting agency" means any agency of the State of Oregon or any political subdivision thereof authorized by law to enter into public contracts and any public body created by intergovernmental agreement.
- (6) "Public improvement" means projects for construction, reconstruction or major renovation on real property by or for a public agency. "Public improvement" does not include emergency work, minor alteration, ordinary repair or maintenance necessary in order to preserve a public improvement. [1975 c.771 § 1; 1979 c.196 § 1; 1979 c.869 § 1a; 1981 c.54 § 1; 1983 c.690 § 2]

279.012 [Repealed by 1975 c.771 § 33]

279.013 [1975 c.771 § 2; 1977 c.456 § 1; 1979 c.195 § 1; 1981 c.466 § 1; 1981 c.528 § 5; 1981 c.712 § 1; repealed by 1983 c.690 § 28]

279.014 [Amended by 1967 c.202 § 1; 1973 c.42 § 1; repealed by 1975 c.771 § 33]

279.015 Competitive bidding; exemptions. (1) All public contracts shall be based upon competitive bids except:

- (a) Contracts made with other public agencies or the Federal Government;
 - (b) Contracts made with qualified nonprofit agencies providing employment opportunities for the handicapped;
 - (c) A public contract exempt under subsection (2) of this section;
 - (d) A contract for supplies, at the option of the contracting agency, may be excluded from the competitive bidding requirement if the value of the contract is less than \$2,500; and
 - (e) Insurance and service contracts as provided for under ORS 414.115, 414.125, 414.135 and 414.145.
- (2) The director or board may exempt certain public contracts or classes of public contracts from the requirements of subsection (1) of this section upon the following findings:
- (a) It is unlikely that such exemption will encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts; and
 - (b) The awarding of public contracts pursuant to the exemption will result in substantial cost savings to the public contracting agency. In making such finding, the director or board may consider the type, cost, amount of the contract, number of persons available to bid and such other factors as may be deemed appropriate.
- (3) A public contract also may be exempted from the requirements of subsection (1) of this section if:

(a) Emergency conditions require prompt execution of the contract; or

(b) In case of sale of surplus property by a public agency, the number, value and nature of the items to be sold make it probable that the cost of conducting a sale by competitive bid will be such that a liquidation sale will result in substantially greater net revenue to the public agency.

(4) The director or board shall adopt rules allowing the governing body of a public agency to declare that an emergency exists and establishing procedures for determining when the conditions in paragraph (b) of subsection (3) of this section are present. The rules shall prescribe that if an emergency is declared, any contract awarded under this subsection and paragraph (a) of subsection (3) of this section must be awarded within 60 days following declaration of the emergency, unless the director or board grants an extension.

(5) In granting exemptions pursuant to paragraphs (a) and (b) of subsection (2) of this section, the director or board shall, where appropriate, direct the use of alternate contracting and purchasing practices that take account of market realities and modern or innovative contracting and purchasing methods, which are also consistent with the public policy of encouraging competition. [1975 c.771 § 3; 1977 c.304 § 6; 1983 c.244 § 1; 1983 c.290 § 3a; 1983 c.590 § 10]

279.016 [Amended by 1971 c.481 § 1; repealed by 1975 c.771 § 33]

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

(2) The director or board may exempt certain products or classes of products from subsection (1) of this section upon any of the following findings:

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

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

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

(d) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies. [1975 c.771 § 4; 1983 c.690 § 4]

279.018 [Repealed by 1975 c.771 § 33]

279.019 Exemption procedure; appeal. (1) Exemptions granted by the director pursuant to ORS 279.015(2) or 279.017(2) constitute rulemaking and not contested cases under ORS 183.310 to 183.550. However, an exemption granted with regard to a specific contract shall be granted by order of the director, which order shall set forth findings supporting the decision of the director to grant or deny the request for exemption. Such order shall be reviewable pursuant to ORS 183.484 and shall not constitute a contested case order. Jurisdiction for review of the order shall be with the Circuit Court of Marion County. The court may award costs and attorney fees to the prevailing party.

(2) Any person except the public contracting agency or anyone representing it may bring a petition for a declaratory judgment to test the validity of any rule adopted by the director under ORS 279.015 and 279.017 in the manner provided in ORS 183.400.

(3) Any person except the public contracting agency or anyone representing it may bring an action for writ of review pursuant to ORS chapter 34 to test the validity of any exemption granted pursuant to ORS 279.015, 279.017 and 279.055 by a board. [1975 c.771 § 6; 1983 c.690 § 5]

279.020 [Repealed by 1975 c.771 § 33]

279.021 Preferences; foreign contractor. (1) In all public contracts, the public contracting agency shall prefer goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal.

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

(b) For purposes of this subsection, a foreign contractor is one who is not domiciled in or registered to do business in the State of Oregon. [1975 c.771 § 5]

279.022 [Repealed by 1975 c.771 § 33]

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

(2) Not less than 30 days prior to adoption of its budget for the subsequent budget period, each public agency shall prepare and file with the Commissioner of the Bureau of Labor and Industries a list of every public improvement known to the agency that the agency plans to fund in the budget period, identifying each improvement by name and estimating the total onsite construction costs. The list shall also contain a statement as to whether the agency intends to perform the construction by a private contractor. If the agency intends to perform construction work using the agency's own equipment and personnel on a project estimated to cost more than \$50,000, then the agency shall also show its decision conforms to the policy stated in subsection (1) of this section. The list is a public record and may be revised periodically by the agency.

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

(a) If the estimated cost exceeds \$50,000, the public agency shall prepare adequate plans and specifications and the estimated unit cost of each classification of work. The estimated cost of the work shall include a reasonable allowance for the cost, including investment cost, of any equipment used. As used in this paragraph, "adequate" means sufficient to control the performance of the work and to assure satisfactory quality of construction by the public agency personnel.

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

(4) Subsections (2) and (3) of this section do not apply to any public agency when the public improvement is to be used for the distribution or transmission of electric power. [1975 c.771 § 7; 1979 c.869 § 2; 1981 c.281 § 1]

279.024 [Repealed by 1975 c.771 § 33]

279.025 Requirements for advertisement for bids. (1) An advertisement for bids shall 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 public contracting agency may determine. If the contract is for a public improvement with an estimated cost in excess of \$50,000, the

advertisement for bids shall be published in at least one trade newspaper of general state-wide circulation. The director or board may, by rule, require an advertisement for bids to be published more than once or in one or more additional publications.

(2) All advertisements for bids shall state:

(a) If the contract is for a public work, that no bid will be received or considered by the public contracting agency unless the bid contains a statement by the bidder as a part of its bid that the provisions of ORS 279.350 are to be complied with;

(b) The date after which bids will not be received, which date shall be not less than five days after the date of the last publication of the advertisement;

(c) The date that prequalification applications must be filed under ORS 279.039(1) and the class or classes of work for which bidders must be prequalified if prequalification is a requirement;

(d) The character of the work to be done or the material or things to be purchased;

(e) The office where the specifications for the work, material or things may be seen;

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

(g) The date, time and place that the public contracting agency will publicly open the bids. [Formerly 279.065; 1977 c.289 § 1; 1979 c.282 § 1; 1983 c.690 § 6]

279.026 [Repealed by 1975 c.771 § 33]

279.027 Requirements for bids. (1) All bids made to the public contracting agency pursuant to ORS 279.015 and 279.025 shall be:

(a) In writing.

(b) Filed with the person designated for receipt of bids by the public contracting agency.

(c) Opened publicly by the public contracting agency at the time designated in the advertisement.

(2) After having been opened the bids shall be filed for public inspection.

(3) A surety bond, cashier's check, or certified check of the bidder shall be attached to all bids as bid security unless the contract for which the bid is submitted has been exempted from this requirement pursuant to ORS 279.033. Such security shall not exceed 10 percent of the amount bid for the contract. [Formerly 279.070]

279.028 Repealed by 1975 c.771 § 33]

279.029 Award of contract; bond; waiver of bond in case of emergency. (1) After the bids are opened as required by ORS 279.027, and after a determination is made that a contract is to be awarded, the public contracting agency shall award the contract to the lowest responsible bidder. "Lowest responsible bidder" means the lowest bidder who has substantially complied with all prescribed public bidding procedures and requirements and who has not been disqualified by the public contracting agency under ORS 279.037.

(2) The successful bidder shall:

(a) Promptly execute a formal contract.

(b) If the contract is for a public improvement, execute and deliver to the public contracting agency a good and sufficient bond, to be approved by the public contracting agency, in a sum equal to the contract price for the faithful performance of the contract. In lieu of a surety bond, the public contracting agency

may permit the successful bidder to submit a cashier's check or certified check in an amount equal to 100 percent of the contract price.

(3) In cases of emergency, or where the interest or property of the public contracting agency probably would suffer material injury by delay or other cause, the requirement of furnishing a good and sufficient bond for the faithful performance of any public contract may be excused, if a declaration of such emergency is made and concurred in by all members of the governing board of the public contracting agency. [Formerly 279.075; 1981 c.466 § 2]

279.030 [Amended by 1971 c.659 § 1; repealed by 1975 c.771 § 33]

279.031 Return or retention of bid security. Upon the execution of the contract and bond by the successful bidder, the bid security of the successful bidder shall be returned to the bidder. The bidder who is awarded a contract and who fails promptly and properly to execute the contract or bond shall forfeit the bid security that accompanied the successful bid. The bid security shall be taken and considered as liquidated damages and not as a penalty for failure of the bidder to execute the contract and bond. The bid security of unsuccessful bidders may be returned to them when the bids have been opened and the contract has been awarded, and shall not be retained by the public body after the contract has been duly signed. [Formerly 279.080; 1981 c.712 § 2]

279.032 [Repealed by 1975 c.771 § 33]

279.033 Exemption of contracts from bid security and bond. The director or board may exempt certain contracts or classes of contracts from the requirement for bid security and from the requirement that a good and sufficient bond be furnished to assure performance of the contract and payment of obligations incurred in the performance; provided, however, the public contracting agency may require bid security and a good and sufficient performance and payment bond even though the contract is of a class exempted by the director or board. [1975 c.771 § 11; 1983 c.690 § 7]

279.034 [Repealed by 1975 c.771 § 33]

279.035 Rejection of bids. The public contracting agency may reject any bid not in compliance with all prescribed public bidding procedures and requirements, and may reject all bids if in the judgment of the agency it is in the public interest to do so. In any case where competitive bids are required and all bids are rejected, and the proposed contract is not abandoned, new bids may be called for as in the first instance. [1975 c.771 § 12]

279.036 [Amended by 1969 c.607 § 1; repealed by 1975 c.771 § 33]

279.037 Disqualification of bidder. (1) A public contracting agency may disqualify any person as a bidder on a public contract if the agency finds:

(a) The person does not have sufficient financial ability to perform the contract. If a bond is required to insure performance of a contract, evidence that the person can acquire a surety bond in the amount and type required shall be sufficient to establish financial ability;

(b) The person does not have equipment available to perform the contract;

(c) The person does not have key personnel available of sufficient experience to perform the contract;
or

(d) The person has repeatedly breached contractual obligations to public and private contracting agencies.

(2) The public contracting agency may make such investigation as is necessary to determine whether

a person is qualified. If a bidder or prospective bidder fails to supply promptly information as requested by the public contracting agency pursuant to such investigation, such failure is grounds for disqualification.

(3) Any information voluntarily submitted by a bidder or prospective bidder pursuant to an investigation under subsection (2) of this section or in a prequalification statement required by ORS 279.039 or in a prequalification request submitted pursuant to ORS 279.041 shall be deemed a trade secret pursuant to ORS 192.500(1)(b) and (e) if requested by the person submitting the information. [1975 c.771 § 13; 1977 c.289 § 7]

279.038 [Repealed by 1975 c.771 § 33]

279.039 Prequalification of bidders; notification. (1) Any public contracting agency may adopt a rule, resolution, ordinance or other regulation requiring mandatory prequalification for all persons desiring to bid for public contracts that are to be let by the agency. The rule, resolution, ordinance or other regulation authorized by this section shall include the time for submitting prequalification applications and a general description of the type and nature of the contracts that may be let. The prequalification application shall be in writing on a standard form prescribed by the director.

(2) The public contracting agency shall within 30 days of the receipt of the prequalification application submitted pursuant to subsection (1) of this section, notify the prospective bidder if the prospective bidder is qualified or not, the nature and type of contracts that the prospective bidder is qualified to bid on and the time period for which the prequalification is valid. If the public contracting agency disqualifies the prospective bidder as to any contracts covered by the rule, resolution, ordinance or other regulation, the notice shall specify which subsections of ORS 279.037 the prospective bidder failed to comply with. Unless the reasons are specified, the bidder shall be deemed to have been prequalified in accordance with the application.

(3) If a public contracting agency subsequently discovers that a person heretofore 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; provided, however, that such revocation shall be invalid as to any contract for which an advertisement for bids has already been made under ORS 279.025. [1975 c.771 § 14; 1977 c.289 § 2; 1981 c.712 § 3; 1983 c.690 § 8]

279.040 [Repealed by 1975 c.771 § 33]

279.041 Application for prequalification; notification; investigation, revocation or revision. (1) When a public contracting agency permits or requires prequalification of bidders, a person who wishes to prequalify shall submit a prequalification application to the agency on a standard form prescribed by the director. Within 30 days after receipt of a prequalification application, the public contracting officer shall investigate the prospective bidder as necessary to determine if the prospective bidder is qualified. The determination shall be made in less than 30 days, if practical, if the prospective bidder requests an early decision to allow the bidder as much time as possible to prepare a bid on a contract that has been advertised. In making its determination, the agency shall only disqualify a person in accordance with ORS 279.037. It shall promptly notify the person whether or not that person is qualified.

(2) If the agency finds that a prospective bidder is qualified, the notice shall state the nature and type of contracts that the person is qualified to bid on and the period of time for which the qualification is valid under the rule, resolution, ordinance or other regulation. If the agency disqualifies a prospective bidder as to any contracts covered by the rule, resolution, ordinance or other regulation, the notice shall specify the reasons found under ORS 279.037 for the disqualification and inform the person of the right to a hearing under ORS 279.043 and 279.045.

(3) If a public contracting agency has reasonable cause to believe that there has been a substantial

change in the conditions of a prequalified person and that the person is no longer qualified or is less qualified, the agency may revoke or may revise and reissue the prequalification after reasonable notice to the prequalified person. The notice shall state the reasons found under ORS 279.037 for revocation or revision of the prequalification of the person and inform the person of the right to a hearing under ORS 279.043 and 279.045. A revocation or revision does not apply to any contract for which publication of advertisement for bids, in accordance with ORS 279.025, commenced prior to the date the notice of revocation or revision was received by the prequalified person. [1975 c.771 § 15; 1977 c.289 § 3; 1981 c.712 § 4; 1983 c.690 § 9]

279.042 [Repealed by 1975 c.771 § 33]

279.043 Appeal of disqualification. Any person who wishes to appeal disqualification as a bidder shall, within three business days after receipt of notice of disqualification, notify the public contracting agency that the person appeals the disqualification. Immediately upon receipt of such notice of appeal, a public contracting agency which is an agency of the State of Oregon shall notify the director. If the public contracting agency is a political subdivision of the state or a public body created by intergovernmental agreement, it shall notify the appropriate board. [1975 c.771 § 17; 1977 c.289 § 4; 1983 c.690 § 10]

279.045 Appeal procedure; hearing; costs; judicial review. (1) The procedure for appeal from a disqualification by a public contracting agency shall be in accordance with this section and is not subject to ORS 183.310 to 183.550 except where specifically provided by this section.

(2) Promptly upon receipt of notice of appeal from a public contracting agency as provided for by ORS 279.043, the director or board shall notify the person appealing and the public contracting agency of the time and place of the hearing. The director or board shall conduct the hearing and decide the appeal within 10 days after receiving the notification from the public contracting agency. The director or board shall set forth in writing the reasons for the decision.

(3) In the hearing the director or board shall consider de novo the notice of disqualification, the record of the investigation made by the public contracting agency and any evidence provided by the parties. In all other respects, hearings before the director shall be conducted in the same manner as a contested case under ORS 183.415(3) to (6) and (8), 183.425, 183.440 and 183.450. Hearings before a board shall be conducted under rules of procedure adopted by the board.

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

(a) If the decision to disqualify a person as a bidder is upheld, the director's costs shall be paid by the person appealing the disqualification.

(b) If the decision to disqualify a person as a bidder is reversed by the director, the director's costs shall be paid by the public contracting agency whose disqualification decision is the subject of the appeal.

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

(a) The decision was procured by corruption, fraud or undue means.

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

members.

