CHAPTER 4: PROCEDURES FOR CONDUCTING ROAD WORK
(This chapter was revised and updated in 2008 and updated in 2010 and 2012)

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CHAPTER 4: PROCEDURES FOR CONDUCTING ROAD WORK

4.000 INTRODUCTION. The methods for carrying out road work are basically no different than for other public construction. However, notwithstanding the statutory requirements for accurate records of all public construction work, state law expressly requires the county to provide complete and accurate cost accounts of all road work completed. Similarly, in addition to general state requirements for audits of public accounts, there is an express requirement for the audit of road work costs.

4.015 SPECIAL REFERENCES. The following are sources of information outside this manual that are particularly relevant to the sections of this chapter, as noted.

Section 4.100


Oregon Department of Justice, Attorney General’s Public Contracts Manual, 2010


Section 4.300

Program for Governmental Research and Education, Oregon State University, The Development of Public Improvement Contracting Law in Oregon, County Practices and Policies Regarding Allocation of Road Work to County Forces and Private Contractors, and Constructing Public Improvements at "Least Cost:" Legal Mandates and County Practices and Policies.

Oregon Department of Transportation, 2008 Oregon Standard Specifications for Construction


Oregon Bureau of Labor and Industries, Prevailing Wage Rates on Public Works

1 The Attorney General’s Model Public Contract Rules are shown online at the Department of Justice OAR chapter 137 under divisions 046, 047, 048 and 049. These rules include the changes and commentary made in response to the few amendments made by the 2011 Legislative Assembly. The changes and commentary made in response to the few amendments made by the 2012 Assembly can be viewed at Attorney General Model Public Contract and Legislative Sufficiency Rules for 2012. However, the 2010 edition is, and will remain, the latest hard-copy version of the manual until at least after the 2013 legislative session. Budget constraints prohibited the printing of a hard-copy 2011-2012 edition.
4.100 PUBLIC CONTRACTS. Public agencies enter into contracts for:

(1) Performance of physical work, such as construction of facilities;

(2) Personal services, such as facility design by a consultant; and

(3) Purchase of materials or equipment

Road contracts of a county are distinctive from other public contracts in that ORS 297.525 and 368.051 may require additional cost records.

Public Contracts Generally

Authority. For many years the state has regulated certain aspects of local government purchasing and contracting for both personal services and construction. Requirements have covered competitive bidding, prevailing wage requirements, preference requirements for Oregon suppliers, etc. The 1975 legislature thoroughly revised the public contracting statutes, and various refinements to the 1975 legislation have followed. Among other changes, it enacted a general requirement for competitive bidding on all public contracts, with certain statutory exemptions, and provides that other exemptions may be authorized under rules of the director, Department of Administrative Services or a local contract review board. The law allowed the county governing body to enact an ordinance designating itself or three or more persons as the contract review board for the county. The
The 2003 legislature did a complete rewrite of the public contract statutes granting public agencies broader authority and revised and expanded ORS Chapter 279 by adding Chapters 279A, 279B and 279C. The updated statutes provide that the county governing body is the local contract review board for the county unless it takes action otherwise. The new revisions further set out that the county governing body may create a county contract review board by appointing a body, board or commission other than the governing body to serve as the county’s contract review board (ORS 279A.060). A county-designated board may also serve other local governments in the county, subject to payment of fees the county may impose for the service. However, any other local government may elect to establish its own board.

In addition to allowing justifiable exemptions from the competitive bid requirements or the approval of a special procurement, the contract review board has power to designate certain service contracts as personal services contracts, to allow purchasing by brand name under certain conditions, reduce bonding requirements of public improvement contracts, decide appeals from disqualified bidders, and establish other contracting procedures within the statutory guidelines. The 2003 legislature expanded the contract review board’s authority in exempting a public improvement contract or a class of public improvement contracts and certain products or classes of products from the competitive bidding under certain circumstances and with certain findings.

The purchase, sale or lease of goods and equipment, however, must comply with the bidding procedure, except that products, services or supplies that cost less than $5,000 may be excluded from competitive bidding requirements.

Public Contracting Code. The 2003 Legislature enacted a major revision of the state public contracting laws applicable to state and local public procurement and public improvements which became operative March 1, 2005. On that date provisions of ORS chapter 279 (with the exception of provisions on products of disabled individuals) were repealed and replaced with three new chapters that constitute the new Public Contracting Code (referenced here as the “Code”):

- **ORS chapter 279A**, General Provisions, which applies to the entire Code.
- **ORS chapter 279B**, Public Procurement, which applies to general good and services procurement, and state agency procurements of personal services other than those for architectural, engineering, land surveying, and related services.
- **ORS chapter 279C**, Public Improvements and Related Contracts, which apply to construction contracts and contracts for architectural, engineering, land surveying, and related services.

The Code was further amended by the 2005 and 2007 Legislatures to address certain “technical amendments” overlooked in the 2003 revision. However, the 2007 session also made some substantive changes to the Code that will be identified later in this chapter.

Model Rules for Public Contracting. **ORS 279A.065** requires the Attorney General to adopt model rules of procedure appropriate for use by state agencies and local governments (“agencies”). Under ORS 279A.065, “agencies” with contracting authority who are subject to the Code are also subject to the model rules unless the “agencies” adopt
their own rules of procedure and specifically state that the model rules do no apply. If an agency adopts its own rules, it must review its rules each time the Attorney General amends the model rules to determine whether the agency should amend its rules to comply with the statutory changes.

“Agencies” that have not adopted their own rules of procedure are subject to the model rules adopted by the Attorney General under ORS 279A.065 (4), including all modifications to the model rules that the AG may adopt. This does not apply to personal services contracts of local governments except for contracts for architectural, engineering, land surveying and related services.

The Attorney General amended the model rules effective January 1, 2010. The amended rules, including commentary, are included in the Attorney General’s Public Contracts Manual. (The 2010 edition is, and will remain, the latest hard-copy version of the manual until at least after the 2013 Legislative Assembly. Budget constrains prohibited the printing of a hard-copy 2011-2012 edition.)

The manual also serves as a reference on many other public contracting issues faced by public agencies. It includes:

- Selected case law on public contracts
- Public contracting code, including 2009 amendments
- Statutes on products related to individuals with a disability
- Model public contract rules and commentary, including amendments effective January 1, 2010
- Other Materials, including reprints of or references to other laws, rules and forms relating to public contracting of benefit to public agencies.

**Caveat:** Note that not all laws, rules and forms apply to both state and local governments. For example, the Attorney General’s review of public contracts rules (OAR chapter 137, division 45) and the Oregon Department of Administrative Services public contracting rules (OAR chapter 125, divisions 246-249) apply only to state agencies, not local governments.

In 2012, the Legislative Assembly enacted SB 1518A (Chapter 53, Oregon Laws 2012) prohibiting state agencies, under specified conditions, from accepting bids or proposals from persons who previously had advised or assisted an agency in public contracting matters.

The Attorney General does not advise local governments, and the materials in the AG’s manual do not constitute legal advice. State agencies and local governments should consult their legal counsel for advice on particular public contracting questions.

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2 The Attorney General’s Model Public Contract Rules are shown in the Department of Justice OAR chapter 137 under divisions 046, 047, 048 and 049. These rules include the changes and commentary made in response to the few amendments made by the 2011 and 2012 Legislative Assemblies.
Cooperative Purchasing. ORS 279A.200 through ORS 279A.225 provide contracting agencies with the specific authority to engage in “cooperative purchasing,” whereby contracting agencies may conduct certain public contracting activities on behalf of other contracting agencies, participate in contracting activities conducted by other contracting agencies, or rely on their membership in a cooperative procurement group as the basis for the selection of contractors to provide certain goods and services. A contracting agency may enter into a contract or price agreement arising out of a cooperative procurement as an alternative to engaging in screening and selection methods set forth in ORS Chapters 279B or 279C.

The Code describes three types of cooperative procurements, and establishes the conditions under which a contracting agency may participate in or administer each. The types of cooperative procurements and the general substantive and procedural requirements are described below.

- **Joint Cooperative Procurements.** Joint cooperative procurements are cooperative procurements in which the contracting agencies or the cooperative procurement group are identified in the applicable solicitation document. A joint cooperative procurement may not be a permissive cooperative procurement. The Model Rules provide that a contracting agency may use a joint cooperative procurement to establish contracts or price agreement for goods, services (including personal services) and contracts for public improvements. A contracting agency may enter into a contract or price agreement arising out of a joint cooperative procurement if the solicitation and award process is an open and impartial competitive process that uses source selection methods substantially equivalent to those set forth in ORS 279B.055 (competitive sealed bids), 279B.060 (competitive sealed proposals), or 279B.085 (special procurements), or substantially equivalent to the competitive bidding process in ORS Chapter 279C. The Code does not establish any separate notice requirements, but does require that the solicitation and the original contract or price agreement identify each participating contracting agency or cooperative procurement group.

- **Permissive Cooperative Procurements.** Permissive cooperative procurements are cooperative procurements in which the contracting agencies are not identified in the applicable solicitation document. The Model Rules provide that a contracting agency may use a permissive cooperative procurement to establish contracts for goods and services (including personal services). A contracting agency may enter into a contract or price agreement arising out of a permissive cooperative procurement if the solicitation and award process is an open and impartial competitive process that uses source selection methods substantially equivalent to those set forth in ORS 279B.055 (competitive sealed bids) or 279B.060 (competitive sealed proposals). If a contracting agency estimates that it will spend in excess of $250,000 on the goods or services acquired under a

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3 Examples include the Oregon Cooperative Purchasing Program ORCPP) operated by the Oregon Department of Administrative Services and the U.S. Communities Government Purchasing Alliance (GPA) available through the National Association of Counties (NACo). GPA a cooperative purchasing program offering local governments’ access to nationally solicited contracts that provide significant reductions in price and guaranteed delivery features.
contract or price agreement arising out of a permissive cooperative procurement, then it must advertise its intent to do so, provide vendors the opportunity to submit comments, and respond to any comments it receives. ORS 279A.215 (2), (3).

- Interstate Cooperative Procurements. Interstate Cooperative Procurements are permissive cooperative procurements in which one or more of the participating agencies are located outside the state of Oregon. The Model Rules provide that a contracting agency may use an interstate cooperative procurement to establish contracts for goods and services (including personal services). A contracting agency may enter into a contract or price agreement arising out of an interstate cooperative procurement if the solicitation and award process is an open and impartial competitive process that uses source selection methods substantially equivalent to those set forth in ORS 279B.055 (competitive sealed bids) or 279B.060 (competitive sealed proposals). A contracting agency, or a cooperative procurement group of which it is a member, must advertise its intent to enter into a contract arising out of the interstate cooperative procurement, provide vendors the opportunity to submit comments, and respond to any comments it receives. ORS 279A.220 (2), (3).

