

**OREGON'S NEW PUBLIC CONTRACTING CODE**  
**Chapter 794, 2003 Laws**

**League of Oregon Cities Conference**  
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by  
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On July 22, the Governor signed House Bill 2341, which became Chapter 794 of Oregon's 2003 Laws. This bill will replace Chapter 279 of the Oregon Revised Statutes with three new subchapters: ORS 279A, 279B and 279C, which collectively will be referred to as the "Public Contracting Code."

ORS subchapter 279A will contain laws applicable to all types of public contracts, including the general authority for local governments to adopt contracting rules. ORS subchapter 279B will contain laws applicable to the procurement of goods and services (including most personal services), but not to public improvements. ORS subchapter 279C will contain the laws applicable to the selection and award of contractors for public improvements and the selection of architects, engineers and land surveyors.

The new Public Contracting Code will be much longer than the current code, but most of the additional length is due to the separation of public improvement provisions from the provisions that apply to goods and services and to new provisions that give special limited contracting autonomy to the departments of transportation, higher education and other state agencies.

**EFFECTIVE DATE:** The New Public Contracting Code will not become effective until March 1, 2005 (Section 336). **The new code incorporates other new law concerning bid closings and first-tier subcontractors that is already in effect, however.** A discussion of that law is included at the end of this paper.

**WHAT PARTS OF CHAPTER 279 DOES CHAPTER 794 REPEAL?** All of ORS Chapter 279 is repealed and replaced by the new chapters 279 A, B and C, except for the following:

ORS 279.340 – 279.342 – Overtime Wages for Public Employees  
ORS 279.625 – Printed Symbols on Recycled Paper  
ORS 279.795 – State Flags to Purchased by Secretary of State  
ORS 279.835 – 279.855 Mandatory Purchasing from Qualified Non-Profit  
Agencies for Disabled Individuals

**WHAT HAPPENS TO RULES ADOPTED UNDER THE OLD CODE?** The new law repeals all local contracting rules (Section 334). This means that all special exemptions from bidding under local rules will expire. The new code will allow contract review boards to create new exemptions, however (Sections 57, for goods and services, and 103, for public improvements).

**HOW WILL LOCAL CONTRACT REVIEW BOARDS BE AFFECTED?** Under the old law, governing bodies had to adopt resolutions or ordinances to declare themselves as a local contract review

board. Under the new law, the governing body of each local government will automatically be the local contract review board (Section 9).

**HOW WILL CONTRACTING AGENCIES EXERCISE CONTRACTING AUTHORITY?** The new code provides two types of rules that can be made by local governments – Section 10 rules and Section 11 rules. The Attorney General cannot promulgate Section 11 rules.

### **Section 10 Rules:**

Section 10 rules are rules of procedure. Section 10 authorizes the Attorney General and contracting agencies to promulgate rules of procedure. If local governments do not adopt their own Section 10 rules, they will be forced to use the Attorney General's rules. The relevant provisions of Section 10 are set forth below:

*SECTION 10a. If House Bill 3476 becomes law, section 10 of this 2003 Act is amended to read:*

*(1) The Attorney General shall prepare and maintain model rules of procedure appropriate for use by all contracting agencies governing public contracting under the Public Contracting Code and may devise and publish forms for use therewith. ....*

*(4) A contracting agency that has not adopted its own rules of procedure in accordance with subsection (5) of this section is subject to the model rules adopted by the Attorney General under this section.... **This subsection does not apply to personal services contracts of local contracting agencies except for contracts for architectural, engineering and land surveying services and related services.**<sup>1</sup>*

*(5)(a) A contracting agency may adopt its own rules of procedure for public contracts that: (A) Specifically state that the model rules adopted by the Attorney General under this section do not apply to the contracting agency; and (B) Prescribe the rules of procedure that the contracting agency will use for public contracts, which may include portions of the model rules adopted by the Attorney General. ...*

Section 10 rules are a pre-condition to the exercise of certain contracting powers, such as the right to use competitive proposals, or informal quotes for public improvements contracts. In a few places, the failure to adopt Section 10 rules could have dire consequences. For example, under Section 51(7), if Section 10 rules are not adopted to allow bids to be corrected and withdrawn before bid opening, a bidder may not correct or withdraw its bid before the bid closing.

