**DEPARTMENT OF ADMINISTRATIVE SERVICES**

**DIVISION 246**

**GENERAL PROVISIONS FOR PUBLIC CONTRACTING**

**125-246-0100**

**Application; Commentary; Federal Law Prevails**

(1) These Rules of the Department of Administrative Services (Department) are policy and procedure that apply to public contracting by:

(a) Agencies subject to these Rules;

(b) All contracting agencies, as defined in ORS 279A.010; and

(c) All public agencies, as defined in ORS 279.835(4); that are subject to the DAS rules adopted under:

(A) Oregon Constitution, Article I, Section 41, subsection 11, related to the use of inmate labor (125-247-0200);

(B) ORS 200.005 through 200.200 related to Certification Office for Business Inclusion and Diversity (COBID) certified firms (see OAR 125-246-0200 through 125-246-0220);

(C) ORS 279.835 through 279.855 related to qualified nonprofit agencies for individuals with disabilities (see OAR 125-055-0005 through 125-055-0045);

(D) ORS 279A.140(2)(h) related to personal services contracts (see OAR 125-246-0335 through 125-246-0353);

(E) ORS 279A.159 requiring education, training or experience for persons that conduct procurements or administer contracts for state contracting agencies (see OAR 125-246-0140);

(F) ORS 279A.250 through 279A.290 related to surplus property (OAR 125-050-0100 through 125-050-0400; 125-247-0200); and

(G) 2015 Oregon Laws, Chapter 807 (HB 3099) requirements for review or approval by the State Chief Information Officer of any Procurement of Information Technology or Telecommunications (see OAR 125-247-0185; ORS 184.477; 279A.050; 279A.075; 279B.075).

(d) Unless required by a specific law, the Secretary of State and State Treasurer are not subject to the Department Public Contracting Rules or policies.

(2) According to ORS 279A.065(5), the Department adopts these Rules, including but not limited to selected and adapted Public Contract Model Rules. Except for those Public Contract Model Rules expressly adopted by the Department in OAR 125-246-0100, 125-247-0100, 125-248-0100 and 125-249-0100, the Public Contract Model Rules adopted by the Attorney General do not apply to the Department or the Agencies. These Department Public Contracting Rules implement the Oregon Public Contracting Code.

(3) These Department Public Contracting Rules consist of the following four Divisions:

(a) Division 246, which applies to all Public Contracting;

(b) Division 247, which applies only to Public Contracting for Supplies and Services, and not to construction services procured through ORS 279C or Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, or Related Services;

(c) Division 248, which applies only to Public Contracting for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services and Related Services; and

(d) Division 249, which applies only to Public Contracting for construction services.

(4) If a conflict arises between these Division 246 Rules and Rules in Division 247, 248 or 249, the Rules in Divisions 247, 248 or 249 take precedence over these Division 246 Rules.

(5) Commentary on these Rules may be published by the Department to assist the Agencies by providing: examples, options, references, background, and other commentary. The Department's commentary is not a Rule or interpretation of any Rule and has no legally-binding effect.

(6) Federal statutes and regulations prevail and govern, except as otherwise expressly provided in ORS 279C.800 through 279C.870 (Prevailing Wage Rate) and despite other provisions of the Public Contracting Code, under the following conditions:

(a) Federal funds are involved; and

(b) The federal statutes or regulations either:

(A) Conflict with any provision of ORS Chapters 279A, 279B, or 279C.005 through 279C.670; or

(B) Require additional conditions in Public Contracts not authorized by ORS Chapters 279A, 279B, or ORS 279C.005 through 279C.670.

(7) **Adaptation of Model Rules for Agency Use**. The following words found in those Model Rules expressly adopted by the Department are replaced by the words as defined in OAR 125-246-0110:

(a) “**Contracting agency(ies)**” is replaced by “**Authorized Agency(ies)**, unless expressly stated otherwise.”

(b) “**Goods or services**” is replaced by “**Supplies and Services**.”

(c) “**Agreements to agree**” and “**price agreement**” are replaced by “**Price Agreement**.”

(8) **Capitalization of Defined Terms**. Uncapitalized terms in those Model Rules expressly adopted by the Department have the same meaning as the same terms that are capitalized and defined in OAR 125-246-0110.

(9) **Department Policy**. Agencies must comply with Department policies, if applicable.