Planned Public Improvements List. ORS 279C.305 provides close surveillance over expenditures for public improvements, whether by contract or force account construction. The law requires counties to prepare and file with the Commissioner of the Bureau of Labor and Industries a list of public improvements planned for construction each fiscal year, not less than 30 days before adoption of the county budget. The list must include the estimated total construction cost of each project and indicate the improvements that will be performed by a private contractor. Before constructing a public improvement that costs more than $125,000 with its own equipment and personnel, the county must prepare adequate plans and specifications, as well as the estimated unit cost of each classification of work. If the county does improvement work with its own forces, it must also keep cost records. The county must contract out every public improvement project that costs more that $5,000 if it fails to adopt a cost record system that substantially complies with model cost accounting guidelines developed by the Oregon Department of Administrative Services.

Personal Service Contracts. The Code preserves local contracting agencies’ authority both to designate particular contracts or classes of contracts as contracts for personal services (ORS 279A.055(2)), and to establish separate procedures for screening and selecting persons to perform personal services (ORS 279A.070). Competitive bidding is not required for personal service contracts, but each county must create a selection procedure for entering into personal services contracts. In 1991 the Attorney General added model rules regarding selection of architects and engineers to the model rules for other contracts even though these contracts do not require competitive bidding. The 2003 legislature added land surveyors and other related services to this requirement and established a special section in ORS Chapter 279C for such contracts.

The 2011 legislature added photogrammetric mapping and transportation planning to the list of services subject to procedures for contracting with architects, engineers, and land surveyors and stipulated the usage of Qualification-Based Selection (QBS) in selecting consultants to provide architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services. The new law clarifies that a contracting agency can
adjust procedures to accommodate the scope, schedule or objectives for a particular project if the estimated cost for services does not exceed $250,000 (ORS 279C.110(2)), and may directly appoint a consultant if the estimated cost for services on a project does not exceed $100,000 (ORS 279C.110(8)). It also allows a contracting agency to enter into a contract with the consultant directly in an emergency (ORS 279C.110(9)), or if the project has been previously described, planned, studied or rendered in a previous contract and the contract is a continuation of the project (ORS 279C.115).

Support for Emerging Small Business. ORS 279A.105 allows a public contracting agency to require a bidder to subcontract with or obtain materials from a certified emerging small business. Under ORS 279A.100, contracts for procurement of goods and services or any other public contract of $50,000 or less may contain limits on competitive bidding to achieve affirmative action goals. The 2009 Legislature extended these provisions to business enterprises that are owned, controlled by, or employs service-disabled veterans. Directories of certified disadvantaged minority and women's businesses and of certified emerging small businesses are maintained by the Oregon Business Development Department. Directories are available online at http://egov.oregon.gov.

Preferences in Public Contracting. Under ORS 279A.128, a contracting agency may provide 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. When the contracting agency provides for a preference under ORS 279A.128, and more than one offeror qualifies for the preference, the contracting agency may give a further preference to a qualifying offeror that resides in or is headquartered in Oregon. A contracting agency may establish a preference percentage higher than ten percent by written order that finds good cause to establish the higher percentage and which explains the contracting agency’s reasons and evidence for finding good cause to establish a higher percentage. A contracting agency may not apply the preferences described in this statute 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. (OAR 137.046.0300(5))

Use, Operation, Maintenance, or Disposition of Personal Property. ORS 279A.185 provides that a county or other local contracting agency may sell, transfer or dispose of personal property in accordance with rules adopted under ORS 279A.070. This section also confirms that a county or other local contracting agency may negotiate with private or public entities to establish contracts, agreements and other cooperative arrangements for the use, operation, maintenance or ultimate lawful disposition of personal property owned or under the control of the public body. The governing body must find that the arrangement will promote economic development in the geographic area.

County Surplus Property. ORS 279A.010 provides that the definition of “public contract” includes the “sale or other disposal … by a contracting agency of personal property …”. However, the new Code does not specifically address the disposition of locally-owned surplus personal property such as surplus equipment and machinery except as noted in ORS 279A.185. ORS 279A.250 to 279A.290 sets forth the process that state agencies must follow for the disposal of state-owned surplus personal property. In the absence of specific requirements in the Code for local governments, it is probably prudent to adopt rules that follow a process similar to the requirements for state agencies found in ORS 279A.280. Counties may also use the services of the State Surplus Property Program.
as described below. However, it is important to remember that regardless how the property is disposed of, if the surplus property was originally purchased with county road funds, any moneys received from the sale of such surplus property needs to be deposited to the road fund.

ORS 271.310 (Chapter 446, Oregon Laws 2011) added a new requirement that any political subdivision, when selling or exchanging real property to an individual, corporation or governmental organization within 100 feet of a railroad right-of-way, or 500 feet of a railroad crossing, must provide notice to the Oregon Department of Transportation (ODOT). Notification must be given at least 30 days prior to the listing or placing real property for sale. Private rail holders may receive notice, but do not receive priority in purchasing over the general public. The measure provides ODOT with rulemaking authority to implement the act.

State Surplus Property Program. The State Surplus Property Program administered by the Oregon Department of Administrative Services (DAS) provides a central distribution point for surplus, seized and/or recovered public property for state agencies and political subdivisions. The program provides property disposal services to state agencies and local governments, as well as acquisition services to state agencies, local governments and qualified non-profit organizations. DAS also administers the Federal Surplus Property Program which provides disposition services to federal executive agencies, as well as acquisition services to state agencies, local governments and qualified non-profit organizations. While emphasis is placed on reutilization of property within the public sector, the program is nationally recognized for its innovative use of the Internet in advertising its post-reutilization property to the general public as well. It is important to note that DAS does charge an administrative fee for these services.

4.110 STATUTES FOR PUBLIC CONTRACTS

Chapter 279A

NOTE: New sections of law were added by legislative action to this ORS chapter or to a series within this ORS chapter by the Legislative Assembly during its 2012 regular session. See sections in the following 2012 Oregon Laws chapters: 2012 Session Laws 0053; 2012 Session Laws 0058

General Provisions

279A.005 Short Title
279A.010 Definitions for Public Contracting Code
279A.015 Policy
279A.020 Organization of Public Contracting Code
279A.025 Application of Public Contracting Code
279A.030 Federal law prevails in case of conflict
AUTHORITY

279A.050 Procurement authority
279A.055 Personal services contracts
279A.060 Local contract review boards
279A.065 Model rules generally; applicability to contracting agencies
279A.070 Rules
279A.075 Delegation

MINORITIES, WOMEN AND EMERGING SMALL BUSINESSES

279A.100 Affirmative action; limited competition permitted
279A.105 Subcontracting to emerging small businesses or businesses owned or controlled by disabled veterans
279A.110 Discrimination in subcontracting prohibited; remedies

CONTRACT PREFERENCES

279A.120 Preference for Oregon goods and services; nonresident bidders
279A.125 Preference for recycled materials
279A.128 Preference for goods fabricated or processed within state or services performed within state

STATE PROCUREMENT

279A.140 State procurement of goods and services; rules
279A.142 Limitation of competition
279A.145 Recycled product purchasing information
279A.150 Procurement of goods containing recycled polyethylene material
279A.155 State procurement of paper

INTERGOVERNMENTAL RELATIONS

(Generally)
279A.180 Purchases through federal programs

279A.185 Local contracting agency arrangements for use or disposition of personal property authorized

279A.190 Transfers of fire protection equipment between fire departments

(Cooperative Procurement)

279A.200 Definitions for ORS 279A.200 to 279A.225

279A.205 Cooperative procurements authorized

279A.210 Joint cooperative procurements

279A.215 Permissive cooperative procurements

279A.220 Interstate cooperative procurements

279A.225 Protests and disputes

STATE SURPLUS PROPERTY

279A.250 Definitions for ORS 279A.250 to 279A.290

279A.255 Inspection, appraisal and inventory of state property; reports by state agencies

279A.260 Powers and duties of department; acquisitions by qualified donees; rules

279A.265 Use of Oregon Department of Administrative Services Operating Fund; cash dividends

279A.270 Contracts with federal government for accepting gifts and acquiring surplus property; bids not required

279A.275 Leasing of state property

279A.280 Disposal of surplus property; costs of disposal

279A.285 Disposition of moneys received as payment for repair or replacement of damaged, destroyed, lost or stolen property

279A.290 Miscellaneous receipts accounts

PENALTIES

279A.990 Penalties

Chapter 297
Municipal Audit Law

297.525  Annual audit of county road work.

Chapter 368

County Roads

368.051  Accounting for county road work.

4.120  CITATIONS ON PUBLIC CONTRACTS

State ex rel Oregon Waste Systems, Inc. v. United Pacific Insurance Co., 172 Or. App. 435, 18 P.3d 491 (2001):  Plaintiff completed its work hauling away tires under a subcontract, but the general contractor did not pay plaintiff the full amount agreed to in the subcontract. Plaintiff argued that the contract involved a project for “construction, reconstruction or major renovation on real property” pursuant to ORS 279.011(8) and was therefore qualified as a “public improvement contract” subject to the bonding requirement of ORS 279.029. The Court of Appeals concluded that hauling away tires simply uncovered the ground, and did not meet the common meaning of “renovate.” The contract was therefore not a contract for public improvement. The bonding requirement in ORS 279.029 depends upon the contract being one for public improvement, and therefore did not apply. (The relevant subject matter of ORS 279.029 is now found under ORS 279C.375 and 279C.380, the relevant subject matter of ORS 279.011 is now found under ORS 279A.010.)

McLean v. Buck Medical Services, 157 Or. App. 563, 971 P.2d 462 (1998):  Defendant ambulance company entered into a contract with two counties to provide ambulance services. Ambulance company employees sought payment of overtime wages as provided for in the public contract overtime wage requirements of ORS chapter 279. The Court of Appeals held that the services provided under the contract were personal services within the meaning of ORS 279.051, and the contracts were therefore exempt from statutory overtime requirements. (The relevant subject matter of ORS 279.051 is now found under ORS 279A.055.)

Double Eagle Golf, Inc. v. City of Portland, 322 Or. 604, 910 P.2d 1104 (1996):  The City issued a request for proposals to operate concessions at a public golf course. The request notified prospective bidders that the goals of the contract were to maximize revenue and service to the public. The incumbent concessionaire submitted a bid, but the City awarded the contract to a party whose bid guaranteed less revenue to the City than the concessionaire's bid. The concessionaire then brought an action against the City and officials. ORS 279.051 gave local contract review boards the authority to designate particular service contracts as personal services contracts. The Supreme Court held that ORS 279.029(1), which required a public contracting agency to award a contract to the "lowest responsible bidder," applied to contracts for the purchase of goods or services, but it did not apply to concession contracts intended to raise revenue for a public agency. (The relevant subject matter of ORS 279.051 is now found under ORS 279A.055. The relevant subject matter of ORS 279.029 is now found under ORS 279C.375 and
Wegroup PC v. State of Oregon, 131 Or. App. 346, 885 P.2d 709 (1994): An architectural firm sought payment from the state for redesign work required because the State changed its plans. The firm's recovery was barred because it failed to comply with the contractual, statutory, and regulatory requirements of modifying the contract price before performing the additional work. The burden was on the firm to refuse to proceed until an appropriate contract amendment had been negotiated and approved pursuant to ORS 279.712. (The relevant subject matter of ORS 279.712 is now found under ORS 279A.140.)