When drafting local rules, be careful to address each situation under the code where "Section 10 rules" are allowed or required, and consider including a provision to allow the purchasing agent to use the Model Rules to govern situations that are not addressed by local rules.

### **Section 11 Rules.**

Section 11 rules can be procedural or substantive rules. A contracting agency/local contract review board can adopt section 11 rules to modify many provisions of the state law. The

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<sup>1</sup> The new code continues the practice of requiring each contracting agency to adopt its own rules for the award of personal services contracts.

Attorney General is not authorized to promulgate Section 11 rules. Section 11 rules can provide for the procurement, management, disposal and control of goods, services, personal services and public improvements under the Public Contracting Code.

Section 11 also requires each contracting agency to create procedures for the screening and selection of persons to perform personal services.<sup>2</sup>

### **Delegation.**

Section 12 clarifies that almost all authority in the code can be delegated and sub-delegated. Contracting agencies can delegate to their executive or administrative officers the authority to adopt Section 10 rules.

### **WHAT CANNOT BE DELEGATED?**

Section 12 allows for delegation unless otherwise provided in the code. In most cases, the code allows authority to be exercised by a “contracting agency” or “in accordance with rules adopted by the contracting agency.” These types of provisions do not specify the body or office within the agency responsible for adopting the rule or acting on behalf of the agency. In other cases, the code stipulates that an authority must be approved or exercised by a contract review board, or by a governing body, or by legislative action.

The authorities that must be exercised by a contract review board include the following.

1. The determination that electronic advertisement of bids or proposals is likely to be cost effective (Section 51(4)).
2. The creation of special methods of solicitation and award for contracts for goods and services under Section 57, and the exemption of public improvement contracts from competitive bidding under Section 103.
3. Hearings on appeal of disbarment or denial of pre-qualification under Section 87 and hearings on appeals of disqualification or denial, revocation or revision of a prequalification under Section 125.
4. The exemption of certain products from the prohibition against brand name specifications for public improvement contracts under Section 107; however, the authority to approve the use of a brand name specification in solicitations to procure goods under Section 76 may be delegated.
5. The exemption of certain contracts from the requirement for all or a portion of bid security or performance bonds under Section 120.

The language of certain sections of the code also indicates that at least some involvement at the level of the governing body is required prior to delegation of authority:

1. Section 8: “A local contract review board by ordinance, resolution, administrative rule or other regulation may designate certain service contracts or classes of service contracts as personal service contracts.”

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<sup>2</sup> See footnote 1.

2. Section 50(4)(a): “A local contracting agency may elect, by rule, charter, ordinance or other appropriate legislative action, to award contracts for personal services ... under the procedures of sections 50 to 57 of this 2003 Act.”

Authority that cannot be delegated will not be provided by the Model Rules. A local government can only exercise the authorities described above through legislative action by its governing body.

## **HOW WILL THE NEW CODE CHANGE PUBLIC CONTRACTING FOR LOCAL GOVERNMENTS?**

Generally speaking, for sophisticated agencies, contracting under the new code will not be much different from contracting under the old code. The general requirement for competitive procurement, the rules for identifying the lowest responsible bidder, the requirements for advertising formal bids and proposals, and the public works prevailing wage laws are basically unchanged.

However, all governments should be prepared to make several changes in response to the new code. The new code provides a much higher level of detail and description of the procedures of informal solicitation and the use of requests for proposals, which will make it difficult for local governments to use less formal procedures unless they adopt special rules. The new code will subject public contracting to a higher level of scrutiny by requiring more notices to be issued and more records to be kept and because it includes an expanded emphasis on the rights of potential contractors to sue contracting agencies.

### **No Statutory Conditions in Contracts for Services other than Public Improvements.**

ORS 279.310-279.340 require all contracts with local governments, regardless of type or size, to contain several paragraphs of statutory language concerning payment of claims, workers' compensation, hours of labor and the like. Although those provisions will still be required to be set forth in contracts for public improvements, they will not be required to be included in other types of contracts.