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

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

(7) The circuit court may, in its discretion, stay the letting of the contract which is the subject of the petition in the same manner as a suit in equity. In the event the court determines that there has been an improper disqualification and the contract has been let, the court may proceed to take evidence to determine the damages, if any, suffered by the petitioner and award such damages as the court may find as a judgment against the director or board. The court may award costs and attorney fees to the prevailing party. [1975 c.771 § 18; 1977 c.289 § 5; 1983 c.690 § 11]

279.046 [Repealed by 1975 c.771 § 33]

279.047 Effect of prequalification by Department of Transportation or General Services. If a person is prequalified with the Department of Transportation to perform contracts, or with the Department of General Services to perform contracts, that person is rebuttably presumed qualified with any other public contracting agency for the same kind of work. When qualifying for the same kind of work with another public contracting agency, that person may submit proof of such prequalification in lieu of a prequalification application as required by ORS 279.039(1) or as a request for prequalification under ORS 279.041(1). [1975 c.771 § 16; 1977 c.289 § 6]

279.048 [Repealed by 1975 c.771 § 33]

279.049 Model rules. The Attorney General shall prepare and maintain model rules of procedure appropriate for use by all public contracting agencies governing bid procedures, advertisements, the awarding of bids, retainage, claims, liens, bid security, payment and performance bonds and other matters involving public contracts, and may devise and publish forms for use therewith. Before adopting or amending any such rule, the Attorney General shall consult with the director, the Director of Transportation, representatives of county governments, representatives of city governments, representatives of school boards and other knowledgeable persons. [1975 c.771 § 26; 1983 c.690 § 12]

279.050 [Amended by 1969 c.349 § 1; 1971 c.180 § 1; repealed by 1975 c.771 § 33]

279.051 Personal services contracts; procedures. (1) Public agencies may enter into contracts for personal services. The provisions of this section do not relieve the agency of the duty to comply with ORS 291.021 or applicable city or county charter provisions. Each public agency shall create procedures for the screening and selection of persons to perform personal services.

(2) The director or board by ordinance, resolution, administrative rule or other regulation may designate certain service contracts or classes of service contracts as personal service contracts. [1975 c.771 § 27; 1979 c.196 § 2; 1981 c.766 § 1; 1983 c.690 § 13]

279.052 [Repealed by 1975 c.771 § 33]

279.053 Laws not to prohibit participation in affirmative action projects; authority to limit bidding for affirmative action purposes. (1) No provision contained in chapter 771, Oregon Laws 1975, shall be construed to prohibit any public contracting body from engaging in bidding and contracting practices designed to accomplish affirmative action goals for disadvantaged or minority groups.

(2) In carrying out the policy of affirmative action, by appropriate ordinance, resolution or admin-

istrative rule, a public contracting body may limit competitive bidding on a public contract estimated to cost \$50,000 or less to contracting entities owned or controlled by persons described in subsection (3) of this section.

(3) As used in this section "affirmative action" is a program designed to insure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age or physical or mental handicap. [1975 c.771 § 32; 1981 c.325 § 4]

279.054 [Repealed by 1975 c.771 § 33]

279.055 Local contract review board; creation; power. (1) Every county by ordinance may create a local contract review board for the county. The board so created may consist of the governing body of the county or at least three persons appointed by and serving at the pleasure of that governing body.

(2) Any other local public agency having a governing body may adopt a resolution or ordinance creating its governing body as a local contract review board for that public agency. The local public agency shall file a copy of the resolution or ordinance with the county governing body. The board created by the local public agency shall not exercise its powers under subsection (4) of this section until the resolution or ordinance has been filed pursuant to this subsection.

(3) A county board created pursuant to subsection (1) of this section shall serve as the local contract review board for local public agencies that do not create their own boards pursuant to subsection (2) of this section, and that have their principal administrative offices within the county. The county board may impose fees on local public agencies that it serves under this subsection if the ordinance creating the county board authorized such fees. The fees shall be prescribed by rule adopted under subsection (5) of this section and shall be calculated to reimburse the county for its costs in serving the local public agencies.

(4) Except as provided in ORS 279.019(1) and (2) and the authority to prescribe the standard prequalification application forms in ORS 279.039(1), boards created under this section shall have all the powers granted the department and director under ORS 279.011 to 279.061. The board shall exercise such powers only after it has adopted rules pursuant to the requirements of subsection (5) of this section.

(5) Each board created under this section shall have rulemaking authority to carry out the powers and duties of the board under ORS 279.011 to 279.061. The rules shall be adopted in the manner prescribed in the resolution or ordinance creating the board.

(6) A local public agency, other than a county, by resolution or ordinance may rescind its action to create a local contract review board. The rescission shall take effect on the date a copy of the resolution or ordinance is filed with the county governing body or on the date stated therein, whichever is the later date. After the date of filing or the date specified, the county board, created pursuant to subsection (1) of this section, shall serve as the local contract review board for the public agency.

(7) Notwithstanding subsection (3) of this section, a local public agency may contract with another public agency to serve as its local contract review board with the powers and duties the local board has over contracts of its own local public agency. Notice of the contract and of its termination shall be given to the county in the same manner as notice is given to the county under subsections (2) and (6) of this section. [1975 c.771 § 34(2); 1979 c.647 § 1; 1979 c.804 § 6; 1983 c.690 § 14]

279.056 When federal law and rules prevail over ORS 279.011 to 279.061. Notwithstanding any provision of ORS 279.011 to 279.061, the applicable federal laws, rules and regulations shall govern in any case where federal funds are involved and the federal laws, rules and regulations conflict with any of the provisions of ORS 279.011 to 279.061 or require additional conditions in public contracts not authorized by ORS 279.011 to 279.061. [1979 c.504 § 2]

279.060 [1969 c.522 § 2; repealed by 1975 c.771 § 33]

279.061 Limitation on public agency constructing public improvement. If a public agency fails to adopt and apply a cost accounting system that substantially complies with the model cost accounting guidelines developed by the Executive Department pursuant to section 3, chapter 869, Oregon Laws 1979, as determined by an accountant qualified to perform audits required by ORS 297.210 and 297.405 to 297.555 (Municipal Audit Law), the public agency shall not construct a public improvement with its own equipment or personnel if the cost is in excess of \$5,000. [1981 c.281 § 2]

279.065 [1969 c.522 § 3; 1975 c.771 § 8; renumbered 279.025]

279.067 Suit by adversely affected bidder. Any bidder adversely affected may commence a suit in the circuit court for the county in which are located the principal offices of the local contract review board or the local government agency, for the purpose of requiring compliance with, or prevention of violations of, ORS 279.011 to 279.061, or to determine the applicability of ORS 279.011 to 279.061 to matters or decisions of the board or agency. The court may order such equitable relief as it considers appropriate in the circumstances. A decision of the local contract review board or the local government agency shall not be voided if other equitable relief is available. The court may order payment of reasonable attorney fees and costs to a successful party in a suit brought under this section. [1983 c.690 § 27]

279.070 [1969 c.522 § 4; 1971 c.659 § 2; 1975 c.771 § 9; renumbered 279.027]

279.075 [1969 c.522 § 5; 1975 c.771 § 10; renumbered 279.029]

279.080 [1969 c.522 § 6; renumbered 279.031]

279.085 [1969 c.522 § 7; repealed by 1975 c.771 § 33]

279.090 [1969 c.522 § 8; repealed by 1975 c.771 § 33]

PUBLIC CONTRACTS GENERALLY

279.310 Definitions for ORS 279.310 to 279.320. When used in ORS 279.310 to 279.320, unless the context otherwise requires:

(1) "Public contract" means a contract made with the state, county, school district, municipality, municipal corporation or subdivision thereof.

(2) "Person" includes the State Accident Insurance Fund Corporation and the Department of Revenue.

(3) "Public improvement" has the meaning given that term by ORS 279.011. [Amended by 1953 c.131 § 3; 1973 c.523 § 1; 1983 c.740 § 76]

279.312 Conditions of public contracts concerning payment of laborers and materialmen, contributions to Industrial Accident Fund, liens and withholding taxes. Every public contract shall contain a condition that the contractor shall:

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

(2) Pay all contributions or amounts due the Industrial Accident Fund from such 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, 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 employes pursuant to ORS

316.167. [Amended by 1953 c.131 § 3; 1957 c.586 § 14; 1965 c.26 § 1; 1969 c.493 § 76]

279.314 Condition concerning payment of claims by public officers. (1) Every public contract shall also contain a clause or condition that, if the contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to the contractor or a subcontractor by any person in connection with the public contract as such claim becomes due, the proper officer or officers representing the state, county, school district, municipality, municipal corporation or subdivision thereof, as the case may be, may pay such claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due the contractor by reason of such contract.

(2) The payment of a claim in the manner authorized in this section shall not relieve the contractor or the contractor's surety from obligation with respect to any unpaid claims. [Amended by 1981 c.712 § 5]

279.316 Condition concerning hours of labor. Every public contract shall, also contain a condition that no person shall be employed for more than eight hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency, or where the public policy absolutely requires it, and in such cases the laborer shall be paid at least time and a half pay for all overtime in excess of eight hours a day and for work performed on Saturday and on any legal holiday specified in ORS 279.334. [Amended by 1967 c.167 § 1; 1979 c.5 § 1]

279.318 Provisions relating to environmental and natural resources laws and rules; change orders. A public contract for a public improvement shall make specific reference to federal, state and local agencies that have enacted ordinances or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that affect the performance of the contract. If the successful bidder is delayed or must undertake additional work by reason of existing regulations or ordinances of agencies not cited in the public contract or due to the enactment of new or the amendment of existing statutes, ordinances or regulations relating to the prevention of environmental pollution and the preservation of natural resources occurring after the submission of the successful bid, the awarding agency shall grant a time extension and issue a change order setting forth the additional work that must be undertaken. The change order shall not invalidate the contract and there shall be, in addition to a reasonable extension of the contract time, a reasonable adjustment in the contract price to compensate the successful bidder for all costs and expenses incurred, including overhead and profits, as a result of such delay or additional work. [Amended by 1973 c.523 § 2; 1975 c.771 § 19]

279.320 Condition concerning payment for medical care and attention to employes. Every public contract shall also 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 or other needed care and attention, incident to sickness or injury, to the employes of such contractor, of all sums which the contractor agrees to pay for such services and all moneys and sums which the contractor collected or deducted from the wages of employes pursuant to any law, contract or agreement for the purpose of providing or paying for such service. [Amended by 1967 c.359 § 687; 1981 c.712 § 6]

279.324 Definitions for ORS 279.324 to 279.332. As used in ORS 279.324 to 279.332 "labor dispute" means a labor dispute as defined in ORS 662.010. [Amended by 1973 c.738 § 1; 1975 c.771 § 20]

279.326 Agreement to terminate contract. The public body and the contractor that are parties to a public contract may agree to terminate the contract:

(1) If work under the contract is suspended by an order of a public agency for any reason considered to be in the public interest other than by a labor dispute or by reason of any third party judicial proceeding relating to the work other than a suit or action filed in regards to a labor dispute; and

(2) If the circumstances or conditions are such that it is impracticable within a reasonable time to

proceed with a substantial portion of the public works. [Amended by 1973 c.738 § 2]

279.328 Extension and compensation when work suspended in certain cases. If work under a contract is suspended pursuant to ORS 279.326(1), and is not the result of a labor dispute but the contract is not terminated, the contractor is entitled to a reasonable extension of the contract time and reasonable compensation for all costs resulting from the suspension plus a reasonable allowance for overhead with respect to such costs. [Amended by 1973 c.738 § 3]

279.330 Compensation when contract terminated. In the event of termination of a public contract pursuant to ORS 279.326, provision shall be made for the payment of compensation to the contractor. In addition to a reasonable amount of compensation for preparatory work and for all costs and expenses arising out of termination, the amount to be paid to the contractor:

- (1) Shall be determined on the basis of the contract price in the case of any fully completed separate item or portion of the work for which there is a separate or unit contract price; and
- (2) May, with respect to any other work, be a percent of the contract price equal to the percentage of the work completed. [Amended by 1973 c.738 § 4]

279.332 Contractual provisions for compensation when contract terminated due to public interest. Any public body may provide in any public works contract detailed provisions under which the contractor shall be entitled, as a matter of right, to compensation upon termination of the contract on account of any reason considered to be in the public interest. [Amended by 1973 c.738 § 5]

279.333 Application of ORS 279.324 to 279.330. ORS 279.324 to 279.330 shall not apply to suspension of the work or termination of the contract which occur as a result of the contractor's violation of federal, state or local statutes, ordinances, rules or regulations in existence at the time the contract was executed or as a result of violations of the terms of the contract. [1973 c.738 § 6]

279.334 Maximum hours of labor on public contracts; holidays; exceptions; liability to workers. (1) In all cases where labor is employed by the state, county, school district, municipality, municipal corporation, or subdivision, through a contractor, no person shall be required or permitted to labor more than eight hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency, or where the public policy absolutely requires it, in which event, the person or persons so employed for excessive hours shall receive at least time and a half pay for all overtime in excess of eight hours a day, and for 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) For the purpose of this section, each time a 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 holiday listed in subsection (1) of this section falls on Saturday, the preceding Friday shall be recognized as a legal holiday.

- (3) Subsections (1) and (2) of this section do not apply to a contract for a public improvement if the

contractor is a party to a collective bargaining agreement in effect with any labor organization.

(4) When specifically agreed to under a written labor-management negotiated labor agreement, a laborer 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 shall not apply to 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.

(6) Any contractor or subcontractor or contractor's or subcontractor's surety who violates the provisions of subsection (1) of this section shall be liable to the employes affected in the amount of their unpaid overtime wages and in an additional amount equal to the unpaid overtime wages as liquidated damages.

(7) An action to enforce liability to workers under subsection (6) of this section may be brought as an action on the contractor's bond as provided for in ORS 279.536. [Amended by 1963 c.241 § 1; 1967 c.167 § 2; 1979 c.5 § 2; 1981 c.281 § 4; 1983 c.264 § 1]

279.336 Time limitation on claim for overtime; posting of circular by contractor. Where labor is employed by the state, county, school district, municipality, municipal corporation or subdivision, through another as a contractor, any worker employed by the contractor shall be foreclosed from the right to collect for any overtime provided in ORS 279.334 unless a claim for payment is filed with the contractor within 90 days from the completion of the contract, providing the contractor has:

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

(2) Maintained such circular continuously posted from the inception to the completion of the contract on which workers are or have been employed. [Amended by 1981 c.712 § 7]

279.338 Length of day's labor on public works. (1) Eight hours shall constitute a day's labor in all cases where the state, county, school district, or any municipality, municipal corporation or subdivision is the employer of labor, either directly or indirectly, by contract with another.

(2) This section does not apply to the employment by any contractor of work for the state, county, school district, or any municipality, municipal corporation, or subdivision thereof, of lead persons, security personnel and timekeepers paid on monthly rate. [Amended by 1981 c.712 § 8]

279.340 Overtime for labor directly employed by local governments. Labor directly employed by a county, municipality, municipal corporation, school district or subdivision shall be allowed overtime as follows:

(1) Overtime shall be compensated, if budgeted funds for such purpose are available, for overtime worked in excess of eight hours in any one day or 40 hours in any one week, at not less than one and one-half times the regular rate of such employment. If budgeted funds are not available for the payment of overtime, such overtime shall be allowed in compensatory time off at not less than time and a half for employment in excess of eight hours in any one day or 40 hours in any one week.