(10) For purposes of these Division 246 Rules, the Department adopts the following Model Public Contract Rules, as revised and effective January 1, 2016: OAR 137-046-0140, 137-046-0300, 137-046-0330, 137-046-0400, 137-046-0410, 137-046-0420, 137-046-0430, 137-046-0440, 137-046-0450, 137-046-0460, 137-046-0470, 137-046-0480.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.020, 279A.030 & 279A.065
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 4-2005, f. 4-13-05, cert. ef. 6-6-05; DAS 7-2005, f. & cert. ef. 6-6-05; DAS 9-2005, f. & cert. ef. 8-3-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 3-2011, f. 12-22-11, cert. ef. 1-1-12; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 4-2013, f. 12-17-13, cert. ef. 1-1-14; DAS 4-2015, f. 12-29-15, cert. ef. 1-1-16; DAS 4-2016, f. 12-22-16, cert. ef. 1-1-17; DAS 3-2018, f. 12-14-18 & cert. ef. 1-1-19

**COMMENTARY ON OAR 125-246-0100**

(1) **Section (2) of this Rule: Format for all Commentaries.** The Commentary refers first to a Model Public Contract Rule, as “Adapted OAR 137-xxx-xxxx,” when the Department essentially duplicates that Model Public Contract Rule, and this reference means the Department intends for its Rule to have the same meaning and interpretation as that Model Public Contract Rule. The Department may refer to a Model Public Contract Rule in whole or in part. If a Department Rule is not followed by a reference to a Model Public Contract Rule, that Department Rule does not duplicate any Model Public Contract Rule.

(2) **Rules Implement the Public Contracting Code.** The Oregon Attorney General’s Administrative Law Manual states:

(a) **Definition of a Rule.** The Administrative Procedures Act defines a “Rule” broadly to include “any agency directive, standard, regulation or statement of general applicability that implements, interprets, or prescribes law or policy” or that describes the agency’s procedure or practice requirements. ORS 183.310(9).

(b) **Bound by Rule.** Once an agency has adopted a rule, the agency is bound to follow its terms. Harsh Investment Corp. v. State Housing Division, 88 Or App 151, 157, 744 P2d 588 (1987).

(c) **Legislative Policy through Rule.** Some agencies may be expressly directed by statute to adopt rules relating to a specific subject. See ORS 279A.065 and ORS 279A.070. Alternatively, an agency’s statutes may implicitly require the agency to adopt rules in order to properly implement those statutes. See e.g., Dinkins v. Bd. of Accountancy, 118 Or App 220, 846 P2d 1186 (1993). In either case, the agency must complete the legislative policy through rulemaking before applying it to specific cases.

(3) **Contracts Formed Before the Public Contracting Code Revision.** The major revisions to the Public Contracting Code became effective on March 1, 2005. Authorized Agencies may, therefore, still be parties to Public Contracts they awarded prior to the effective date of the Code. A Public Contract that was formed before March 1, 2005, remains subject to the public contracting laws (former ORS chapter 279) as they existed at the time the Contract was made. It also generally remains subject to the public contracting rules that were in effect at that time, despite that the old rules were repealed on March 1, 2005. To the extent that the application of these newer rules will not impair the contract rights of parties to Public Contracts formed before March 1, 2005, however, the new rules that govern Contract Amendments (OAR 125-246-0560, for example) may be applied in the administration of these old Contracts.

**137-046-0130**

**Application of the Code and Model Rules; Exceptions**

(1) Except as set forth in this section, a Contracting Agency shall exercise all procurement authority related to Public Contracting in accordance with the Code and the Model Rules.

(2) A Contracting Agency that has specifically opted out of the Model Rules and adopted its own rules of procedure for Public Contracting pursuant to 279A.065 in the exercise of its own contracting authority is not subject to these Model Rules, except for those portions of the Model Rules that the Contracting Agency has prescribed for its own use for Public Contracting and except for those portions of the Model Rules pertaining to the procurement of Construction Manager/General Contractor Services under ORS 279A.065(3), where the Contracting Agency is not permitted to opt out of the Model Rules.

(3) Contracts or classes of Contracts for Personal Services of a Local Contracting Agency designated as such by the Local Contracting Agency's Local Contract Review Board pursuant to ORS 279A.055, are not subject to these Model Rules, unless the Local Contracting Agency adopts OAR 137-047-0250 through 137-047-0290 as the procedures the Local Contracting Agency will use to screen and select persons to perform Contracts for Personal Services other than Architectural, Engineering and Surveying Services and Related Services.

(4) These Model Rules do not apply to the Contracts or the classes of Contracts described in ORS 279A.025(2).