### **Exemption of Donated and Volunteer Projects from Public Contracting.**

Under current law, any improvement to real property for a public agency is a public improvement. This has caused confusion for public works departments struggling to understand whether privately engineered public improvements constructed by developers are subject to requirements for competitive bidding and other public contracting laws. The current definition of public improvements also requires the absurd result that contracts with neighborhood groups and other benefactors for donated improvements have to include the burdensome statutory language in ORS 279.310 – 279.340 concerning payment of claims, workers' compensation, and hours of labor, even though most of those provisions are not applicable to volunteer labor. The new code's definition of “public improvement” solves these problems because it will not include projects “for which no funds of a public agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection.”

### **Hours of Labor and Overtime for Service Contracts.**

Existing law requires employees under public contracts to be paid overtime wages when working on weekends and holidays. This requirement is unreasonable in some cases, for

example, when applied to contracts for food services, where employees are often employed on a part-time basis and weekend shifts are common. For contracts other than public improvements, Section 48b of the new code reasonably redefines the conditions for labor as: “A contractor on a public contract ... shall pay employees for overtime work performed under the public contract in accordance with ORS 653.010 to 653.261 and the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).

### **Statutory Procedures for Informal Quotes.**

**For Goods and Services up to \$150,000.** Section 54 allows contracts for goods and services in amounts up to \$150,000 to be awarded using an informal competitive quote process. Under this process, an award may be based on criteria other than price, provided that a record is kept of the basis for the award. No rules are required to use this provision.

**For Public Improvements up to \$100,000.** Section 132, 133. After adopting Section 10 rules, a contracting agency may use an informal competitive quote process for transportation public improvements (highways, bridges, other projects) of not more than \$50,000 and for other types of public improvements under contracts up to \$100,000. Under this process, an award may be based on criteria other than price, provided that a record is kept of the basis for the award. For some reason, these provisions will be repealed on June 30, 2009. (Section 332a.)

### **Use of Requests for Proposals for Public Improvement Contracts Require Rulemaking.**

Under the new code, contract review boards will continue to be able to approve the use of a request for proposal (“RFP”) process for public improvement contracts, but Section 129 will not allow an RFP to be used unless Section 10 procedural rules have been adopted. Despite this fact, Sections 130 and 131 provide ample restrictions, requirements and procedural rules for the issuance of most RFPs, leaving one to wonder what remains to be addressed in the rules required by Section 129.

### **Statutory RFP Procedure for Selection of Goods and Services Without Rulemaking.**

The new code will include a statutory procedure for using requests for proposals (“RFP”) to solicit vendors of goods and services. The procedure is based on the RFP procedure in the current model rules. This statute was drafted to be self-executing, so that no rules are required to use the procedure. A copy of Section 52 is added at the end of this paper.

### **Price Agreements are Not Revocable.**

A “Price Agreement” is a unilateral offer by one party to sell goods to another party for a stipulated price, without a corresponding promise to buy from the purchaser.

Under ORS 72.2050, a vendor may revoke the terms of a price agreement at any time after three (3) months. Section 63 of the bill will make ORS 72.2050 inapplicable to price agreements with governments.

### **Performance AND Payments Bonds.**

A combined performance and payment bond for 100% of the contract price will no longer suffice. Section 188 will require general contractors to provide separate performance and payment bonds, each in the amount of 100% of the contract price. Because sureties have been

reluctant to issue performance bonds that cover the design aspect of design/build contracts, provisions were added to Section 118 to allow contractors to substitute a cashier's check in lieu of part or all of a performance bond.

Section 120a allows contract review boards to adopt rules that exempt certain contracts or classes of contracts from all or a portion of the requirement for bid security and from all or a portion of the requirement for performance and payment bonds. Using the authority of Section 120a, a local government could adopt rules that would allow contractors to furnish combined performance and payment bonds in cases where the expense of obtaining separate bonds might prevent competition from new or smaller contractors.

Sections 119 and 120 of HB 2341 are reproduced at the end of this paper.

