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NOTICE OF PROPOSED RULEMAKING INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 137
DEPARTMENT OF JUSTICE

FILED

11/21/2025 3:47 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Amends Model Contracting Rules in response to HB3653 (2025), HB3646 (2025) and HB4006 (2024)

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/22/2025 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Salem, OR 97301

Filed By:
Katie DeVore
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 12/15/2025

TIME: 1:00 PM - 2:00 PM

OFFICER: John McCormick

REMOTE HEARING DETAILS

MEETING URL: Click here to join the meeting

PHONE NUMBER: 132-379-2614

CONFERENCE ID: 21862979871748

SPECIAL INSTRUCTIONS:

Passcode: Gf6nC6XA

NEED FOR THE RULE(S)

These amendments are made pursuant to ORS 279A.065(4) and amend OAR 137-048-0130, 137-048-0300, 137-049-0600, 137-049-0610, 137-049-0620, 137-049-0640, 137-049-0670 and 137-049-0680 in response to HB3653 (2025), amend OAR 137-046-0300 in response to HB3646 (2025), and amend OAR 137-049-0820 in response to HB4006 (2024).

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

HB3653 (2025): <https://olis.oregonlegislature.gov/liz/2025R1/Downloads/MeasureDocument/HB3653/Enrolled>

HB3646 (2025): <https://olis.oregonlegislature.gov/liz/2025R1/Downloads/MeasureDocument/HB3646/Enrolled>

HB4006 (2024): <https://olis.oregonlegislature.gov/liz/2024R1/Downloads/MeasureDocument/HB4006/Enrolled>

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

These amendments will not affect racial equity in this state. These amendments are made in response to the House Bills

identified elsewhere in this Notice, and relate to energy performance contracts, contract preferences in public procurement for employee-owned businesses and submitting surety bonds in lieu of retainage for certain public improvement contracts.

FISCAL AND ECONOMIC IMPACT:

No fiscal or economic impacts resulting from these rule amendments were identified.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) These rules affect state agencies and units of local government that meet the definition of “contracting agency” at ORS 279A.010(1)(b) whose public contracting is governed by the Attorney General's Model Rules of Public Contracting pursuant to ORS 279A.065(5).

(2) (a) Though these rules do not govern the activities of small businesses, small businesses that submit offers in response to solicitation documents to contracting agencies subject to these rules may be affected by these rules by the need to comply with them, or by having such offers evaluated according to them.(b) There are no additional reporting requirements under these amended rules. (c) These rules do not require specific action from small businesses. Contracting agencies may be required to make minor changes to current practices governing public contracting activities under the Public Contracting Code.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

No small businesses participated in the Rules Advisory Committee convened for these amended rules. Trade organizations representing businesses in Oregon that submit offers to public contracting were consulted.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

137-046-0300, 137-048-0130, 137-048-0300, 137-049-0600, 137-049-0610, 137-049-0620, 137-049-0640, 137-049-0670, 137-049-0680, 137-049-0820

AMEND: 137-046-0300

RULE SUMMARY: The amendments to OAR 137-046-0300 (i) add to an existing list of preferences in the award of public contracts established by ORS 279A.128 a preference for an entity "in which the entity's employees own at least 50 percent of the ownership interest in the entity directly or through an employee stock ownership plan recognized by the Internal Revenue Service as a qualified stock ownership plan" and (ii) reorganize the rule for clarity.

CHANGES TO RULE:

137-046-0300

Preference for Oregon Goods and Services ¶¶

(1) Tiebreaker Preference and Award When Offers Are Identical. Under ORS 279A.120, when a Contracting Agency receives Offers identical in price, fitness, availability and quality, and chooses to Award a Contract, the Contracting Agency shall Award the Contract based on the following order of precedence:¶¶

(a) The Contracting Agency shall Award the Contract to the Offeror among those submitting identical Offers who is offering Goods or Services, or both, or Personal Services, that are manufactured, produced or to be performed

in Oregon.¶¶

(b) If two or more Offerors submit identical Offers, and they all offer Goods or Services, or both, or Personal Services, that are manufactured, produced or to be performed in Oregon, the Contracting Agency shall Award the Contract by drawing lots among the identical Offers. The Contracting Agency shall provide the Offerors who submitted the identical Offers notice of the date, time and location of the drawing of lots and an opportunity for these Offerors to be present when the lots are drawn.¶¶

(c) If the Contracting Agency receives identical Offers, and none of the identical Offers offer Goods or Services, or both, or Personal Services, that are manufactured, produced or to be performed in Oregon, then the Contracting Agency shall award the Contract by drawing lots among the identical Offers. The Contracting Agency shall provide to the Offerors who submitted the identical Offers notice of the date, time and location of the drawing of lots and an opportunity for these Offerors to be present when the lots are drawn.¶¶

(2) Determining if Offers are Identical. For purposes of Section 1 of this rule, a Contracting Agency shall consider Offers identical in price, fitness, availability and quality as follows:¶¶

(a) Bids received in response to an Invitation to Bid are identical in price, fitness, availability and quality if the Bids are Responsive, and offer the Goods or Services, or both, or Personal Services, described in the Invitation to Bid at the same price.¶¶

(b) Proposals received in response to a Request for Proposals are identical in price, fitness, availability and quality if they are Responsive and achieve equal scores when scored in accordance with the evaluation criteria set forth in the Request for Proposals.¶¶

(c) Offers received in response to a Special Procurement conducted under ORS 279B.085 are identical in price, fitness, availability and quality if, after completing the contracting procedure approved by the Contract Review Authority, the Contracting Agency determines, in Writing, that two or more Offers are equally advantageous to the Contracting Agency.¶¶

(d) Offers received in response to an intermediate Procurement conducted pursuant to ORS 279B.070 are identical if the Offers equally best serve the interests of the Contracting Agency in accordance with 279B.070(4).¶¶

(3) Determining if Goods or Services or Personal Services are Manufactured or Produced or Performed in Oregon. In applying the preference described in Section 1 of this rule, a Contracting Agency shall determine whether a Contract is predominantly for the predominant purpose of the Solicitation is to acquire Goods, Services or Personal Services, and then use the predominant purpose to determine if they may apply the preference to Offeror's Goods, Services, or Personal Services are manufactured, produced, or performed in Oregon that fulfill the predominant purpose of the Solicitation. Contracting Agencies may request, either in a Solicitation Document, following Closing, or at any other time the Contracting Agency determines is appropriate, any information the Contracting Agency may need to determine if the Goods, Services or Personal Services are manufactured or produced in Oregon. A Contracting Agency may use any reasonable criteria to determine if Goods, Services or Personal Services are manufactured, produced, or performed in Oregon, provided that the criteria reasonably relate to that determination, and provided that the Contracting Agency applies those criteria equally to each Offer.¶¶

(4) Procedure for Drawing Lots. When this rule calls for the drawing of lots, the Contracting Agency shall draw lots by a procedure that affords each Offeror subject to the drawing a substantially equal probability of selection and that does not allow the person making the selection the opportunity to manipulate the drawing of lots to increase the probability of selecting one Offeror over another.¶¶

(5) Discretionary Preference and Awards. Under ORS 279A.128, a Contracting Agency may provide the following discretionary preferences:¶¶

(a) A Contracting Agency may provide, in a Solicitation Document for Goods, Services or Personal Services, a specified percentage preference of not more than ten percent for (i) Goods fabric:¶¶

(A) For Goods or Services provided by a benefit company that is incorporated, or processed entirely in Oregon or Services or Personal Services performed entirely in Oregon or (ii) for goods or services provided by a benefit company that is incorporated, organized, formed or created under ORS 60.754 and has the majority of the benefit company's regular, full-time workforce located in this state organized, formed or created under ORS 60.754, submits with its Offer a valid certificate of existence issued pursuant to ORS 60.027, and has the majority of the benefit company's regular, full-time workforce located in this state.¶¶

(B) For Goods or Services provided by an entity in which the entity's employees own at least 50 percent of the ownership interest in the entity directly or through an employee stock ownership plan recognized by the Internal Revenue Service as a qualified stock ownership plan.¶¶

(b) A Contracting Agency may provide the preference described in subsection (a) of this Section only if the price offered by an Offeror that otherwise qualifies for the preference is not more than 5 percent greater than the price offered by any other Offeror. A Contracting Agency shall apply the preference described in subsection (a) of this Section by reducing the price offered by an Offeror that qualifies for the preference by the amount described in

the Solicitation Document for purposes of evaluation of the qualifying Offeror's Offer.¶

(c) A Contracting Agency may provide, in a Solicitation Document for Goods, Services or Personal Services, a specified percentage preference of not more than ten percent for Goods fabricated or processed entirely in Oregon or Services or Personal Services performed entirely in Oregon, if the gGoods or sServices cost not more than ~~five~~ten percent more than the ~~goods or services available from a contractor~~price offered by any other Offeror proposing Goods that are not fabricated or processed, or Services that ~~is~~are not a benefit company. When the Contracting Agency ~~provid~~performed within this state. A Contracting Agency shall apply the preference described in this Section by reducing the price offered by an Offeror that qualifies for a~~the~~ preference under this Section, and more than one Offeror qualifies for the preference, by the amount described in the Solicitation Document for purposes of evaluation of the qualifying Offeror's Offer.¶

(d) If more than one Offeror qualifies for a preference provided to Offerors pursuant to subsections (a) or (c) of this Section, then the Contracting Agency may give a further preference to a ~~qualifying Offeror~~an Offeror that qualifies for the preference and that resides in or is headquartered in ~~Oregon~~this state.¶

(e) A Contracting Agency may ~~establish~~give a preference percentage higher than ten percent by written order that finds good cause to~~as~~ described in Section (a)(B) of this Section only to an Offeror that submits evidence that it qualifies for the preference. The Contracting Agency shall include in the Solicitation Document in which it establishes the higher p~~preference~~percentage and which explains the Contracting Agency's reasons and evidence for finding good cause to establish ~~ace~~ a description of the evidence an Offeror must provide to qualify for the preference.¶

(f) A Contracting Agency, by Written order, may set a higher cost percentage for any preference described in subsection (a) of this section based on a Written determination establishing the Contracting Agency's findings that there is good cause to set a higher cost percentage and explaining the reasons for the higher cost percentage.¶

(g) A Contracting Agency may not apply the preferences described in this Section in a Procurement for emergency work, minor alterations, ordinary repairs or maintenance of public improvements, or construction work that is described in ORS 297C.320.

Statutory/Other Authority: ORS 279A.065, OL 2011; ch. 237 sec. 1, OL 2025 ch. 304 sec. 1

Statutes/Other Implemented: ORS 279A.065, ~~ch 237~~, ORS 279A.120, ORS 279A.128

RULE SUMMARY: The amendments update the reference to Energy Performance Contracts pursuant to HB 3653.