Or. Atty. Gen Inf. Op. No. OP-5841 (May 1985): A county public contract review board (PCRB) does not have general statutory authority to review and supervise (except for considering, granting or denying exemptions) the contracting procedures and contract terms of local public agencies that are subject to its jurisdiction. (The PCRB is now referenced as the local contract review board, see ORS 279A.060.)

4.200 REQUIREMENTS FOR PUBLIC PROCUREMENT CONTRACTS.

Application. In response to House Resolution 1 (2001), representatives of local governments, schools, state agencies, contractors, unions, and trade organizations worked through the 2002 interim on a comprehensive rewrite of Oregon’s public contracting laws. Reflecting practices suggested by the American Bar Association’s Model Procurement Code, the new Oregon Code, enacted as House Bill 2341 (Chapter 794, Oregon Laws 2003) applied to public contracts first advertised, or entered into, on or after March 1, 2005.

Methods of Source Selection. Greater procurement flexibility is allowed in Chapter 279B than under former law for the general procurement of “goods and services” (other than public improvements and related services addressed in ORS Chapter 279C). Special treatment is provided for personal service contracts as they are identified by local agencies (ORS 279A.055 (2)). Contracting agencies may select from two primary methods of procurement: competitive sealed bids or competitive sealed proposals. Chapter 279B sets forth the provisions and “checklist” requirements for source selection, including the two primary methods of procurement: competitive sealed bids or competitive sealed proposals. It also authorizes the following alternatives:

- **Small Procurements.** ORS 279B.065 procedures are highly informal for procurement with a value of under $5,000.

- **Intermediate Procurements.** Under ORS 279B.070 at least three competitive quotes are required for these informal procurements, up to $150,000 in value.

- **Sole Source Procurements.** Under ORS 279B.075 written findings are required that the goods or services are available from only one source.

- **Emergency Procurements.** In ORS 279B.080 the head of a contracting agency, or designee, may authorize a defined “emergency” procurement after documentation. (See ORS 279A.010 for the definition of “emergency” and ORS 279A.075 for delegation of authority.)
Special Procurements. Under ORS 279B.085 the contracting agency must detail the selection method to be used, the goods or services to be acquired and the circumstances that justify a selection method different from those described above.

ORS Chapter 279B also contains its own administrative provisions, including cancellation, offeror responsibility, prequalification and debarment, notice of intent to award, use of price agreements, matters pertaining to specifications and legal remedies.

Legal remedies provisions are set forth in ORS chapter 279B for procurement of goods and services, in which a protest procedure is established at the contracting agency level. However, these provisions do not apply to architectural, engineering photogrammetric mapping, transportation planning land, surveying or related services contracting under ORS chapter 279C. These provisions also do not apply to public improvement contracting under ORS chapter 279C, in which the current legal remedies under ORS 279C.460 through 279C.470 remain in place.

4.210 STATUTES ON PUBLIC PROCUREMENT CONTRACTS

Chapter 279B

Public Procurement

NOTE: New sections of law were added by legislative action to this ORS chapter or to a series within this ORS chapter by the Legislative Assembly during its 2012 regular session. See sections in the following 2012 Oregon Laws chapters: 2012 Session Laws 0053

PUBLIC FACILITIES, CONTRACTING & INSURANCE

GENERAL PROVISIONS

279B.005 Definitions

279B.010 Policy

279B.015 Applicability

279B.020 Maximum hours of labor on public contracts; holidays; exceptions; liability to workers; rules

279B.025 Procurement practices regarding recyclable and reusable goods

279B.030 Demonstration that procurement will cost less than performing service or that performing service is not feasible; exemptions

279B.033 Contents of cost analysis; conditions under which procurement may proceed; exceptions
279B.036  Determination of feasibility of procurement

SOURCE SELECTION

(Methods of Source Selection)

279B.050  Methods of source selection

279B.055  Competitive sealed bidding

279B.060  Competitive sealed proposals

279B.065  Small procurements

279B.070  Intermediate procurements

279B.075  Sole-source procurements

279B.080  Emergency procurements

279B.085  Special procurements

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

279B.100  Cancellation, rejection, delay of invitations for bids or requests for proposals

(Qualifications)

279B.110  Responsibility of bidders and proposers

279B.115  Qualified products lists

279B.120  Prequalification of prospective bidders and proposers

279B.125  Application for prequalification

279B.130  Debarment of prospective bidders and proposers

(Notice of Intent to Award)

279B.135  Notice of intent to award

(Price Agreements)

279B.140  Price agreements

(Determinations)
4.220 CITATIONS ON PUBLIC PROCUREMENT CONTRACTS

Northwest Pump & Equipment Company v. Stach, 167 Or. App. 64, 1 P.3d 466 (2000): Northwest Pump submitted the lowest bid for a contract to provide materials for the construction of gasoline storage tanks and pumping equipment, but Linn County awarded the contract to the only other bidder. Northwest Pump then filed an action against the County and the successful bidder, alleging multiple violations of ORS 279.029(1), including the requirement that contracts for public improvement be awarded
to the “lowest responsible bidder.” Northwest Pump sought declaratory and injunctive relief, bid preparation costs, attorney fees and costs, and damages for lost profits that the company allegedly would have earned on the contract. The claims for lost profits and injunctive relief were dropped, and the trial court awarded partial summary judgment to plaintiff on liability, concluding that the County used brand names in violation of ORS 279.017, failed to comply with the advertising requirements of ORS 279.025 and violated Linn County Code. The remaining issues went to trial, and the trial court awarded Northwest Pump $4,000 in damages for its bid preparation costs.

On appeal, Northwest Pump contested an award of $25,000 of the $79,000 that it sought to recover in attorney fees under ORS 279.067. The Court of Appeals determined it required more comprehensive findings, such as the amount Northwest Pump’s award was reduced for pursuing its claim for lost profits that was eventually dropped, to determine if the trial court abused its discretion. The award of attorney fees was vacated and the case was remanded. (The relevant subject matter of ORS 279.029 is now found under ORS 279C.375. The relevant subject matter of ORS 279.017 is now found under ORS 279B.215. The relevant subject matter of ORS 279.067 is now found under ORS 279C.460.)

Double Eagle Golf, Inc. v. City of Portland, 322 Or. 604, 910 P.2d 1104 (1996): The City issued a request for proposals to operate concessions at a public golf course. The request notified prospective bidders that the goals of the contract were to maximize revenue and service to the public. The incumbent concessionaire submitted a bid, but the City awarded the contract to a party whose bid guaranteed less revenue to the City than the concessionaire's bid. The concessionaire then brought an action against the City and officials. ORS 279.051 gave local contract review boards the authority to designate particular service contracts as personal services contracts. The Supreme Court held that ORS 279.029(1), which required a public contracting agency to award a contract to the "lowest responsible bidder," applied to contracts for the purchase of goods or services, but it did not apply to concession contracts intended to raise revenue for a public agency. (The relevant subject matter of ORS 279.051 is now found under ORS 279A.055. The relevant subject matter of ORS 279.029 is now found under ORS 279C.375.)

Schlumberger Technologies, Inc. v. Tri-County Metro. Transp. Dist., 145 Or. App. 12, 929 P.2d 331 (1996): The Court of Appeals held that deciding whether a bid meets the technical terms of an invitation for bids requires an exercise of judgment that is within the scope of the duties of the entity issuing the invitation, and which may require its specific expertise; the reviewing court determines whether that entity properly abused its discretion, not whether the court agrees with the decision.

4.300 REQUIREMENTS FOR PUBLIC IMPROVEMENT CONTRACTS.

Public Improvement and Related Contracts

Of the three chapters within the Public Contracting Code, ORS Chapter 279C most closely resembles former ORS Chapter 279. In developing ORS Chapter 279C, the statutes in former ORS Chapter 279 were reorganized and updated by House Bill 2341 (2003 Oregon Laws, Chapter 794), but unlike ORS Chapters 279A and 279B, ORS Chapter 279C did not undergo a wholesale change from the law prior to 2003. For all construction services contracts, competitive bidding is the norm and the chapter details the required competitive
bidding procedures. However, the chapter also includes exceptions and exemptions to the competitive bidding process. The Chapter 279C provisions pertaining to construction services also address general concepts, such as the following: hours of labor, prevailing wage rates, what qualifies as a “public work”, what constitutes “funds of a public agency”, payment and interest, retainage, actions against payment bonds, first-tier subcontractor disclosure, prequalification, disqualification, rejection of bids, contract award, allowing multiple awards, required contract clauses, and legal remedies. More specifically:

- **Architectural, Engineer, Photogrammetric Mapping, Transportation Planning, Land Surveying and Related Services.** Definitions and procedural requirements are in ORS 279C.100 to 279C.125. Related services are defined and procedural provisions are identified. The qualifications based selection process or “QBS” is required for all agencies for architectural, engineering, photogrammetric mapping, transportation planning and land surveying contracts, unless exempt under one of the provisions of ORS 279C.110. Otherwise the QBS process is merely an option for local government agencies.

- **Bidding Exceptions and Exemptions.** While competitive bidding is the standard for public improvement contracts under ORS 279C.335, it also sets forth some exceptions to the competitive bidding requirement, specifically for intermediate level contracts (as detailed below) and authorized class exemptions.

- **Performance and Payment Bonds.** ORS 279C.375 and 279C.380 specifically require a 100% performance bond as well as a 100% payment bond, rather than one combined bond, and clarifies the purpose of each. The bonds must be from a surety company with a state certificate of authority, and these statutes clarify that the right of action on the payment bond also applies in the case of competitive proposals.

- **Competitive Proposals.** ORS 279C.400 to 279C.410 do not authorize the use of competitive proposals for public improvement contracts, but set out a procedural framework if they are authorized by an exemption. Bidding statutes applicable to competitive proposals are identified, as well as inapplicable statutes. Requirements for Requests for Proposals (RFPs) and the selection process are also set forth.

- **Competitive Quotes.** ORS 279C.335(1)(d) that if the estimated value of a public improvement will not exceed $100,000, the contracting agency may follow the intermediate procurement procedures of ORS 279C.412 and 279C.414 with rules adopted under ORS 279A.065.

- **Construction Contracts that are not Public Improvements.** Under the provisions of ORS 279C.320 construction contracts that are not for public improvements are to be procured as ordinary goods and services under ORS 279B. (These contracts including minor alterations, ordinary repair or maintenance of a public improvement, and emergency work.) Additional procedural and substantive provisions related to the “public works” statutes are located in ORS 279C.800 to 279C.870 (including the Public Works Bond, additional retainage for failure to submit certified payroll statements, and a prevailing wage rates threshold of $50,000).
Procurement of Construction Services

**Competitive Bidding and Least-cost Policies.** [ORS 279C.300](#) addresses the statutory “policy of competition” and states that “(I)t is the policy of the State of Oregon that public improvement contracts awarded under this chapter must be based on competitive bidding, except as otherwise specifically provided in [ORS 279C.335](#) for exceptions and formal exemptions from competitive bidding requirements.” [ORS 279C.305](#) requires public agencies to make every effort to construct improvements at the least cost. This goal may be attained either by use of an agency's own equipment and personnel or by contract with a private contractor. Regardless of the estimated cost of a project, the public agency must prepare during the annual budget period a list of every improvement project to be funded by the agency. The list must show the estimated cost, indicate which projects are expected to be done by private contract, and must be filed with the Commissioner of the Bureau of Labor and Industries.