### **Stricter Rules for Cooperative Purchasing (also known as “piggy backing” and “tagging-on”).**

For purchases over \$250,000, a purchasing agent must publish notice, receive comments and make findings before using a contract issued by another government (Section 28). This restriction will not apply, however, to pre-planned cooperative purchasing arrangements conducted under Section 27. Section 28 is reproduced at the end of this paper.

### **Judicial Remedies Provided for Procurements of Goods and Services.**

Sections 83-87 are new provisions governing the rights of affected persons to seek judicial review of the acts of contract review boards and contracting agencies under subchapters 279A and 279B. The judicial remedies provisions do not apply to acts made under Subchapter 279C (public improvements and architects, engineers, land surveyors).

Although the judicial remedies sections appear to invite and encourage litigation, the trade-off for local governments is that the sections also create limitations on the right to seek judicial review, and allow governments to proceed with the award and execution of a contract, when necessary. The judicial remedies provisions limit the period of time for seeking a writ of review, in most cases, to the period prior to contract execution. A reproduction of the judicial remedies provisions, with headings and commentary, is provided at the end of this paper.

### **MUST A LOCAL GOVERNMENT WAIT UNTIL 2005 TO BEGIN USING THE NEW CODE?**

Under the current code, a local government can adopt new rules for the selection and award of personal service contracts that incorporate provisions of the new code.

Section 335 of the Act provides authority to local governments to adopt Section 10 and Section 11 rules prior to March 1, 2005.

*SECTION 335. Permissible actions before operative date. (1) The Director of the Oregon Department of Administrative Services ... and local contracting agencies may take any action before the operative date specified in section 337 of this 2003 Act that is necessary to enable them to exercise, on and after the operative date specified in section 337 of this 2003 Act, the duties, functions and powers granted to them under this 2003 Act.*

Section 335 does not authorize contracting agencies to implement the new rules prior to 2005, but contracting agencies could use their contract review board powers to exempt contracts awarded under the new rules from the requirements of current law.

Could the new law provide the basis for findings of fact that support special exemptions under ORS 279.015(2) for contracts awarded by the RFP and intermediate procurement procedures described in the new code?

## SELECTED PROVISIONS OF HB 2341

### SECTION 28. Permissive cooperative procurements.

(1) A contracting agency may establish a contract or price agreement through a permissive cooperative procurement only if:

(a) The administering contracting agency's solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in Section 51 or 52 of this 2003 Act;

(b) The administering contracting agency's solicitation and the original contract allow other contracting agencies to establish contracts or price agreements under the terms, conditions and prices of the original contract;

(c) The contractor agrees to extend the terms, conditions and prices of the original contract to the purchasing contracting agency; and

(d) No material change is made in the terms, conditions or prices of the contract or price agreement between the contractor and the purchasing contracting agency from the terms, conditions and prices of the original contract between the contractor and the administering contracting agency.

(2)(a) A purchasing contracting agency shall provide public notice of intent to establish a contract or price agreement through a permissive cooperative procurement if the estimated amount of the procurement exceeds \$250,000.

(b) The notice of intent must include:

(A) A description of the procurement;

(B) An estimated amount of the procurement;

(C) The name of the administering contracting agency; and

(D) A time, place and date by which comments must be submitted to the purchasing contracting agency regarding the intent to establish a contract or price agreement through a permissive cooperative procurement.

(c) Public notice of the intent to establish a contract or price agreement through a permissive cooperative procurement must be given in the same manner as provided in section 51 (4)(b) and (c) of this 2003 Act.

(d) Unless otherwise specified in rules adopted under section 11 of this 2003 Act, the purchasing contracting agency shall give public notice at least seven days before the deadline for submission of comments regarding the intent to establish a contract or price agreement through a permissive cooperative procurement.

(3) If a purchasing contracting agency is required to provide notice of intent to establish a contract or price agreement through a permissive cooperative procurement under subsection (2) of this section:

(a) The purchasing contracting agency shall provide vendors who would otherwise be prospective bidders or proposers on the contract or price agreement, if the procurement were competitively procured under sections 47 to 87 of this 2003 Act, an opportunity to comment on the intent to establish a contract or price agreement through a permissive cooperative procurement.

(b) Vendors must submit comments within seven days after the notice of intent is published.