CHANGES TO RULE:

137-048-0130

Applicable Selection Procedures; Pricing Information; Disclosure of Proposals; Conflicts of Interest ¶¶

(1) When selecting the most qualified Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, Contracting Agencies shall follow the applicable selection procedure under either OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure) or 137-048-0220 (Formal Selection Procedure). State Contracting Agencies selecting a Consultant under this section (1) may solicit or use pricing policies and pricing Proposals, or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, to determine a Consultant's compensation only after the State Contracting Agency has selected the most qualified Consultant in accordance with the applicable selection procedure; provided, however, this restriction on a State Contracting Agency's solicitation or use of pricing policies, pricing Proposals or other pricing information does not apply to selection procedures used by the State Contracting Agency to select a Consultant when the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services for the Project do not exceed \$100,000 or in an Emergency, pursuant to ORS 279C.0110(10) and (11). In following the Direct Appointment Procedure under OAR 137-048-0200, a State Contracting Agency or Local Contracting Agency may base its selection of a Consultant on any information available to the Agency prior to beginning the Direct Appointment Procedure for the Project involved. Local Contracting Agencies may solicit or use pricing policies and pricing Proposals, or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, in any of the Local Contracting Agencies' selection procedures to select Consultants to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, pursuant to the requirements of ORS 279C.110(5).¶¶

(2) Contracting Agencies selecting a Consultant to perform Related Services shall follow one of the following selection procedures:¶¶

(a) When selecting a Consultant on the basis of qualifications alone, Contracting Agencies shall follow the applicable selection procedure under OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure), or 137-048-0220 (Formal Selection Procedure);¶¶

(b) When selecting a Consultant on the basis of price competition alone, Contracting Agencies shall follow the applicable provisions under OAR 137-048-0200 (Direct Appointment Procedure), the applicable provisions of 137-048-0210 (Informal Selection Procedure) pertaining to obtaining and evaluating price Proposals and other pricing information, or the applicable provisions of 137-048-0220 (Formal Selection Procedure) pertaining to obtaining and evaluating price Proposals and other pricing information; and¶¶

(c) When selecting a Consultant on the basis of price and qualifications, Contracting Agencies shall follow the applicable provisions under OAR 137-048-0200 (Direct Appointment Procedure), the applicable provisions of 137-048-0210 (Informal Selection Procedure) pertaining to obtaining and evaluating price and qualifications Proposals, or the applicable provisions of 137-048-0220 (Formal Selection Procedure) pertaining to obtaining and evaluating price and qualifications Proposals. For selections under the informal selection procedure of OAR 137-048-0210, Contracting Agencies may use abbreviated requests for Proposals that nevertheless meet the requirements of OAR 137-048-0210, when the Contracting Agency determines, in its sole discretion, that the characteristics of the Project and the Related Services required by the Contracting Agency would be adequately addressed by a more abbreviated request for Proposals document, generally comparable to the intermediate Procurement procedures and related documentation under ORS 279B.070 and OAR 137-047-0270. Contracting Agencies subject to this section (2) may request and consider a Proposer's pricing policies and pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, submitted with a Proposal.¶¶

(3) A Contracting Agency is not required to follow the procedures in Section (1) or Section (2) of this rule, when the Contracting Agency has established Price Agreements with more than one Consultant and is selecting a single Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services under an individual work order or task order. Provided, however, the criteria and procedures the Contracting Agency uses to select a single Consultant, when the Contracting Agency has established Price Agreements with more than one Consultant, must meet the requirements of OAR 137-048-0270 (Price Agreements).¶¶

(4) Contracting Agencies may use electronic methods to screen and select a Consultant in accordance with the procedures described in sections (1) and (2) of this rule. If a Contracting Agency uses electronic methods to screen

and select a Consultant, the Contracting Agency shall first promulgate rules for conducting the screening and selection procedure by electronic means, substantially in conformance with OAR 137-047-0330 (Electronic Procurement).¶¶

(5) For purposes of these division 48 rules, a "mixed" Contract is one requiring the Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and also provide Related Services, other Services or other related Goods under the Contract. A Contracting Agency's classification of a procurement that will involve a "mixed" Contract will be determined by the predominant purpose of the Contract. A Contracting Agency will determine the predominant purpose of the Contract by determining which of the Services involves the majority of the total Estimated Fee to be paid under the Contract. If the majority of the total Estimated Fee to be paid under the Contract is for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, the Contracting Agency shall comply with the requirements of ORS 279C.110 and section (1) of this rule. If majority of the total Estimated Fee to be paid under the Contract is for Related Services, the Contracting Agency shall comply with the requirements of ORS 279C.120 and section (2) of this rule. If the majority of the total Estimated Fee to be paid under the Contract is for some other Services or Goods under the Public Contracting Code, the Contracting Agency shall comply with the applicable provisions of the Public Contracting Code and divisions 46, 47 and 49 of the Model Rules that match the predominant purpose of the Contract.¶¶

(6) In applying these rules, State Contracting Agencies shall support the State of Oregon's goal of promoting a sustainable economy in the rural areas of the state.¶¶

(7) Consistent with the requirements of ORS 279C.107 and the remaining requirements of ORS 279C.100, 279C.105 and 279C.110 through 279C.125, the following provisions apply to Proposals received by a Contracting Agency for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services:¶¶

(a) The term "competitive proposal," for purposes of ORS 279C.107, includes Proposals under OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure), 137-048-0220 (Formal Selection Procedure) or 137-048-0130(2)(c) (selection based on price and qualifications) and any Proposals submitted in response to a selection process for a work order or task order under 137-048-0270 (Price Agreements).¶¶

(b) For purposes of Proposals received by a Contracting Agency under OAR 137-048-0200 (Direct Appointment Procedure), a formal notice of intent to award is not required. As a result, while a Contracting Agency may make Proposals under 137-048-0200 (Direct Appointment Procedure) open for public inspection following the Contracting Agency's decision to begin Contract negotiations with the selected Consultant, 137-048-0200 Proposals are not required to be open for public inspection until after the Contracting Agency has executed a Contract with the selected Consultant.¶¶

(c) In the limited circumstances permitted by ORS 279C.110, 279C.115 and 279C.120, where the Contracting Agency is conducting discussions or negotiations with Proposers who submit Proposals that the Contracting Agency has determined to be closely competitive or to have a reasonable chance of being selected for award, the Contracting Agency may open Proposals so as to avoid disclosure of Proposal contents to competing Proposers, consistent with the requirements of ORS 279C.107. Otherwise, Contracting Agencies may open Proposals in such a way as to avoid disclosure of the contents until after the Contracting Agency executes a Contract with the selected Consultant. If the Contracting Agency determines that it is in the best interest of the Contracting Agency to do so, the Contracting Agencies may make Proposals available for public inspection following the Contracting Agency's issuance of a notice of intent to award a Contract to a Consultant; and¶¶

(d) Disclosure of Proposals and Proposal information is otherwise governed by ORS 279C.107.¶¶

(8) As required by ORS 279C.307(1), pertaining to requirements to ensure the objectivity and independence of providers of certain Personal Services which are procured under ORS chapter 279C, Contracting Agencies may not:¶¶

(a) Procure the Personal Services identified in ORS 279C.307 from a Contractor or Consultant or an affiliate of a Contractor or Consultant who is a party to the Public Contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the Personal Services; or¶¶

(b) Procure the Personal Services identified in ORS 279C.307 through the Public Contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the Personal Services.¶¶

(9) The requirements of ORS 279C.307(1) and section (8) of this rule apply in the following circumstances, except as provided in sections (10) and (11) of this rule:¶¶

(a) A Contracting Agency requires the Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Public Contract or performance under a Public Contract that is subject to ORS chapter 279C. A Public Contract that is "subject to ORS chapter 279C" includes a Public Contract for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, a Public Contract for Related Services or a Public Contract

for construction services under ORS chapter 279C.¶¶

(b) The Procurements of Personal Services subject to the requirements of ORS 279C.307 include, but are not limited to, the following:¶¶

(A) Procurements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, which involve overseeing or monitoring the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C;¶¶

(B) Procurements for commissioning services, which involve monitoring, inspecting, evaluating or otherwise overseeing the performance of a Contractor or Consultant providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C;¶¶

(C) Procurements for project management services, which involve administration, management, monitoring, inspecting, evaluating compliance with or otherwise overseeing the performance of a Contractor or Consultant providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, construction services subject to ORS chapter 279C, commissioning services or other Related Services for a Project;¶¶

(D) Procurements for special inspections and testing services, which involve inspecting, testing or otherwise overseeing the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C; and¶¶

(E) Procurements for other Related Services or Personal Services, which involve administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing the Public Contracts described in Section (9)(a) of this rule.¶¶

(10) The requirements of ORS 279C.307(1) and section (8) of this rule do not apply in the following circumstances, except as further specified below:¶¶

(a) To a Contracting Agency's Procurement of both design services and construction services through a single "Design-Build" Procurement, as that term is defined in OAR 137-049-0610. Such a Design-Build Procurement includes a Procurement under an Energy Savings Performance Contract, as defined in ORS 279A.010. Provided, however, the requirements of ORS 279C.307 do apply to a Contracting Agency's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Design-Build Contract or performance under such a Contract resulting from a Design-Build Procurement; and¶¶

(b) To a Contracting Agency's Procurement of both pre-construction services and construction services through a single Procurement of Construction Manager/General Contractor Services, as that term is defined in ORS 279C.332(3). Provided, however, the requirements of ORS 279C.307 do apply to a Contracting Agency's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Construction Manager/General Contractor Services Contract or performance under such a Contract resulting from a Procurement of Construction Manager/General Contractor Services.¶¶

(11) As permitted by ORS 279C.307(3), a Contracting Agency may apply for an exception to the requirements of ORS 279C.307(1) in the situation when the Contracting Agency anticipates that it must procure Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Public Contract or performance under a Public Contract that is subject to ORS chapter 279C, and the Contracting Agency desires to accept a Bid or other Proposal from a Contractor or Consultant that would otherwise be prohibited from bidding or proposing to provide the required Personal Services. In order for the Contracting Agency to obtain such an exception to the requirements of ORS 279C.307(1), the Contracting Agency must apply for and obtain an approved exception from the Appropriate Authority for the Contracting Agency before awarding a contract to the Contractor or Consultant under a Procurement for the required Personal Services, or before entering into an amendment of an existing Public Contract with the Contractor or Consultant to obtain the Personal Services.¶¶

(a) Application Requirements. The Contracting Agency's application to the Appropriate Authority for an exception under ORS 279C.307(3) must include the following Findings and Justifications:¶¶

(A) The Contracting Agency requires the Personal Services described in ORS 279C.307(1);¶¶

(B) Accepting a Bid or Proposal from a Contractor or Consultant that would be subject to the prohibition described in ORS 279C.307(1) is in the best interest of the Contracting Agency;¶¶

(C) Approving the exception is unlikely to encourage favoritism in awarding Public Contracts or to substantially diminish competition for Public Contracts; and¶¶

(D) Approving the exception:¶¶

(i) Is reasonably expected to result in substantial cost savings to the Contracting Agency or the public; or¶¶

(ii) Otherwise will substantially promote the public interest in a manner that could not be practicably realized by complying with the prohibition described in ORS 279C.307(1).¶¶

(b) Consultation with Legal Counsel. A Contracting Agency shall consult with the Contracting Agency's legal counsel during the exception process provided for in ORS 279C.307(3) as follows:¶¶

(A) During the process of preparing an application for the exception to ensure compliance with the requirements of ORS 279C.307 and with the other applicable provisions of ORS Chapter 279C;¶¶

(B) Pursuant to the requirements of an ORS 279C.307(3) exception approved by the Contracting Agency's Appropriate Authority; and¶¶

(C) The Contracting Agency's consultation with its legal counsel should include discussion and evaluation of mitigation measures that the Contracting Agency can include in the Procurement and in any resulting Public Contract for the Personal Services, in order to reduce any competitive advantage that the Contractor or Consultant may have or may be perceived to have, and to increase the objectivity and independence of the Contractor or Consultant during its performance of the Personal Services.¶¶

(c) Definitions. The following definitions apply to section (11) of this rule:¶¶

(A) "Appropriate Authority" means, for a State Contracting Agency, the Director of the Oregon Department of Administrative Services; for the Oregon Department of Transportation pursuant to ORS 279A.050(3)(b), the Director of Transportation; and, for a Local Contracting Agency, the Local Contracting Agency's local contract review board; and¶¶

(B) "Findings and Justifications" means the determinations, findings and justifications for a conclusion that a Contracting Agency, in seeking an exception from the objectivity and independence requirements of ORS 279C.307(1), reaches based on the considerations set forth in ORS 279C.307(3)(d) and based on sufficient supporting facts.

Statutory/Other Authority: ORS 279A.065, OL 2011, ch. 458

Statutes/Other Implemented: ORS 279A.065, OL 2011 ch. 458, ORS 279C.100-279C.125, OL 2009, ch. 880, sec. 11, ~~OL 2011, ch 458~~

AMEND: 137-048-0300

RULE SUMMARY: The Amendments update the reference to Energy Performance contracts pursuant to HB 3653.