(2) Notwithstanding the provisions of subsection (1) of this section, if a county, municipality, municipal corporation, school district or subdivision adopts a 10-hour day and a four-day week for any of its laborers, such laborers shall be allowed overtime compensation for employment in excess of 10 hours in any one day. [Amended by 1973 c.418 § 1]

279.342 Exceptions to ORS 279.340. The provisions of ORS 279.340 relating to pay for overtime shall not apply to:

- (1) Labor employed in forest fire fighting.
- (2) Employes of any irrigation system district actually engaged in the distribution of water for irrigation or domestic use.
- (3) Fire or police protection personnel employed by any fire or police department of any municipal corporation.
- (4) Employment less than 10 hours in any one day where labor is directly employed on a four-day workweek.
- (5) Employes exempted from overtime:
 - (a) By a county, municipality, municipal corporation, school district or subdivision because of the executive, administrative, supervisory or professional nature of their employment as the nature of such employment is defined by rule of the Commissioner of the Bureau of Labor and Industries; or
 - (b) By a collective bargaining agreement expressly waiving application of ORS 279.340.
- (6) Employes of a county, city, municipal corporation or other political subdivision engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises if, before performance of the work and pursuant to an agreement between the employer and employe or between the employer and the bargaining representative of the employes when the employes are represented under a collective bargaining agreement, a work period of 14 consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for the employe's employment in excess of eight hours in any workday and in excess of 80 hours in such 14-day period, the employe receives compensation at a rate not less than one and one-half times the rate at which the employe is employed. [Amended by 1953 c.579 § 3; 1955 c.510 § 1; 1967 c.67 § 1; 1973 c.460 § 1; 1975 c.770 § 1; 1977 c.388 § 1; 1981 c.361 § 3; 1983 c.699 § 4]

279.344 [Repealed by 1953 c.577 § 2]

279.346 [Repealed by 1953 c.577 § 2]

279.348 Definitions for ORS 279.348 to 279.363. As used in ORS 279.348 to 279.365, unless the context requires otherwise:

(1) "Prevailing rate of wage" means the rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality to the majority of workers employed on projects of similar character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries. In making such determinations, the commissioner may take into consideration findings of an appropriate federal agency which determines prevailing wages and bargaining agreements in force in the locality for particular trades or occupations. If there is not a majority in the same trade or occupation paid at the same rate, the average rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality to workers in the same trade or occupation shall be the prevailing rate. If the wage paid by any contractor or subcontractor to workers on any public work is based on some period of time other than an hour, the hourly wage shall be mathematically determined by the number of hours worked in that period of time. If it appears to the commissioner data necessary to determine the prevailing rate of wage in a locality is not available or is not sufficient, the Commissioner of the Bureau of Labor and Industries may adopt the prevailing rate of wage as determined by the Secretary of Labor of the United States.

(2) "Locality" means the following district in which the public work, or the major portion thereof, is to be performed:

- (a) District 1, composed of Clatsop, Columbia and Tillamook Counties;
- (b) District 2, composed of Clackamas, Multnomah and Washington Counties;
- (c) District 3, composed of Marion, Polk and Yamhill Counties;
- (d) District 4, composed of Benton, Lincoln and Linn Counties;
- (e) District 5, composed of Lane County;
- (f) District 6, composed of Douglas County;
- (g) District 7, composed of Coos and Curry Counties;
- (h) District 8, composed of Jackson and Josephine Counties;
- (i) District 9, composed of Hood River, Sherman and Wasco Counties;
- (j) District 10, composed of Crook, Deschutes and Jefferson Counties;
- (k) District 11, composed of Klamath and Lake Counties;
- (L) District 12, composed of Gilliam, Grant, Morrow, Umatilla and Wheeler Counties;
- (m) District 13, composed of Baker, Union and Wallowa Counties; and
- (n) District 14, composed of Harney and Malheur Counties.

(3) "Public works" includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on by any public agency to serve the interest of the general public.

(4) "Fringe benefits" means the amount of:

(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a plan, fund or program; and

(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed in writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state or local law to provide any of such benefits.

(5) "Public agency" means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter. [1959 c.627 § 1; 1969 c.369 § 1; subsection (4) enacted as 1969 c.369 § 3; subsection (5) enacted as 1969 c.369 § 4; 1977 c.797 § 1; 1979 c.282 § 2; 1981 c.712 § 9; 1983 c.710 § 1]

279.350 Workers on public works to be paid not less than prevailing rate of wage; posting of rates. (1) The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor is performed. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash, by the making of

contributions of a type referred to in ORS 279.348(4)(a), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in ORS 279.348(4)(b), or any combination thereof, where the aggregate of any such payments, contributions and costs is not less than the prevailing rate of wage.

(2) After a contract for a public works is executed with any contractor or work is commenced upon any public works, the amount of the prevailing rate of wage shall not be subject to attack in any legal proceeding by any contractor or subcontractor in connection with that contract.

(3) It shall not be a defense in any legal proceeding that the prevailing rate of wage is less than the amount required to be in the specifications of a contract for public works, or that there was an agreement between the employe and the employer to work at less than the wage rates required to be paid under this section.

(4) Every contractor or subcontractor engaged on a project for which there is a contract for a public work shall keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project. Contractors and subcontractors shall be furnished copies of these wage rates by the commissioner without charge. [1959 c.627 § 2; 1977 c.797 § 2; 1981 c.712 § 19; 1983 c.264 § 2; 1983 c.710 § 2]

279.352 Provision in contract for minimum rate of wage. The specifications for every contract for a public work shall contain a provision stating the existing prevailing rate of wage which may be paid to workers in each trade or occupation required for such public work employed in the performance of the contract either by the contractor or subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract, and the contract shall contain a provision that such workers shall be paid not less than such specified minimum hourly rate of wage. [1959 c.627 §§ 3, 4; 1965 c.449 § 1; 1977 c.797 § 3; 1979 c.282 § 3; 1983 c.710 § 3]

279.354 Certification of rate of wage by contractor or subcontractor. (1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract, which certificate and statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor or subcontractor's knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.

(2) Each certified statement required by subsection (1) of this section shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. A true copy of the certified statements shall also be filed at the same time with the Commissioner of the Bureau of Labor and Industries. Certified statements shall be submitted as follows:

(a) For any project 90 days or less from the date of award of the contract to the date of completion of work under the contract, the statements shall be submitted once before the first payment and once before final payment is made of any sum due on account of a contract for a public work.

(b) For any project exceeding 90 days from the date of award of the contract to the date of completion of work under the contract, the statements shall be submitted once before the first payment is made, at 90-

day intervals thereafter, and once before final payment is made of any sum due on account of a contract for a public work.

(3) Each contractor or subcontractor shall preserve the certified statements for a period of three years from the date of completion of the contract. [1959 c.627 § 5; 1967 c.207 § 1; 1977 c.797 § 4; 1981 c.712 § 12; 1983 c.710 § 4]

279.355 Inspection to determine whether prevailing rate of wage being paid; proceedings to require payment of prevailing rate or overtime. (1) At any reasonable time the Commissioner of the Bureau of Labor and Industries may enter the office or business establishment of any contractor or subcontractor performing public works, and gather facts and information necessary to determine if the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works.

(2) Every contractor or subcontractor performing work on public works shall make available to the commissioner for inspection during normal business hours and, upon request made a reasonable time in advance, any payroll or other records in the possession or under the control of the contractor or subcontractor that are deemed necessary by the commissioner to determine if the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works.

(3) Notwithstanding ORS 192.410 to 192.500, any record obtained or made by the commissioner under this section shall not be open to inspection by the public.

(4) The Commissioner of the Bureau of Labor and Industries may, without necessity of an assignment, initiate legal proceedings against employers to enjoin future failures to pay required prevailing wages or overtime pay and to require the payment of prevailing wages or overtime pay due employees. The commissioner is entitled to recover, in addition to other costs, such sum as the court or judge may adjudge reasonable as attorney fees. If the commissioner does not prevail in such action, the commissioner shall pay all costs and disbursements from the Bureau of Labor and Industries Account. [1969 c.369 § 5; 1981 c.712 § 13]

279.356 Liability for violations. (1) Any contractor or subcontractor or contractor's or subcontractor's surety who violates the provisions of ORS 279.350 shall be liable to the workers affected in the amount of their unpaid minimum wages, including all fringe benefits under ORS 279.348(4), and in an additional amount equal to said unpaid wages as liquidated damages.

(2) Actions to enforce liability to workers under subsection (1) of this section may be brought as actions on contractors' bonds as provided for in ORS 279.536.

(3) If the public agency fails to include the provision required by ORS 279.352 in a public works contract, the liability for unpaid minimum wages, as described in subsection (1) of this section, shall be exclusively that of the public contracting agency. The Commissioner of the Bureau of Labor and Industries may enforce the provisions of this subsection by a civil action under ORS 279.355(4), by a civil action on an assigned wage claim under ORS 652.330, or by an administrative proceeding on an assigned wage claim under ORS 652.332. [1959 c.627 §§ 6, 7; 1969 c.369 § 6; 1981 c.712 § 14; 1983 c.264 § 4; 1983 c.711 § 3]

279.357 Exemptions. ORS 279.348 to 279.365 do not apply to:

(1) Projects for which the contract price does not exceed \$10,000.

(2) Projects regulated under the Davis-Bacon Act (40 U.S.C. 276a). [1977 c.797 § 8; 1981 c.712 § 15; 1983 c.710 § 5]

NOTE: 279.357 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 279 or any

series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

279.358 [1975 c.772 § 5; renumbered 279.400]

279.359 Determination of prevailing rate of wage; providing commissioner with information. (1) The Commissioner of the Bureau of Labor and Industries shall determine the prevailing rate of wage for workers in each trade or occupation in each locality under ORS 279.348 at least once each year and make this information available. The commissioner may amend the rate at any time.

(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

(3) Notwithstanding ORS 192.410 to 192.500, all information or records provided to the commissioner under this section are confidential and not available for inspection by the public.

(4) As used in this section, "person" includes any employer, labor organization or any official representative of an employe or employer association. [1977 c.797 § 7; 1983 c.710 § 6]

279.360 [1955 c.563 § 1; 1963 c.136 § 2; 1963 c.482 § 1; 1971 c.743 § 349; repealed by 1975 c.771 § 33]

279.361 Ineligibility for public contracts for failure to pay or post prevailing rate of wage; payroll reports to commissioner. (1) When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS 183.310 to 183.550, determines that a contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works, or has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4), the contractor, subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest shall be ineligible for a period not to exceed three years from the date of publication of the name of the contractor or subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. The commissioner shall maintain a written list of the names of those contractors and subcontractors determined to be ineligible under this section and the period of time for which they are ineligible. A copy of the list shall be published, furnished upon request and made available to contracting agencies.

(2) When the contractor or subcontractor is a corporation, the provisions of subsection (1) of this section shall apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing rate of wage.

(3) For good cause shown, the Commissioner of the Bureau of Labor and Industries may direct the removal of the name of that contractor or subcontractor from the ineligible list.

(4) To assist the Commissioner of the Bureau of Labor and Industries in determining if the contractor or subcontractor is paying the prevailing rate of wage, when a prevailing wage rate claim is filed, a contractor or subcontractor required to pay the prevailing rate of wage to workers employed upon public works under ORS chapter 279 shall send a certified copy of the payroll for those workers when the commissioner requests the certified copy. [1977 c.797 § 6; 1983 c.710 § 7]

279.362 [1955 c.563 § 2; 1959 c.414 § 1; repealed by 1975 c.773 § 1]

279.363 Notifying commissioner of contract. Public contracting agencies shall notify the Commissioner of the Bureau of Labor and Industries in writing, on a form prescribed by the commissioner, whenever a contract subject to the provisions of ORS 279.348 to 279.365 has been awarded. This

notification shall be made within 30 days of the date that such contract is awarded. [1981 c.712 § 11]

279.365 Civil action to enforce payment of prevailing wage. (1) The Commissioner of the Bureau of Labor and Industries or any other person may bring a civil action in any court of competent jurisdiction to require a public agency under a public contract with a contractor to withhold twice the wages in dispute if it is shown that the contractor or subcontractor on the contract has intentionally failed or refused to pay the prevailing rate of wage to workers employed on that contract and to require the contractor to pay the prevailing rate of wage and any deficiencies that can be shown to exist because of improper wage payments already made. In addition to other relief, the court may also enjoin any such contractor or subcontractor from committing future violations. The contractor or subcontractor involved shall be named as a party in all civil actions brought under this section. In addition to other costs, the court may award the prevailing party a reasonable attorney fee at the trial and on appeal. However, no attorney fee may be awarded against the Commissioner of the Bureau of Labor and Industries under this section.

(2) The court shall require any party, other than the Commissioner of the Bureau of Labor and Industries, that brings a civil action under this section to post a bond sufficient to cover the estimated attorney fees and costs to the public agency and to the contractor or subcontractor of any temporary restraining order, preliminary injunction or permanent injunction awarded in the action, in the event that the party bringing the action does not ultimately prevail.

(3) In addition to any other relief, the court in a civil action brought under this section may enjoin the public agency from contracting with the contractor or subcontractor if the court finds that the Commissioner of the Bureau of Labor and Industries would be entitled to place the contractor or subcontractor on the ineligible list established under ORS 279.361(1). If the court issues such an injunction, the commissioner shall place the contractor or subcontractor on the list for a period of three years, subject to the provision of ORS 279.361(2).

(4) "Public agency" has the meaning given the term in ORS 279.011. [1983 c.711 § 2]

279.400 Withholding of retainage. (1) The withholding of retainage by a contractor or subcontractor on public contracts for public improvements shall be in accordance with ORS 701.420 and 701.430 except when the charter of the public agency that is a party to a public contract contains provisions requiring retainage by the public agency of more than five percent of the contract price of the work completed.

(2) As used in this section:

(a) "Public contract" means any purchase, lease or sale by a public agency of personal property, public improvements or services other than agreements which are for personal service.

(b) "Public agency" or "public contracting agency" means any agency of the State of Oregon or any political subdivision thereof authorized by law to enter into public contracts.

(c) "Public improvement" means any construction of improvements on real property by or for a public agency. [Formerly 279.358; 1979 c.196 § 3]

279.410 "Retainage" defined for ORS 279.011 to 279.575. As used in ORS 279.011 to 279.575, unless the context otherwise requires, "retainage" means the difference between the amount earned by the contractor on a public contract and the amount paid on the contract by the public contracting agency. [1977 c.727 § 3]

279.420 Form of retainage. (1) Money retained by a public contracting agency under ORS 279.575(2) shall be:

(a) Retained in a fund by the public contracting agency and paid to the contractor in accordance with ORS 279.575; or

(b) At the option of the contractor, paid to the contractor in accordance with subsection (3) or (4) of this section and in a manner authorized by the Director of the Department of General Services.

(2) If the public agency incurs additional costs as a result of the exercise of the options described in subsection (1) of this section, the agency may recover such costs from the contractor by reduction of the final payment. As work on the contract progresses, the agency shall, upon demand, inform the contractor of all accrued costs.

(3) The contractor may deposit bonds or securities with the public contracting agency or in any bank or trust company to be held in lieu of the cash retainage for the benefit of the public contracting agency. In such event the public agency shall reduce the retainage in an amount equal to the value of the bonds and securities and pay the amount of the reduction to the contractor in accordance with ORS 279.575. Interest on such bonds or securities shall accrue to the contractor.

(4) If the contractor elects, the retainage as accumulated shall be deposited by the public contracting agency in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the public contracting agency. Interest earned on such an account shall accrue to the contractor.

(5) Bonds and securities deposited or acquired in lieu of retainage, as permitted by this section, shall be of a character approved by the Director of the Department of General Services, including but not limited to:

- (a) Bills, certificates, notes or bonds of the United States.
- (b) Other obligations of the United States or its agencies.
- (c) Obligations of any corporation wholly owned by the Federal Government.
- (d) Indebtedness of the Federal National Mortgage Association. [1977 c.727 § 4; 1983 c.690 § 15]

279.430 Limitation on retainage requirements. Unless otherwise specifically included by statute, the provisions of ORS 279.420 or 279.575 shall only apply as between the public contracting agency and the party with whom it contracts. [1977 c.727 § 5]

BONDS; ACTIONS ON BOND

279.502 [1957 c.650 § 1; 1969 c.607 § 2; repealed by 1975 c.771 § 33]

279.510 [Amended by 1955 c.526 § 1; 1957 c.650 § 2; 1965 c.26 § 2; 1969 c.493 § 77; repealed by 1975 c.771 § 33]

279.512 [Amended by 1957 c.650 § 3; repealed by 1975 c.771 § 33]

279.514 [Amended by 1957 c.650 § 4; repealed by 1975 c.771 § 33]

279.515 [1957 c.650 § 5; repealed by 1975 c.771 § 33]

279.516 [Repealed by 1957 c.650 § 15]

279.518 [Amended by 1957 c.650 § 9; renumbered 279.538]

279.520 [Amended by 1953 c.131 § 3; 1955 c.526 § 2; repealed by 1957 c.650 § 15]

279.522 [Repealed by 1957 c.650 § 15]

279.524 [Repealed by 1957 c.650 § 15]

279.526 Right of action against bond of contractor or subcontractor. A person claiming to

have supplied labor or materials for the prosecution of the work provided for in the contract, including any person having direct contractual relationship with the contractor furnishing the bond or direct contractual relationship with any subcontractor, or an assignee of such person, or a person claiming moneys due the State Accident Insurance Fund Corporation, the State Department of Employment Trust Fund or the Department of Revenue in connection with the performance of the contract, has a right of action on the contractor's bond, cashier's check or certified check as provided for in ORS 279.029 if the person or the person's assignee has presented and filed a notice of claim, as prescribed in ORS 279.528, prior to the expiration of six months immediately following the acceptance of the work by the affirmative action of the public body which let the contract. [Amended by 1953 c.131 § 3; 1957 c.650 § 6; 1969 c.689 § 1; 1975 c.771 § 21; 1981 c.712 § 16; 1983 c.264 § 3]

279.528 Execution and contents of notice of claim. (1) The notices of claim required by ORS 279.526 shall be presented to and filed with the Secretary of State or the clerk or auditor of the public body which let the contract.