**Projects Over $125,000.** If the estimated cost of a public improvement project exceeds $125,000 and the public agency is using its own equipment and personnel, the agency must show that this method is least costly and must prepare adequate plans, specifications, and estimated costs of the proposed improvement. The agency must then keep an accurate account of the costs incurred, in compliance with model cost accounting guidelines developed by the Oregon Department of Administrative Services (formerly the Oregon Executive Department). [ORS 279C.310](#) prohibits public improvements using county equipment or personnel if the project costs in excess of $5,000 and cost accounting guidelines are not used.

**Cost Account.** [ORS 368.051](#) specifically requires county road officials to maintain a cost account for all road work performed by the county. [ORS 297.525](#) requires that the annual county audit include a cost audit of the cost account for county road work. (Also see section 4.502 for additional information on cost accounting.)

**Contract Limitations.** [ORS 279C.335](#) requires competitive bidding on public improvement contracts but makes various exceptions. It is possible under this law to exempt a public improvement contract or a class of public improvement contracts from competitive bidding upon adoption of findings following a public hearing. Projects costing in excess of $100,000 which have not been competitively bid must be evaluated and reported comparing the actual results with the details provided in the findings along with other analyses (ORS 279C.355). In addition under [ORS 279A.185](#) a county or other local contracting agency may negotiate certain arrangements without competitive bids for the use, operation, maintenance, or disposition property. Many of the exceptions depend upon action by a contract review board which adopts rules under which it can deal with special situations related to public contracts. The county governing body is the local contract review board for the county unless it takes action otherwise. The county governing body may create a local contract review board by appointing a body, board or commission other than the governing body to serve as the county’s contract review board, as provided in [ORS 279A.060](#).

Adopted in 1985, [ORS 279C.315](#) voided any contract provision purporting to take away a contractor's right to compensation for delay if the delay was caused by the public contracting agency. [ORS 279C.360](#) lists requirements for bid advertisements. [ORS 279C.365](#)
279C.365 specifies information to be included in bid documents including statements to identify the right of the agency to reject bids and limit receipt of bids to bidders registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board. ORS 297C.370 also specifies when a bidder must submit information about first-tier subcontractors to the public contracting agency. ORS 279C.830 specifies that the specifications for public works contracts contain a provision stating the existing state prevailing rate of wage and, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act (40 U.S.C. 3141 et seq.) to be paid to workers or referenced electronically if available electronically or accessible on the Internet.

Requirements for Public Improvement Contracts (See section 4.720 for Contract Checklist.)

Policy on Competitive Bidding. It is the policy of the State of Oregon that public improvement contracts awarded under ORS Chapter 279C must be competitively bidding (see ORS 279C.300) as required by ORS 279C.335 unless exempted under one of the provisions of subsection (1) of the section. ORS 279C.340 authorizes public agencies to negotiate with the lowest responsible bidder when all bids exceed the agency’s cost estimate subject to the provision of ORS 279C.340 and rules adopted by the agency for such situations. ORS 279C.307 enacted in 2009 restricts a contracting agency from contracting for administration of a public contract with parties to the contract to be administered, but with some exceptions. See section 4.720 for a contract checklist and forms in awarding public improvement contracts.

Public Contract Labor Requirements. Modern public contract law deals in large part with the obligation of units of local government to meet certain requirements with regard to labor.

The requirements under ORS 279C.540, 279C.545 and 653.268 provide, among other things, for a work-day generally limited to 10 hours and a work-week to 40 hours, except in cases of public need. Additionally, the statutes allow certain types of overtime, while placing a time limit on overtime claims. ORS 653.269 includes a number of exceptions and modifications to overtime laws. Public contractors must generally, under ORS 279C.800 to 279C.870, pay the prevailing wage for the type of work and locality of work and are subject to certain inspections and sanctions in order to ensure compliance. ORS 279C.810 exempts projects from prevailing wage when the contract price does not exceed $50,000. If the contract is subject to state and federal prevailing wage, the public agency must include in the specifications information showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality, as determined by the Commissioner of the Bureau of Labor and Industries. The specifications for every contract must also contain a provision stating that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work, unless exempt under ORS 279C.836(7) or (8). If the contract does not contain a provision covering the prevailing wage obligation, the public agency and the contractor or subcontractor share the liability.

First-Tier Subcontractor Disclosure. ORS 279C.370 requires bidders on public improvement contracts to disclose the first-tier subcontractors that will be furnishing labor or labor and materials in connection with the contract and whose subcontracts equal or exceed certain dollar values. A bidder’s failure to submit a completed disclosure form is considered to be a nonresponsive bid and may not be awarded the contract. The contracting
agency is not required to determine the accuracy or the completeness of the subcontractor disclosure.

The disclosure must include the name of each subcontractor, the category of work that each will perform and the dollar value of each subcontract. The information must be disclosed in substantially the form provided in ORS 279C.370. (See section 4.720 for a copy of the First-Tier Subcontractor Disclosure Form).

Award of Contract. After bids are opened and a determination is made to award the contract, the contracting agency must award the contract to the “lowest responsible bidder.” In determining the lowest responsible bidder, a contracting agency must do all of the following:

(1) Check the Construction Contractors Board’s contractor disqualification list.

(2) Determine that the contractor has met the standards of responsibility as set forth in ORS 279C.375 (3) (b) (A through I),

(3) Document the contracting agency’s compliance with items (1) and (2) above in substantially the form provided in ORS 279C.375. (See section 4.720 for a copy of the Responsibility Determination Form), and

(4) Submit the Responsibility Determination Form with any attachments to the Construction Contractors Board within 30 days after awarding the contract.

Effective July 1, 2008, a contracting agency may not exclude a commercial contractor from bidding on a public contract because the contractor’s license issued by the Construction Contractors Board is endorsed as a level 1 or level 2 license (see ORS 279C.375 (6)).

Termination of Contracts. The public body and the contractor may terminate a contract by mutual agreement in certain situations involving either the public interest or impracticality, as set forth in ORS 279C.330, with appropriate compensation being paid. The statutes also provide for temporary suspension of work, again with compensation.

Retainage of Payment Due. Retainage provisions have been upheld by the court and are presently codified in ORS 279C.550 to 279C.570 and ORS 701.410 to 701.440. Public agencies may exceed the usual 5 percent limit on retainage provided that the agency's charter requires a higher percentage. Various retainage requirements are set forth in ORS 279C.560. With legislation passed in 2009, public agencies are now required to accept general obligation bonds, irrevocable letters of credit, or other forms of financial security from a contractor in lieu of moneys held as retainage, unless the agency makes a finding that the alternative security offered poses extraordinary risk for the agency. Under ORS 701.440, some of the statutory retainage requirements do not apply to federally funded projects.

Prompt Payment. Prompt payments are required on public contracts for public improvements under ORS 279C.570. If a payment is not made within the earlier of 30 days of receipt of the invoice from the contractor or 15 days after the payment is approved by the agency, the agency must pay interest on the amount due. Similar requirements are in the
law for contractors to promptly pay subcontractors. Contracts awarded by a public contracting agency must include a clause which requires the contractor to include prompt payment and interest clauses in subcontracts and for subcontractors to include such contracts in any lower-tier subcontracts. ORS 279C.515

Other Contract Provisions. Under ORS 279C.505, public contracts must obligate the contractor to make prompt payment to employees and agree to allow no liens or claims to be filed against the contracting agency on account of labor or materials furnished.

ORS 279C.525 requires bid documents to make specific reference to any federal, state or local ordinances or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that affect the performance of the contract. If the contractor is delayed or must do additional work because of failure to cite ordinances or the enactment of new ordinances, the contracting agency may terminate the contract, get the work done or issue a change order to the contractor to do the cleanup work. Similar provisions are included in ORS 279C.525 for conditions necessary to comply with referenced regulations, where the conditions were not addressed by the bid documents and were discovered after award of the contract.

Contract bid specifications and contracts must include a provision that a fee equal to 0.1 percent of the contract price (not less than $250 or more than $7,500) is to be paid by the public agency to the Bureau of Labor and Industries for the Prevailing Wage Education and Enforcement Account to fund wage surveys, prevailing wage enforcement and public education efforts (ORS 279C.825).

Certified payroll statements received by a public agency are public records subject to the provisions of ORS 192.410 to 192.505. Each public improvement contract must also contain a condition that the contractor demonstrate that an employee drug testing program is in place (ORS 279C.505 (2)).

ORS 279C.500 to 279C.535 addresses a number of additional contract requirements that affect the provisions of contract documents and contract administration. These are in addition to matters discussed in other portions of this chapter. The Attorney General has drafted model contract provisions that address various statutory requirements. The state highway specification publication also provides example of provisions for contracts covering these statutory requirements.

Recent Legislative Changes

Procedural and substantive changes made by the 2009 Legislature are as follows:

- **Chapter 149, Oregon Laws 2009 (HB 2731)** Permits contracting agency and person appealing a disqualification, denial, revocation, or revision of being prequalified for public contracting work, to agree on a time in which the Director of Oregon Department of Administrative Services or the local contract review board must conduct the hearing and decide an appeal.

- **Chapter 160, Oregon Laws 2009 (SB 50)** Extends the deadline for notice of claim from a laborer or supplier on public contracts from 120 to 180 days following the last day labor or furnished materials were provided, and extends
the deadline for notice of claim for a required contribution to an employee benefit plan from 150 to 200 days.

• **Chapter 214, Oregon Laws 2009 (HB 2763)** Allows contracting agencies to pay up to ten percent more than lowest bidder, for agricultural products produced and transported entirely within Oregon. Allows higher percentage to be paid if agency finds and explains good cause in a written determination.

• **Chapter 235, Oregon Laws 2009 (SB 479)** Provides that Public Contracting Code may not be construed to prohibit contracting agency from giving preference in awarding public contract to business enterprise that is owned or controlled by disabled veteran as defined in ORS 408.225. Permits contracting agency by ordinance, resolution or rule to limit competition for certain contracts to business enterprise that is owned or controlled by disabled veteran. Permits contracting agency to require contractor to award subcontract to business enterprise that is owned or controlled by disabled veteran. Prohibits discrimination against subcontractor that is owned or controlled by or that employs disabled veteran.