CHANGES TO RULE:

137-048-0300

Prohibited Payment Methodology; Purchase Restrictions ¶¶

(1) Except as otherwise allowed by law, a Contracting Agency shall not enter into any Contract which includes compensation provisions that expressly provide for payment of:¶¶

(a) Consultant's costs under the Contract plus a percentage of those costs; or¶¶

(b) A percentage of the Project construction costs or total Project costs.¶¶

(2) Except as otherwise allowed by law, a Contracting Agency shall not enter into any Contract in which:¶¶

(a) The compensation paid under the Contract is solely based on or limited to the Consultant's hourly rates for the Consultant's personnel working on the Project and reimbursable expenses incurred during the performance of work on the Project (sometimes referred to as a "time and materials" Contract); and¶¶

(b) The Contract does not include a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract.¶¶

(3) Except in cases of Emergency or in the particular instances noted in the subsections below, a Contracting Agency shall not purchase any building materials, supplies or equipment for any building, structure or facility constructed by or for the Contracting Agency from any Consultant under a Contract with Contracting Agency to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, for the building, structure or facility. This prohibition does not apply if either of the following circumstances exists:¶¶

(a) The Consultant is providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services under a Contract with a Contracting Agency to perform Design-Build services or Energy Savings Performance Contract services (see OAR 137-049-0670 and 137-049-0680); or¶¶

(b) That portion of the Contract relating to the acquisition of building materials, supplies or equipment was awarded to the Consultant pursuant to applicable law governing the award of such a Contract.

Statutory/Other Authority: ORS 279A.065, OL 2011; ch. 458

Statutes/Other Implemented: ORS 279A.065, OL 2011; ch. 458

AMEND: 137-049-0600

RULE SUMMARY: The amendments update the reference to Energy Performance Contracts pursuant to HB 3653.

CHANGES TO RULE:

137-049-0600

Purpose II

OAR 137-049-0600 to 137-049-0690 are intended to provide guidance to Contracting Agencies regarding the use of Alternative Contracting Methods for Public Improvement Contracts, as may be directed by a Contracting Agency's Contract Review Authority under ORS 279C.335. These Alternative Contracting Methods include, but are not limited to, the following forms of contracting: Design-Build, Energy Savings-Performance Contract and the Construction Manager/General Contractor Method. To the extent any such Alternative Contracting Methods are utilized within the competitive bidding process set forth in 279C.335(1), these OAR 137-049-0600 to 137-049-0690 rules are advisory only and may be used or referred to by a Contracting Agency in whole, in part or not at all, within the discretion of the Contracting Agency. As to ESPC contracting, ~~these OAR 137-049-0600 to 137-049-0690 rules implement the requirements of ORS 279C.335 pertaining to the adoption of~~ sets forth the Model Rules appropriate for use by all Contracting Agencies to govern the procedures for entering into ESPCs enter into Energy Performance Contracts pursuant to ORS 279C.335(1)(f). As to contracting for Construction Manager/General Contractor Services requiring an exemption from competitive bidding under 279C.335(2), OAR 137-049-0600 to 137-049-0690 include mandatory and optional provisions pertaining to the procurement of Construction Manager/General Contractor Services, pursuant to the requirements of ORS 279C.337.

Statutory/Other Authority: ORS 279C.335, 279A.065, 351.086

Statutes/Other Implemented: ORS 279C.335, 279C.337, 279A.065, 351.086

RULE SUMMARY: The amendments update the definitions associated with Energy Performance Contracts pursuant to HB 3653.

CHANGES TO RULE:

137-049-0610

Definitions for Alternative Contracting Methods ¶¶

The following definitions shall apply to these OAR 137-049-0600 to 137-049-0690 rules, unless the context requires otherwise:¶¶

(1) Affiliate has the meaning set forth in ORS 279C.332(1).¶¶

(2) Alternative Contracting Methods means innovative techniques for procuring or performing Public Improvement Contracts, utilizing processes other than the traditional methods involved in the design-bid-build construction contracting method (with Award of a Public Improvement Contract based solely on price, in which a final design is issued with formal Bid documents, construction Work is obtained by sealed Bid Awarded to the Responsible Bidder submitting the lowest Responsive Bid, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design-Build contracting, CM/GC forms of contracting and ESPC Energy Performance Contracts, which are specifically addressed in these OAR 137-049-0600 to 137-049-0690 rules. These methods also include other developing techniques, which include but are not limited to general "performance contracting," "cost plus time" contracting (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(I)) and "qualifications plus project approach" contracting (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(II)). Procedural requirements for these methods are identified in these OAR 137-049-0600 to 137-049-0690 rules, when a Contracting Agency uses an Alternative Contracting Method in a procurement that requires an exemption from competitive bidding under ORS 279C.335(2) or in an ESPC Energy Performance Contract procurement that is excepted from competitive bidding under ORS 279.335(1)(f).¶¶

(3) Construction Manager/General Contractor (or "CM/GC") has the meaning set forth in ORS 279C.332(2).¶¶

(4) Construction Manager/General Contractor Method (or "CM/GC Method") means the Alternative Contracting Method which involves a Contracting Agency's selection of a CM/GC to perform CM/GC Services for a project or projects.¶¶

(5) Construction Manager/General Contractor Services (or "CM/GC Services") has the meaning set forth in ORS 279C.332(3).¶¶

(6) Design-Build means a form of Procurement that results in a Public Improvement Contract in which the construction Contractor also provides or obtains specified design services, participates on the project team with the Contracting Agency, and manages both design and construction. In this form of Contract, a single Person provides the Contracting Agency with all of the Personal Services and construction Work necessary to both design and construct the project.¶¶

(7) Early Work means construction services, construction materials and other Work authorized by the parties to be performed under the CM/GC Contract in advance of the establishment of the GMP, fixed price or other maximum, not-to-exceed price for the project. Permissible Early Work shall be limited to early procurement of materials and supplies, early release of bid or proposal packages for site development and related activities, and any other advance Work related to important components of the project for which performance prior to establishment of the GMP will materially and positively affect the development or completion of the project.¶¶

(8) Energy Conservation Measures (or "ECMs") (also known as "energy efficiency measures") means, as used in ESPC Procurement, any equipment, an Energy Performance Contract, any fixture or, furnishing, or system to be added to or used in an existing building or structure, and any repair, alteration or improvement to an existing building to meet a need or requirement for: providing guarantee energy savings or structure that is designed to performance; reducing energy consumption and rel, greenhouse gas emissions, waste generation or waste costs, including those consumption; reducing costs related to electrical energy, thermal energy energy usage and storage, water consumption, supply or waste disposal, and future contract; reducing labor costs and materials costs associated with maintenance of the building or structure necessary to repair, replace or maintain energy supply and storage systems, water supply systems or plumbing or waste disposal systems; or increasing renewable energy generation and storage. For purposes of these OAR 137-049-0600 to 137-049-0690 rules, use of either or both of the terms "building" or "structure" shall be deemed to include existing energy, water and waste disposal systems connected or related to or otherwise used for the building or structure when such system(s) are included in the project, either as part of the project together with the building or structure, or when such system(s) are the focus of the project. Maintenance services are not Energy Conservation Measures, for purposes of these 137-049-0600 to 137-049-0690 rules.¶¶

(9) Energy Savings Guarantee means the energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the Contracting Agency that certain energy savings CM Design and Implementation means the third phase of the project in an Energy Performance Contract, under which the Qualified Energy Service Company completes any plans and Specifications required to implement the ECMs that have been agreed to, and the Qualified Energy Service Company's performance will be achieved for the project covered by the RFP, through the installation and implementation of the agreed-upon ECMs for the project. The Energy Savings Guarantee shall include, but shall not be limited to, the specific energy savings and performance levels and amounts that will be guaranteed, provisions related to the financial remedies available to the Contracting Agency in the event the guaranteed savings and performance are not achieved, the specific conditions under which the ESCO will guarantee energy savings, all fabrication, construction, assembly or installation of the ECMs, and provides commissioning, construction administration and related Personal Services or Work for such implementation. ¶

(10) Energy Performance Contract (or "EPC") means a Public Improvement Contract between a Contracting Agency and a Qualified Energy Service Company, in which the Qualified Energy Service Company: ¶

(a) Identifies and assesses a need or requirement in a public improvement for: (i) Providing guaranteed energy savings or performance through an energy conservation measure; (ii) Reducing energy consumption, greenhouse gas emissions, waste generation or water consumption; (iii) Reducing costs related to energy usage and storage, water supply or waste disposal; (iv) Reducing labor and materials costs necessary to repair, replace or maintain energy supply and storage systems, water supply systems or plumbing or waste disposal systems; or (v) Increasing renewable energy generation and performance (including the specific responsibilities of the Contracting Agency after final completion of the storage, including renewable energy from thermal energy sources; and ¶

(b) Recommends and designs and construction phase), and the term of the energy savings and performance guarantee. ¶

(10) Energy Savings Performance Contract (or "ESPC") means a Public Improvement Contract between a Contracting Agency and as, including fabrication, assembly or installation, as appropriate, a fixture, furnishing, or system that meets the need or requirement identified in subparagraph (A). In this form of Contract, the Qualified Energy Service Company for the identification, evaluation, recommendation, design will provide the Contracting Agency with all of the Personal Services and construction of Energy Conservation Measures, including a Design-Build Contract, that guarantee energy sav Work necessary to identify, assess, and design and construct, including, fabrication, assembly or installation, as appropriate, the fixture, furnishings or performance system. ¶

(11) General Conditions Work (or "GC Work") means a general grouping of project Work required to support construction operations on the project that is not included within the Contractor's overhead or fee. ¶

(12) Guaranteed Maximum Price (or "GMP") has the meaning set forth in ORS 279C.332(4), pertaining to procurements for CM/GC Services. For Alternative Contracting Methods other than the CM/GC Method, "Guaranteed Maximum Price" or "GMP" means the total maximum price provided to the Contracting Agency by the Contractor and accepted by the Contracting Agency that includes all reimbursable costs and fees for completion of the Contract Work and any particularly identified contingency amounts, as defined by the Public Improvement Contract. ¶

(13) Measurement and Verification (or "M & V") means, as used in ESPC Procurement an EPC, the examination of installed ECMs using the International Performance Measurement and Verification Protocol ("IPMVP"), or any other comparable protocol or process, to monitor and verify the operation of energy-using systems pre-installation and post-installation. ¶

(14) Project Development Plan means a secondary phase of Personal Services and Work performed by an ESCO in an ESPC Procurement when the ESCO the project under an EPC, under which the Qualified Energy Service Company performs more extensive design assessment of the agreed-upon ECMs for the project, provides the detailed provisions of the ESCO's Energy Savings Guarantee that the fully installed and commissioned ECMs will achieve a particular energy savings level for the building or structure including preliminary design, and prepares an overall report or plan summarizing the ESCO Qualified Energy Service Company's Work during this secondary phase of the Work project and otherwise explaining how the agreed-upon ECMs will be implemented during the design and construction phase of the Work (ECM Design and Implementation); The term "Project Development Plan" can may also refer to the report or plan provided by the ESCO Qualified Energy Service Company at the conclusion of this phase of the Work project. ¶

(15) Qualified Energy Service Company (or "ESCO") means, as used in ESPC Procurement an Energy Performance Contract,, a company, firm or other legal Person with the following characteristics: that has a demonstrated technical, operational, financial and managerial capabilities to design, install, construct, commission, manage, measure and verify, and otherwise implement Energy Conservation Measures and other Work on building systems or building components that are directly related to the ECMs in existing buildings and structures; a prior record of successfully performing ESPCs on projects involving existing buildings and structures that are comparable to the project under consideration by the Contracting Agency; and the financial strength to

effectively guarantee energy savings and performance under the ESPC for the project in question for, and a prior record of success in, identifying and assessing needs for and recommending, designing and constructing, fabricating, assembling or installing fixtures, furnishings or systems that meet the requirements of an energy performance contract, and has developed expertise in measuring and verifying energy use and reductions in energy use, expertise in identifying greenhouse gas emissions and methods for reducing greenhouse gas emissions or expertise in methods of providing savings, reductions or other benefits that an authorized state agency may seek through an energy performance contract, and is prequalified by the Oregon Department of Energy pursuant to ORS 276.915(3)(g) and ODOE's implementing regulations under OAR Division 330, Chapter 130, and listed as an approved Contractor by Oregon Department of Energy, or the ability to secure necessary financial measures to effectively guarantee energy savings under an ESPC for that projectwise meets the standards for prequalification specified by an Authorized State Agency, as defined under ORS 276.905(2).¶

(16) Savings has the meaning set forth in ORS 279C.337(4), pertaining to CM/GC Services procurements. For other Alternative Contracting Methods, "Savings" means a positive difference between a Guaranteed Maximum Price or other maximum not-to-exceed price set forth in a Public Improvement Contract and the actual cost of the Contractor's performance of the Contract Work payable by the Contracting Agency under the terms of the Contract, including costs for which a Contracting Agency reimburses a Contractor and fees, profits or other payments the Contractor earns.¶

(17) ~~Technical Energy Audit means, as used in ESPC Procurement, the initial phase of Personal Services to be performed by an ESCO~~Investment Grade Audit means the initial phase of the project under an Energy Performance Contract, under which the Qualified Energy Service Company provides Personal Services that includes a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to the Contracting Agency of the ESCO's findings during this initial phase of the Work; the term "Technical Energy; the term "Investment Grade Audit" can~~may~~ also refer to the report provided by the ESCO at the conclusion of this phase of the ~~Work~~project.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.332, 279C.335, 279A.065

AMEND: 137-049-0620

RULE SUMMARY: The amendments update the references to Energy Performance Contracts pursuant to HB 3653.