(2) The notice shall be in writing substantially as follows:

To (here insert the name of the public body):

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

----- (here to be signed)

(3) The notice shall be signed by the person making the claim or giving the notice. [Amended by 1957 c.650 § 7; 1969 c.689 § 2; 1975 c.771 § 22]

279.530 [Amended by 1957 c.650 § 10; renumbered 279.540]

279.532 [Amended by 1953 c.131 § 3; 1955 c.526 § 3; 1957 c.650 § 11; renumbered 279.542]

279.534 [Amended by 1953 c.131 § 3; 1957 c.650 § 12; renumbered 279.544]

279.536 Action by claimant on contractor's bond. (1) A person who has filed and served the notice or notices of claim, as required under ORS 279.526 and 279.528, or that person's assignee, may institute an action on the contractor's bond, cashier's check or certified check as provided for in ORS 279.029 in the circuit court of this state or the federal district court of this district.

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

(3) The action must be instituted no later than two years after the acceptance of the work by the affirmative action of the public body which let the contract. [1957 c.650 § 8; 1969 c.689 § 3; 1975 c.771 § 23; 1981 c.712 § 17]

279.538 Preference of labor and material liens. All labor and material liens shall have preference and be superior to all other liens and claims of whatsoever kind or nature created by ORS 279.310 to 279.318 and 279.526 to 279.542. [Formerly 279.518]

279.540 Rights of persons furnishing medical care and attention to employes of contractor. A person furnishing or providing medical, surgical or hospital care or other needed care and attention, incident to sickness or injury, to the employes of a contractor of a contract made with a public body, or to the employes of his subcontractor, shall be deemed to have performed labor for prosecution of the work provided in the contract for the purposes of ORS 279.526 to 279.542. [Formerly 279.530]

279.542 Joint liability where bond not executed. If the contract is one for which a bond, cashier's check or certified check as provided for in ORS 279.029 is required and the contractor fails to pay for labor or materials or to pay claims due the State Industrial Accident Fund, the State Unemployment Compensation Trust Fund or the Department of Revenue and the officers of the public body which let the contract fail or neglect to require the person entering into the contract to execute the bond, cashier's check or certified check:

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

(2) The public body and the officers authorizing the contract shall be jointly liable for the labor and materials used in the prosecution of any work under the contract and for claims due the State Industrial Accident Fund, the State Unemployment Compensation Trust Fund and the Department of Revenue, if the contract was entered into on behalf of a public body other than the state. [Formerly 279.532; 1975 c.771 § 23a]

279.544 [Formerly 279.534; repealed by 1975 c.771 § 33]

279.575 Progress payments on public contracts; retainage; interest; exception; settlement of compensation disputes. (1) Public contracting agencies shall make progress payments on the contract monthly as work progresses on a public contract for a public improvement. Payments shall be based upon estimates of work completed that are approved by the public contracting agency. A progress payment shall not be considered acceptance or approval of any work or waiver of any defects therein. The public contracting agency shall pay to the contractor interest at the rate of one and one-half percent per month on the progress payment, not including retainage, due the contractor. The interest shall commence 30 days after the request for payment is made by the contractor or 15 days after the payment is approved by the agency, whichever is the earlier date.

(2) A public contracting agency may reserve as retainage from any progress payment on a public contract an amount not to exceed five percent of the payment. As work progresses, an agency may reduce the amount of the retainage and the agency may eliminate retainage on any remaining monthly contract payments after 50 percent of the work under the contract is completed if, in the agency's opinion, such work is progressing satisfactorily. Elimination or reduction of retainage shall be allowed only upon written application by the contractor, which application shall include written approval of the contractor's surety; except that when the contract work is 97-1/2 percent completed the agency may, at its discretion and without application by the contractor, reduce the retained amount to 100 percent of the value of the contract work remaining to be done.

(3) The retainage held by a public contracting agency shall be included in and paid to the contractor as part of the final payment of the contract price. The public contracting agency shall pay to the contractor interest at the rate of one and one-half percent per month on the final payment due the contractor, interest to commence 30 days after the work under the contract has been completed and accepted and to run until the date when the final payment is tendered to the contractor. The contractor shall notify the public contracting agency in writing when the contractor considers the work complete and the public contracting

agency shall, within 15 days after receiving the written notice, either accept the work or notify the contractor of work yet to be performed on the contract. If the public contracting agency does not within the time allowed notify the contractor of work yet to be performed to fulfill contractual obligations, the interest provided by this subsection shall commence to run 30 days after the end of the 15-day period.

(4) The public contracting agency shall pay, upon settlement or judgment in favor of the contractor regarding any dispute as to the compensation due a contractor for work performed under the terms of a public contract, the amount due plus interest at the rate of one and one-half percent per month on such amount accruing from the later of:

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

(b) Thirty days after the date on which the claim for the payment under dispute was presented to the public contracting agency by the contractor in writing or in accordance with applicable provisions of the contract. [1969 c.423 § 1; 1971 c.746 § 1; 1973 c.384 § 1; 1975 c.771 § 28; 1975 c.772 § 8; 1977 c.727 § 1; 1979 c.406 § 3; 1981 c.712 § 18]

279.610 [Amended by 1957 c.418 § 1; repealed by 1975 c.771 § 33]

279.612 [Amended by 1957 c.418 § 2; 1969 c.415 § 1; repealed by 1975 c.771 § 33]

279.614 [Repealed by 1975 c.771 § 33]

279.616 [Repealed by 1975 c.771 § 33]

279.618 [Amended by 1971 c.659 § 3; repealed by 1975 c.771 § 33]

279.620 [Amended by 1955 c.693 § 1; repealed by 1975 c.771 § 33]

279.622 [Amended by 1963 c.28 § 1; repealed by 1975 c.771 § 33]

279.624 [Repealed by 1975 c.771 § 33]

279.626 [Repealed by 1975 c.771 § 33]

279.628 [Repealed by 1975 c.771 § 33]

STATE PURCHASING

279.710 Definitions for ORS 279.710 to 279.746. As used in ORS 279.710 to 279.746, unless the context otherwise requires:

(1) "Department" means the Department of General Services.

(2) "State agency" or "agency" means every state officer, board, commission, department, institution, branch or agency of the state government, whose costs are paid wholly or in part from funds held in the State Treasury, except the Legislative Assembly, the courts and their officers and committees, and except the Secretary of State and the State Treasurer in the performance of the duties of their constitutional offices.

(3) "Purchase" includes acquisition of personal property by lease or rental agreement.

(4) "Services other than personal" include insurance, fidelity bonds, public improvement projects, services, including but not limited to personal services and professional services, rendered by independent contractors with the state and utility services. [Amended by 1957 c.660 § 1; 1977 c.598 § 30]

279.711 Title to property acquired by state agency to be taken in name of state. Notwithstanding any other provisions of law to the contrary, any state agency, including the constitutional state officers and the courts, authorized by law to acquire real or personal property or interest

therein, shall take title to the same in the name of the State of Oregon. [Formerly 273.005]

279.712 Department of General Services to purchase for state agencies; approval of professional and personal services; exemptions. (1) The Department of General Services shall purchase or otherwise provide for the acquisition or furnishing of all supplies, materials, equipment and services other than personal required by state agencies.

(2) The department shall approve all professional and personal services contracts of agencies for architectural, engineering, and related services before any such contract becomes binding and before any service may be performed under the contract.

(3) Subsections (1) and (2) of this section do not apply to:

(a) Purchases of alcoholic liquor by the Oregon Liquor Control Commission;

(b) Agreements entered into by the Department of Education for the purchase or distribution of textbooks;

(c) Personal service and public improvement contracts of the Department of Transportation relating to maintenance or construction of highways, bridges, parks or other transportation facilities;

(d) Personal service and public improvement contracts of the Department of Higher Education relating to instructional, research, student union, athletic and recreational facilities;

(e) Personal service and public improvement contracts of the State Department of Fish and Wildlife for dams, fishways, ponds and related fish and game propagation facilities;

(f) Personal and professional service contracts subject to review by the Executive Department as provided in ORS 291.021; and

(g) Insurance and service contracts to provide medical assistance as provided for under ORS 414.115, 414.125, 414.135 and 414.145. [Amended by 1957 c.660 § 2; 1973 c.84 § 3; 1977 c.598 § 31; 1983 c.590 § 11]

279.714 [Amended by 1969 c.349 § 2; 1969 c.607 § 3; 1971 c.180 § 2; repealed by 1975 c.771 § 33]

279.716 [Amended by 1969 c.607 § 4; repealed by 1975 c.771 § 33]

279.717 Securing bids. (1) The Department of General Services may secure competitive bids formally or informally. Formal bids may be secured through public advertising or the circularization of mailing lists or both.

(2) The department shall:

(a) Keep lists of interested bidders for circularization.

(b) Post in its office reasonably in advance of the last date for receiving bids copies of all notices of calls for bids.

(c) Take reasonable measures in securing informal bids to assure that calls for bids are adequately advertised and that prospective bidders have a reasonable opportunity to submit their bids.

(d) Take other reasonable measures to assure that calls for bids are adequately advertised. [1977 c.314 § 2]

279.718 [Repealed by 1975 c.771 § 33]

279.720 [Amended by 1969 c.607 § 5; repealed by 1975 c.771 § 33]

279.722 Department may require that bids be accompanied by check or bond. (1) In its

discretion, the department may require that bids be accompanied either by a certified check, or by a bond in favor of the state furnished by a surety company authorized to do business in this state, in a sum not less than five percent of the total amount of the bid. However, at the time of submitting any bid, a bidder may, at the option of the bidder, furnish a bond covering any and all bids submitted during one calendar year.

(2) Notwithstanding the provisions of ORS 293.265 or any other provision of law, when bid security is in the form of a certified check, the department shall deposit such a check in the General Services Operating Account, established under ORS 283.075. However, the department shall return the appropriate bid security held to an unsuccessful bidder in a timely manner and pursuant to the provisions of ORS 279.031. [Amended by 1955 c.57 § 1; 1971 c.743 § 350; 1981 c.106 § 3]

279.723 Requisitions. The department shall prescribe the time, manner, authentication and form of making requisitions by state agencies for supplies, materials, equipment and services other than personal. [Formerly 279.732]

279.724 [Amended by 1953 c.11 § 3; 1955 c.194 § 1; repealed by 1975 c.771 § 33]

279.725 Agency purchase contracts and orders. Except as otherwise provided in ORS 279.712 and 279.727, no purchase contract or order shall be valid or effective without the written approval of the department. [Formerly 279.734]

279.726 [Repealed by 1975 c.771 § 33]

279.727 State agency may be authorized to purchase directly; procedure. Under rules and regulations prescribed by it, the department may authorize any state agency to purchase directly, specified supplies, materials, equipment and services other than personal. In making such purchases, the authorized agency shall call for bids and proceed otherwise in like manner as required in case of purchases by the department, except that in conditions constituting an emergency, as defined by regulations of the department, purchases for immediate use may be made without calling for bids by the department or agency. [Formerly 279.738]

279.728 [Amended by 1955 c.45 § 1; repealed by 1975 c.771 § 33]

279.729 Establishing and enforcing specifications. (1) The department may:

- (a) Establish and enforce standards for all supplies, materials and equipment in common use by state agencies.
- (b) Make or cause to be made any test, examination or analysis necessary therefor.
- (c) Require the assistance of any and all officers and agencies therefor.
- (d) Prepare or cause to be prepared proper and uniform specifications.
- (e) Classify the requirements of the various agencies of the state government for the purpose of the use and application of such standard specifications.

(2) The department shall prescribe standards and specifications for paper used by state agencies that shall require the highest percentage possible of the total of the paper purchased by the department in any fiscal year be recycled paper or paper in the same grade most nearly meeting the definition of recycled paper. The department shall make available, through its purchasing procedure, in all grades where it can be obtained, recycled paper or that paper in the same grade most nearly meeting the definition of recycled paper.

(3) As used in this section, "recycled paper" has the meaning given that term by ORS 279.731. [Formerly 279.740]

279.730 [Amended by 1969 c.597 § 56; repealed by 1975 c.771 § 33]

279.731 Definitions for ORS 279.731 to 279.739. As used in ORS 279.731 to 279.739, unless the context otherwise requires:

(1) "Post-consumer waste" means a finished material which would normally be disposed of as solid waste.

(2) "Recycled paper" means a paper product with not less than:

(a) Fifty percent of its total weight consisting of secondary waste materials; or

(b) Twenty-five percent of its total weight consisting of post-consumer waste.

(3) "Secondary waste materials" means fragments of products or finished products of a manufacturing process which has converted a virgin resource into a commodity of real economic value, and includes post-consumer waste, but does not include mill broke, wood slabs, chips, sawdust or other wood residue from a manufacturing process.

(4) "State agency" includes the Legislative Assembly, the courts and their officers and committees and the constitutional state officers. [1975 c.240 § 2]

279.732 [Renumbered 279.723]

279.733 State agency purchasing; use of recovered resources and recycled material. All state agencies purchasing supplies, materials, equipment or personal services shall:

(1) Review their procurement specifications currently utilized in order to eliminate, wherever economically feasible, discrimination against the procurement of recovered resources or recycled materials.

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

(3) Develop purchasing practices which, to the maximum extent economically feasible, assure purchase of materials which are recycled or which may be recycled or reused when discarded.

(4) Establish management practices which minimize the volume of solid waste generated by them by limiting the amount of materials consumed and discarded.

(5) Use and require persons with whom they contract to use, in the performance of the contract work, to the maximum extent economically feasible, recycled paper. [1975 c.240 § 3]

279.734 [Amended by 1953 c.11 § 3; renumbered 279.725]

279.735 Rules for recycling and reusing solid waste; exemption. (1) Notwithstanding ORS 183.335(5) the department shall adopt rules pursuant to ORS 183.310 to 183.550 that:

(a) Establish procedures for the separation of solid waste generated by state agencies which can be recycled or reused.

(b) Establish a system for the collection of solid waste generated by state agencies which can be recycled or reused. The system shall assure that the material is made available to appropriate agencies or private industries for reuse or recycling at the greatest economic value and to the greatest extent feasible for recycling.

(2) All state agencies shall comply with the procedures and systems established pursuant to subsection (1) of this section.

(3) The Governor may exempt any single activity or facility of any state agency from compliance under this section if he determines it to be in the paramount interest of the state. Any exemption shall be

for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year. The Governor shall make public all exemptions together with his reasons for granting such exemptions. [1975 c.240 § 4]

279.736 [Repealed by 1975 c.771 § 33]

279.737 Guidelines and procedures to encourage paper conservation. (1) The department shall encourage paper conservation.

(2) The department shall provide guidelines to state agencies and state contractors on the availability of recycled paper and paper products, including the sources of supply and the potential uses of various grades of recycled paper.

(3) The department shall review the total paper purchases and utilization of each state agency.

(4) The department shall, in conjunction with the administrative heads of state agencies, develop procedures to eliminate excessive or unnecessary paper use, including but not limited to overpurchase of paper, overprinting of materials, purchase of too high a grade of paper, purchase of paper which is not recyclable and purchase of virgin paper when recycled paper is available in the same grade. [1975 c.240 § 5]

279.738 [Renumbered 279.727]

279.739 Preference to recycled materials. (1) Notwithstanding provisions of law requiring a public agency to enter into contracts with the lowest responsible bidder and subject to subsection (2) of this section, any public agency charged with the purchase of materials and supplies for any public use may, in its discretion, give preference to the purchase of materials and supplies manufactured from recycled materials.

(2) A public agency may give preference to materials and supplies manufactured from recycled materials only if:

(a) The bids of the persons or manufacturing concerns supplying the recycled materials, or the prices quoted by them, do not exceed by more than five percent the lowest bid or prices quoted by persons and manufacturing concerns offering nonrecycled materials; and

(b) The public agency finds that the public good will be served thereby.

(3) As used in this section:

(a) "Public agency" means a county, city, special district, or other public and municipal corporations, and any instrumentality thereof.