• **Chapter 368, Oregon Laws 2009 (HB 2953)** Provides that contracting agency may reject bid for public improvement contract if bidder does not demonstrate that bidder is responsible. Provides that bidder must demonstrate responsibility by showing that bidder has licenses that businesses and service professionals operating in this state must have in order to undertake work specified in public improvement contract and that bidder is covered by liability and other insurance in amounts required in solicitation documents for public improvement contract.

• **Chapter 568, Oregon Laws 2009 (HB 2955)** Requires contracting agencies to accept general obligation bonds, irrevocable letters of credit, or other forms of financial security from a contractor in lieu of moneys held as retainage in connection with public improvement contracts, unless the agency makes findings that the alternative security offered poses extraordinary risk. Permits a contractor to accept similar instruments from a subcontractor.

• **Chapter 880, Oregon Laws 2009 (HB 2867)** made several changes to the Public Contracting Code in ORS Chapters 279B and 279C:
  o Requires a contracting agency, before conducting a procurement for goods or services with an estimated contract price that exceeds $250,000, to demonstrate with cost analysis or by other means that the cost of providing goods or performing service with a contracting agency’s own personnel or resources is greater than cost of procuring goods or services from the contractor. Excludes cities or counties that have a population of not more than 15,000, and other specified contracting agencies.
  o Requires contracting agencies, before entering into a public contract, to establish measurable standards to assess the quality of a contractor’s performance and clear consequences for failing to meet those standards. Directs the Department of Administrative Services to consult, evaluate effectiveness, and report to the Legislative Assembly on January 10, 2011.
  o Modifies ORS 279B.420 regarding judicial review.
Prohibits a contracting agency from contracting for administration with parties to the contract to be administered, with some exceptions.

- Specifies additional criteria for contracting agency to use in determining the contractor’s responsibility and for prequalifying the contractor.

**Procedural and substantive changes made by the 2011 and 2012 Legislatures are as follows:**

- **Chapter 4, Oregon Laws 2012 (HB 4034)** Changes the applicable interest rate for a contractor’s failure to make a timely payment in accordance with a public improvement contract to nine percent per annum. Requires that a public improvement contract obligate a contractor to provide a first-tier subcontractor with a standard payment claim form and that the contractor use the same form and regular administrative procedures to process payments during the entire term of a public contract. Permits a contractor to change the form or administrative procedure if the subcontractor is notified of the new or changed form or procedure and includes in the notice the new or changed form or a description of the new or changed procedure. Establishes operative date 91 days after measure’s effective date.

- **Chapter 53, Oregon Laws 2012 (SB 1518A)** Prohibits state contracting agency, under specified conditions, from accepting bid or proposal from bidder or proposer that advised or assisted state contracting agency concerning solicitation documents or materials related to public contract.

- **Chapter 83, Oregon Laws 2012 (SB 1533B)** Revises requirement that contracting agencies include an amount in contracts for construction, reconstruction or major renovation of public buildings equivalent to 1.5 percent of the total contract price for the inclusion of solar technologies to allow for inclusion of geothermal electricity generation or direct use of geothermal energy.

- **Chapter 237, Oregon Laws 2011 (HB 3000)** Allows contracting agencies to pay up to 10 percent more for goods fabricated or processed, or services performed entirely within the state, with the exception of specified public improvements and construction contracts. Allows contracting agencies to give further preference to bidder or proposer that resides or is headquartered in Oregon if more than one bidder or proposer qualifies for the 10 percent preference. Allows contracting agencies to set the preference higher than 10 percent if the agency finds good cause.

- **Chapter 458, Oregon Laws 2011 (HB 3316)** Adds photogrammetric mapping and transportation planning to the list of services subject to procedures for contracting with architects, engineers and land surveyors. Modifies the usage of qualification-based selection in selecting consultants to provide architectural, engineering, photogrammetric mapping, transportation planning or land surveying services. Clarifies that a contracting agency can adjust procedures to accommodate the scope, schedule or objectives for a particular project if the estimated cost for services does not exceed $250,000, and may directly appoint a consultant if the estimated cost for services on a project does not exceed $100,000. Allows the Department of Administrative Services, attorney general and contracting agencies subject to the state’s model public contracting rules to
take any action on or before the measure's operative date necessary to enable to exercise the measure’s provisions.

Prevailing wage changes made by the 2009 Legislature are as follows:

- **Chapter 7, Oregon Laws 2009 (SB 54)** Requires contractor and subcontractor certified statements of payroll records for workers on public works contracts to include weekly gross wages of each worker.

- **Chapter 107, Oregon Laws 2009 (SB 55)** Provides that contractor or subcontractor that intentionally falsifies information in certified statements of payroll records is ineligible for public works contract for three years.

- **Chapter 161, Oregon Laws 2009 (SB 53)** Requires contracting agency to pay fee for prevailing wage education and enforcement when notifying BOLI commissioner of award of public works contract within 30 days after award.

- **Chapter 322, Oregon Laws 2009 (HB 2907)** Prohibits contracting agency from entering into agreement with another state or political subdivision or agency of another state in which contracting agency agrees that contractor may pay less than prevailing wage.

- **Chapter 788, Oregon Laws 2009 (SB 51)** Increases minimum fee payable by contracting agency of prevailing wage education and enforcement to $250; maximum fee to $7,500.

Prevailing wage changes made by the 2010 Legislature are as follows:

- **Chapter 45, Oregon Laws 2010 (HB 3651)** Amends ORS 279C.800 to provide that workers on solar energy installations on real property owned by a public body must be paid the prevailing rate of wage, regardless of how small the installation may be or how the installation is financed.

Prevailing wage changes made by the 2011 Legislature are as follows:

- **Chapter 265, Oregon Laws 2011 (SB 178)** Removes requirement for Bureau of Labor and Industries to compare state and federal wage rates and make results available. Directs public agencies to include provisions for payment of higher wage rate by contractors and subcontractors in public works contracts.

4.310 **STATUTES ON PUBLIC IMPROVEMENT CONTRACTS**

Chapter 279C

Public Contracting of Public Improvements

NOTE: ORS sections in this chapter were amended or repealed by the Legislative Assembly during its 2012 regular session. See the measure summaries above for a summary of the measures passed by the 2012 Legislature.
GENERAL PROVISIONS

279C.005  Definitions

279C.010  Applicability

ARCHITECTURAL, ENGINEERING, LAND SURVEYING AND RELATED SERVICES

279C.100  Definitions for ORS 279C.100 to 279C.125

279C.105  Contracts for architectural, engineering, photogrammetric mapping, transportation planning or land surveying and related services; procedures

279C.107  Public disclosure of contents of proposals for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services; treatment of trade secrets and confidential information

279C.110  Selection procedure for consultants to provide services; compensation; applicability

279C.115  Direct contracts for services of consultants

279C.120  Selection procedure for related services

279C.125  Architectural, engineering, photogrammetric mapping, transportation planning and land surveying services selection process for local public improvements procured through state agency; rules

PROCUREMENT OF CONSTRUCTION SERVICES

(General Policies)

279C.300  Policy on competition

279C.305  Least-cost policy for public improvements; costs estimates in budget process; use of agency forces; record of costs

279C.307  Limitations in procurement of personal services; exception

279C.310  Limitation on contracting agency constructing public improvement

279C.315  Waiver of damages for unreasonable delay by contracting agency against public policy

279C.320  Contracts for construction other than public improvements

279C.325  Limitation on contracting agency awarding contract to nonresident
education service district

(Competitive Bidding; Contract Specifications; Exceptions; Exemptions)

279C.330 “Findings” defined

279C.335 Competitive bidding; exceptions; exemptions

279C.340 Contract negotiations

279C.345 Specifications for contracts; exemptions

279C.350 Exemption procedure; appeal

279C.355 Evaluation of public improvement projects not contracted by competitive bidding

(Solicitation; Contract Award; Rejection)

279C.360 Requirement for public improvement advertisements

279C.365 Requirements for solicitation documents and bids and proposals

279C.370 First-tier subcontractor disclosure

279C.375 Award and execution of contract; determination of responsibility of bidder; bonds; impermissible exclusions

279C.380 Performance bond; payment bond; waiver of bonds

279C.385 Return or retention of bid security

279C.390 Exemption of contracts from bid security and bonds

279C.395 Rejection of bids

(Competitive Proposals)

279C.400 Competitive proposals; procedure

279C.405 Requirements for requests for proposals

279C.410 Receipt of proposals; evaluation and award

279C.412 Competitive quotes for intermediate procurements

279C.414 Requirements for competitive quotes

(Prequalification and Disqualification)
Prequalification of bidders

Effect of prequalification by Department of Transportation or Oregon Department of Administrative Services

Disqualification from consideration for award of contracts

Appeal of disqualification

Appeal procedure for prequalification and disqualification decisions; hearing; costs; judicial review

Action by or on behalf of adversely affected bidder or proposer; exception for personal services contract

Action against successful bidder; amount of damages; when action to be commenced; defenses

Compensation for contractor on contract declared void by court; exceptions; applicability

CONSTRUCTION CONTRACTS GENERALLY

“Person” defined

Conditions concerning payment, contributions, liens, withholding, drug testing

Demolition contracts to require material salvage; lawn and landscape maintenance contracts to require composting or mulching

Conditions concerning payment of claims by public officers, payment to persons furnishing labor or materials and complaints

Condition concerning hours of labor

Provisions concerning environmental and natural resources laws; remedies

Inclusion of amount for solar energy technology in public improvement contract; written determination of appropriateness; exemptions and limitations

State Department of Energy requirements and specifications; rules

Condition concerning payment for medical care and providing
workers’ compensation

279C.535 Condition concerning steel material; rules

(Hours of Labor)

279C.540 Maximum hours of labor on public contracts; holidays; exceptions; liability to workers; rules

279C.545 Time limitation on claim for overtime; posting of circular by contractor

(Retainage and Payments)

279C.550 “Retainage” defined

279C.555 Withholding of retainage

279C.560 Form of retainage

279C.565 Limitation on retainage requirements

279C.570 Prompt payment policy; progress payments; retainage; interest; exception; settlement of compensation disputes

(Subcontractors)

279C.580 Contractor’s relations with subcontractors

279C.585 Authority to substitute undisclosed first-tier subcontractor; circumstances; rules

279C.590 Complaint process for substitutions of subcontractors; civil penalties

(Action on Payment Bonds and Public Works Bonds)

279C.600 Right of action on payment bond or public works bond of contractor or subcontractor; notice of claim

279C.605 Notice of claim

279C.610 Action on contractor’s public works bond or payment bond; time limitation

279C.615 Preference for labor and material liens

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

279C.625 Joint liability when payment bond not executed

(Termination of Contract for Public Interest Reasons)
“Labor dispute” defined

Extension and compensation when work suspended

Compensation when contract terminated due to public interest

Contractual provisions for compensation when contract terminated due to public interest

Application of ORS 279C.650 to 279C.670

PREVAILING WAGE RATE

Definitions for ORS 279C.800 to 279C.870

Policy

Workforce diversity for public works projects

Rules

Exemptions; rules

Determination of prevailing wage; sources of information; comparison of state and federal prevailing wage; other powers of commissioner

Advisory committee to assist commissioner

Fees; rules

Agreement with other state to pay less than prevailing rate of wage

Provisions concerning prevailing rate of wage in specifications, contracts and subcontracts; applicability of prevailing wage; bond

Notifying commissioner of public works contract

Public works bond; rules

Applicability of state and federal rates of wage

Payment of prevailing rate of wage; posting of rates and fringe benefit plan provisions

Certified statements regarding payment of prevailing rates of wage; retainage

Inspection to determine whether prevailing rate of wage being paid; civil action for failure to pay prevailing rate of wage or overtime
4.320 CITATIONS ON PUBLIC IMPROVEMENT CONTRACTS

Dental v. City of Salem, 196 Or. App. 574, 103 P.3d 1150 (2004): Dental submitted towing contract proposals to the City, but he failed to include the required Letter of Appointment certification from the state police. The City therefore rejected each of his proposals and awarded its towing contracts to other companies. Dental filed an action against the City, seeking a declaratory judgment, injunctive relief, and asserting a breach of contract claim. The trial court awarded judgment in favor of Dental. The Court of Appeals found that the trial court erred in awarding declaratory relief instead of addressing the owner's claim under ORS 279.067. Declaratory relief was inappropriate, as it would not serve a useful purpose, and because the Oregon Legislature created a statutory remedy. There was no dispute that Dental’s bids did not comply with all prescribed public bidding procedures and requirements. Therefore, the City did not abuse its discretion in rejecting the bids. (The relevant subject matter of ORS 279.067 is now found under ORS 279C.460.)