CHANGES TO RULE:

137-049-0620

Use of Alternative Contracting Methods ¶¶

(1) Competitive Bidding Exemptions. ORS Chapter 279C requires a competitive bidding process for Public Improvement Contracts, unless a statutory exception applies, a class of Contracts has been exempted from the competitive bidding process, or an individual Contract has been exempted from the competitive bidding process, in accordance with 279C.335 and any applicable Contracting Agency administrative rules. Use of Alternative Contracting Methods may be directed by the Contracting Agency if that use is within the competitive bidding process, if feasible, or through an available statutory exception to the competitive bidding process. Use of Alternative Contracting Methods must be directed through a Contracting Agency's Contract Review Authority, however, when use of the Alternative Contracting Method requires an exemption to the prescribed competitive bidding requirement of 279C.335. In any of these circumstances, use of Alternative Contracting Methods must be justified in accordance with any applicable Code and Contracting Agency requirements and, if required, these OAR 137-049-0600 to 137-049-0690 rules. See 137-049-0630 regarding required Findings and restrictions on exemptions from the competitive bidding requirement under ORS 279C.335.¶¶

(2) Energy ~~Savings~~-Performance Contracts. ESPCs are excepted from the competitive bidding requirements for Public Improvement Contracts pursuant to ORS 279C.335(1)(f), if the Contracting Agency complies with the procedures set forth in OAR 137-049-0600 to 137-049-0690 or parallel administrative rules meeting the requirements of ORS 279A.065 related to the solicitation, negotiation and contracting for ESPC Work. If those procedures are not followed, an ESPC procurement may still be exempted from competitive bidding requirements for public improvements by following the general exemption procedures within ORS 279C.335.¶¶

(3) Post-Project Evaluation. ORS 279C.355 requires that the Contracting Agency prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 when the Contracting Agency does not use the competitive bidding process required by 279C.335. The purpose of this evaluation is to determine whether it was actually in the Contracting Agency's best interest to use an Alternative Contracting Method outside the competitive bidding process. The evaluation must be delivered to the Contracting Agency's Contract Review Authority within 30 Days of the date the Contracting Agency "accepts" the Public Improvement project, which event is typically defined in the Contract. In the absence of such definition, acceptance of the Project occurs on the later of the date of final payment or the date of final completion of the Contract Work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:¶¶

(a) Financial information, consisting of cost estimates, any Guaranteed Maximum Price, changes and actual costs;¶¶

(b) A narrative description of successes and failures during design, engineering and construction; and¶¶

(c) An objective assessment of the use of the Alternative Contracting Method as compared to the exemption Findings.

Statutory/Other Authority: ORS 279C.335, 279A.065

Statutes/Other Implemented: ORS 279C.335, 279A.065, 279C.355, 351.086

AMEND: 137-049-0640

RULE SUMMARY: The amendments update the competitive proposal procedures for Energy Performance contracts pursuant to HB 3653.

CHANGES TO RULE:

137-049-0640

Competitive Proposals; Procedure ¶¶

Contracting Agencies may utilize the following RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS 279C.330 to 279C.337, 279C.400 to 279C.410 and OAR 137-049-0600 to 137-049-0690, unless other applicable statutes control a Contracting Agency's use of competitive Proposals for Public Improvement Contracts. Also see the subdivision of rules in this division 49 entitled "Formal Procurement Rules," 137-049-0200 to 137-049-0480, and RFP related rules under the Alternative Contracting Methods subdivision at 137-049-0640 to 137-049-0660. For ESPCs, ~~the following if a Contracting Agency desires the Procurement process to be excepted from the competitive bidding requirements of ORS 279C.335, a Contracting Agency shall utilize the EPC RFP p~~Procedure as further specified in ~~137-049-0645, 137-049-0650, 137-049-0660 and 137-049-0680 shall be utilized, OAR 137-049-0680(6) or, if the Contracting Agency if a State Contracting Agency desires the Procurement process to be exempt from the competitive bidding requirements of ORS 279C.335, the State Contracting Agency may also utilize the Non-~~Competitive Selection procedure specified in OAR 137-049-0680(7). The RFP process for the Alternative Contracting Methods identified in OAR 137-049-0600 to 137-049-0690 includes the following steps:¶¶

(1) Proposal Evaluation. Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. Proposal evaluation shall be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors shall:¶¶

(a) Be reasonable estimates based on information available to the Contracting Agency;¶¶

(b) Treat all Proposals equitably; and¶¶

(c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to the Contracting Agency. See ORS 279C.305. ~~For ESPC Proposal evaluations, the Contracting Agency may provide in the RFP that qualifications-based evaluation factors will outweigh the Contracting Agency's consideration of price-related factors, due to the fact that prices for the major components of the Work to be performed during the ESPC process contemplated by the RFP will likely not be determinable at the time of Proposal evaluation. For CM/GC Services Proposal evaluations, the Contracting Agency must comply with ORS 279C.337.¶¶~~

(2) Evaluation Factors.¶¶

(a) In basic negotiated construction contracting, where the only reason for an RFP is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that could affect the cost or quality of the Work.¶¶

(b) In CM/GC contracting, in addition to (a) above, those factors may also include the ability to respond to the technical complexity or unique character of the project, analyze and propose solutions or approaches to complex project problems, analyze and propose value engineering options, analyze and propose energy efficiency measures or alternative energy options, coordinate multiple disciplines on the project, effectively utilize the time available to commence and complete the improvement, and related matters that could affect the cost or quality of the Work.¶¶

(c) In Design-Build contracting, in addition to (a) and (b) above, those factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design-builder team experience and related matters that could affect the cost or quality of the Work.¶¶

~~(d) In ESPC contracting, in addition to the factors set forth in subsections (a), (b) and (c) above, those factors may also include sample Technical Energy Audits from similar projects, sample M & V reports, financial statements and related information of the ESCO for a time period established in the RFP, financial statements and related information of joint venturers comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline consultant), past performance of the ESCO in meeting energy guarantee Contract levels, the specific Person that will provide the Energy Savings Guarantee to be offered by the ESCO, the ESCO's management plan for the project, information on the specific methods, techniques and equipment that the ESCO will use in the performance of the Work under the ESPC, the ESCO's team members and consultants to be assigned to the project, the ESCO's experience in the Energy Savings Performance Contracting field, the ESCO's experience acting as the prime contractor on previous ESPC projects (as opposed to a sub-contractor or consultant to a prime~~

ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular project between the Contracting Agency and the ESCO, the ESCO's equipment performance guarantee policies and procedures, the ESCO's energy savings and cost savings guarantee policies and procedures, the ESCO's project cost guarantee policies and procedures, the ESCO's pricing methodologies, the price that the ESCO will charge for the Technical Energy Audit phase of the Work and the ESCO's fee structure for all phases of the ESPC.¶¶

(3) Contract Negotiations. Contract terms may be negotiated to the extent allowed by the RFP and OAR 137-049-0600 to 137-049-0690, provided that the general Work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See 137-049-0650. Terms that may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that could affect the cost or quality of the Work. For the CM/GC Method, terms that may be negotiated also include the specific scope of pre-construction services, the GC Work, any Early Work and other construction Work to be performed by the CM/GC, and any other terms that the Contracting Agency has identified as being subject to negotiation, consistent with the requirements of OAR 137-049-0690. In ESPC contracting, terms that may be negotiated also include the scope of preliminary design of ECMs to be evaluated by the parties during the Technical Energy Audit phase of the Work, the scope of Personal Services and Work to be performed by the ESCO during the Project Development Plan phase of the Work, the detailed provisions of the Energy Savings Guarantee to be provided by the ESCO and scope of Work, methodologies and compensation terms and conditions during the design and construction phase and M & V phase of the Work, consistent with the requirements of OAR 137-049-0680.

Statutory/Other Authority: ORS 279C.335, 279A.065

Statutes/Other Implemented: ORS 279C.335, 279A.065, 351.086

RULE SUMMARY: The amendments update the reference to Energy Performance Contracts pursuant to HB 3653.

CHANGES TO RULE:

137-049-0670

Design-Build Contracts ¶¶

(1) General. The Design-Build form of contracting, as defined at OAR 137-049-0610(3), has technical complexities that are not readily apparent. Contracting Agencies shall use this contracting method only with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to use the Design-Build process, the Contracting Agency must be able to reasonably anticipate the following types of benefits:¶¶

(a) Obtaining, through a Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility;¶¶

(b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;¶¶

(c) Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing Contract claims;¶¶

(d) Shortening project time as construction activity (early submittals, mobilization, subcontracting and advance Work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased projects); or¶¶

(e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.¶¶

(2) Authority. Contracting Agencies shall utilize the Design-Build form of contracting only in accordance with the requirements of these OARs 137-049-0600 to 137-049-0690 rules. See particularly 137-049-0620 on "Use of Alternative Contracting Methods" and 137-049-0680 pertaining to ESPCs.¶¶

(3) Selection. Design-Build selection criteria may include those factors set forth above in OAR 137-049-0640(2)(a), (b) and (c).¶¶

(4) QBS Inapplicable. Because the value of construction Work predominates the Design-Build form of contracting, the qualifications based selection (QBS) process mandated by ORS 279C.110 for State Contracting Agencies in obtaining certain consultant Personal Services is not applicable.¶¶

(5) Licensing. If a Design-Build Contractor is not an Oregon licensed design professional, the Contracting Agency shall require that the Design-Build Contractor disclose in its Written Offer that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(2)(g) regarding the offer of architectural services, and 672.060(11) regarding the offer of engineering services that are appurtenant to construction Work.¶¶

(6) Performance Security. ORS 279C.380(1)(a) provides that for Design-Build Contracts the surety's obligation on performance bonds, or the Bidder's obligation on cashier's or certified checks accepted in lieu thereof, includes the preparation and completion of design and related Personal Services specified in the Contract. This additional obligation, beyond performance of construction Work, extends only to the provision of Personal Services and related design revisions, corrective Work and associated costs prior to final completion of the Contract (or for such longer time as may be defined in the Contract). The obligation is not intended to be a substitute for professional liability insurance, and does not include errors and omissions or latent defects coverage.¶¶

(7) Contract Requirements. Contracting Agencies shall conform their Design-Build contracting practices to the following requirements:¶¶

(a) Design Services. The level or type of design services required must be clearly defined within the Procurement documents and Contract, along with a description of the level or type of design services previously performed for the project. The Personal Services and Work to be performed shall be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.¶¶

(b) Professional Liability. The Contract shall clearly identify the liability of design professionals with respect to the Design-Build Contractor and the Contracting Agency, as well as requirements for professional liability insurance.¶¶

(c) Risk Allocation. The Contract shall clearly identify the extent to which the Contracting Agency requires an express indemnification from the Design-Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty Work claims.¶¶

(d) Warranties. The Contract shall clearly identify any express warranties made to the Contracting Agency

regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.¶¶

(e) Incentives. The Contract shall clearly identify any economic incentives and disincentives, the specific criteria that apply and their relationship to other financial elements of the Contract.¶¶

(f) Honoraria. If allowed by the RFP, honoraria or stipends may be provided for early design submittals from qualified finalists during the solicitation process on the basis that the Contracting Agency is benefited from such deliverables.