(b) "Recycled material" means any material that would otherwise be a useless, unwanted or discarded material except for the fact that the material still has useful physical or chemical properties after serving a specific purpose and can, therefore, be reused or recycled. [1975 c.240 § 6]

279.740 [Amended by 1975 c.240 § 7; renumbered 279.729]

279.742 Purchase of supplies, materials and equipment for supply of state agencies from General Services Operating Account; classified list of estimated needs. (1) The department may purchase supplies, materials and equipment from the General Services Operating Account for the purpose of supplying requirements of state agencies, the cost of which shall be reimbursed to the account from charges paid by state agencies on the basis of actual usage. Administrative costs incurred in the operation of the General Services Operating Account may be paid from the account and the amount of such costs shall be added to the cost of the services, supplies, materials and equipment as charged to the agencies supplied.

(2) At the time specified by the department, each state agency shall submit to the department a classified list of its estimated needs for supplies, materials and equipment for a period designated by the department. The department shall consolidate the estimates and, on the authority thereof, may, out of the General Services Operating Account, purchase either the entire amount or only a part thereof at one time. [Amended by 1959 c.662 § 1; 1965 c.365 § 6; 1967 c.419 § 41; 1977 c.91 § 1; 1981 c.106 § 1]

279.744 Purchase or contract by department for individual state agency. Any purchase or contract by the department for the account of any individual state agency shall be made on the basis of a requisition by the agency.

279.746 Storage facilities. (1) The department shall establish and have charge of any central storerooms and supply rooms serving more than one state agency.

(2) The department may acquire and maintain storage facilities and make such rules and regulations as are necessary for the proper and economical handling of state purchases.

279.748 Federal laws and rules govern where federal granted funds. Notwithstanding any provision in ORS 279.710 to 279.746 to the contrary, in all cases where federal granted funds are involved, the federal laws, rules and regulations applicable thereto shall govern.

279.791 State flags for display on public buildings to be purchased by department. (1) The Department of General Services shall purchase or otherwise provide for the acquisition of Oregon State flags of suitable size in sufficient quantity to meet the requirements of the state, counties and school districts under ORS 186.110. At the times specified by the department, the person or body having custody of the public building or public school building shall submit to the department its estimated needs for Oregon State flags for a period designated by the department. The department shall consolidate the estimates. Based on the consolidated estimates, the department may provide for the purchase of the entire flag requirements or only a part thereof at one time; or on the authority of the consolidated estimates, the department may, out of the operating account provided for in ORS 283.075, purchase the entire amount or only a part thereof at one time; and if the operating account is used, the person or body having custody of the public building or public school building shall requisition Oregon State flags as needed and shall pay the department the cost of such flags.

(2) The department may authorize the purchase directly by the person or body having custody of the public building or public school building of the required Oregon State flags. [1953 c.474 § 5; 1981 c.106 § 14]

279.795 State flags for Armed Forces to be purchased by Secretary of State. Upon written request and at his discretion, the Secretary of State is authorized to purchase and furnish an Oregon State Flag to units or to individual Oregon members of the Armed Forces of the United States serving at home or abroad. The cost of furnishing such flags shall be paid out of funds appropriated or made available from other sources to the Secretary of State to carry out the purpose of this section. [1969 c.263 § 1]

SURPLUS OR EXCESS PROPERTY

279.810 [Amended by 1955 c.47 § 1; repealed by 1975 c.771 § 33]

279.812 [Repealed by 1975 c.771 § 33]

279.814 [Amended by 1955 c.47 § 2; repealed by 1975 c.771 § 33]

279.816 [Amended by 1967 c.419 § 28; repealed by 1975 c.771 § 33]

279.818 [Repealed by 1975 c.771 § 33]

279.820 Powers and duties of Department of General Services with respect to surplus or excess property; acquisition by state agencies, institutions and political subdivisions. (1) Subject to the power of the Governor to abolish the functions listed in this section when he determines that it is no longer necessary or desirable for the department to continue such functions, the Department of General Services shall have the following duties and powers:

(a) To accept and distribute surplus or excess properties which may be available to tax-supported medical institutions, hospitals, clinics, health centers, school systems, schools, colleges and universities, to other nonprofit medical institutions, hospitals, clinics, health centers, schools, colleges and universities, to civil defense organizations, to state institutions and agencies, to political subdivisions of the state and to other organizations or institutions as are eligible under federal law to acquire surplus or excess property, referred to in this section as eligible recipients.

(b) To provide suitable facilities which may be needed for storage.

(c) To cooperate with other state agencies for surplus or excess property and the Federal Government, and any agencies thereof; and enter into reciprocal agreements and contracts with such other state agencies and the Federal Government with respect to the utilization and exchange of property, facilities, personnel and services of each by the other as the department may deem necessary or proper for the administration of the provisions of this section in accordance with the federal law governing the acquisition of surplus or excess property; and expend funds in connection therewith.

(d) To adopt policies for the distribution of surplus or excess properties to eligible recipients and to make rules and regulations necessary or proper for the administration and enforcement of the provisions of this section in accordance with the federal law governing the acquisition of surplus or excess property.

(e) To fix charges to cover costs of acquiring, purchasing, shipping, handling, warehousing, storing and distributing surplus or excess properties obtained by donations or purchase, subject to federal laws and rules and regulations adopted pursuant thereto and for the payment of necessary administrative expenses. All fees or charges collected or received shall be deposited in the General Services Operating Account.

(f) To act for eligible recipients in the procurement by sale or donation of surplus or excess real and personal property.

(g) To cooperate with eligible recipients in locating, obtaining and warehousing surplus or excess properties and state purchases which may be available to them by purchase or donation.

(2) The governing board or the executive head of state institutions and agencies and political subdivisions of the state, eligible under federal law to acquire surplus or excess property, may by order or resolution confer upon any officer or employe thereof continuing authority from time to time to secure the transfer to it of surplus or excess property through the Department of General Services in accordance with the federal law governing the acquisition of surplus or excess property. [Amended by 1957 c.42 § 1; 1959 c.662 § 15; 1961 c.128 § 1; 1975 c.771 § 29]

279.822 Use of General Services Operating Account; cash dividends. (1) In addition to the other purposes for which the General Services Operating Account created by ORS 283.075 may be used, the General Services Operating Account hereby is appropriated continuously for and may be used for the purposes of ORS 279.820 and this section. All claims approved by the Department of General Services for the purposes of ORS 279.820 and this section shall be paid as provided in ORS 293.295 to 293.462. The Executive Department shall draw warrants on the State Treasurer for the payment thereof payable out of the General Services Operating Account. All moneys received under ORS 279.820 shall be paid by the department to the State Treasurer for credit to the General Services Operating Account.

(2) The Director of the Department of General Services may distribute in the form of cash dividends accumulated surpluses in the General Services Operating Account that arise because the charges collected from eligible recipients are in excess of the amount necessary to keep the activities under ORS 279.820 and this section on a self-sustaining basis. The cash dividends shall be paid to the eligible recipients referred to in ORS 279.820(1). Any dividend paid pursuant to this subsection shall be based on the ratio of the charges collected from each eligible recipient during the preceding fiscal year to the total charges collected from all eligible recipients for the fiscal year immediately preceding the fiscal year in which the dividend is authorized to be paid.

(3) Upon termination by the Governor of the functions of the department under ORS 279.820, any balance remaining in the General Services Operating Account which is attributable to the activities under ORS 279.820 and this section shall be refunded pro rata to the eligible recipients referred to in ORS 279.820(1) upon the basis of the total charges collected from each such eligible recipient during the preceding fiscal year, unless the Director of the Department of General Services determines that the cost of making any such refund is excessive in which case the unrefunded money shall be paid to the Treasurer of the United States. [Amended by 1957 c.42 § 2; 1959 c.662 § 14; 1975 c.771 § 30; 1981 c.106 § 15; 1983 c.740 § 77]

279.824 Contracts with Federal Government for accepting gifts and acquiring surplus war materials; bids not required. The Department of General Services may enter into any contract with the United States or with any agency thereof for the purpose of accepting gifts and for the acquisition of surplus or excess materials or property upon such terms and conditions as may be agreed upon, without regard to the provisions of law, requiring the posting of notices or public advertising for bids or the soliciting or receiving of competitive bids. [Amended by 1975 c.771 § 31]

PRODUCTS OF THE HANDICAPPED

279.835 Definitions for ORS 279.015 and 279.835 to 279.855. As used in ORS 279.835 to 279.855:

(1) "Department" means the Department of General Services.

(2) "Handicapped individual" means a disabled individual who, because of the nature of disabilities, is not able to participate fully in competitive employment, and for whom specialized employment opportunities must be provided.

(3) "Public agency" or "public contracting agency" has the same meaning contained in ORS 279.011.

(4) "Qualified nonprofit agency for handicapped" means a nonprofit activity center or sheltered workshop:

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

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

(c) Which in the manufacture of products and in the provision of services, whether or not the products or services are procured under ORS 279.015 and 279.835 to 279.855, during the fiscal year employs handicapped individuals for not less than 75 percent of the man-hours of direct labor required for the manufacture or provision of the products or services.

(5) "Direct labor" includes all work required for preparation, processing and packing, but not supervision, administration, inspection and shipping. [1977 c.304 § 3; 1983 c.690 § 17]

279.840 Policy. The purpose of ORS 279.015 and 279.835 to 279.855 is to further the policy of this state to encourage and assist handicapped individuals to achieve maximum personal independence through useful and productive gainful employment by assuring an expanded and constant market for sheltered workshop and activity center products and services, thereby enhancing their dignity and capacity for self-support and minimizing their dependence on welfare and need for costly institutionalization. [1977 c.304 § 2]

279.845 Department of General Services to determine and revise prices for products and services of nonprofit agency for handicapped; department to publish sources of products and services. (1) It shall be the duty of the department to:

(a) Determine the price of all products manufactured and services offered for sale to the various public agencies by any qualified nonprofit agency for the handicapped. The price shall recover for the workshops the cost of raw materials, labor, overhead, delivery costs and a margin held in reserve for inventory and equipment replacement;

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

(c) To make such rules regarding specifications, time of delivery and other relevant matters of procedure as shall be necessary to carry out the purposes of ORS 279.015 and 279.835 to 279.855.

(2) The department shall establish and publish a list of sources or potential sources of products produced by any qualified nonprofit agency for the handicapped and the services provided by any such agency, which the department determines are suitable for procurement by public agencies pursuant to ORS 279.015 and 279.835 to 279.855. This procurement list and revisions thereof shall be distributed to all public purchasing officers. [1977 c.304 § 4]

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

(2) In furthering the purposes of ORS 279.015 and 279.835 to 279.855, it is the intent of the Legislative Assembly that there be close cooperation between the department, public contracting agencies and qualified nonprofit agencies for the handicapped. The department on behalf of public contracting agencies and qualified nonprofit agencies for the handicapped is authorized to enter into such contractual agreements, cooperative working relationships or other arrangements as may be determined to be necessary for effective cooperation and efficient realization of the objectives of ORS 279.015 and 279.835 to 279.855 and any other law requiring procurement of products or services. [1977 c.304 § 5]

279.855 Qualified nonprofit agencies may obtain goods and services through department. Qualified nonprofit agencies for the handicapped participating in the program set forth in ORS 279.015 and 279.835 to 279.850 may purchase equipment, materials, supplies and services through the department in the same manner as state agencies as provided in ORS 279.710 to 279.746 and 279.820 to 279.824. [1977 c.304 § 7]

PENALTIES

279.990 Penalties. (1) Any contractor, subcontractor, agent or person in authority or in charge who violates any of the provisions of ORS 279.310 to 279.318, 279.338 or 279.538, as to hours of employment of labor shall, upon conviction, be fined not less than \$50 nor more than \$1,000, or imprisoned in the county

jail for not less than five days nor more than one year, or both.

(2) The provisions of ORS 291.990 apply to ORS 279.710 to 279.746 and 279.824. Any violation of ORS 279.710 to 279.746 or 279.824 shall, upon conviction, be punished as prescribed in ORS 291.990.

(3) Any contractor or subcontractor subject to ORS 279.350 who fails to pay the prevailing rate of wage as required by ORS 279.350 shall be punished, upon conviction, by a fine of not more than \$1,000, or by imprisonment in the county jail for not more than six months, or both. [Amended by 1953 c.577 § 2; subsection

(4) (1979 Replacement Part) enacted as 1955 c.563 § 3; 1969 c.369 § 7; 1971 c.743 § 351]

APPENDIX C
Chapter 282
1981 REPLACEMENT PART
(1983 reprint)
Public Printing

STATE PRINTING; STATE PRINTING SECTION; STATE PRINTER

- 282.010 Definitions for ORS 282.010 to 282.070 and 282.080 to 282.150
- 282.020 Control of state printing and printing purchases
- 282.025 Legislative printing priority required
- 282.030 Submitting copy specifications for approval of department
- 282.040 Charges for printing by state printing section
- 282.050 Multiple duplication work
- 282.060 Exception to application of state laws where federal funds are involved
- 282.070 University printing plant; limiting printing in these and other state plants
- 282.075 Athletic departments exempt
- 282.080 State Printer; assistants
- 282.090 Bonds of State Printer
- 282.110 Use of General Services Operating Account
- 282.150 Printing inaugural address of Governor

PUBLIC PRINTING GENERALLY

- 282.210 Performance within state of public printing, binding and stationery work; stipulation in request for bids and in contracts; exceptions
- 282.220 Payment for unauthorized work outside state prohibited
- 282.230 Provisions required in contracts for work to be done outside of state

PENALTIES

- 282.990 Penalties

CROSS REFERENCES

Application to State Accident Insurance Fund Corporation, 656.753

282.010 to 282.050

Commodity commissions printing provided by department, 576.307

Oregon Beef Council, printing provided by department, 577.320

282.010 to 282.150

Laws for state printing and State Printer authorized, Const. Art. XII, § 1

282.080

Qualifications of State Printer, Const. Art. XII, § 1

282.110

Allotment required prior to expenditures from certain funds, 291.238

STATE PRINTING; STATE PRINTING SECTION; STATE PRINTER

282.010 Definitions for ORS 282.010 to 282.070 and 282.080 to 282.150. As used in ORS 282.010 to 282.070 and 282.080 to 282.150, unless the context otherwise requires:

(1) "Department" means the Department of General Services.

(2) "State printing section" means the administrative unit within the Department of General Services handling the state printing functions. [Amended by 1975 c.605 § 1]

282.020 Control of state printing and printing purchases. (1) Subject to the final approval of the Director of the Department of General Services, the State Printer shall:

(a) Control and manage the state printing section and all state printing.

(b) Control all printing purchases, including those outside of the state printing plant; and any printing done outside of the state printing plant may be done only through authority of the State Printer.

(2) Printing and binding which advertises or promotes products, agricultural or manufactured, shall not be considered state printing.

(3) The State Printer may advertise for bids and award contracts for state printing, but the policy of the State Printer in deciding what work shall be let by contract shall be dictated by questions of good business and economy. [Amended by 1959 c.293 § 1; 1975 c.605 § 2]

282.025 Legislative printing priority required. During sessions of the Legislative Assembly and immediately thereafter the department and the state printing section shall give first priority to the printing of legislative publications and materials for the Legislative Assembly, its officers and committees. [1973 c.492 § 2]

282.030 Submitting copy specifications for approval of department. (1) Before being printed all copy specifications must be submitted to the department for review and approval as to format, style and quality in accordance with rules of the department. The department may in the interest of economy, revise the specifications but not in such a manner as to destroy the purpose or quantity of the copy.

(2) For purposes of this section, "copy specification" does not include any specification of the Legislative Assembly or any committee or officer thereof. [Amended by 1975 c.605 § 4]

282.040 Charges for printing by state printing section. The department shall determine and fix the charges to be made for all work done by the state printing section. In determining the charges, the cost of all labor, materials, office expense and depreciation shall be taken into consideration. All printing shall be paid for by the agency for whose use and benefit it is secured and at the rate fixed and as per invoices rendered by the department. Duplicating services rendered by the state printing section shall be deemed to be "printing" for the purposes of this section. [Amended by 1975 c.605 § 5]

282.050 Multiple duplication work. (1) As used in this section, unless the context otherwise requires, the terms "state agency" or "agency" have the meaning given such terms in ORS 291.002.

(2) The department shall control and regulate the performance and production of all multiple duplication work required by state agencies and the purchase and use of multiple duplication equipment, including but not limited to xerographic or other copying devices. The department shall itself perform, through the state printing plant, such duplicating services for the state agencies as may practicably and economically be performed centrally, and for that purpose may require that duplicating equipment possessed by any agency be transferred to the state printing section. The department further may require transfers of duplicating equipment between agencies where so to do would result in efficiency and

economy. Where any duplicating equipment is so transferred to the state printing section or between agencies, the proper adjustment shall be made in the accounts and appropriation allotments of the department and of the agencies involved. [Amended by 1975 c.605 § 6]

282.060 Exception to application of state laws where federal funds are involved. Notwithstanding any provision in ORS 282.020 or 282.050 to the contrary, in all cases where federal granted funds are involved, the federal laws, rules and regulations applicable thereto shall govern.