(5) These Model Rules do not apply to the contracting activities of the public bodies listed in ORS 279A.025(3).

(6) Contracting Agencies otherwise subject to the Code and these Model Rules may enter into Contracts for Goods or Services with non-profit agencies providing employment opportunities for individuals with disabilities pursuant to ORS 279.835 through 279.855 without following the source selection procedures set forth in either 279A.200 through 279A.225, or 279B.050 through 279B.085. However, Contracting Agencies must enter into such Contracts in accordance with administrative rules promulgated by the Department.

Stat. Auth.: ORS 279A.065
Stats. Implemented: ORS 279A.050, 279A.055, 279A.065 & 279A.180
Hist.: DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05; DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06; DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08; DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14; Administrative correction, 1-27-15; DOJ 2-2015, f. & cert. ef. 2-3-15

**125-246-0110**

**Definitions**

The following terms are a compilation of definitions, including those found in the Public Contracting Code, in other statutes referenced by the Public Contracting Code, and elsewhere in these Rules. Partial definitions of the Public Contracting Code are for the use of the Agencies only. The following terms, when capitalized in these Rules, have the meaning given below:

(1) "**Addendum**" or "**Addenda**" means an addition to, deletion from, a material change in, or general interest explanation of a Solicitation Document.

(2) "**Adequate**" is defined in ORS 279C.305 and means sufficient to control the performance of the Work and to ensure satisfactory quality of construction by the contracting agency personnel.

(3) "**Advantageous**" means a judgmental assessment by the Agency of the Agency's best interests.

(4) An “**Administrator**” or "**Administering Contracting Agency**" is defined in OAR 125-246-0400.

(5) "**Affected Person**" or "**Affected Offeror**" means a Person whose ability to participate in a Procurement is adversely affected by an Agency decision.

(6) "**Affirmative Action**" is defined in ORS 279A.100 and means a program designed to ensure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age, physical or mental disability, or a policy to give a preference in awarding public contracts to disabled veterans.

(7) "**Agency**" means those agencies of the State of Oregon that are subject to the procurement authority of the Director of the Department according to ORS 279A.050 and 279A.140. This term includes the Department when the Department is engaged in Public Contracting. Under these Rules, an Agency is authorized only through a delegation of authority according to OAR 125-246-0170.

(8) “**Agreement to Agree**” means a Price Agreement as defined in Subsection (110).

(9) “**Amendment**” means a Written modification to the terms and conditions of a Public Contract, other than Changes to the Work as defined in OAR 125-249-0910, that meets the requirements of 125-247-0805, 125-248-0340, 125-249-0160, and 125-249-0910. For the purposes of these Rules, Amendments are included within the definitions of “Procurements” and “Contract Administration.”

(10) "**Architect**" is defined in ORS 279C.100 and means a person who is registered and holds a valid certificate in the practice of architecture in the State of Oregon, as provided under ORS 671.010 to 671.220, and includes without limitation the terms "architect," "licensed architect" and "registered architect.

(11) "**Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services**" is defined in ORS 279C.100(2).

(12) "**As-Is, Where-Is**" applies to the sale of Goods and means that the Goods are of the kind, quality, and locale represented, even though they may be in a damaged condition. It implies that the buyer takes the entire risk as to the quality of the Goods involved, based upon the buyer's own inspection. Implied and express warranties are excluded in sales of Goods "As-Is, Where-Is."

(13) "**Authorized Agency**” means any Person authorized according to OAR 125-246-0170 to conduct a Procurement or take other actions on an Agency’s behalf. This term, including its use in the Rules, does not convey authority to an Agency. For the authority of Agencies under the Code and these Rules, see OAR 125-246-0170 only.

(14) "**Award**" means the Agency's identification of the Person(s) with whom the Agency intends to enter into a Contract.

(15) "**Bid**" means a Written response to an Invitation to Bid.

(16) "**Bidder**" means a Person who submits a Bid in response to an Invitation to Bid.

(17) "**Brand Name or Equal Specification**" is defined in ORS 279B.200(1) and means a Specification that uses one or more manufacturers' names, makes, catalog numbers or similar identifying characteristics to describe the standard of quality, performance, functionality or other characteristics needed to meet the Agency's requirements and that authorizes Offerors to offer Supplies and Services that are equivalent or superior to those named or described in the Specification.

(18) "**Brand Name Specification**" is defined in ORS 279B.200(2) and means a Specification limited to one or more products, brand names, makes, manufacturer's names, catalog numbers or similar identifying characteristics.