Statutory/Other Authority: ORS 279C.335, 279A.065

Statutes/Other Implemented: ORS 279C.335, 279A.065, 279C.110, 351.086

RULE SUMMARY: The amendments update the procurement procedures, including a non-competitive selection procedure, and the associated contract requirements for Energy Performance contracts pursuant to HB 3653.

CHANGES TO RULE:

137-049-0680

Energy Savings Performance Contracts (ESPC) ¶¶

(1) Generally. These OAR 137-049-0600 to 137-049-0690 rules include a limited, efficient method for Contracting Agencies to enter into ESPCs outside the competitive bidding requirements of ORS 279C.335 for existing buildings or structures, but not for new construction. See ORS 279C.335(1)(f). If a Contracting Agency chooses not to utilize the ESPC Procurement method provided for by these OAR 137-049-0600 to 137-049-0690 rules, the Contracting Agency may still enter into an ESPC by complying with the competitive bidding exemption process set forth in ORS 279C.335, or by otherwise complying with the Procurement requirements applicable to any Contracting Agency not subject to all the requirements of 279C.335.¶¶

(2) ESPC Contracting Method. The ESPC form of contracting, as defined at OAR 137-049-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the Contracting Agency, as well as the additional technical complexities associated with a Design-Build Contract. Contracting Agencies shall only utilize the ESPC contracting method with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the ESPC contracting process, the Contracting Agency must be able to reasonably anticipate one or more of the following types of benefits:¶¶

(a) Obtaining, through an ESCO, the following types of integrated Personal Services and Work: facility profiling, energy baseline studies, ECMs, Technical Energy Audits, project development planning, engineering design, plan preparation, cost estimating, life cycle costing, construction administration, project management, construction, quality control, operations and maintenance staff training, commissioning services, M & V services and required documentation as a fully integrated function with a single point of responsibility;¶¶

(b) Obtaining, through an ESCO, an Energy Savings Guarantee;¶¶

(c) Integrating the Technical Energy Audit phase and the Project Development Plan phase into the design and construction phase of Work on the project;¶¶

(d) Reducing the risk of design flaws, misunderstandings and conflicts inherent in the construction process, through the integration of ESPC Personal Services and Work;¶¶

(e) Obtaining innovative design solutions through the collaboration of the members of the ESCO integrated ESPC team;¶¶

(f) Integrating cost-effective ECMs into an existing building or structure, so that the ECMs pay for themselves through savings realized over the useful life of the ECMs;¶¶

(g) Preliminary design, development, implementation and an Energy Savings Guarantee of ECMs into an existing building or structure through an ESPC, as a distinct part of a major remodel of that building or structure that is being performed under a separate remodeling Contract; and¶¶

(h) Satisfying local energy efficiency design criteria or requirements.¶¶

(3) Authority. Contracting Agencies desiring to pursue an exemption from the competitive bidding requirements of ORS 279C.335 (and, if applicable, ORS 351.086), shall utilize the ESPC form of contracting only in accordance with the requirements of these OAR 137-049-0600 to 137-049-0690 rules.¶¶

(4) No Findings Required. A Contracting Agency is only required to comply with the ESPC contracting procedures set forth in these OAR 137-049-0600 to 137-049-0690 rules in order for the ESPC to be exempt from the competitive bidding processes of ORS 279C.335. No Findings are required for an ESPC to be exempt from the competitive bidding process for Public Improvement Contracts pursuant to 279C.335, unless the Contracting Agency is subject to the requirements of 279C.335 and chooses not to comply with the ESPC contracting procedures set forth in OAR 137-049-0600 to 137-049-0690.¶¶

(5) Selection. ESPC selection criteria may include those factors set forth above in OAR 137-049-0640(2)(a), (b), (c) and (d). Since the Energy Savings Guarantee is such a fundamental component in the ESPC contracting process, Proposers must disclose in their Proposals the identity of any Person providing (directly or indirectly) any Energy Savings Guarantee that may be offered by the successful ESCO during the course of the performance of the ESPC, along with any financial statements and related information pertaining to any such Person.¶¶

(6) QBS Inapplicable. Because the value of construction Work predominates in the ESPC method of contracting, the qualifications based selection (QBS) process mandated by ORS 279C.110 for State Contracting Agencies in obtaining certain consultant services is not applicable.¶¶

(7) Licensing. If the ESCO is not an Oregon licensed design professional, the Contracting Agency shall require that the ESCO disclose in the ESPC that it is not an Oregon licensed design professional, and identify the Oregon

licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and 672.060(11) regarding the offer of engineering services that are appurtenant to construction Work.¶¶

(8) Performance Security. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the ESCO must provide a performance bond and a payment bond, each for 100% of the full Contract Price, including the construction Work and design and related Personal Services specified in the ESPC Design-Build Contract, pursuant to ORS 279C.380(1)(a). For ESPC Design-Build Contracts, these "design and related services" include conventional design services, commissioning services, training services for the Contracting Agency's operations and maintenance staff, and any similar Personal Services provided by the ESCO under the ESPC Design-Build Contract prior to final completion of construction. M & V services, and any Personal Services or Work associated with the ESCO's Energy Savings Guarantee are not included in these 279C.380(1)(a) "design and related services." Nevertheless, a Contracting Agency may require that the ESCO provide performance security for M & V services and any Personal Services or Work associated with the ESCO's Energy Savings Guarantee, if the Contracting Agency so provides in the RFP.¶¶

(9) Contracting Requirements. Contracting Agencies shall conform their ESPC contracting practices to the following requirements:¶¶

(a) General ESPC Contracting Practices. An ESPC involves a multi-phase project, which includes the following contractual elements:¶¶

(A) A contractual structure which includes general Contract terms describing the relationship of the parties, the various phases of the Work, the contractual terms governing the Technical Energy Audit for the project, the contractual terms governing the Project Development Plan for the project, the contractual terms governing the final design and construction of the project, the contractual terms governing the performance of the M & V services for the project, and the detailed provisions of the ESCO's Energy Savings Guarantee for the project.¶¶

(B) The various phases of the ESCO's Work will include the following:¶¶

(i) The Technical Energy Audit phase of the Work;¶¶

(ii) The Project Development Plan phase of the Work;¶¶

(iii) A third phase of the Work that constitutes a Design-Build Contract, during which the ESCO completes any plans and Specifications required to implement the ECMs that have been agreed to by the parties to the ESPC, and the ESCO performs all construction, commissioning, construction administration and related Personal Services or Work to actually construct the project; and¶¶

(iv) A final phase of the Work, whereby the ESCO, independently or in cooperation with an independent consultant hired by the Contracting Agency, performs M & V services to ensure that the Energy Savings Guarantee identified by the ESCO in the earlier phases of the Work and agreed to by the parties has actually been achieved.¶¶

(b) Design-Build Contracting Requirements in ESPCs. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the Contracting Agency shall conform its Design-Build contracting practices to the Design-Build contracting requirements set forth in OAR 137-040-0560(7) above.¶¶

(c) Pricing Alternatives. The Contracting Agency may utilize one of the following pricing alternatives in an ESPC:¶¶

(A) A fixed price for each phase of the Personal Services and Work to be provided by the ESCO;¶¶

(B) A cost reimbursement pricing mechanism, with a maximum not-to-exceed price or a GMP; or¶¶

(C) A combination of a fixed fee for certain components of the Personal Services to be performed, a cost reimbursement pricing mechanism for the construction Work to be performed with a GMP, a single or annual fixed fee for M & V services to be performed for an identified time period after final completion of the construction Work, and a single or annual Energy Savings Guarantee fixed fee payable for an identified time period after final completion of the construction Work that is conditioned on certain energy savings being achieved at the facility by the ECMs that have been implemented by the ESCO during the project (in the event an annual M & V services fee and annual Energy Savings Guarantee fee is utilized by the parties, the parties may provide in the Design-Build Contract that, at the sole option of the Contracting Agency, the ESCO's M & V services may be terminated prior to the completion of the M & V/Energy Savings Guarantee period and the Contracting Agency's future obligation to pay the M & V services fee and Energy Savings Guarantee fee will likewise be terminated, under terms agreed to by the parties).¶¶

(d) Permitted ESPC Scope of Work. The scope of Work under the ESPC is restricted to implementation and installation of ECMs, as well as other Work on building systems or building components that are directly related to the ECMs, and that, as an integrated unit, will pay for themselves over the useful life of the ECMs installed. The permitted scope of Work for ESPCs resulting from a solicitation under these 137-049-0600 to 137-049-0690 rules does not include maintenance services for the project facility PCs for public improvements outside the competitive bidding requirements of ORS 279C.335 for existing buildings or structures, but not for new construction. See ORS 279C.335(1)(f). If a Contracting Agency chooses not to utilize the EPC Procurement methods provided for by these OAR 137-049-0600 to 137-049-0690 rules, the Contracting Agency may still

enter into an EPC by complying with the competitive bidding exemption process set forth in ORS 279C.335, or by otherwise complying with the Procurement requirements applicable to any Contracting Agency not subject to all the requirements of ORS 279C.335.^{¶¶}

(2) EPC Contracting Method. The EPC form of contracting for public improvements, as defined at OAR 137-049-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the Contracting Agency, as well as the additional technical complexities associated with an Energy Performance Contract, which includes various project phases requiring a combination of Personal Services and construction Work. Contracting Agencies shall only utilize the EPC contracting method with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the EPC contracting process, the Contracting Agency must be able to reasonably anticipate one or more of the following types of benefits:^{¶¶}

(a) Obtaining, through an ESCO, the following types of integrated Personal Services and Work: facility profiling, energy baseline studies, ECMs, Investment Grade Audits, project development planning, engineering design, plan preparation, cost estimating, life cycle costing, construction administration, project management, construction, fabrication, assembly or installation, quality control, operations and maintenance staff training, commissioning services, M & V services and required documentation as a fully integrated function;^{¶¶}

(b) Obtaining, through an ESCO guaranteed energy savings or performance; reduced energy consumption, greenhouse gas emissions, waste generation or water consumption; reduced costs related to energy usage and storage, water supply or waste disposal; reduced labor costs and materials costs necessary to repair, replace or maintain energy supply and storage systems, water supply systems or plumbing or waste disposal systems; or increased renewable energy generation and storage;^{¶¶}

(c) Integrating the Investment Grade Audit phase and the Project Development Plan phase into the ECM Design and Implementation phase on the project;^{¶¶}

(d) Reducing the risk of design flaws, misunderstandings and conflicts inherent in the construction process, through the integration of EPC Personal Services and Work;^{¶¶}

(e) Obtaining innovative design solutions through the collaboration of the members of the ESCO integrated EPC team;^{¶¶}

(f) Integrating cost-effective ECMs into an existing building or structure, so that the ECMs pay for themselves through savings realized over the useful life of the ECMs;^{¶¶}

(g) Preliminary design, development and, implementation of ECMs into an existing building or structure through an EPC, as a distinct part of a major remodel of that building or structure that is being performed under a separate remodeling Contract; or^{¶¶}

(h) Satisfying local energy efficiency design criteria or requirements.^{¶¶}

(3) Authority. Contracting Agencies desiring to pursue an exception from the competitive bidding requirements of ORS 279C.335 (and, if applicable, ORS 351.086), shall utilize the EPC form of contracting only in accordance with the requirements of these OAR 137-049-0600 to 137-049-0690 rules.^{¶¶}

(4) Findings. A Contracting Agency is only required to comply with the EPC contracting procedures set forth in these OAR 137-049-0600 to 137-049-0690 rules in order for the EPC to be excepted from the competitive bidding processes of ORS 279C.335. No Findings are required for an EPC to be excepted from the competitive bidding process for Public Improvement Contracts pursuant to 279C.335(1)(f). Should a Contracting Agency subject to the requirements of ORS 279C.335 choose to not comply with the EPC contracting procedures set forth in these OAR 137-049-0600 to 137-049-0690 rules, the Contracting Agency may still enter into an EPC for a public improvement by complying with the competitive bidding exemption process set forth in ORS 279C.335(2). In such case, findings will be required.^{¶¶}