State ex rel Oregon Waste Systems, Inc. v. United Pacific Insurance Co., 172 Or. App. 435, 18 P.3d 491 (2001): Plaintiff completed its work hauling away tires under a subcontract, but the general contractor did not pay plaintiff the full amount agreed to in the subcontract. Plaintiff argued that the contract involved a project for “construction, reconstruction or major renovation on real property” pursuant to ORS 279.011(8) and was therefore qualified as a “public improvement contract” subject to the bonding requirement of ORS 279.029. The Court of Appeals concluded that hauling away tires simply uncovered the ground, and did not meet the common meaning of “renovate.” The contract was therefore not a contract for public improvement. The bonding requirement in ORS 279.029 depends upon the contract being one for public improvement, and therefore did not apply. (The relevant subject matter of ORS 279.029 is now found under ORS 279C.375 and 279C.380, the relevant subject matter of ORS 279.011 is now found under ORS 279A.010.)

Northwest Pump & Equipment Company v. Stach, 167 Or. App. 64, 1 P.3d 466 (2000): Northwest Pump submitted the lowest bid for a contract to provide materials for the construction of gasoline storage tanks and pumping equipment, but Linn County awarded the contract to the only other bidder. Northwest Pump then filed an action against the County and the successful bidder, alleging multiple violations of ORS 279.029(1), including the requirement that contracts for public improvement be awarded to the “lowest responsible bidder.” Northwest Pump sought declaratory and injunctive relief, bid preparation costs, attorney fees and costs, and damages for lost profits that the company allegedly would have earned on the contract. The claims for lost profits and
injunctive relief were dropped, and the trial court awarded partial summary judgment to plaintiff on liability, concluding that the County used brand names in violation of ORS 279.017, failed to comply with the advertising requirements of ORS 279.025 and violated Linn County Code. The remaining issues went to trial, and the trial court awarded Northwest Pump $4,000 in damages for its bid preparation costs.

On appeal, Northwest Pump contested an award of $25,000 of the $79,000 that it sought to recover in attorney fees under ORS 279.067. The Court of Appeals determined it required more comprehensive findings, such as the amount Northwest Pump’s award was reduced for pursuing its claim for lost profits that was eventually dropped, to determine if the trial court abused its discretion. The award of attorney fees was vacated and the case was remanded. (The relevant subject matter of ORS 279.029 is now found under ORS 279C.375. The relevant subject matter of ORS 279.017 is now found under ORS 279B.215. The relevant subject matter of ORS 279.067 is now found under ORS 279C.460.)

Schlumberger Technologies, Inc. v. Tri-County Metro. Transp. Dist., 149 Or. App. 316, 942 P.2d 862 (1997): The successful bidder intervened in an action filed by the unsuccessful bidder against Tri-Met. The successful bidder was subject to the same rights and liabilities as an original party, and therefore potentially entitled to recover attorney fees. (The relevant subject matter of ORS 279.067 is now found under ORS 279C.460.)

Steelman-Duff, Inc. v. State, ex rel. ODOT/Oregon State Hwy Div., 323 Or. 220, 915 P.2d 958 (1996): A successful bidder was named as a defendant in an unsuccessful bidders’ action against ODOT. After the trial court found the unsuccessful bidder was not entitled to relief, the successful bidder sought to recover attorney fees. The Supreme Court held that ORS 279.067(4) permits an award of attorney fees to any party to a proceeding brought pursuant to this section, whether or not that party is one of the types specifically enumerated in this section. (The relevant subject matter of ORS 279.067 is now found under ORS 279C.460.)

Schlumberger Technologies, Inc. v. Tri-County Metro. Transp. Dist., 145 Or. App. 12, 929 P.2d 331 (1996): The Court of Appeals held that deciding whether a bid meets the technical terms of an invitation for bids requires an exercise of judgment that is within the scope of the duties of the entity issuing the invitation, and which may require its specific expertise; the reviewing court determines whether that entity properly abused its discretion, not whether the court agrees with the decision.

Coates v. State ex rel ODOT, 144 Or. App. 449, 927 P.2d 108 (1996): Considering the legislative intent of ORS 279.435, as well as the text and context, the Court of Appeals concluded that this section allows attorney fees only on claims for interest. (The relevant subject matter of ORS 279.435 is now found under ORS 279C.570.)

Stockton v. Silco Construction Co., 319 Or. 365, 877 P.2d 71 (1994): Employees of a subcontractor on several public works projects alleged they were not paid the prevailing wage. The Supreme Court held that ORS 279.350 makes subcontractors, rather than the general contractor, directly liable for making the required payments to their own employees. The statute also imposes direct liability on the subcontractors, rather than the general contractor, for deficiencies. The Court further concluded that the
legislature did not intend ORS 279.365(1) to provide a right of action against the contractor for unpaid prevailing wages. (The relevant subject matter of ORS 279.530 is now found under ORS 279C.840. The relevant subject matter of ORS 279.365 is now found under ORS 279C.870.)

Or. Atty. Gen. Inf. Op. No. OP-5868 (September 1985): A public agency could construct a public improvement estimated to cost more than $50,000 using its own equipment personnel even though the agency did not list the project with the Commissioner of the Bureau of Labor and Industries before adopting its budget. However, the agency must make a pre-construction filing with the commissioner and comply with ORS 279.023(1) and 279.023(3). (The relevant subject matter of ORS 279.023 is now found under ORS 279C.305.) (Note: The $50,000 level was increased to $125,000 in 1997.)

Or. Atty. Gen Inf. Op. No. OP-5664 (May 22, 1984): If the work involved is not construction, reconstruction, major renovation or painting, a contract does not need to include a requirement for paying the prevailing wage rate. A contract to paint or to repaint traffic lines would require payment of the prevailing wage if the contract amount exceeded $10,000. However, contracts for many typical maintenance and repair activities such as snow removal, sanding, mowing and culvert cleaning need not include a requirement for payment of the prevailing rate. (Note: the $10,000 threshold was increased by the 2005 Legislature to $50,000, see ORS 279C.810.)

41 Or. Atty. Gen. Op. 327 (1981): A public contracting agency which has submitted a public improvement to bid and then discovers it does not have the money available to build the improvement cannot enter into a contract with the low bidder to hold the bid open at the bid price plus an increment based upon a cost of living index for the period of time over 90 days which the contract would be delayed due to lack of funds. (Note: ORS 279C.340 provides for negotiation with the lowest bidder under certain conditions.)

4.400 ENGINEERING WHEN DEVELOPER FINANCES IMPROVEMENTS. County land division regulations commonly require a developer to install various public facilities, including road improvements. The usual expectation is that the developer will pay for the facilities when installed. When a developer's funds are used to install public improvements, ORS 92.097 provides that the developer has a right to employ an engineer to design or supervise installation of the improvements. However, the work must be done to county standards, and the county may charge a fee to cover county costs, such as for inspection of the work. In some circumstances, deferred payment under special assessment procedures may be extended to a developer by a county. If special assessment procedures are extended, the work is not done by private funds, and the county is probably not obligated to permit the developer to hire outside engineering, even though it may elect to do so.

4.410 STATUTES ON DEVELOPER FINANCING

Chapter 92
**Subdivisions and Partitions**

**92.097** Employment of private licensed engineer by private developer; government standards and fees

**4.450 SIDEWALK AND CURB REPAIR.** The repair of sidewalks and curbs is the responsibility of the owner of abutting property. If out of repair, the county notifies the owner; if the owner does not make the repairs, the county may do so and charge the cost which, if unpaid, becomes a lien on the property. For possible county liability for injuries occurring due to sidewalks in disrepair, see sec. 2.520.

**4.460 STATUTES ON SIDEWALK AND CURB REPAIR.**

*Chapter 368*

*County Roads*

**368.910** Owner to repair sidewalks and curbs along road; county may repair if owner fails

**368.915** Payment and reimbursement when county makes repairs

**368.920** Expense of repairs as lien on abutting property

**368.925** Delinquency in paying assessment for repairs; execution sale

**4.500 REQUIREMENTS FOR CONDUCTING ROAD WORK.** [ORS 279C.005](https://www.oregonlegislature.gov/bills_laws/ors/ors279c005.htm) sets out the Oregon Legislature’s “least-cost policy” for public works directing public agencies to make every effort to construct public improvements at the least cost to the agency. However, [ORS 279A.010 (1) (cc)](https://www.oregonlegislature.gov/bills_laws/ors/ors279a010.htm) defines “public improvement” as a project for construction or reconstruction of a public facility, but does not include the repair or maintenance necessary to preserve the facility. Therefore, the maintenance and preservation of the county’s road system may be accomplished by either use of the county’s own equipment and personnel or by public contract. As noted in section 4.506 most county maintenance work is performed with county employees and county-owned equipment.

The ability of cities and counties to maintain roads and streets with their own equipment and personnel was limited by the 1979 Legislature with the passage of legislation requiring cities and counties to implement cost accounting systems consistent with guidelines promulgated by the State Executive Department. (See the following sections for additional information on cost accounting.)