(c) And if the purchasing contracting agency receives comments on the intent to establish a contract or price agreement through a permissive cooperative procurement, before the purchasing contracting agency may establish a contract or price agreement through the permissive cooperative procurement, the purchasing contracting agency shall make a written determination that establishing a contract or price agreement through a permissive cooperative procurement is in the best interest of the purchasing contracting agency. The purchasing contracting agency shall provide a copy of the written determination to any vendor that submitted comments.

## **SECTION 52. Competitive sealed proposals.**

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

(2) The request for proposals must include:

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

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

(c) A procurement description;

(d) A time, date and place that prequalification applications, if any, must be filed and the classes of work, if any, for which proposers must be prequalified in accordance with Section 61 of this 2003 Act;

(e) A statement that the contracting agency may cancel the procurement or reject any or all proposals in accordance with Section 58 of this 2003 Act;

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

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

(h) All contractual terms and conditions applicable to the procurement. The request for proposals also may:

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

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

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

(D) Announce the method of contractor selection that may include, but is not limited to, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed to identify a class of proposers that fall within a competitive range or to otherwise

eliminate from consideration a class of lower ranked proposers, or any combination of methods, as authorized or prescribed by rules adopted under section 10 of this 2003 Act; and

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

(3)(a) The contracting agency may require proposal security in any form deemed prudent by the contracting agency. Proposal security shall serve the same function with respect to requests for proposals as bid security serves with respect to invitations to bid under section 51 of this 2003 Act.

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

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

(4) Public notice of the request for proposals shall be given in the same manner as provided for public notice of invitations to bid in section 51 (4) of this 2003 Act.

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

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

(c) If a request for proposals is canceled under section 58 of this 2003 Act after proposals are received, the contracting agency may return a proposal to the proposer that made the proposal. The contracting agency shall keep a list of returned proposals in the file for the solicitation.

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

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

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

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

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

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

(E) Competitive simultaneous negotiations;

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

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

(H) Any combination of methods described in this paragraph, as authorized or prescribed by rules adopted under section 10 of this 2003 Act.

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

(d) After the opening of proposals, a contracting agency may issue or electronically post an addendum to the request for proposals that modifies the criteria, rating process and procedure for any tier of competition before the start of the tier to which the addendum applies. The contracting agency shall send an addendum that is issued by a method other than electronic posting to all proposers who are eligible to compete under the addendum. The contracting agency shall issue or post the addendum at least five days before the start of the subject tier of competition or as otherwise determined by the contracting agency to be adequate to allow eligible proposers to prepare for the competition in accordance with rules adopted under section 10 of this 2003 Act.

(7) The cancellation of requests for proposals and the rejection of proposals must be in accordance with section 58 of this 2003 Act.

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

(9) The contracting agency shall issue or electronically post the notice of intent to award described in section 64 of this 2003 Act to each proposer who was evaluated in the final competitive tier.

(10) If a contract is awarded, the contracting agency shall award the contract to the responsible proposer whose proposal the contracting agency determines in writing to be the most advantageous to the contracting agency based on the evaluation process and evaluation factors described in the request for proposals, any applicable preferences described in sections 16 and 17 of this 2003 Act and, when applicable, the outcome of any negotiations authorized by the request for proposals. Other factors may not be used in the evaluation. When the request for proposals specifies or authorizes the award of multiple public contracts, the contracting agency shall award public contracts to the responsible proposers who qualify for the award of a contract under the terms of the request for proposals.

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

**SECTION 118. Performance bond; payment bond; waiver of bonds in case of emergency.**

(1) A successful bidder for a public improvement contract shall promptly execute and deliver to the contracting agency the following bonds:

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

(b) A payment bond in an amount equal to the full contract price, solely for the protection of claimants under section 154 of this 2003 Act.

(2) If the public improvement contract is with a single person to provide construction manager and general contractor services, in which a guaranteed maximum price may be established by an amendment authorizing construction period services following preconstruction period services, the contractor shall provide the bonds required by subsection (1) of this section upon execution of an amendment establishing the guaranteed maximum price. The contracting agency shall also require the contractor to provide bonds equal to the value of construction services authorized by any early work amendment in advance of the guaranteed maximum price amendment. Such bonds must be provided before construction starts.