(5) Competitive Bidding Exception Procurement Process. If a Contracting Agency desires the EPC procurement process to be excepted from the competitive bidding requirements of ORS 279C.335, the Contracting Agency shall utilize the EPC Request for Proposal procedure, or, if the Contracting Agency is a State Contracting Agency, the State Contracting Agency may also utilize the Non-Competitive Selection procedure, as further specified in OAR 137-049-0680(6) and OAR 137-049-0680(7), respectively.^{¶¶}

(6) EPC Request for Proposals Procedure.^{¶¶}

(a) Solicitation Documents. In addition to the Solicitation Document requirements of OAR 137-049-0200, EPC RFP Solicitation Documents shall conform to the following standards:^{¶¶}

(A) Selection Criteria. The Contracting Agency shall set forth the selection criteria in the Solicitation Document. The Contracting Agency shall evaluate Proposals only in accordance with the criteria set forth in the RFP and applicable law. Because the value of construction Work predominates in the EPC method of contracting, the qualifications based selection (QBS) process mandated by ORS 279C.110 for State Contracting Agencies in obtaining certain consultant services is not applicable for competitive procurements for EPCs. The Contracting Agency shall evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.^{¶¶}

(B) Evaluation Factors. The Contracting Agency shall set forth the evaluation factors in the Solicitation Document.^{¶¶}

Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such factors shall be reasonable estimates based on information available to the Contracting Agency, treat all Proposals equitably, and recognize that public policy requires that Public Improvements be constructed at the least overall cost to the Contracting Agency. See ORS 279C.305. Proposal evaluation shall be as objective as possible. The Contracting Agency may provide in the RFP that qualifications-based evaluation factors will outweigh the Contracting Agency's consideration of price-related factors, due to the fact that prices for the major components of the Work to be performed during the EPC process contemplated by the RFP will likely not be determinable at the time of Proposal evaluation. In addition to price, evaluation factors may include the following for EPC Procurements:¶

(i) Firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that could affect the cost or quality of the Work;¶

(ii) The ability to respond to the technical complexity or unique character of the project, analyze and propose solutions or approaches to complex project problems, analyze and propose value engineering options, analyze and propose energy efficiency measures or alternative energy options, coordinate multiple disciplines on the project, effectively utilize the time available to commence and complete the improvement, and related matters that could affect the cost or quality of the Work;¶

(iii) Design professional qualifications, specialized experience, preliminary design submittals, technical merit, design-builder team experience and related matters that could affect the cost or quality of the Work;¶

(iv) Sample Investment Grade Audits from similar projects, sample M & V reports, financial statements and related information of the ESCO for a time period established in the RFP;¶

(v) Financial statements and related information of joint venturers comprising the ESCO;¶

(vi) The ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline consultant);¶

(vii) Past performance of the ESCO in meeting guaranteed energy savings or performance through an ECM, the ESCO's management plan for the project, information on the specific methods, techniques and equipment that the ESCO will use in the performance of the Work under the EPC;¶

(viii) The ESCO's team members and consultants to be assigned to the project, the ESCO's experience in the Energy Performance Contracting field, the ESCO's experience acting as the prime contractor on previous EPC projects (as opposed to a sub-contractor or consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an EPC project or the inability or unwillingness of the ESCO to complete an EPC project;¶

(ix) The ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant);¶

(x) The ESCO's ability to explain the unique risks associated with EPC projects and the assignment of risk in the particular project between the Contracting Agency and the ESCO; or¶

(xi) The ESCO's equipment performance guarantee policies and procedures, if any, the ESCO's energy savings and cost savings guarantee policies and procedures, if any, the ESCO's project cost guarantee policies and procedures, if any, the ESCO's pricing methodologies, the price that the ESCO will charge for the Investment Grade Audit phase of the project and the ESCO's fee structure for all phases of the EPC.¶

(C) Discussion and Negotiation with Proposers prior to award. Subject to ORS 279C.410(4), the Solicitation Document may provide for discussions and negotiations with Proposers to be conducted for the purpose of Proposal evaluation prior to award. When the Contracting Agency is willing to allow submission of revised Proposals following discussions, in the Solicitation Document, the Contracting Agency shall identify the specific terms and conditions or provisions of the Solicitation Document that are subject to discussion and negotiation and authorize Proposers to propose certain alternative terms and conditions in lieu of the terms and conditions the Contracting Agency has identified. The Contracting Agency shall describe the evaluation, discussion and negotiation processes, including how the Contracting Agency will establish the Competitive Range, if any, in the Solicitation Document.¶

(D) Competitive Range. The anticipated size of any Competitive Range must be stated in the Solicitation Document, but may be decreased if the number of Proposers that submit responsive Proposals is less than the specified number, or may be increased as provided in OAR 137-049-0680(6)(c)(A).¶

(E) Number of Contract Awards. When the Contracting Agency intends to Award Contracts to more than one Proposer, the Contracting Agency shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. The Contracting Agency shall also include the criteria it will use to determine how the Contracting Agency will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular Contractor to provide Personal Services or Work from those Contractors Awarded Contracts.¶

(F) Clarifications. In evaluating Proposals, a Contracting Agency may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer shall submit Written and Signed clarifications and such clarifications shall become part of the Proposer's Proposal.¶

(b) RFP Cancellation. Nothing in this rule shall restrict or prohibit the Contracting Agency from canceling the solicitation at any time.¶

(c) RFP Competitive Range; Protest; Award.¶

(A) Determining Competitive Range.¶

(i) If the Contracting Agency does not cancel the solicitation, after the Opening the Contracting Agency will evaluate all Proposals in accordance with the evaluation criteria set forth in the RFP. After evaluation of all Proposals in accordance with the criteria set forth in the RFP, the Contracting Agency will rank the Proposers based on the Contracting Agency's scoring and determine the Competitive Range.¶

(ii) The Contracting Agency may increase the number of Proposers in the Competitive Range if the Contracting Agency's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number of Proposers greater than the initial Competitive Range are closely competitive, or have a reasonable chance of being determined the best Proposer after the Contracting Agency's evaluation of revised Proposals submitted in accordance with the process described in this rule.¶

(iii) Protesting Competitive Range. The Contracting Agency shall provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not within the Competitive Range may protest the Contracting Agency's evaluation and determination of the Competitive Range in accordance with OAR 137-049-0450.¶

(d) Intent to Award; Discuss or Negotiate. After the protest period provided in accordance with these rules expires, or after the Contracting Agency has provided a final response to any protest, whichever date is later, the Contracting Agency may either:¶

(A) Provide Written notice to all Proposers in the Competitive Range of its intent to Award the Contract to the highest-ranked Proposer in the Competitive Range.¶

(i) An unsuccessful Proposer may protest the Contracting Agency's intent to Award in accordance with OAR 137-049-0450.¶

(ii) After the protest period provided in accordance with OAR 137-049-0450 expires, or after the Contracting Agency has provided a final response to any protest, whichever date is later, the Contracting Agency shall commence final Contract negotiations with the highest-ranked Proposer in the Competitive Range; or¶

(B) Engage in discussions with Proposers in the Competitive Range and accept revised Proposals from them, and, following such discussions and receipt and evaluation of revised Proposals, conduct negotiations with the Proposers in the Competitive Range.¶

(e) Discussions; Revised Proposals. If the Contracting Agency chooses to enter into discussions with and receive revised Proposals from the Proposers in the Competitive Range, the Contracting Agency shall proceed as follows:¶

(A) Initiating Discussions. The Contracting Agency shall initiate oral or Written discussions with all of the Proposers in the Competitive Range regarding their Proposals with respect to the provisions of the RFP that the Contracting Agency identified in the RFP as the subject of discussions. The Contracting Agency may conduct discussions for the following purposes:¶

(i) Informing Proposers of deficiencies in their initial Proposals;¶

(ii) Notifying Proposers of parts of their Proposals for which the Contracting Agency would like additional information; or¶

(iii) Otherwise allowing Proposers to develop revised Proposals that will allow the Contracting Agency to obtain the best Proposal based on the requirements and evaluation criteria set forth in the RFP.¶

(B) Conducting Discussions. The Contracting Agency may conduct discussions with each Proposer in the Competitive Range necessary to fulfill the purposes of this section, but need not conduct the same amount of discussions with each Proposer. The Contracting Agency may terminate discussions with any Proposer in the Competitive Range at any time. However, the Contracting Agency shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with Contracting Agency before the Contracting Agency notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.¶

(i) In conducting discussions, the Contracting Agency: shall treat all Proposers fairly and shall not favor any Proposer over another; shall not discuss other Proposers' Proposals; shall not suggest specific revisions that a Proposer should make to its Proposal; and shall not otherwise direct the Proposer to make any specific revisions to its Proposal.¶

(ii) At any time during the time allowed for discussions, the Contracting Agency may: Continue discussions with a particular Proposer; terminate discussions with a particular Proposer and continue discussions with other Proposers in the Competitive Range; or conclude discussions with all remaining Proposers in the Competitive Range and provide notice to the Proposers in the Competitive Range to submit revised Proposals.¶

(C) Revised Proposals. If the Contracting Agency does not cancel the solicitation at the conclusion of the Contracting Agency's discussions with all remaining Proposers in the Competitive Range, the Contracting Agency shall give all remaining Proposers in the Competitive Range notice of the date and time by which they must submit revised Proposals. This notice constitutes the Contracting Agency's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in the Contracting Agency's notice.¶

(i) Upon receipt of the revised Proposals, the Contracting Agency shall evaluate the revised Proposals based upon the evaluation criteria set forth in the RFP, and rank the revised Proposals based on the Contracting Agency's scoring.¶

(ii) The Contracting Agency may conduct discussions with and accept only one revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the RFP.¶

(f) Intent to Award; Protest. The Contracting Agency shall provide Written notice to all Proposers in the Competitive Range of the Contracting Agency's intent to Award the Contract. An unsuccessful Proposer may protest the Contracting Agency's intent to Award in accordance with OAR 137-049-0450. After the protest period provided in accordance with that rule expires, or after the Contracting Agency has provided a final response to any protest, whichever date is later, the Contracting Agency shall commence final Contract negotiations.¶

(g) Negotiations.¶

(A) Initiating Negotiations. The Contracting Agency may determine to commence negotiations with the highest-ranked Proposer in the Competitive Range following the:¶

(i) Initial determination of the Competitive Range; or¶

(ii) Conclusion of discussions with all Proposers in the Competitive Range and evaluation of revised Proposals.¶

(B) Conducting Negotiations. Scope. The Contracting Agency may negotiate:¶

(i) The statement of work for each stage of the project;¶

(ii) Contract performance, methods of construction or fabrication, assembly or installation, timing, assignment of risk in specified areas, fee, and other matters that could affect the cost or quality of the Work, as well as the scope of preliminary identification and assessment of ECMs to be evaluated by the parties during the Investment Grade Audit phase of the Work, the scope of Personal Services and Work to be performed by the ESCO during the Project Development Plan phase of the Work, and scope of Work, methodologies and compensation terms and conditions during the ECM Design and Implementation and M & V phases of the project.¶

(iii) The Contract Price as it is affected by negotiating the statement of work; and¶

(iv) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the RFP. Accordingly, Proposers shall not submit, and the Contracting Agency shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the RFP.¶

(C) Continuing Negotiations. If the Contracting Agency terminates negotiations with a Proposer, the Contracting Agency may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this rule until the Contracting Agency has:¶

(i) Determined to Award the Contract to the Proposer with whom it is currently negotiating; or¶

(ii) Completed one round of negotiations with all Proposers in the Competitive Range, unless the Contracting Agency provided for more than one round of discussions or negotiations in the RFP, in which case the Contracting Agency may proceed with any authorized further rounds of discussions or negotiations.¶

(D) Terminating Discussions or Negotiations. At any time during discussions or negotiations conducted in accordance with this rule, the Contracting Agency may terminate discussions or negotiations with the Proposer with whom it is currently conducting discussions or negotiations if the Contracting Agency reasonably believes that:¶