**4.502 ACCOUNTING GUIDELINES.** The statutes regarding contract work found in [ORS 279A.005 to 279A.125](https://www.oregonlegislature.gov/bills_laws/ors/ors279a005.htm) and [279C.005 to 279C.870](https://www.oregonlegislature.gov/bills_laws/ors/ors279c005.htm) place an obligation on each public agency, including county road departments, to account for costs of public improvement projects. As part of this accountability, [ORS 279C.305](https://www.oregonlegislature.gov/bills_laws/ors/ors279c305.htm) requires each public
agency to prepare a list of all public improvements showing the estimated cost and to file a copy of the list with the commissioner of the Bureau of Labor and Industries. The definition of "public improvement" and “public improvement contracts” in [ORS 279A.010](#) helps distinguish improvement projects from other work such as maintenance and from projects where no funds of the agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection. The list of public improvements is prepared at least 30 days before adoption of the annual budget and represents the best judgment available at the time of its preparation. It does not bind the public agency to a public improvement program that is identical to the list.

Whether work is a public improvement or maintenance is sometimes subject to controversy. Asphalt overlays were the subject of circuit court decisions in Klamath and Clackamas counties. In [AGC v. Klamath County (1982)](#), an asphalt overlay "not less that 2 1/2" in depth, 24' in width, and extending approximately five continuous miles in length over an existing road surface, costing in excess of $50,000" was judged a public improvement. In rendering the February 1982 opinion, the judge observed that the term public improvement applies to work "which is a substantial permanent addition or betterment of real property, as opposed to ordinary repair or maintenance which is necessary to maintain an existing improvement or facility." Among the considerations noted was testimony that a 2 1/2" overlay adds structural strength and that the Federal Highway Administration classifies resurfacing of 3/4" or more as beyond ordinary maintenance. In [AGC v. Clackamas County (1986)](#), the evidence did not establish that an asphalt overlay approximately 2" thick would be a public improvement under ORS 279.011(6). The March 1986 opinion observed that whether "an overlay constitutes improvement by adding structural strength is determined by comparing the condition and capacity of the road as originally constructed or subsequently improved with the condition the road is in or will be in following the overlay." Since the evidence did not establish that an improvement had been made, the judgment denied the action against the county. In 1997, an amendment to ORS 279.023 (now [ORS 279C.305](#)) declared that road resurfacing at a depth of two or more inches and at an estimated cost that exceeds $125,000 is a public improvement.

The list submitted to the Bureau of Labor and Industries must indicate which public improvement projects are expected to be done by contract. Each project done by the public agency's own forces must have a cost record. Cost accounting guidelines have been prepared by the state Executive Department, but a public agency is not required to use the guideline accounting system. However, unless the guideline system or a comparable system is used, under [ORS 279C.310](#) the agency must contract out any public improvement work costing over $5,000. The following is the Executive Department's commentary and guidelines.

**COST ACCOUNTING GUIDELINES FOR PUBLIC AGENCIES**

Section 3 of Chapter 869, Oregon Laws 1979, required the Executive Department to develop model cost accounting guidelines. The law further requires the Executive Department to distribute copies of the guidelines and to determine the number of agencies which either intend to adopt the guidelines, or have existing accounting practices which will provide an accurate accounting for construction projects. Adoption of the cost accounting guidelines is optional.

One objective of Chapter 869 is to provide more accurate financial information for projects.
constructed by public agencies' own personnel and equipment. In addition to the advantages of obtaining more accurate information for managerial purposes, the agencies' ability to comply with minimal financial reporting standards requires cost accounting procedures.

The National Committee on Governmental Accounting in its publication "Governmental Accounting, Auditing and Financial Reporting," commonly known by its acronym GAAFR, requires that when a governmental unit's own personnel perform construction "...a complete accounting of costs of labor, materials, equipment usage, and overhead must form the basis for entries in the General Fixed Assets Group of Accounts."

Reporting in financial statements of "public domain" fixed assets - roads, bridges, drainage systems, and similar assets dedicated directly to public service other than used in providing public services - is optional. The agency's accounting policy in this respect should be disclosed in the Summary of Significant Accounting Policies, and consistently applied.

Executive Department cost accounting guidelines are not intended to serve as an accounting manual, but as a listing of general procedures which in our opinion are necessary to comply with Oregon Statutes and Generally Accepted Accounting Principles.

**COST ACCOUNTING GUIDELINES**

I. NUMERIC CODING SYSTEM

A numeric coding system for accounting purposes should be developed. Each project will be assigned an account number.

Entities with automated accounting systems are encouraged to establish cost centers for accumulating project costs. Many related costs may be incurred long before construction actually begins. Projects accounting codes are, therefore, essential to ensure that all chargeable costs are recorded.

II. PERSONAL SERVICES COSTS

A. The use of detailed time records is a fundamental requirement for accurately accumulating labor costs. Employee time records should provide information at an hourly level for type of activity and by project.

B. The costs of employee vacation, sick leave, all other employer paid insurance and/or retirement benefits, and all other employer paid benefits should be reflected in hourly charge rates. Workers' Compensation costs used in this calculation shall be based on actual rates paid.

C. Travel time to and from the job site should be charged to the project.

III. MATERIALS

A. Materials issuance from inventory or stores for use on a particular project should be documented by requisition forms.
B. Direct material purchases for use on a specific project should be documented by purchase orders and invoices.

C. Costs of other supplies not directly chargeable to a specific project should be considered in overhead calculation. See Section V.

IV. EQUIPMENT USAGE RATES

A. Agencies may develop internal usage rates based on depreciation schedules, investment cost (ORS 279.023 (3) (now ORS 279C.305 (3)), and operating costs such as fuel, oil, and repairs.

B. Agencies may use widely accepted rate schedules such as those used by the Oregon State Highway Division for "external" work such as force account or price agreement.

V. OVERHEAD AND RELATED COSTS

A. All general administrative and other "overhead" expenses directly or indirectly applicable to construction activities should be identified and charged. The use of formula or percentage charge rates is acceptable if those rates are supported by documentation. Documentation would consist of work papers showing the rationale and computations for allocating general administrative expenses.

B. Accounting principles require the capitalization of a wide range of ancillary costs. Examples are engineering, legal and other professional fees, acquisition costs, freight and transportation, and site preparation.

VI. FINANCIAL REPORTING

The final project costs will be closed to the appropriate ledger account. Public agencies are encouraged to prepare cost reports on completion of each project.

4.504 EQUIPMENT MAINTENANCE AND EQUIPMENT RENTAL RATES. Maintenance of county vehicles and equipment is commonly part of a public works operation, but some maintenance is provided by private contractors. The amount of maintenance performed in the county's shop depends on the size and location of the county. Most county equipment is used in connection with road work and other public works activities, but a county equipment maintenance shop may also service vehicles used by county administrators, inspectors, sheriff, and others. A county with a motor pool or equipment pool has a separate agency, often in the public works department, to care for equipment used by the various departments. This isolates the equipment ownership costs and may help provide budget control and increase the awareness of costs. To comply with the statutory requirement to keep records of construction cost, a county must make a reasonable estimate of the cost of equipment used to construct public improvements. Estimates of equipment cost are commonly made by establishing equipment rental rates that can be charged to the project or another account.

Benton County made a study in 1980 to establish rental rates for county equipment.
The system takes into account the numerous components that enter into total cost. The tabulation on the next page summarizes the considerations involved. While a county may use a technique of this kind to set rates, other recognized rates, such as those used by the state Highway Division, may be utilized by the county for project cost accounting.

**BENTON COUNTY STUDY, 1980**

**MAJOR COMPONENTS OF EQUIPMENT RENTAL RATES**

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>I. Capital Recovery</strong></td>
<td>Established at beginning but may need adjustment following periodic review of estimates</td>
</tr>
<tr>
<td>A. Initial purchase price</td>
<td>Would include delivery by supplier</td>
</tr>
<tr>
<td>B. Set-up cost</td>
<td>Delivery by county, equipment added by county, etc.</td>
</tr>
<tr>
<td>C. Estimated life</td>
<td>Years and hours or miles of use before liquidation</td>
</tr>
<tr>
<td>D. Estimated replacement cost</td>
<td>Recognizes inflation to year of replacement</td>
</tr>
<tr>
<td>E. Estimated liquidation value</td>
<td>Expected salvage value at end of life</td>
</tr>
<tr>
<td>F. Anticipated use</td>
<td>Hours or miles of use per year</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>II. Use Costs</strong></td>
<td>Includes operations cost and maintenance and repairs Established periodically, such as annually</td>
</tr>
<tr>
<td>A. Chargeable employee expense</td>
<td>Employees involved in servicing as distinguished from operating equipment</td>
</tr>
<tr>
<td>1. Direct cost</td>
<td>Wages and fixed cost of fringe benefits</td>
</tr>
<tr>
<td>2. Indirect cost</td>
<td>Variable benefits such as sick leave</td>
</tr>
<tr>
<td>B. Shop equipment</td>
<td>Chargeable to specific equipment</td>
</tr>
<tr>
<td>1. Hand tools</td>
<td></td>
</tr>
<tr>
<td>2. Service vehicle</td>
<td></td>
</tr>
<tr>
<td>3. Specialized tools</td>
<td></td>
</tr>
<tr>
<td>C. Material</td>
<td></td>
</tr>
<tr>
<td>1. Tires</td>
<td>Chargeable to specific equipment</td>
</tr>
<tr>
<td>2. Fuel and lubricants</td>
<td></td>
</tr>
<tr>
<td>3. Filters</td>
<td></td>
</tr>
<tr>
<td>4. Major repair parts</td>
<td></td>
</tr>
<tr>
<td>5. Miscellaneous small parts</td>
<td></td>
</tr>
<tr>
<td>D. Outside repairs or service</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>III. Overhead</strong></td>
<td>Items not included above and not easily measurable by equipment item serviced</td>
</tr>
<tr>
<td>A. Fixed assets</td>
<td>Include only personnel who cause costs because of involvement in the equipment care activity</td>
</tr>
<tr>
<td>1. Buildings and grounds</td>
<td></td>
</tr>
<tr>
<td>2. Operating expenses</td>
<td></td>
</tr>
<tr>
<td>B. Nonchargeable personnel expense</td>
<td></td>
</tr>
<tr>
<td>1. Supervisory</td>
<td></td>
</tr>
<tr>
<td>2. Support</td>
<td></td>
</tr>
</tbody>
</table>

**NOTE:** The capital recovery concept described in the Benton County study goes beyond the cost accounting guideline requirement that internally established rental rates must account for depreciation as well as for the cost of maintenance, repair, insurance and fuel. The purpose for the county’s concept is to have sufficient money on hand to purchase a
replacement when the equipment has served its useful life. The rate will exceed a rate based on depreciation alone because of the effect of inflation. Either method complies with the provision of ORS 279.023 (now ORS 279C.305) which requires that cost of equipment used to include "investment cost."

4.506 CONSTRUCTION BY CONTRACT AND FORCE ACCOUNT. Counties almost universally handle public works maintenance with county employees and county-owned equipment. However, there is considerable variation in policies and practices governing construction of public improvements. Some counties enter into contracts with private firms for all or most of their construction projects, while others do at least some of their construction with their own forces (force account).

Among the factors to consider in making the choice between contract and force account construction are the availability of private contractors in a particular area; the amount of preliminary engineering required to prepare a project for bidding; the relative efficiency of county crews and contractors for a particular construction project or type of project; the optimal size of the county public works department considering both normal maintenance operations and unusual or emergency situations, and the efficient utilization of that optimal number of employees.