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

(4) In cases of emergency, or when the interest or property of the contracting agency or the public agency or agencies for whose benefit the contract was awarded probably would suffer material injury by delay or other cause, the requirement of furnishing a good and sufficient performance bond and a good and sufficient payment bond for the faithful performance of any public improvement contract may be excused, if a declaration of such emergency is made in accordance with rules adopted under section 10 of this 2003 Act.

**SECTION 119. Return or retention of bid security.**

Upon the execution of a public improvement contract and delivery of a good and sufficient performance bond and a good and sufficient payment bond by the successful bidder, the bid security of the successful bidder shall be returned to the bidder. A bidder who is awarded a contract and who fails promptly and properly to execute the contract and to deliver the performance bond and the payment bond 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 bonds. The bid security of unsuccessful bidders may be returned to them when the bids have been opened and the contract has been awarded, and may not be retained by the contracting agency after the contract has been duly signed.

**SECTION 120. Exemption of contracts from bid security and bonds.**

(1) Subject to the provisions of subsection (2) of this section, the Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in section 7 (3)(b) of this 2003 Act, the Director of Transportation may exempt certain contracts or classes of contracts from all or a portion of the requirement for bid security and from all or a portion of the requirement that good and sufficient bonds be furnished to ensure performance of the contract and payment of obligations incurred in the performance.

(2) The contracting agency may require bid security and a good and sufficient performance bond, a good and sufficient payment bond, or any combination of such bonds, even though the public improvement contract is of a class exempted by the Director of the Oregon Department of Administrative Services, the local contract review board or, for contracts described in section 7 (3)(b) of this 2003 Act, the Director of Transportation.

## Legislative Alert – Bid Closing Dates

A new public contracting law (HB 3422) will change ORS 279.027 to restrict certain bid closings to Tuesdays, Wednesdays and Thursdays between 2 p.m. and 5 p.m. The other changes made by HB 3422 are:

1. The Tuesday-Thursday bid closing restrictions apply only to bids that will be subject to the first-tier subcontractor disclosure rules.
2. Regardless of whether first-tier subcontractor disclosure is required, the Tuesday-Thursday rules will not apply to contracts for maintenance or construction of highways, bridges or other transportation facilities.
3. The opening of bids must occur immediately after the deadline for submitting bids (bid closing). Agencies cannot require subcontractor disclosures to be delivered before bid opening.
4. The time for bidders to submit their first-tier subcontractor disclosures has been reduced from four working hours after bid closing to two (2) working hours after bid closing.
5. The threshold for application of the first-tier subcontractor disclosure rules to public improvement contracts has been raised, from contracts with a value of more than \$75,000, to contracts with a value of more than \$100,000.

The new law includes a statutory subcontractor disclosure form that must be used, but the form that was placed into the bill is defective in one minor aspect that may be corrected before the end of the 2003 legislative assembly. Until the form is corrected, however, I recommend that you use the form set forth on the next page.

**ALL OF THE CHANGES APPLY TO INVITATIONS TO BID FIRST ADVERTISED ON OR AFTER AUGUST 1, 2003.**

FIRST TIER SUBCONTRACTOR DISCLOSURE FORM

PROJECT NAME: \_\_\_\_\_

BID # \_\_\_\_\_

BID CLOSING: Date: \_\_\_\_\_ Time: \_\_\_\_\_ p.m.

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

List below the name of each subcontractor that will be furnishing labor or labor and materials and that is required to be disclosed, the category of work that the subcontractor will be performing and the dollar value of the subcontract. Enter "NONE" if there are not subcontractors that need to be disclosed. (ATTACH ADDITIONAL SHEETS IF NEEDED)

NAME OF SUBCONTRACTOR	DOLLAR VALUE	CATEGORY OF WORK
_____	\$ _____	_____
_____	\$ _____	_____
_____	\$ _____	_____
_____	\$ _____	_____
_____	\$ _____	_____

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

Form submitted by (bidder name): \_\_\_\_\_

Contact name: \_\_\_\_\_ Phone no.: \_\_\_\_\_