(i) The Proposer is not discussing or negotiating in good faith; or¶

(ii) Further discussions or negotiations with the Proposer will not result in the parties agreeing to the terms and conditions of a final Contract in a timely manner.¶

(7) Non-Competitive Selection Procedure for State Contracting Agencies¶

(a) General. A State Contracting Agency may enter into an Energy Performance Contract for a public improvement with an ESCO prequalified by the Oregon Department of Energy pursuant to ORS 276.915(3)(g) without first conducting a competitive procurement under OAR 137-049-0680(6) if:¶

(A) The State Contracting Agency enters such contract in accordance with these OAR 137-049-0600 to 137-049-0690 rules; and¶

(B) The State Contracting Agency and prequalified ESCO negotiate and include, as a component of the EPC, a performance guarantee for the benefits that the EPC will provide to the Contracting Agency.¶

(b) Performance Guarantee. The form of the performance guarantee may include a personal or corporate guarantee, or a third-party guarantee in the form of a bond. Other forms may be considered on an individual basis at the discretion of the Contracting Agency. The performance guarantee must include:¶

(A) The ESCO's performance obligations and responsibilities for achieving the purposes of the EPC;¶
(B) The conditions under which the ESCO will guarantee savings, reductions, benefits, or other purposes of the EPC;¶
(C) The terms during which the performance guarantee will remain; and¶
(D) Remedies available to the Contracting Agency, including damages and appropriate equitable relief, if an ECM designed and constructed, including fabrication, assembly or install, by the ESCO under the EPC fails to achieve the savings, reductions, benefits or other purposes specified in the EPC. (c) Contract Negotiation. In addition to the performance guarantee, contract terms that may be negotiated include the details of Contract performance, methods of construction or fabrication, assembly or installation, timing, assignment of risk in specified areas, fee, and other matters that could affect the cost or quality of the Work, as well as scope of preliminary identification and assessment of ECMs to be evaluated by the parties during the Investment Grade Audit phase of the Work, the scope of Personal Services and Work to be performed by the ESCO during the Project Development Plan phase of the Work, and scope of Work, methodologies and compensation terms and conditions during the ECM Design and Implementation and M & V phases of the project.¶
(8) Contracting Requirements. Contracting Agencies shall conform their EPC contracting practices to the following requirements:¶
(a) General . An EPC involves a multi-phase project, which includes the following contractual elements:¶
(A) A description of the four phases of the EPC project, which include the following: (i) The Investment Grade phase; (ii) The Project Development Plan phase; (iii) The ECM Design and Implementation phase; and (iv) The M&V services phase.¶
(B) Comprehensive contract provisions that not only describe and govern the relationship of the parties, but also include the contractual terms governing the Investment Grade Audit phase , the contractual terms governing the Project Development Plan phase, the contractual terms governing the ECM Design and Implementation phase, , the contractual terms governing the performance of the M & V services phase, and the detailed provisions of the ESCO's Performance Guarantee for the project if the EPC is entered into pursuant to OAR 137-049-0680(7).¶
(C) Design-Build Contracting Requirements for EPCs. Parties agree that upon authorization of the ECM Design and Implementation phase, the EPC constitutes a Design-Build contract, which must include the following:¶
(i) Design Services. The level or type of design services required during the ECM Design and Implementation phase must be clearly defined within the Contract, along with a description of the level or type of design services previously performed for the project. The Personal Services and Work to be performed shall be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.¶
(ii) Professional Liability. The EPC shall clearly identify the liability of design professionals with respect to the ESCO and the Contracting Agency, as well as requirements for professional liability insurance.¶
(iii) Risk Allocation. The EPC shall clearly identify the extent to which the Contracting Agency requires an express indemnification from the ESCO for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty Work claims.¶
(iv) Warranties. The EPC shall clearly identify any express warranties made to the Contracting Agency regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.¶
(v) Performance Security. The ESCO must provide a performance bond and a payment bond, each for 100% of the full Contract Price, including the construction, assembly or installation Work and design and related specified in the EPC, pursuant to ORS 279C.380(1)(a). Design and related services include conventional design services, commissioning services, training services for the Contracting Agency's operations and maintenance staff, and any similar Personal Services provided by the ESCO in the ECM Design and Implementation phase under the EPC prior to final completion of construction, assembly, or installation. M & V services, and any Personal Services or Work associated with the ESCO's Performance Guarantee, if required under the EPC, are not included in these 279C.380(1)(a) design and related services. Nevertheless, a Contracting Agency may require that the ESCO provide performance security for M & V services and any Personal Services or Work associated with the ESCO's Performance Guarantee, if the Contracting Agency so provides in the RFP or negotiations with the ESCO.¶
(b) Pricing Alternatives. The Contracting Agency may utilize one of the following pricing alternatives in an EPC:¶
(A) A fixed price for each phase to be provided by the ESCO;¶
(B) A cost reimbursement pricing mechanism, with a maximum not-to-exceed price or a GMP; or¶
(C) A combination of a fixed fee for certain components of the Personal Services to be performed, a cost reimbursement pricing mechanism for the construction Work, including assembly or installation, to be performed with a GMP, a single or annual fixed fee for M & V services to be performed for an identified time period after final completion of the construction, assembly or installation Work, and a single or annual Performance Guarantee fee payable per the terms of the performance guarantee if the EPC is entered into pursuant to OAR 137-049-0680(7).¶

(c) Permitted EPC Scope of Work. The scope of Work under the EPC is restricted to identifying and assessing a need or requirement in a public improvement for (i) Providing guaranteed energy savings or performance through an energy conservation measure; (ii) Reducing energy consumption, greenhouse gas emissions, waste generation or water consumption; (iii) Reducing costs related to energy usage and storage, water supply or waste disposal; (iv) Reducing labor and materials costs necessary to repair, replace or maintain energy supply and storage systems, water supply systems or plumbing or waste disposal systems; or (v) Increasing renewable energy generation and storage, including renewable energy from thermal energy sources; and implementation, including design, construction, fabrication, and assembly or installation of ECMs, as well as other Work on building systems or building components that are directly related to the ECMs. The permitted scope of Work for ESPCs resulting from a solicitation under these 137-049-0600 to 137-049-0690 rules does not include maintenance services for the project facility.¶

(d) Licensing. If the ESCO is not an Oregon licensed design professional, the Contracting Agency shall require that the ESCO disclose in the EPC that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and 672.060(11) regarding the offer of engineering services that are appurtenant to construction Work.

Statutory/Other Authority: ORS 279C.335, 279A.065

Statutes/Other Implemented: ORS 279C.335, 279A.065, 279C.110, 351.086

RULE SUMMARY: The amendments update the procedures for holding retainage or amounts in lieu of retainage to pursuant to HB 4006 (2024).

CHANGES TO RULE:

137-049-0820

Retainage ¶¶

(1) Withholding of Retainage. A Contracting Agency ~~shall not~~ may withhold amounts from a Contractor's progress payments on Public Improvement Contracts as retainage in an amount ~~in excess of~~ not to exceed five percent of the Contract Price for Work completed. If the Contractor has performed at least 50 percent of the Contract Work and is progressing satisfactorily, upon the Contractor's submission of Written apppayment. Generally, the purpose of retainage is to incentivize the Contractor to satisfactorily progress the work and complete the Project on schedule or otherwise protect the Contracting Agency's interests. ¶

(2) Procedures for Holding Retainage. ¶

(a) If a Contracting Agency will withhold retainage on a Public Improvement Contract, it must include the retainage requirement and amount of retainage in the Solicitation containing the surety's Written approval, the Documents and resulting Contract. ¶

(b) The Contracting Agency shall hold all retained moneys in a Contracting Agency may, in its discretion, reduce or eliminate retainage on any remaining progress payments. The Contracting Agency shall respond in Writing to all such applications within a reasonable time. When the Contract Work is 97-1/2 percent completed, the Contracting Agency may, at its discretion and with fund or account, and, for all accounts other than those contemplated by subsection (2)(c), interest is not required to accrue on the retained moneys. ¶

(c) Interest Bearing Account. Following the Contract Award, the Contractor may elect to have the Contracting Agency deposit the retainage, as the retainage accumulates, in an interest bearing account in a bank or other financial institution for the benefit of the Contracting Agency. Any such election must be made timely such that it does not result in schedule delays. If the Contracting Agency is a state Contracting Agency, the account must be established through the State Treasurer. Earnings on the account accrue to the Contractor. When a Contractor on a Public Improvement Contract elects to have the Contracting Agency deposit the accumulated retainage in an interest-bearing account, the Contractor, within 30 days following payment of the final amount application by the Contractor, reduce the retained amount to 100 percent of the value of the remaidue for construction of the Public Improvement, shall pay to each subcontractor who performed work on the construction the subcontractor's proportional share of the interest earnings that accrued to the Contractor as a result of the election. A subcontractor's share of the total amount of interest earnings unperformed Contract Work. A Contracting Agency may at any time reinstate retainage. Retainage shall be included in the fin this subsection shall be determined by the proportion that the amount of retainage withheld from the subcontractor bears to the amount of retainage withheld from the Contractor and the length of time the retainage was withheld from the subcontractor. A share of the interest earnings shall be paid to a subcontractor under this subsection only when Retainage is withheld from the subcontractor for more than 60 days after the day on which the first partial payment of was due the Csubcontract Price. ¶

(2) Cash Retainage – Contract Price or under the terms of the subcontract; and the amount of interest earnings due the subcontractor exceeds \$5100,000 or Less. When the Contract Price for a Public Improvement Contract is \$500,000 or less, a Contracting Agency may reserve as. ¶

(3) Reduction or Elimination of Retainage. ¶

(a) 50% Completion Milestone. After 50 percent of the work under the Public Improvement Contract is complete, the Contractor may request elimination or reduction of retainage from any progress payment an amount not to exceed five percent, pursuant to ORS 279C.570(7). The Contracting Agency shall hold all retained moneys in a Contracting Agency fund or account, and interest is not required to accrue on the retained moneys. ¶

(3) Cash Retainage – Contract Price in Excess of \$500,000. When the Contract Price for a by Written application, which shall include Written approval of the Contractor's surety. Following receipt of a Written application by the Contractor, the Contracting Agency shall consider whether work is progressing satisfactorily, requirements are being met, and the Contracting Agency's interests will be protected if retainage is eliminated or reduced. In its sole discretion, the Contracting Agency shall decide whether to grant the reduction or elimination of retainage and shall respond in Writing with its decision within a reasonable time. ¶

(b) 97.5% Completion Milestone. After 97.5 percent of the work under the Public Improvement Contract exceeds \$500,000, is complete, at the Contracting Agency shall, in the ordinary course, deposit cash retainage in an amount not to exceed five percent from any progress payment due under the Public Improvement Contract into an interest-bearing escrow account, pursuant to ORS 279C.570(2) [House Bill 2415 (2019 Oregon Laws, Chapter

486)]. The Contractor under the Public Improvement Contract is entitled to receive interest on the retained moneys from the date the Contractor's related payment request is fully approved's discretion and without application by the Contractor, the Contracting Agency may reduce the retained amount to 100 percent of the value of the Contract work remaining to be done.¶

(4) Procedures for Payment of Retainage. The retainage held by a Contracting Agency shall be included in and paid to the Contractor as part of the final payment of the Contract Price.¶

(a) Notification of Final Completion. The Contractor shall notify the Contracting Agency in Writing when the Contractor considers the work complete. Within 15 days after receipt, the Contracting Agency shall either:¶

(A) Notify the Contractor that the work has been accepted and pay the amount held as retainage to the Contractor as part of the final payment of the Contract Price. Additionally, the Contracting Agency shall pay interest at the rate of 1.5 percent per month on the final payment due the Contractor, interest to commence 30 days after the work under the Contract has been completed and accepted and to run until the date when the final payment is tendered by to the Contracting Agency until the date the retainor; or¶

(B) Notify the Contractor that the work has not been accepted and describe the work yet to be performed moneys are paid by the Contracting Agency to the Contractor. For purposes of the Contract; however, if the Contracting Agency does not provide such notice within the 15-day period, the interest provided by this subsection, a paym shall commence to run 30 days after the end of retainage is deemed to be "paid" by a Contracting Agency when the payment is transmitted to the Contractor, or otherwise applied against an obligation of the Contractor under the Public Improvement Contract the 15-day period. The amount held as retainage shall be paid following the Contractor's completion of the work and the Contracting Agency's acceptance, as part of final payment of the Contract Price. ¶