282.070 University printing plant; limiting printing in these and other state plants. (1) Subject to subsections (2) and (3) of this section, the Department of Higher Education may operate:

- (a) A printing plant at the University of Oregon.
- (b) A printing plant at Oregon State University.

(2) Equipment or technologies employed at university printing facilities shall be subject to prior review and approval by the State Printer.

(3) No printing shall be done in any publicly owned printing plant within the state, except such printing as is paid for wholly or in part out of funds regularly coming into the hands of the comptroller of the university, or paid for out of funds of the State of Oregon, the institution or the political subdivision owning the printing plant, or out of funds of the Federal Government appropriated for such printing purposes. [Amended by 1975 c.605 § 7]

282.075 Athletic departments exempt. An athletic department of any college or university under the jurisdiction of the State Board of Higher Education shall not be required to use for printing state printing controlled by the State Printer as required by ORS 282.020(1). [1977 c.693 § 1]

282.080 State Printer; assistants. (1) Subject to any applicable provisions of the Oregon Constitution and the State Personnel Relations Law, the Department of General Services shall appoint a State Printer. The State Printer shall be paid out of the General Services Operating Account as provided in ORS 282.110.

(2) Subject to the State Personnel Relations Law, the department shall employ such other assistance as may be necessary for carrying out the functions of the state printing section. [Amended by 1959 c.662 § 9]

282.090 Bonds of State Printer. Before entering upon the duties of his office, the State Printer shall file a bond as required by ORS 292.040 and shall furnish such other bond as in the judgment of the department may be necessary to insure the faithful performance of the duties of his office.

282.100 [Amended by 1959 c.607 § 1; repealed by 1975 c.605 § 33]

282.110 Use of General Services Operating Account. (1) All moneys received by the department for printing, ruling, binding, etc., including duplicating services rendered by the state printing section, shall be promptly deposited in the State Treasury to the credit of the General Services Operating Account created by ORS 283.075.

(2) In addition to the other purposes for which the General Services Operating Account may be used, the General Services Operating Account hereby is appropriated continuously for and may be used for the purchase of all supplies and the payment of all labor and expense, including equipment and facilities, connected with the operation of the state printing section. The administrative costs incurred in the operation of the General Services Operating Account for the purposes of this section shall be paid from the

account and shall be added to the costs of the services rendered by the state printing section and collected by the department. [Amended by 1959 c.662 § 8; 1975 c.605 § 8; 1981 c.106 § 16]

282.120 [Amended by 1959 c.662 § 10; 1975 c.605 § 9; repealed by 1981 c.106 § 22]

282.130 [Amended by 1959 c.662 § 11; repealed by 1977 c.316 § 4]

282.140 [Amended by 1959 c.662 § 12; repealed by 1977 c.216 § 34]

282.150 Printing inaugural address of Governor. At the inauguration of a Governor, the State Printer shall cause to be printed such number of copies of the inaugural address as the Governor-elect directs. [Amended by 1957 c.230 § 1; 1975 c.605 § 10]

PUBLIC PRINTING GENERALLY

282.210 Performance within state of public printing, binding and stationery work; stipulation in request for bids and in contracts; exceptions. (1) Except as provided in subsection (2) of this section, all printing, binding and stationery work for the state or any county, city, town, port district, school district, or other political subdivision thereof, shall be performed within the state. All requests for bids and all contracts for such work shall so stipulate.

(2) The work referred to in subsection (1) of this section may be performed outside the state if it is established that:

(a) The work cannot be performed within the state;

(b) The lowest price for which such work can be procured within the state exceeds the charge usually and customarily made to private individuals and corporations for work of similar character and quality; or

(c) All bids for the work, or any part thereof, are excessive and not reasonably competitive.

282.220 Payment for unauthorized work outside state prohibited. No payment shall be made by the state or any political subdivision thereof for printing, binding or stationery work unless it appears that such work was done within the state, or was authorized to be done outside the state pursuant to ORS 282.210.

282.230 Provisions required in contracts for work to be done outside of state. (1) All contracts for work to be performed outside the state under ORS 282.210 shall provide and require that such work shall be performed under conditions of labor and employment which shall substantially conform to the laws of this state respecting hours of labor, the minimum wage scale for women and minors, and the rules and regulations promulgated by the Wage and Hour Commission of the State of Oregon regarding conditions of employment, hours of labor and minimum wages.

(2) Violation of the provision required by subsection (1) of this section shall be grounds for cancellation of the contract.

PENALTIES

282.990 Penalties. The provisions of ORS 291.990 apply to ORS 282.020 and to 282.050. Any violation of ORS 282.040 to 282.060 shall, upon conviction, be punished as prescribed in ORS 291.990.

APPENDIX D
OREGON ADMINISTRATIVE RULES
CHAPTER 125
PUBLIC CONTRACT EXEMPTIONS

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- 125-300-001 Definitions
- 125-300-010 Exemptions

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- 125-310-020 Contracts Under Certain Dollar Amounts
- 125-310-025 Request for Proposal
- 125-310-030 Emergency Contracts
- 125-310-035 Equipment Repair and Overhaul
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- 125-350-010 Auction Sales of Personal Property
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- 125-360-010 Bid Security Requirements
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OREGON ADMINISTRATIVE RULES
CHAPTER 125, DIVISION 300-360 — PUBLIC CONTRACT EXEMPTIONS

DIVISION 300

INTRODUCTION AND DEFINITIONS

Purpose and Statutory Authority

125-300-000 (1) Purpose. These rules prescribe public contract exemptions for all state agencies and those local political subdivisions that have contracted with the Department of General Services to serve as their public contract review authority as provided in OAR 125-10-005. These rules may be adopted in whole or in part by any political subdivision public contract review authority.

(2) Statutory Authority. These rules are authorized by ORS 279.015(2) and ORS 279.017(2).

Definitions

125-300-001 as used in this Chapter, unless the context requires otherwise:

1. "Department" means the Department of General Services.
2. "Director" means the Director of the Department of General Services.
3. "Public agency" or "Public contracting agency" means any agency of the State of Oregon or any political subdivision thereof authorized by law to enter into public contracts and any public body created by intergovernmental agreement.
4. "Public contract" means any purchase, lease or sale by a public agency of personal property, public improvements or services other than agreements which are for personal services.
5. "Requirements contract" means an agreement in which the vendor agrees to supply all the purchaser's requirements that arise for an item or items within a specified time period.
6. "Price agreement" means the same as requirements contract defined above.
7. "Service" means work performed to meet a demand, especially work that is not connected with manufacturing a product.
8. "Service contract" means a contract that calls primarily for a contractor's time and effort rather than for an end product.
9. "Request for Proposal" means the solicitation of competitive proposals, or offers, to be used as a basis for making an acquisition, or entering into a contract when specification and price will not necessarily be the predominant award criteria.
10. "Public contract review authority" means a local contract review board created pursuant to ORS 279.055 or the Department of General Services if the local political subdivision has contracted with the Department to serve as its public contract review authority as provided in OAR 125-10-005. For State of Oregon agencies, the review authority is the Director of the Department of General Services.
11. "Personal property" means everything subject to ownership which is not real property and has exchangeable value.
12. "Personal service contracts" means the types of contracts defined in rule 125-310-092(1).
13. "Invitation to bid" means the solicitation of competitive offers in which specification, price and delivery (or project completion) will be the predominant award criteria.

14. "Competitive bidding" means the issuing of invitations to bid which follow the formal process for advertising, bid, and bid opening required by ORS Chapter 279.

15. "Competitive quotes" means the solicitation by the public contracting agency of offers from competing vendors. The solicitation may be by advertisement or by the public contracting agency initiating a request to vendors to make an offer. The solicitation and the offer may be in writing or oral.

Exemptions

125-300-010 All public contracts shall be based upon formal competitive bidding except the following:

- (A) Contracts made with other public agencies or the federal government.
- (B) Contracts which are for personal services and are covered by rule 125-300-092.
- (C) Contracts specifically exempt under the provisions of the rules in the following Divisions.

DIVISION 310

GENERAL EXEMPTIONS

Life Cycle Costing

125-310-015 (1) In determining the lowest responsible bidder, in the award of a contract, a public contracting agency may use the concept of life cycle costing if it complies with section (2) of this rule. As used in this rule, life cycle costing means determining the cost of a product for its useful life.

(2)(a) Prior to the time of writing specifications for the product, the public contracting agency shall identify those factors which will have cost implications over the life of the product.

(b) The Invitation to Bid shall set out clearly the factors and methodology to be used in life cycle cost adjustments.

(c) At or after the formal bid opening, the results of life cycle costing adjustments shall be applied to the base bid, and the bidder whose total bid results in the lowest ownership cost, taking into account the life cycle costing adjustments, shall be considered the lowest responsible bidder.

Contracts Under Certain Dollar Amounts

125-310-020 (1) Public contracting agencies may, in their discretion, let public contracts not to exceed \$15,000 for the purchase of goods, materials, supplies and services without formal competitive bidding, if the agency has determined that the awarding of the contract without formal competitive bidding will result in cost savings and the following conditions are complied with:

(a) The contract is for a single project, and is not a component of or related to any other project.

(b) When the amount of the contract does not exceed \$1,000, the public contracting agency should, where feasible, obtain competitive quotes.

(c) When the amount of the contract is more than \$1,000, but less than \$15,000, the public contracting agency shall obtain a minimum of three competitive quotes. The public contracting agency shall keep a written record of the source and amount of the quotes received. If three quotes are not available, a lesser number will suffice provided that a written record is made of the effort to obtain the quotes.

(2) Public contracting agencies may, in their discretion, let public contracts for trade related projects, i.e., construction, maintenance, repair, or similar labor and materials contracts without formal competitive bidding if the agency has determined that the awarding of the contract without formal competitive bidding

will result in cost savings and the following conditions are complied with:

(a) The contract is for a single project, and is not a component of or related to any other project.

(b) When the amount of the contract does not exceed \$1,000, the public contracting agency should, where feasible, obtain competitive quotes.

(c) When the amount of the contract is more than \$1,000, but less than \$10,000, except as provided in subsection (d) the public contracting agency shall obtain a minimum of three competitive quotes. The public contracting agency shall keep a written record of the source and amount of the quotes received. If three quotes are not available, a lesser number will suffice provided that a written record is made of the effort to obtain the quotes.

(d) When the contract is for maintenance or repair of roads, highways or parking lots and is more than \$10,000, but less than \$25,000, the public contracting agency may let the contract without formal competitive bidding if a minimum of three competitive quotes are obtained. The public contracting agency shall keep a written record of the source and amount of the quotes received. If three quotes are not available, a lesser number will suffice provided a written record is made of the effort to obtain the quotes.

125-310-025 Public contracting agencies may, at their discretion, use request-for-proposal competitive procurement methods subject to the following conditions:

(1) Contractual requirements are stated clearly in the solicitation document.

(2) Evaluation criteria to be applied in awarding the contract and the role of an evaluation committee are stated clearly in the solicitation document.

(a) Criteria used to identify the proposal that best meets the public contracting needs may include but are not limited to cost, quality, service, compatibility, product reliability, operating efficiency and expansion potential.

(3) Solicitation document clearly states all complaint processes and remedies available.

(4) Solicitation document states the provisions made for vendors to comment on any specifications which they feel limit competition.

125-310-030 (1) Public contracting agencies may, in their discretion, let public contracts without formal competitive bidding if an emergency exists and the emergency consists of circumstances that could not have been reasonably foreseen and requires prompt execution of a contract to remedy the condition.

(2) Public contracting agencies required to act by governing body shall adopt a resolution indicating the existence of the emergency stating with specificity the emergency conditions necessitating the prompt execution of the contract.

(3) Public contracting agencies with a single executive officer must make detailed written findings describing the emergency conditions necessitating prompt execution of the contract.

(4) Any contract awarded under this exemption shall be awarded within 60 days following declaration of the emergency unless an extension is granted pursuant to ORS 279.015(4).

Equipment Repair and Overhaul

125-310-035 (1) Contracts for equipment repair or overhaul may be let without formal competitive bidding, subject to the following conditions:

(a) Service and/or parts required are unknown and the cost cannot be determined without extensive preliminary dismantling or testing; or

(b) Service and/or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source.

(2) If the contract exceeds \$10,000, the public contracting agency shall document in its procurement file the reasons why competitive bids or quotes were deemed to be impractical.

Contracts for Price Regulated Items

125-310-040 Public contracting agencies may, without competitive bidding, contract for the direct purchase of goods or services where the rate or price for the goods or services being purchased is established by federal, state, or local regulatory authority.

Laboratory and Medical Supplies

125-310-045 Public contracting agencies are not required to purchase the following specified laboratory and medical supplies on the basis of a single award to the lowest responsible bidder, but instead may purchase different brands of the same item by awarding contracts, after competitive bidding, to the lowest responsible bidder for each brand. The laboratory and medical supplies affected by this rule are:

- (1) Drugs, biological, blood fractions, and blood components.
- (2) Intravenous solutions and associated supplies for administration.
- (3) Microbiologicals, biochemicals, and diagnostic reagents.
- (4) Surgical dressings.
- (5) Heart valves.
- (6) E.E.G., E.K.G., electrodes, charts, and associated supplies.
- (7) Sterilizing wraps.
- (8) Catheters, medical tubes, and associated supplies.
- (9) Surgical and orthopedic instruments.
- (10) Hearing aids.
- (11) Pacemakers.
- (12) Dental supplies.
- (13) Laboratory small package chemicals.
- (14) Biology supplies.

Gasoline, Diesel Fuel, Heating Oil, Lubricants and Asphalts

125-310-055 Public contracting agencies are exempt from formal competitive bidding requirements for the purchase of gasoline, diesel fuel, heating oil, lubricants and asphalts if the agency seeks competitive quotes from a majority of vendors in the area, makes its purchases from the least expensive source, and retains written justification for the purchase made.

Copyrighted Materials

125-310-060 If the contract is for the purchase of copyrighted materials and there is only one known supplier available for such goods, the public contracting agency may contract for the purchase of the goods without competitive bidding.

Periodicals

125-310-068 Public contracting agencies may purchase subscriptions for periodicals, including journals, magazines, and similar publications without competitive bidding.

Items for Resale by Public Educational Agency Student Stores

125-310-070 Public educational agencies operating student stores may, without competitive bidding, purchase personal property for resale within the stores.

Purchases of Used Personal Property

125-310-075 Public contracting agencies may purchase used personal property for \$10,000 or less without competitive bidding if the agency has determined that the direct purchase without competitive bidding will result in cost savings. For purchases of used personal property over \$10,000, three competitive quotes shall be obtained. If three quotes are not available, a written record must be made of the attempt to obtain quotes.

Advertising Contracts

125-310-080 Public contracting agencies may purchase advertising without competitive bidding.

Investment Contracts

125-310-090 Public contracting agencies may, without competitive bidding, contract for the purpose of the investment of public funds or the borrowing of funds by a public agency when such investment or borrowing of funds is contracted pursuant to duly enacted statute, ordinance, charter, or constitution.

Personal Service Contracts

125-310-092 (1) The following are personal service contracts:

(a) Contracts for services performed as an independent contractor in a professional capacity, including but not limited to the services of an accountant; attorney; architectural or land use planning consultant; physician or dentist; registered professional engineer; appraiser or surveyor; passenger aircraft pilot; aerial photographer; timber cruiser; data processing consultant or broadcaster.

(b) Contracts for services as an artist in the performing or fine arts, including but not limited to persons identified as photographer, filmmaker, painter, weaver, or sculptor.

(c) Contracts for services of a specialized, creative and research-oriented, noncommercial nature.

(d) Contracts for services as a consultant.

(e) Contracts for educational and human custodial care services.

(2) The following are not personal service contracts:

(a) Contracts, even though in a professional capacity, if predominately for a product, e.g., a contract with a landscape architect to design a garden is for personal services, but a contract to design a garden and supply all the shrubs and trees is predominately for a tangible product.

(b) A service contract to supply labor which is of a type that can generally be done by any competent worker, e.g., janitorial, security guard, crop spraying, laundry and landscape maintenance service contracts.

(c) Contracts for trade-related activities considered to be labor and material contracts.

(d) Contracts for services of a trade-related activity, even though a specific license is required to

engage in the activity. Examples are repair and/or maintenance of all types of equipment or structures.