Some restrictions are placed on counties and other public agencies that construct their own improvements. As described in 4.502, to provide a method of monitoring these restrictions, each public agency must prepare a list of the year's public improvement projects to be filed with the state Commissioner of Labor and Industries.

Oregon law requires that construction must be at "least cost" to the public agency. When the public agency rather than a private contractor constructs a project that costs more than $125,000 the agency is required to demonstrate the "lowest cost" advantage. The public agency also must prepare adequate plans, specifications and unit cost estimates for the work to be done by the agency's forces. No public improvement in excess of $5,000 may be constructed with an agency's forces unless the agency has a system for keeping records that substantially complies with cost accounting guidelines provided by the state Executive Department.

Public improvements are often paid for by developers, usually in compliance with subdivision regulations or other standards required of new developments. Counties may design the work, using the county engineering staff. State law provides that a developer can use a private engineer to design and supervise installation of public improvements financed with the developer's funds, but the public agency can establish standards for the improvements, inspect the plans and the work, and charge the cost of these services to the developer.

4.510 SELECTION OF CONSULTANTS. Contracting for consultant services is distinctive from construction contracts because of the selection process. Selecting firms to provide professional services is not by the low-bid price method because of the need to select on the basis of professional competency to provide the service required. There are several references that may be helpful to a county that is reviewing consultant selection procedures. The Local Government Section of the Oregon Department of Transportation
has developed the Local Agency Guidelines (LAG Manual) to provide information and guidance to aid counties in meeting Federal Highway Administration (FHWA) funding and contracting requirements. The LAG Manual includes a chapter for selecting and hiring consultants for local government federal-aid projects. The two-tiered selection procedure and contract provisions (also known as a flex service contract) conform to federal requirements, including those that assure minority contractors receive a reasonable share of the work.

Additionally, ORS 279A.065 required the Attorney General to prepare model contracting rules including procedures for the selection of architects, engineers and land surveyors to provide contract services. The Oregon Department of Justice publishes the Attorney General’s Public Contracting Manual following each legislative session for use by state agencies and local governments. The manual includes a section on “Consultant Selection: Architectural, Engineering and Land Surveying Services and Related Services Contracts” which provides guidance to counties on the two-tiered procedures for contracting for such services.

ORS 279C.110 requires state agencies and local government to select architectural, engineering, photogrammetric, transportation planning and land surveying consultants on the basis of qualifications for the type of service required. Contracting agencies may use pricing information only after the agency has selected a candidate through the qualification-based selection (QBS) process required by subsection 2 of ORS 279C.110. The qualifications based selection process is required unless exempt under one of the provisions of ORS 279C.110. (The discretionary option for local governments was repealed by Chapter 458, Oregon Laws 2011).

4.520 PREQUALIFICATION OF BIDDERS. Although a county is not required to prequalify those who bid on county work, ORS 279C.430 to 279C.450 apply if the county elects to require or permit prequalification. Under ORS 279C.435 a person who is prequalified with the state Department of Transportation is rebuttably presumed to be prequalified for county work at the same level. ORS 279C.435 also refers to prequalification by the state Department of Administrative Services, but the department eliminated its prequalification list in 1982 and has established a post-qualification procedure. ORS 279C.365 prohibits receiving a contract bid unless the bidder is registered with the Construction Contractor's Board or licensed by the State Landscape Contractor's Board.

Under ORS 279C.430, if a county requires prequalification, a prospective bidder who applies for prequalification must be notified of qualification or disqualification within 30 days of the date the county receives the required application. If an applicant is disqualified, the notification must specify the provision of ORS 279C.440 that was the grounds for disqualification. If prequalification is not required by the county, a bidder may be disqualified by the county as part of the process of selecting the bidder to be awarded the contract. In either case, a bidder's qualification or disqualification must be based on one or more of the five reasons listed in ORS 279C.440. Apparently a contractor could be prequalified and yet not be permitted to bid because of failure to be registered or licensed by the state.
4.530  CONTRACT ADMINISTRATION. In addition to inspection of contract work, the county will want to monitor a contractor's fiscal and accountability responsibilities as they may relate to contract compliance. For example, before the contract work gets underway, the contractor should have appropriate certificates of insurance and workers' compensation.

See section 4.300 for statutory requirements for public improvement contracts and procedural and substantive changes made by recent legislatures.

See section 4.720 for a contract checklist and forms for awarding public improvement contracts.”
LANE COUNTY PUBLIC WORKS DEPARTMENT  
CAPITAL PROJECT COST ESTIMATE

**PROJECT**

Road Name or Other Identification

Project Type  
(Check appropriate boxes)

- [] Grade  
- [] Landscape  
- [] Bikeway  
- [] Base  
- [] Channelization  
- [] Other  
- [] Pave  
- [] Traffic Signal (S)  
- [] Oil Mat  
- [] Signing/Stripping

Project No. _______________  Road No. _______________  Bridge No. _______________

Beginning Point  milepost  intersecting road  Ending Point  milepost  intersecting road

**PROJECT COST ESTIMATE SUMMARY**

<table>
<thead>
<tr>
<th></th>
<th>BY COUNTY FORCES</th>
<th>BY CONTRACT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>labor</td>
<td>direct overhead</td>
</tr>
<tr>
<td></td>
<td>equipment</td>
<td>direct overhead</td>
</tr>
<tr>
<td></td>
<td>materials</td>
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</tr>
<tr>
<td></td>
<td>division overhead</td>
<td>xxxxxx</td>
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<tr>
<td></td>
<td>engineering</td>
<td></td>
</tr>
<tr>
<td></td>
<td>other</td>
<td></td>
</tr>
<tr>
<td></td>
<td>overhead</td>
<td></td>
</tr>
<tr>
<td></td>
<td>total</td>
<td></td>
</tr>
</tbody>
</table>

Date

INSTRUCTIONS:

- Fill in the necessary data for each section.
- Use check boxes to indicate the type of work involved.
- Calculate the total cost for each category and include overhead as specified.

4-42
4.710 FORMS FOR PUBLIC IMPROVEMENT LISTING UNDER ORS 279.023. The Public Improvement Summary Form, No. WH-118 should be used to list all public improvements the county plans to fund in the fiscal year, noting the project information requested on the form. The Project Comparison Form, No. WH-119 should be used when the county plans to use county personnel and equipment to construct a project estimated to cost more than $125,000. ORS 279C.305 requires the county to show that the decision conforms with the state's policy that public agencies should make every effort to construct improvements at the least cost to the public agency.

In developing cost comparisons, use unit costs that can be substantiated by the cost accounting system and contractor unit prices that reflect bidding data. All projects should be summarized on Form No. WH-118 indicating the work will be performed by contract or by county forces -- whichever method is estimated to result in the least cost to the county.

If the county is not budgeting for any public improvements for the year, simply indicate "none" on the summary form.

It is very important that this information be submitted to the Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon St. #32, Portland OR 97232, at least 30 days before final adoption of the budget. In addition, copies should be sent to the Association of Oregon Counties office.

4.720 CHECKLIST AND FORMS FOR AWARDING PUBLIC IMPROVEMENT CONTRACTS

After all bids are opened and a determination is made that a contract will be awarded, but prior to the award of contract, the county road official should use the following checklist or something similar to verify that the county is ready to award a contract.

Once the determination to award has been made, ORS 279C.375 provides that the county must award the contract to the lowest responsible bidder and submit the Responsibility Determination form, with any attachments, to the Construction Contractors Board within 30 days of awarding the contract.

Additionally, ORS 279C.835 requires the county to notify the Bureau of Labor and Industries on the BOLI Notice of Award of Public Works Contract form (WH-81) whenever a contract subject to the prevailing wage law is awarded. The county has 30 days to submit the notice and the notice must also include a copy of the disclosure of first-tier subcontractors submitted under ORS 279C.370. Notice is not required if the contract is for less than $50,000 or is exempt from the prevailing wage law for some other reason. (Some legal counsels advise their clients that both forms be filed for all contracts awarded.)

For contracts first advertised or solicited on or after January 1, 2008, ORS 279C.825 requires the contracting agency to pay the contract fee to BOLI.
CONTRACT CHECKLIST

Contract Name: ________________________________
Contract Number: _____________________________
Bid Opening Date ____________________________

BID REVIEW CHECKLIST
____ Check all price X quantity arithmetic checked
____ Check all bid totals checked
____ Are there limiting statements made by the contractor?
____ Verify Bid Bond (Quantity and Validity)
____ Verify if the Contractor is a resident or Non-Resident Bidder (Bid Preference to be applied as needed)
____ Verify contractor identification information is correct.
____ Verify bid is signed by an authorized agent of the contractor
____ Verify Contractor’s Board Registration (is it valid through life of project?)
____ Verify Federal Tax ID Number is provided
____ Verify First-Tier Subcontractor Disclosure Form was provided within 2 hours of bid opening

PRE-NOTICE OF AWARD CHECKLIST
____ Verify the contractor is not on the Construction Contractors Board list of ineligible contractors
____ Verify the contractor is not on the Bureau of Labor and Industries list of ineligible contractors
____ Complete Responsible Bidder Determination Form
____ Send Notice of Intent to Award to all bidders (7-days before award)

BEFORE Executing CONTRACT CHECKLIST
____ Performance Bond
____ Payment Bond
____ Liability Insurance Certificate
____ Worker’s Compensation Insurance Certificate

AFTER-AWARD CHECKLIST
____ Return all bid bonds and securities to other bidders
____ Send all of the following to BOLI:
    _____ Notice of Award (BOLI Form WH-81 in Prevailing Wage Book)
    _____ Responsible Bidder Determination Form
    _____ BOLI Fee—0.1% of the contract price, but no more than $7,500 or no less than $250.
FIRST-TIER SUBCONTRACTOR  
DISCLOSURE FORM  

Project Name: _____________________________  
Bid #: ___________________________________  
Bid Closing: Date: __________ Time: __________  

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

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

<table>
<thead>
<tr>
<th>NAME</th>
<th>DOLLAR VALUE</th>
<th>CATEGORY OF WORK</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) ________________ $______________ ________________</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2) ________________ $______________ ________________</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3) ________________ $______________ ________________</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4) ________________ $______________ ________________</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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

Form submitted by (Bidder Name): ______________________________________  
Contact Name: ______________________________________________________  
Phone No.: _________________________________________________________
RESPONSIBILITY DETERMINATION FORM

Project Name: ________________________
Bid Number: _________________________
Business Entity Name: ____________________________________________________
CCB License Number: _________________
Form Submitted By (Contracting Agency): ____________________________________
Form Submitted By (Contracting Agency Representative’s Name): _________________
                                           Title: __________________Date: ______________

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

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

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

[ ] Determined the bidder to be (check one of the following):
  [ ] Responsible under ORS 279C.375 (3) (a) and (b).
  [ ] Not responsible under ORS 279C.375 (3) (a) and (b).

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