(19) “**Business Day**” means 8:00 a.m. to 5:00 p.m., Pacific Time, Monday through Friday, excluding State of Oregon holidays.

(20) "**Certification Office for Business Inclusion and Diversity (COBID)**, formerly the **Office of Minority, Women, and Emerging Small Business**" or "**OMWESB**" is defined in ORS 200.025 and 200.055 and means the office that administers the certification process for the Disadvantaged Business Enterprise (DBE), Minority-owned Business Enterprise (MBE), Woman-owned Business Enterprise (WBE), Service Disabled Veteran-owned Business (SDV), and Emerging Small Business (ESB) Programs. Certification Office for Business Inclusion and Diversity (COBID), formerly OMWESB, is the sole authority providing certification in Oregon for disadvantaged, minority-owned, woman-owned, service disabled veteran owned, and emerging small businesses.

(21) "**Chief Procurement Officer**" or “**CPO**” or “State Chief Procurement Officer” means the individual designated and authorized by the Director of the Department to perform certain procurement functions described in these Rules, or the Chief Procurement Officer’s delegate.

(22) "**Class Special Procurement**" is defined in ORS 279B.085 and means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of entering into a series of Contracts over time for the acquisition of a specified class of Goods or Services.

(23) "**Client**" means any individual, family or Provider:

(a) For whom an Agency must provide Services and incidental or specialized Goods, in any combination thereof (“Services and Incidental Supplies”), according to state, federal law, rule, and policy. Those Services and Incidental Supplies include but are not limited to treatment, care, protection, and support without regard to the proximity of the services being provided;

(b) Who in fact receives and utilizes services provided by an Agency primarily for that individual's or family's benefit;

(c) Who is under the custody, care, or both of the Agency; or

(d) Who provides direct care or Services and is a proxy or representative of the non-Provider Client.

(24) "**Client Services**" means any Services that directly or primarily support a Client, whether the Client is the recipient through the provision of voluntary or mandatory Services. Client Services also means any Goods that are incidental or specialized in relation to any Services defined in this Subsection. Client Services may include but are not limited to (where these terms are used in another statute, they must have that meaning):

(a) Housing, including utilities, rent or mortgage or assistance to pay rent, mortgage or utilities;

(b) Sustenance, including clothing;

(c) Employment training or Skills training to improve employability;

(d) Services for people with disabilities;

(e) Foster care or foster care facilities;

(f) Residential care or residential care facilities;

(g) Community housing;

(h) In-home care including home delivered meals;

(i) Medical care, services and treatment, including but not limited to:

(A) Medical, Dental, Hospital, Psychological, Psychiatric, Therapy, Vision;

(B) Alcohol and drug treatment;

(C) Smoking cessation;

(D) Drugs, prescriptions and non-prescription;

(E) Nursing services and facilities;

(j) Transportation or relocation;

(k) Quality of life, living skills training; or

(l) Personal care; or

(m) Legal services and expert witnesses services;

(n) Religious practices, traditions and services, separately or in any combination thereof; and

(o) Educational services.

The term "Client Services" does not include benefits or services provided as a condition of employment with an Agency.

(25) "**Closing**" means the date and time specified in a Solicitation Document as the deadline for submitting Offers.

(26) "**Code**" is the "**Public Contracting Code**," defined in ORS 279A.010(1)(bb), and “Code” means ORS Chapters 279A, 279B and 279C.

(27) “**Competitive Quotes**” means the sourcing method according to OAR 125-249-0160.

(28) "**Competitive Range**" means the Proposers with whom the Agency will conduct Discussions or Negotiations if the Agency intends to conduct Discussions or Negotiations in accordance with OAR 125-247-0260 or 125-249-0650.

(29) "**Competitive Sealed Bidding**" means the sourcing method according to ORS 279B.055.

(30) "**Competitive Sealed Proposals**" means the sourcing method according to ORS 279B.060.

(31) "**Consultant**" means the Person with whom an Agency enters into a Contract for the purposes of consulting, conferring, or deliberating on one or more subjects, and this Person provides advice or opinion; e.g., Consultants for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services as defined in ORS 279C.115 and information technology Consultants.

(32) "**Contract**" means an agreement between two or more Persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation. For the purposes of these Rules, “Contract” means Public Contract.

(33) "**Contract Administration**" means all functions related to a given Contract, including Amendments, between an Agency and a Contractor from:

(a) The time the Contract is signed by all parties until;

(b) The Work is completed and accepted or the Contract is terminated, final payment has been made, and any disputes have been resolved.