Single Seller of Product Required

25-310-120 Subject to the requirements of rule 125-340-030, public contracting agencies may purchase without competitive bidding if there is only one seller of a product of the quality required, or if the efficient utilization of existing equipment or supplies requires specification of a compatible product for which there is only one seller.

Food Service Contracts

125-310-135 (1) For purposes of this rule food service means a contract in which the contractor agrees to perform for a public contracting agency all of the following functions; the purchase, preparation, and service of meals and related services.

(2) Contracts for food services may be let without formal competitive bidding subject to the following conditions:

(a) Prior to the selection of a contractor, the public contracting agency has made reasonable efforts to inform known companies providing food services of the subject matter of the contract and solicit proposals including public advertisements in at least one newspaper of general circulation in the area where the contract is to be performed.

(b) The contractor is selected on the basis of the most competitive offer considering cost, quality of the product and the service to be rendered.

Employe Benefit Insurance

125-310-139 Public contracting agencies may purchase employe benefit insurance without competitive bidding.

Insurance Contracts

125-310-140 Contracts for insurance where either the annual or aggregate premium exceeds \$5,000 must be let by formal competitive bidding or by one of the following procedures:

(a) Agent of Record: The public contracting agency may appoint a licensed insurance agent ("agent of record") to perform insurance services in connection with more than one insurance contract. Among the services to be provided is the securing of competitive proposals from insurance carriers for all coverages for which the agency of record is given responsibility:

(A) Prior to the selection of an agent of record, the public contracting agency shall make reasonable efforts to inform known insurance agents in the competitive market area that it is considering such selection. These efforts shall include a public advertisement in at least one newspaper of general circulation in the area where the contract is to be performed. The advertisement shall generally describe the nature of the insurance that the public contracting agency will require. If the amount of the annual premium for insurance, other than employe benefits insurance is likely to exceed \$10,000 per year, such notice shall also include a public advertisement in at least one insurance trade publication of general circulation in the state.

(B) Any appointment period shall not exceed three years. Agents may serve more than one appointment period. Agents must qualify for appointment prior to each period as if each appointment period were the first.

(C) In selecting an agent of record, the public contracting agency shall select the agent(s) most likely

to perform the most cost-effective services.

(b) **Specific Proposals For Insurance Contracts:** The public contracting agency may solicit proposals from licensed insurance agents for the purpose of acquiring specific insurance contracts subject to the following conditions:

(A) The public contracting agency shall make reasonable efforts to inform known insurance agents in the competitive market area of the subject matter of the contract, and to solicit proposals for providing the services required in connection with the contract. Such efforts shall include public advertisements in at least one newspaper of general circulation in the area where the public contracting agency is located. If the amount of annual premium for insurance, other than employe benefits insurance is likely to exceed \$10,000 per year, such notice shall also include a public advertisement in at least one insurance trade publication of general circulation in the state.

(B) The public contracting agency shall select an agent on the basis of the most competitive offer considering coverage, premium cost, and service to be provided.

Affirmative Action Contracts

125-310-145 Public contracts may be let without competitive bidding if the letting of the contract is pursuant to a specific affirmative action plan. Affirmative action is a program designed to insure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age, or physical or mental handicap, including, but not limited to, personal practices of contractors, "set-aside" programs and minority business enterprises.

Contract Amendments (Including Change Orders and Extra Work)

125-310-150 Any contract amendment for additional work including change orders, extra work, field orders, or other change in the original specifications which increases the original contract price, may be made with the contractor without competitive bidding subject to the following conditions:

(1) The original contract was let by competitive bidding, unit prices or bid alternates were provided that established the cost for additional work, and a binding obligation exists on the parties covering the terms and conditions of the additional work; or

(2) The amount of the aggregate cost increase resulting from all amendments shall not exceed 10% of the initial contract, or 20% of the initial contract when the initial contract is for a face amount not exceeding \$100,000. Amendments made pursuant to section (1) of this rule are not included in computing the aggregate amount under this section.

Purchases of Hospital and Medical Supplies and Equipment

125-310-205 Public contracting agencies which are members of legally established purchasing cooperatives are exempt from the requirements of competitive bidding and the requirements contract provisions of rule 125-310-300 on purchases of hospital and medical supplies and hospital and medical equipment through the cooperative.

Equipment and Supplies used in Intercollegiate or Interscholastic Athletic Programs

125-310-210 Public contracting agencies are exempt from the prohibition in ORS 279.017 from requiring products by brand name or make or the products of particular manufacturers or sellers in purchasing and contracting for equipment and supplies used in intercollegiate or interscholastic athletic programs. The agency shall use as a minimum the request-for-proposal process (rule 125-310-025) and shall utilize procedures that will maintain the integrity of ORS 279.015.

Purchases for Ocean Going Vessels

125-310-215 Public contracting agencies are exempt from the requirements of competitive bidding for purchases made for its ocean going vessels when the ships are in other than home port.

Oregon Counties; Ballots, Ballot Pages, and Ballot Cards

125-310-225 Oregon Counties are exempt from competitive bidding requirements for the printing of ballots, including ballot pages and labeling of ballot cards.

Purchases of Cadaveric Organs

125-310-230 Public contracting agencies are exempt from competitive bidding requirements for the purchase of cadaveric organs.

Radio and Television Contracts Used in Athletic Programs

125-310-240 Public contracting agencies are exempt from the requirements of competitive bidding for radio and television services provided athletic programs. As an alternative to competitive bidding, the agencies shall as a minimum use the request-for-proposal process (rule 125-310-025) and request proposals from all interested vendors of such services. The request for proposal shall include minimum qualification specifications and shall invite the interested vendors to propose other ancillary services.

Each ancillary service shall be accompanied by a dollar value which reflects current purchase price for the service and a description of its use and application. Contracts may be awarded for not more than three years.

Requirements Contracts

125-310-300 (1) Public contracting agencies may enter into requirements contracts whereby it is agreed to purchase requirements for an anticipated need at a pre-determined price providing the following conditions are complied with:

(a) The contract must be let by competitive procurement process pursuant to the requirements of these rules.

(b) The term of the contract including renewals does not exceed three years.

Purchases Under Requirements Contracts

125-310-310 (1) When the price of goods and services has been established by a requirements contract pursuant to rule 125-310-300, public contracting agencies may purchase the goods and services from the supplier without subsequent competitive bidding.

(2) One public contracting agency may use the requirements contract entered into by another public contracting agency when a formal inter-agency agreement exists between the two agencies.

Specific Exemptions

125-310-320 (1) Public contracting agencies may request a ruling from their appropriate public contract review authority exempting a particular contract or contracts from the bidding requirements of ORS 279.015 which are not otherwise exempted under these rules. The request shall contain the following:

(a) The nature of the project;

(b) Estimated cost of the project;

(c) A narrative description of the cost savings anticipated by the exemption from competitive bidding

and the reasons competitive bidding would be inappropriate,

- (d) Proposed alternative contracting and purchasing practices to be employed; and
- (e) The estimated date by which it would be necessary to let the contract.

(2) The review authority may require such additional information as is deemed necessary to determine whether a specific contract is to be exempt from competitive bidding.

DIVISION 320

INFORMATION SYSTEMS CONTRACTS

Data and Word Processing Contracts

125-320-010 Contract for acquisition of data and word processing hardware and systems software may be let using alternate competitive procurement methods subject to the following conditions:

(a) If the contract amount does not exceed \$15,000, the public contracting agency shall, as a minimum, follow informal competitive procurement methods. Prior to selection of a vendor, reasonable efforts will be made to solicit proposals from three or more vendors. Justification of award shall be documented and become a public record of the agency.

(b) If the contract amount exceeds \$15,000, the public contracting agency may use the request for proposal process (rule 125-310-025) and shall solicit written proposals. Solicitations shall be requested from appropriate vendors appearing on lists compiled by the agency or by advertising in an appropriate trade publication of general circulation when required by statute. The agency shall document the evaluation and award process, which will be part of the public record justifying the award.

(c) If the amount of the contract exceeds \$500,000, in addition to the requirements of subsection (1)(b) of this rule, the public contracting agency shall:

(A) Provide an opportunity for vendors to review requirements and, prior to submitting proposals, comment on any specifications which they feel limit competition;

(B) Provide that residual values be considered only if they are clearly ascertainable; and

(C) Provide that cost of conversion will be minimized by the agency. Vendors competing in this category of procurement shall be given the opportunity to review the evaluation of their proposal before final management review and selection. If there is less than a 1% difference between the performance/cost ratio of the highest ranked proposals, appropriate consideration must be given to the procurement of equipment which will encourage competition.

Telecommunications Systems Contracts

125-320-020 (1) Contracts for acquisition of telecommunications system hardware and software may be let using alternate competitive procurement methods subject to the following conditions:

(a) If the contract amount does not exceed \$15,000, the public contracting agency shall as a minimum obtain competitive quotes. Prior to selection of a vendor reasonable efforts will be made to solicit proposals from three or more vendors. Justification of award shall be documented and become a public record of the agency.

(b) If the contract amount exceeds \$15,000, the public contracting agency may use the request-for-proposal process (rule 125-310-025) and shall solicit written proposals. Solicitations shall be requested from appropriate vendors appearing on lists compiled by the agency or by advertising in an appropriate trade publication of general circulation when required by statute.

(2) The telecommunications solicitation authorized in subsection 1(b) shall:

(a) State the contractual requirements in the solicitations document;

(b) State the evaluation criteria to be applied in awarding the contract and the roles of any evaluation committee. Criteria that would be used to identify the proposal that best meets the public contracting agency's needs may include, but are not limited to cost, quality, service, compatibility, product reliability, operating efficiency, and expansion potential;

(c) State the provisions made for vendors to comment on any specifications which they feel limit competition.

Telecommunications Services and Equipment

125-320-025 (1) Public agencies may continue the existing telecommunications services and equipment after January 1, 1984 from the current provider, or the appropriate AT&T companies assigned such service or product area under the divestiture orders of *United States v Western Electric Co., et al., No. 82-0192, The District Court, District of Columbia, 1983.*

(2) Any new type of service or equipment or any major replacement of existing services or equipment where the rate is not established by federal, state, or local regulatory authority shall be acquired by competitive procurement.

(3) This rule is intended to provide an orderly transition period. The rule is automatically repealed on July 1, 1986.

Office Copier Purchases

125-320-030 (1) Public contracting agencies may enter into multiple price agreements or requirements contracts for either the purchase or lease of office copying equipment. Except for this multiple award exemption, such agreements shall otherwise conform to the requirements of rule 125-310-300.

(2) In exercising this exemption the public agency shall fully consider the operating capabilities, limitations and cost of each brand or model and select that brand which will produce the best combination of performance and cost per copy for each application.

DIVISION 330

STATE AGENCY SPECIFIC

Office of the Secretary of State; Signs for Polling Places

125-330-010 The Office of the Secretary of State is exempt from competitive bidding requirements for the purchase of signs for the identification of polling places.

Commission for the Blind "Snap Pack" Packaging System

125-330-020 The Commission for the Blind is exempt from competitive bidding requirements for the purchase of equipment and materials involved in the "Snap Pack" packaging system, developed by the Volvo Company of Sweden, for the use by the Oregon Industries for the Blind.

Purchases of Alcoholic Liquor for Resale

125-330-030 In the purchase of alcoholic liquor for resale, the Oregon Liquor Control Commission is exempt from the requirements of competitive bidding and the statutory restriction on the purchase of a product by brand name.

DIVISION 340

BRAND NAMES OR MARKS

Specification of Particular Brand Names or Products

125-340-010 (1) Specifications for public contracts shall not expressly or implicitly require any product of any particular manufacturer or seller except pursuant to an exemption under rules 125-310-060 (Copyrighted Materials), 125-340-030 (Single Manufacturer or Compatible Products), 125-340-040 (Product Prequalification), or 125-340-050 (Brand Name or Mark Exemption Applications).

(2) If there is no other practical method of specification, public contracting agencies may designate a particular brand name, make, or product "or equal", but this practice should be avoided whenever practicable.

Copyrighted Materials

125-340-020 Public contracting agencies may specify a specific copyrighted product. This exemption does not include patented or trade mark goods.

Single Manufacturer or Compatible Products

125-340-030 (1) If there is only one manufacturer or seller of a product of the quality required, or if the required product is data processing equipment which will be used for research where there are requirements for exchange of software and data with other research establishments, or if the efficient utilization of the existing equipment or supplies requires a compatible product of a particular manufacturer or seller, a public contracting agency may specify such particular product subject to the following conditions:

(a) The product is selected on the basis of the most competitive offer considering quality and cost. The term "cost" includes not only the product price but also other items of expense such as costs related to quality or conversion.

(b) Prior to awarding the contract, the public contracting agency has made reasonable effort to notify all known vendors of competing or comparable products of the intended specifications and invited such vendors to submit competing proposals. If the purchase does not exceed \$15,000, such notice and invitation may be informal. If the amount of the purchase exceeds \$15,000, such notice shall include advertisement in at least one newspaper of general circulation in the area where the contract is to be performed and shall be timely to allow competing vendors a reasonable opportunity to make proposals.

(2) If the amount of the purchase exceeds \$15,000 and is not also pursuant to the date and word processing exemption, rule 125-320-010, the public contracting agency shall document its actions in the bid file. Such documentation shall include:

(a) A brief description of the proposed contract or contracts.

(b) A detailed description of the reasons why the product and/or seller was selected and any competing products and/or sellers that were rejected. The description shall also include the efforts taken by the public contracting agency to notify and invite proposals from competing vendors.

(3) If the public contracting agency intends to make several purchases of the product of a particular manufacturer or seller for a period not to exceed two years, it may so state in the documentation required by subsection (1)(b) and section (2), and such documentation shall be sufficient notice as to subsequent purchases.

Product Prequalification

125-340-040 (1) When it is impractical to create specific design or performance specifications for a type of product to be purchased, a public contracting agency may specify a list of approved products by reference to particular manufacturers or sellers in accordance with the following product prequalification procedure:

(a) The agency has made reasonable efforts to notify all known manufacturers or vendors of competitive products of its intention to accept applications for inclusion in its list of prequalified products. Notification shall include advertisement in a trade journal of state-wide distribution when possible. In lieu of advertising, an agency may notify vendors and manufacturers appearing on the appropriate list maintained by the Department.

(b) The agency permits application for prequalification of similar products up to 15 days prior to advertisement for bids on the product.

(2) If an application for inclusion in a list of prequalified products is denied, or an existing prequalification revoked, the agency shall notify the applicant in writing. The applicant may appeal to the appropriate contract review authority.

Brand Name or Mark Exemption Applications

125-340-050 A public contracting agency may apply for and receive a brand name or make exemption ruling from the appropriate contract review authority for current and contemplated future purchases. Applications shall contain the following information:

(1) A brief description of the contract or contracts to be covered. The description should include contemplated future purchases.

(2) The brand name, mark, or product to be specified.

(3) The reasons the agency is seeking the exemption.

Conditions of Exemptions

125-340-060 The public contract review authority may grant exemptions if any of the following conditions are met:

(1) The exemption is not likely to encourage favoritism in public contracts or substantially diminish competition and will result in cost savings.

(2) There is only one manufacturer or seller of the product of the quality required, or efficient utilization of existing equipment or supplies requires acquisition of compatible equipment or supplies.

(3) The exemption is requested for the purchase of a particular product to be used in an experimental project.

DIVISION 350

PROPERTY DISPOSITION

Auction Sales of Personal Property

125-350-010 Personal property may be sold at auction if the agency responsible for the sale determines that the auction contemplated will probably result in a higher net return than if the property were sold by competitive written bid.

Sales of Personal Property

125-350-015 Public contracting agencies may sell personal property, including recyclable or reclaimed materials, without formal competitive bidding if the agency has determined that a negotiated sale will result in increased net revenue and the following conditions are complied with:

(1) The personal property has been made available to other state agencies and local governmental units in accordance with ORS 283.235, if the seller is the State of Oregon; and

(2) When the current market value per item is deemed to be less than \$1,000, the public contracting agency may establish a selling price, schedule and advertise a sale date, and sell to the first qualified buyer meeting the sale terms; or

(3) When the current value per item is deemed to exceed \$1,000, the personal property must be offered for competitive written bid and be advertised in accordance with ORS 279.025, or be offered for sale at public auction in accordance with OAR 125-350-010. If no bids are received or if a determination is made that the market value of the property exceeds the offer of the highest responsible bidder, all bids may be rejected and the public contracting agency may negotiate a sale subject to the following conditions:

(a) An appraisal of the market value of the property is obtained and documented and the negotiated sale price exceeds the market value; or

(b) The sale amount exceeds the highest bid received through the bidding or auction process.