(b) Failure to Reach Final Completion. If the Contractor abandons the work or leaves the work unfinished or otherwise defaults on the Contract, the amount retained will accrue to the Contracting Agency and the Contractor shall have no entitlement or claim to such sums. ¶

(45) Alternatives In Lieu of Cash Retainage-Unless - Requirements. A Contractor may submit and a Contracting Agency tshat reserves an amount as retainage finds in writing that acceptingll accept from a Contractor in lieu of withholding moneys for all or a portion of the retainage required under a Public Improvement Contract: (i) a Retainage Surety Bond, or (ii) deposit of bonds, securities or other instruments described in part (a) of this section or a s. A Contracting Agency may reject security bond described in part (b) of this section poses an extraordinary risk that is not typically associated with the bonds, securities, other instruments or surety bond, as applicable, thes, bonds, securities or other instruments that a Contractor submits only if the Contracting Agency first finds in Writing good cause for the rejection that is based on unique project circumstances.¶

(a) Retainage Surety Bonds. A Retainage Surety Bond compliant with the requirements of this section may be submitted to a Contracting Agency; in lieu of withholding moneys from payment, shall accept from the Contractor:¶

(a) Bonds, securities or other instruments that are deposited and accepted as provided in subsection (6)(a) of this rule; or all or any portion of the amount of funds retained, or to be retained, by the Contracting Agency. A Retainage Surety Bond must be in substantially the form specified in ORS 701.435(4). A surety bond must be executed by a surety bonding company that is authorized to transact surety business in Oregon and may not be a surety obligation of an individual. The surety bond and any proceeds of the surety bond must be made subject to all claims and liens and in the same manner and priority specified for retainage under ORS 279C.550 to 279C.570 and 279C.600 to 279C.625.¶

(A) Amount of Retainage Surety Bond.¶

(b) A sFull Retainage Surety bBond deposited as provided in subsection (6)(b) of this rule.¶

(5) Deposit in interest-bearing accounts. Upon election of the Contractor and when the Contract Price in the Public Improvement Contract is \$500,000 or less, a Contracting Agency shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the Contracting Agency. Earnings on such. A Contractor may provide a Retainage Surety Bond in lieu of all retainage required by the Public Improvement Contract. The amount of the Retainage Surety Bond shall be calculated by applying the retainage percentage to the Contract Price and must include a provision for coverage of any increases in the Contract Price. If a full Retainage Surety Bond is provided by a Contractor at any time after the first progress payment has been made, the Contracting Agency, within 30 days after receipt, shall pay any retained amount to the Contractor. ¶

(ii) Partial Retainage Surety Bond. A Contractor may provide a Retainage Surety Bond in lieu of a portion of the retainage required by the Public Improvement Contract. Following receipt of a Retainage Surety Bond in an acemount shall accrue on the cash retainage from the dateless than the full amount required to be retained, the Contracting Agency, within 30 days of receipt, shall pay to the Contractor's related payment request is fully approved by the Contracting Agency until the date the retained moneys are paid by any retained amounts up to the amount of the Retainage Surety Bond. If the amount of the Retainage Surety Bond is less than the amount

~~retained by the Contracting Agency, the Contracting Agency will pay to the Contractor. For purposes of this section, a payment of the retainage in the amount of the Retainage Surety Bond, and the remaining required retainage will be subject to Section (4). If the amount of the Retainage is deemed to be "paid" Surety Bond is in excess of the amount retained by the Contracting Agency when the payment is transmitted to the Contractor, or otherwise applied against an obligation, the Contracting Agency will pay to the Contractor the retained amount, and will reduce the moneys the Contracting Agency holds as retainage from progress payments in an amount equal to the value of the Retainage Surety Bond in excess of the Contractor under the Public Improvement Contract. State Contracting Agencies shall establish the interest-bearing account through the State Treasurer. When amount retained as of the date of the bond.~~

~~(B) Subcontracting Requirements for Retainage Surety Bonds. When a Contracting Agency accepts a Retainage Surety Bond in lieu of retainage from a Contractor under this section, the Contractor shall accept surety bonds from subcontractors or suppliers from which the Contractor makes an election for deposit of retainage into an interest-bearing account and has withheld retainage.~~

~~(i) At any time before final payment on a Public Improvement Contract, a subcontractor may submit a surety bond to a Contractor and request that the Contract Price for on the Public Improvement Contract exceeds \$500,000, the Contractor's election shall be satisfied by the Contracting Agency's establishment of an interest-bearing escrow account, pursuant to ORS 279C.570(2) [House Bill 2415 (2019 Oregon Laws, Chapter 486)].~~

~~(6) Alternatives In Lieu of Cash Retainage – Requirements. In lieu of cash retainage to be held by a Contracting Agency, the Contractor may substitute one of the following:~~

~~(a) Deposit of bonds, securities or other instruments:~~

~~(A) The Contractor may deposit bonds, securities or other instruments with submit a surety bond to the Contracting Agency for the portion of the Contractor's retainage that pertains to the subcontractor. The surety bond the subcontractor provides to the Contractor must meet the requirements set forth in paragraph (a)(A). When a Contractor at a subcontractor's request obtains and submits to the Contracting Agency a surety bond under this subsection, the Contractor may withhold from payments to the subcontractor an amount equivalent to the portion of the Contractor's surety bond premium for which the subcontractor is responsible.~~

~~(ii) Within 30 days after a subcontractor's request, the Contractor shall provide, and the Contracting Agency shall accept, a surety bond that meets the requirements set forth in subsection (a) unless:~~

~~(I) The Contracting Agency has found in Writing good cause to reject the surety bond based on unique project circumstances;~~

~~(II) The surety bond is not commercially available; or~~

~~(III) The subcontractor refuses to pay to the Contractor the subcontractor's portion of the surety bond premium or refuses to provide the Contractor with a surety bond that meets the requirements of subsection (a).~~

~~(iii) A surety bond the Contracting Agency or in any bank or trust company to be held for the benefit of the Contracting Agency. If the Contracting Agency accepts the deposit, or submits under this section, and any proceeds from the surety bond, must be made subject to all claims and liens and in the same manner and priority specified for retainage under ORS 279C.550 to 279C.570 and 279C.600 to 279C.625.~~

~~(iv) A Contractor must, within 30 days after receiving a surety bond from a subcontractor or supplier, release to the Contracting Agency shall reduce the Contractor the amount the Contractor holds as retainage by an amount equal to the value of the bonds and securities, and reimburse the excess to the Contractor that is equivalent to the amount the subcontractor or supplier submitted as the surety bond.~~

~~(v) A surety bond under this section must be in substantially the form specified in ORS 701.435(4).~~

~~(b) Requirements for Deposit of Bonds, Securities or Other Instruments ("Deposit") Submitted by a Contractor in Lieu of Retainage.~~

~~(BA) Bonds, securities and other instruments deposited or acquired by a Contractor in lieu of cash retainage must be of a character approved by the Director of the Oregon Department of Administrative Services, which may include, without including but not limited to:~~

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

~~(ii) Other obligations of the United States or agencies of the United States.~~

~~(iii) Obligations of a corporation wholly owned by the Federal Government.~~

~~(iv) Indebtedness of the Federal National Mortgage Association.~~

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

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

~~(CB) Upon Bonds, securities or other instruments may be deposited with: (i) the Contracting Agency's determination that all requirements for the protection of the Contracting Agency's interests have been fulfilled, it shall release to the Contractor all bonds and securities deposited in lieu, or (ii) in a bank or other financial institution for the Contracting Agency to hold for the Contracting Agency's benefit.~~

~~(C) Interest or earnings on the bonds, securities or other instruments accrue to the Contractor.~~

~~(D) Amount of Deposit.~~

(i) Deposit Equivalent to Full Amount of Retainage.

(b) Deposit of surety bond. A Contracting Agency, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the Contracting Agency in lieu of all or a portion of funds A Contractor may provide a Deposit meeting the requirements of this section in lieu of all retainage required by the Public Improvement Contract. The amount of the Deposit shall be calculated by applying the retainage percentage to the Contract Price and must include a provision for coverage of any increases in the Contract Price. If a Deposit equivalent to the full amount of retainage is provided by a Contractor at any time after the first progress payment has been made, the Contracting Agency shall pay any retained or to be retained. A Contractor amount to the Contractor.

(ii) Partial Deposit. If a Contractor provides a Deposit, ing such a bond shall accept surety bonds from its sube lieu of a portion of the retainage required by the Public Improvement Contractors and suppliers in lieu of retainage. In such cases, retainage shall be reduced by an in an amount less than the full amount required to be retained, the Contracting Agency shall pay to the Contractor any retained amount equals up to the value amount of the bond, and the ex Deposit. If the amount of the Deposit is less s shall be reimbursed.

(7) Recovery of Additional Costs. Pursuant to ORS 279A.560(3), an the amount retained by the Contracting Agency, the Contracting Agency may recover from the Contractor all additional costs incurred in the proper handling of retainage alternatives request will pay to the Contractor the retainage in the amount of the Deposit, and the remaining retainage will be remain subject to Section (4). If the amount of the Deposit is in excess of the amount retained by the Contracting Agency, wthether a request for the deposit of bonds, securities or other instruments in lieu of e Contracting Agency will pay to the Contractor the retained amount, and will reduce the moneys the Contracting Agency holds ash retainage, a request for a surety bond in lieu of cash retainage or an election for an interest-bearing account. If a Contracting Agency incurs costs associated with establishing a fund or account under s from progress payments in an amount equal to the value of the surety bond in excess of the amount retained as of the date of the Deposit.

(6) Costs Incurred Holding Retainage or Amounts in Lieu of Retainage.

(a) Contractor's costs. A Contractor shall bear additional costs that the Contractor incurs after the date on which the Contractor submits a bid or proposal to the Contracting Agency that arise from (a) utilizing Retainage Surety Bonds, Bonds, Securities, or Other Instruments in lieu of holding retainage as described in Section (25) of this rule or establishing (including Retainage Surety Bond premiums), or (b) requesting that the Contracting Agency deposit retainage in an interest-bearing escrow account under section (3) of this rule, as set forth in Section 2(c). These costs are not reimbursable project costs and the Contracting Agency is not permitted to recover such costs from the Contractor.

(8) Additional Retainage When Certified Payroll Statements Not Filed. Pursuant to ORS 279C.845(7), if responsible for paying these costs.

(b) Recovery of Additional Costs Incurred by Agency. If a Contracting Agency incurs additional costs arising from a Contractor is required to file certified payroll statements and fails to do so, s exercise of (a) utilizing Retainage Surety Bonds, Bonds, Securities, or Other Instruments in lieu of holding retainage as described in Section (5), or (b) requesting that the Contracting Agency shall retain 25 percent of any amount earned by the Contractor on a Public Works Contract until the Contractor has filed such statements with the Contracting Agency. T deposit retainage in an interest bearing account as set forth in Section 2(c), the Contracting Agency may recover the additional costs from the Contractor by reducing the final payment. As work on the Contract progresses, the Contracting Agency shall pay the Contractor the amount retained under this provision within 14 days after the Contractor files the certified statements, regardless of whether a subcontractor has filed such, upon demand, inform the Contractor of all accrued costs.

(7) Separate Retainage When Certified Payroll Statements Not Filed - Notwithstanding ORS 279C.555 or 279C.570(7) or OAR 137-049-0820 , if a Contractor is required to file certified statements (but see under ORS 279C.845(1) regarding the requirement for both contractors and subcontractors to file certified statements with the Contracting Agency). See BOLI rule at OAR 839-025-00107), the Contracting Agency shall retain 25 percent of any amount earned by the Contractor on the public works until the Contractor has filed with the Contracting Agency certified statements in accordance with applicable BOLI rules.

Statutory/Other Authority: ORS 279A.065, ORS 279C.845

Statutes/Other Implemented: ORS 279C.560, ORS 279C.570, ORS 701.420