(34) “**Contract Administrator**” means the officer, employee, or other individual designated in Writing by an Authorized Agency, by name or position description, to conduct the Contract Administration of a Contract or class of Contracts.

(35) "**Contractor**" means the Person with whom an Agency enters into a Contract and has the same meaning as "Consultant" or “Provider."

(36) "**Contract Price**" means, as the context requires, the maximum monetary obligation that an Agency either will or may incur under a Contract, including bonuses, incentives and contingency amounts, if the Contractor fully performs under the Contract, and including, but not limited to consideration of Sustainability in accordance with ORS 184.421 and OAR 125-246-0120, and Life Cycle Costing in accordance with OAR 125-247-0170. This definition does not apply to the term "contract price" as used in the "thirty percent weight to contract price" amendments to ORS 279B.060 enacted as 2018 Oregon Laws, chapter 85, subsections 3(3)(e), 3(9)(a), and 3(9)(b), or as used in any Rules that implement those amendments.

(37) "**Contract Review Authority**" means the Director of the Department and the Director's delegatee, unless specified by statute as the Director of the Oregon Department of Transportation.

(38) "**Contract-Specific Special Procurement**" is defined in ORS 279B.085 and means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of entering into a single Contract or a number of related Contracts for the acquisition of specified Supplies and Services on a one-time basis or for a single project.

(39) “**Contracting Agency**.”

(a) “Contracting Agency” is defined in ORS 279A.010(1)(b) and, for Agencies operating under these Rules and the Code, means the Director of the Oregon Department of Administrative Services, authorized to act on their behalf according to ORS 279A.140.

(b) The definition of “Contracting Agency” in ORS 279A.010(1)(b) does not give Agencies procurement authority. For procurement authority of Agencies, see OAR 125-246-0170.

(40) "**Cooperative Procurement**" is defined in OAR 125-246-0400.

(41) "**Cooperative Procurement Group**" is defined in OAR 125-246-0400.

(42) "**Days**" means calendar days.

(43) "**Department**" means the Oregon Department of Administrative Services. The procurement authority of the Department is described in OAR 125-246-0170. When a Rule refers to any action of the Department, any individual acting on behalf of the Department must be authorized to take such action in accordance with OAR 125-246-0170.

(44) "**Department Price Agreement**" means a Price Agreement issued by the Department on behalf of all Agencies. Such Agreements may be mandatory for use by Agencies or voluntary for use by Agencies. Such Agreements may result from a Cooperative Procurement. According to OAR 125-246-0360 (Purchases through Federal Programs), an Authorized Agency may not purchase Supplies and Services through Federal Programs if a mandatory Department Price Agreement for those authorized Supplies and Services exists.

(45) "**Designated Procurement Officer**" means the individual designated and authorized by the head of an Authorized Agency to perform certain Procurement functions described in these Rules. If any head of an Authorized Agency does not designate and authorize an individual as a Designated Procurement Officer, "Designated Procurement Officer" also means that head of the Authorized Agency, who then acts in the place of the Designated Procurement Officer.

(46) "**Descriptive Literature**" means Written information submitted with the Offer that addresses the Supplies and Services included in the Offer.

(47) "**Director**” is defined in ORS 279A.010(1)(e) and means the Director of the Department or a person designated by the Director to carry out the authority of the Director under the Public Contracting Code and these Rules.

(48) "**Discussions**" means to exchange information, compare views, take counsel, and communicate with another for the purposes of achieving clarification and mutual understanding of an Offer.

(49) "**Disqualification**" means a disqualification, suspension or debarment of a Person according to ORS 200.065, 200.075, and 279A.110 and OAR 125-246-0210(4).

(50) "**Donee**" is defined in ORS 279A.250(1) and means an entity eligible to acquire federal donation property based upon federal regulations or eligible to acquire Surplus Property in accordance with rules adopted by the Department. Entities eligible to acquire federal donation property may also acquire Surplus Property other than federal donation property.

(51) "**Electronic Advertisement**" means an Agency's Solicitation Document, Request for Quotes, request for information or other document inviting participation in the Agency's Procurements made available over the Internet via:

(a) The World Wide Web;

(b) ORPIN; or

(c) An Electronic Procurement System other than ORPIN approved by the State Chief Procurement Officer. An Electronic Advertisement may or may not include a Solicitation Document.