Liquidation Sales of Personal Property

125-350-020 Public contracting agencies may sell personal property through a commercially recognized third party liquidator if the agency has determined that a liquidation sale will result in increased net revenue and the following conditions are complied with:

(a) The personal property has been made available to other state agencies and local governmental units in accordance with ORS 283.235, if the seller is the State of Oregon; and

(b) The selection of the liquidator was conducted, as a minimum, by the competitive request-for-proposal process governed by rule 125-310-025.

Donations of Personal Property

125-350-025 (1) Public agencies may transfer personal property, including recyclable or reclaimed materials, without remuneration or only nominal remuneration without competitive bids to the following activities;

(a) Another public agency; or

(b) Any sheltered workshop, work activity center or group care home which operates under contract or agreement with, or grant from, any state agency and which is certified to receive federal surplus property; or

(c) Any recognized non-profit activity which is certified to receive federal surplus property.

(2) Public agencies may donate or sell, without competitive bids, surplus personal property to recognized private non-profit social or health service activities, subject to the following conditions:

(a) A determination has been made that the property is not needed for other public purposes;

(b) If the property has a current market value of \$250 or more, the donation or sale shall:

(A) Be approved by the public agency's chief executive officer;

(B) Be documented by the agency to be clearly in the public interest.

(c) The agency determines this is the most efficient and cost-effective method for disposing of the property.

(3) The public contracting agency shall maintain a record of all transfers, donations or sales authorized by subsections (1) and (2) of this section.

DIVISION 360

WAIVER OF SECURITY BID AND PERFORMANCE BOND

Bid Security Requirements

125-360-010 A public contracting agency may, in its discretion, waive the bid security requirements of ORS 279.027 for contracts other than those for public improvements.

Contracts Under \$10,000

125-360-020 A public contracting agency may, in its discretion, waive the bid security requirements of ORS 279.027 and performance bond requirements of ORS 279.029 if the amount of the contract for the public improvement is less than \$10,000.

APPENDIX E

SELECTIVE OREGON CASE LAW ON PUBLIC CONTRACTING

This appendix compiles some Oregon cases construing Oregon statutes on public contracting. These cases have clarified and explained the import of some of the statutory language governing public contracting. Some of this case law also explains the common law background to public contracting issues. The cases are discussed in the same subject matter sequence as the provisions of the Model Rules.

BIDS

I. Notice, Preparation

Generally, public contracts are awarded after a system of competitive bidding. ORS 279.015 requires that all substantial public contracts shall be based upon a competitive bid. However, there are a number of exceptions to this general rule. The Oregon courts have dealt with two of them.

In *Bower Trucking and Warehouse Co. v. Multnomah County*, 35 Or App 427, 582 P2d 439 (1978), the Oregon Court of Appeals found an implied exception to the competitive bidding requirement when the contract is one for a public utility's services. Because the rates and charges for the public utility's services are regulated pursuant to law, the public agency need not advertise for bids. The public agency is bound to pay the regulated price for the public utility's services.

The second Oregon case, *Photo-Art Commercial Studios, Inc. v. Hunter*, 42 Or App 207, 600 P2d 471 (1979), construed ORS 279.011(4), which at the time allowed public agencies to award a contract for "exclusively . . . personal service" without competitive bidding.

In *Photo-Art*, the State Highway Commission contracted with Photo-Art Commercial Studios, Inc., to produce a movie on the construction of the I-205 bridge. The court held that the contract in question was for personal services (filming involved) and for goods (the film itself). 42 Or App at 213. The court strictly construed the term "exclusively" to mean contracts that were only for personal services. Any kind of mixed goods/services contract was held to be outside of the exclusion established by ORS 279.011(4).

The Oregon legislature subsequently amended the statute to delete the word "exclusively." Or Laws 1979, ch 196, § 1. This amendment reduces the restrictions imposed upon personal service contracts by the *Photo-Art* decision. The Oregon courts have not addressed the question since the amendment, however a predominant test is used to determine whether a given contract is for personal services. ORS 291.021; OAR 125-310-092.

II. Modification, Withdrawal

The Oregon courts have uniformly followed the basic rule that a bid is fully revokable until accepted. See, e.g., *Taggart, Inc. v. Douglas County*, 31 Or App 1137, 572 P2d 1050 (1977). In *Taggart*, the court held that unless the parties to the contract agree that the bid is not to be revokable for a period of time, or unless a relevant statute or rule provides the same, bids are freely revokable prior to acceptance. 31 Or App at 1141. The *Taggart* court even went so far as to hold that the bid may be withdrawn after it has been opened and examined by the public contracting agency. *Id.* at 1140-1141. The court held that if the public contracting agency wants bids to be nonrevokable for a specified period of time, then it must make that qualification part of the bidding specifications. *Id.*

III. Award

When a public contracting agency is restricted to a specific manner of entering into a contract, the agency must follow that procedure to be legally bound. *Springfield Milling Co. v. Lane County*, 5 Or 265 (1874). Even if the contractor proceeds with the performance of the contract, and the agency receives the

benefit and enjoyment of the fruits of the contract, the courts will still not imply a contract between the parties absent the specified ratification procedure. *Id.* at 267.

The Oregon court affirmed this proposition of law in *White v. City of Seaside*, 107 Or 330, 213 P 892 (1923). In *White*, the municipal charter established a procedure for ratification of city contracts. The charter said that the procedure must be followed or the ratification would not be accepted. The charter mandated that all contracts must be authorized by ordinance or resolution signed by the city auditor and a police judge. The auditor refused to sign the contract in question, and the court held that the city ratification was therefore ineffectual. The *White* court noted that the city did have certain alternatives that they could follow to ratify the contract, such as compelling the auditor to sign the contract by mandamus or removing the auditor and replacing him with someone who would ratify the contract. But, the court maintained that the existence of these alternatives did not relieve the city from the responsibility of following the mandated procedures in the charter to ratify the contract in question. *Id.* at 337.

Moreover, the Oregon courts have held that the public contractor is charged with knowing the extent of the authority that the agency's officer has to bind the agency into a contract. *Forrester v. City of Hillsboro*, 156 Or 89, 91, 66 P2d 496 (1937). If the contractor attempts to enter a contract which is beyond the agent's scope of authority, the court has held once again that the contract is invalid. *Id.* The court in *Forrester* reemphasized that if the charter requires certain steps be taken before a contract may be ratified, and the charter is mandatory in demanding that those steps be taken, a contract not conforming to that procedure is invalid. The contract cannot be ratified, and no implied liability for the reasonable value of the property and services given to the public contracting agency will arise. *Id.*

If there is no established procedure for the public agencies who enter into a contract, then general common law rules regarding procedure of offer and acceptance of a contract will control. *Andal v. City of Salem*, 53 Or App 159, 630 P2d 1344 (1981). In *Andal*, the Salem city charter only provided that the mayor sign all contracts. The court held that the charter provision did not establish a contract procedure. Because there was no charter-imposed limitation on the contract procedure, the contract was governed by general contract law. The contractor in *Andal* was therefore allowed to recover for the goods and services conferred upon the city. *Id.* at 163. See also *Winklebleck v. City of Portland*, 147 Or 226, 31 P2d 637 (1934).

Once the procedures mandated by the public agency have been followed and all the bids have been opened, received and examined, ORS 279.029 mandates that the contract be awarded to the "lowest responsible bidder." That term as used in a different statute was construed in *Hanson v. Mosser*, 247 Or 1, 427 P2d 97 (1967). The *Hanson* court held that the determination of who was the lowest responsible bidder is an exercise of a *bida fide* judgment, based upon facts tending reasonably to support the agent's determination. *Id.* at 10. The court further stated that in the absence of fraud or gross abuse, the court will not interfere with the exercise of discretion by administrative boards or officers in their determination of who was the lowest responsible bidder. See also *Oregon Printing Industry v. Chamberlain*, 2 Or App 401, 467 P2d 657 (1970).

The *Oregon Printing* case construed the Oregon statute which requires public agencies to prefer contracting for printing services with in-state establishments. ORS 282.210. The *Oregon Printing* case considered the bid of an Oregon printer for a contract advertised by the State Printing Office. The Oregon printer's bid was \$1,650, or 12 percent above the next lowest bid, which was by a foreign corporation. The court held that the state printer's award of the bid to the foreign corporation was not an abuse of his discretion. The court concluded that the discretion vested in the director had not been abused when he concluded that the Oregon corporation's bid was excessive. *Id.* at 406. See ORS 279.021 for a more general preference statute but with requirements far less vigorous than ORS 282.210.

IV. Mistakes, Late Withdrawals

The Oregon courts have long held that a contractor may equitably avoid enforcement of a contract based upon a bid which contained a material mistake. *State Highway Commission v. State Construction Company*, 203 Or 414, 280 P2d 370 (1955); *Rushlight Co. v. City of Portland*, 189 Or 194, 219 P2d 732 (1950). In *Rushlight*, the contractor inadvertently omitted the cost of steel for the project. The contractor notified the city of its mistake and asked to withdraw its bid after the bid had been opened but before the city had acted upon it. Because the bid was over 30 percent lower than the next highest bid. The court held that the city either knew or reasonably should have known that the bid contained a mistake. *Id.* at 245. The city could not hold the contractor to his bid, and was required to return the bid security to the contractor.

While the court will allow the withdrawal of a bid if it contains a material mistake, the mistake must have been caused by a sufficiently justifiable reason. *Gardner v. Meiling*, 280 Or 665, 572 P2d 1012 (1977).

JUDICIAL REVIEW

I. Bidding Procedure

The Oregon court has held that all public agency bidding procedures and rules are reviewable pursuant to ORS 183.400. In *Morse Bros. Prestress v. City of Lake Oswego*, 55 Or App 886, 640 P2d 645 (1982), the court held that the petition to review administrative rules allowed in that statute also applies to rules promulgated by local public contract review boards, as well as state public contract review boards.

Morse Brothers was a judicial review proceeding pursuant to ORS 183.400 to challenge regulations adopted by a local public contract review board. While the court held that the regulations were reviewable under the Administrative Procedures Act, the court held the regulations as valid because local boards are not required to follow APA rulemaking procedures. 55 Or App at 896.

While the courts may review the rules and procedures that the public agency promulgates to control their awarding of contracts, the court will not directly review the agency's decision to award the contract to a particular contractor. In *Strand Century, Inc. v. Dallas*, 68 Or App 705, 683 P2d 561 (1984), the court refused to review a challenge made to the City of Eugene's awarding of a public contract. The court noted that ORS 279.067 has created a special proceeding to challenge the award of a public contract through the local contract review board and the circuit court where that board is located. 68 Or App at 707. Therefore, the scope of review which the Court of Appeals will exercise appears restricted. The first remedy should be sought with the local public contract review board and the circuit court where venue lies.

II. Extent of Authority to Contract

Public contracting agents have two types of limitations upon their authority to contract. The first limitation is whether the public agent has been granted the requisite authority to contract by the agency for whom he or she works. Secondly, the type contract entered into may be restricted in its length to the term of the agent who enters the contract depending upon the type of power that the agent exercises. These two limitations will be dealt with separately.

Initially, the courts have mandated that the public contracting agents must have the authority to enter into the contract in question in order for it to be binding upon the public agency. However, there is a long-established distinction between the types of authority that a public contracting agent may exercise. The agent may have the actual authority to enter into the contract, as granted by the public agency in question. This authority is granted to the agency when the public contracting agency manifests their consent that the agency may bind them to a contract. *Restatement (2d), Agency, § 7.*

However, the agent may also have the apparent authority to bind the public agency to a contract if the contractor reasonably believes that the agency has the requisite authority and that belief arises because of representations made by the agent. Restatement (2d), Agency, § 8. This distinction between the type of authority exercised by the agency in entering the contract has been a significant factor in earlier Oregon decisions.

In *State v. Des Chutes Land Co.*, 64 Or 167, 129 P 764 (1913), the Oregon Supreme Court held that contractors dealing with an agent of a public contracting agency are held to have notice of that agent's authority. If that agent attempts to enter a contract which is outside of his or her authority, the contractor cannot plead that the agent had the apparent authority to enter that contract. The court stated that there was no such thing as apparent authority in a public agent, as there could be in the case of an agent for a private party. *Id.* at 175. A contract by a public agency which is outside of his or her authority is void, and the contractor may not recover for goods or services given to the public agency.

This blanket prohibition against suits based upon a contract made by a public agent who had less than actual authority to enter that contract was revisited by the Supreme Court in 1983. In *Wiggins v. Barrett and Assoc.*, 295 Or 679, 669 P2d 1132 (1983), a sanitation district contracted with a property owner to supply him with a free connection to the sewer if the property owner would give the district an easement across his land. The property owner stipulated that he would grant the easement only if the district made a gravity flow connection to the sewer. The agency's local field representative in charge of that particular job agreed to supply the property owner with the gravity flow connection. When the construction was finished, the property owner noticed that the connection was of insufficient depth to be effective. The district denied that the representative had the authority to enter into the contract for the gravity flow system and maintained that they did not have to compensate plaintiff for failure to supply him with that type of connection.

While the court reaffirmed the *Des Chutes* rule it did hold, on the specific facts before it, for the property owner. Justice Linde's concurring opinion is of special significance to public agencies in this area of law.

The court has also recognized that an official or agency who exercises the contracting power in excess or abuse of the authority that the officer or agency has been granted acts without the sanction of the state and that exercise may be enjoined. *Hanson v. Mosser*, 247 Or 1, 427 P2d 97 (1967). In *Hanson*, the court explained that public officers hold and exercise only the authority lawfully delegated to them. Where officers act beyond or in abuse of their delegated authority, they act as individuals. A suit regarding a contract entered into by an official or official beyond their authority is therefore not one against the state, but against the officer. The state is therefore not liable for any damages arising under the contract. *Id.* at 7.

The second limitation placed upon the extent of a public agency's contract deals with the length of time that a contract may run. A local government officer or agency has generally been described as having two types of powers: governmental and proprietary. The type of power exercised in creating the contract determines the contract's maximum length. If the contract is created through the officer's or agency's governmental powers, then the term of the contract may not run beyond the length of the officer's term of office absent statutory authority to the contrary. *Jacobberger v. School District No. 1*, 122 Or 124, 256 P 652 (1927). Governmental powers have been described in *Miles v. City of Baker*, 152 Or 87, 51 P2d 1047 (1935).

If, on the other hand, the power exercised is deemed to be a proprietary or business power, there is no limitation as to the length of time that the contract may run. The power may be exercised in a way that will be binding upon the public agency after the board or officer exercising the power has ceased to hold

office. *Id.* at 93-94, 51 P2d 1047 (1935).

III. Debt Limits

A public agency may not contract beyond the limits of indebtedness established by constitution, statute or charter. *Public Market Co. v. City of Portland*, 160 Or 155, 83 P2d 440 (1938). The Oregon court has established a two-step test to determine whether the provisions of a debt limitation are triggered:

1. The contract is entered into by an agency which is subject to the limitation; and
2. The contract exposes general tax revenues, triggering the debt limitation provisions.

DeFazio v. Washington Public Power Supply System, 296 Or 550, 679 P2d 1316 (1984).

In regard to the first test, the court held the contractor must be truly independent of the state or public body. The leading case is *McClain v. Regents of the University*, 124 Or 629, 265 P 412 (1928). The court held that even the minimal control that the state held over the University Regents was sufficient to make them a state agency within the terms of the test.

The courts have been more willing to recognize an exception to debt limitation provisions through the second prong of the test. Numerous decisions have repeatedly hinged the application of debt limitation provisions upon the potential exposure of general tax revenue. See, e.g., *Walsh Construction Company v. Smith*, 272 Or 398, 537 P2d 542 (1975)(housing bond made payable from rents held to be outside debt limitations despite a "moral make-up clause"); *Morris v. City of Salem*, 179 Or 666, 174 P2d 192 (1946)(same for contract to purchase parking meters payable only from meter revenue; *McClain v. Regents of the University*, *supra*, (same for dormitory bonds payable only from rental income). In *DeFazio*, the court held that the agreements made by WPPSS did not contravene the debt limitations because they were payable entirely from utility revenues, not from taxes. Therefore, because general tax revenues were not threatened, WPPSS's ability to contract was not subject to the debt limitation provisions.

**STATE OF OREGON
DEPARTMENT OF JUSTICE**

**ATTORNEY GENERAL'S
MODEL PUBLIC CONTRACT
RULES MANUAL**



**DAVE FROHNMAYER
Attorney General**

**Effective
October 1, 1984**