(52) "**Electronic Offer**" means a response to an Agency's Solicitation Document or request for Quotes submitted to an Agency via

(a) The World Wide Web or some other Internet protocol; or

(b) ORPIN or other Electronic Procurement System approved by the State Chief Procurement Officer.

(53) "**Electronic Procurement System**" means ORPIN or other system approved by the State Chief Procurement Officer, constituting an information system that Persons may access through the Internet, using the World Wide Web or some other Internet protocol, or that Persons may otherwise remotely access using a computer, that enables Persons to send Electronic Offers and an Agency to post Electronic Advertisements, receive Electronic Offers, and conduct any activities related to a Procurement.

(54) "**Electronic Goods**" means Goods which are dependent on electric currents or electromagnetic fields in order to Work properly and Goods for the generation, transfer and measurement of such currents and fields.

(55) "**Emergency**" means circumstances that:

(a) Could not have been reasonably foreseen;

(b) Create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and

(c) Require prompt execution of a Contract to remedy the condition. An "Emergency Procurement" means a sourcing method according to ORS 279B.080, 279C.335(5), 125-248-0200, or related Rules.

(56) "**Energy Savings Performance Contract**" means a Public Contract between an Agency and a qualified energy service company for the identification, evaluation, recommendation, design and construction of energy conservation measures, including a design-build contract, that guarantee energy savings or performance.

(57) "**Engineer**" is defined in ORS 279C.100 and means a Person who is registered and holds a valid certificate in the practice of engineering in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002(2).

(58) “**Enterprise Information Technology and Telecommunications**” is defined in ORS (Chapter 807, 2015 Laws) and means:

(a) Technologies, resources, systems and services that state agencies use to generate, process, store and secure information for governmental purposes, including geographic information;

(b) Technologies, resources, systems and services that state agencies use to send, receive, process or otherwise facilitate telecommunications for governmental purposes; and

(c) Technologies, resources, systems and services that state agencies use to install, maintain, repair, update, replace, remove or otherwise support the technologies, resources, systems or services described in paragraphs (a) and (b) of this subsection.

(59) "**Established Catalog Price**" means the price included in a catalog, price list, schedule or other form that:

(a) Is regularly maintained by a manufacturer or Contractor;

(b) Is either published or otherwise available for inspection by customers; and

(c) States prices at which sales are currently or were last made to a significant number of any category of buyers or to buyers constituting the general market, including Public Bodies, for the Supplies and Services involved.

(60) "**Executive Department**" is defined in ORS 174.112.

(a) Subject to ORS 174.108, “Executive Department” means: all statewide elected officers other than judges, and all boards, commissions, departments, divisions and other entities, without regard to the designation given to those entities, that are within the Executive Department of government as described in Section 1, Article III of the Oregon Constitution, and that are not:

(A) In the judicial department or the legislative department;

(B) Local governments; or

(C) Special government bodies.

(b) Subject to ORS 174.108, as used in the statutes of this State, “Executive Department” includes:

(A) An entity created by statute for the purpose of giving advice only to the Executive Department and that does not have members who are officers or employees of the judicial department or Legislative Department;

(B) An entity created by the Executive Department for the purpose of giving advice to the Executive Department, if the document creating the entity indicates that the entity is a public body; and

(C) Any entity created by the Executive Department other than an entity described in Subsection (B), unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the Executive Department.

(61) "**Findings**" is defined in ORS 279C.330 and means the justification for an agency's conclusion that includes, but is not limited to, information regarding:

(a) Operational, budget and financial data;

(b) Public benefits;

(c) Value engineering;

(d) Specialized expertise required;

(e) Public safety;

(f) Market conditions;

(g) Technical complexity; and

(h) Funding sources.

(62) "**Fire Protection Equipment**" is defined in ORS 476.005 and means any apparatus, machinery or appliance intended for use by a fire service unit in fire prevention or suppression activities, excepting forest fire protection equipment.

(63) "**Flagger**" means a person who controls the movement of vehicular traffic through construction projects using sign, hand or flag signals.

(64) “**Formal Selection Procedure**” means the procedure according to OAR 125-248-0220.

(65) "**Fringe Benefits**" is defined in ORS 279C.800 and means the amount of:

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

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

(66) "**Good Cause**" is defined in ORS 279C.585, and the Oregon Construction Contractors Board must define "Good Cause" by rule. "Good Cause" includes, but is not limited to, the financial instability of a subcontractor. The definition of "Good Cause" must reflect the least-cost policy for Public Improvements established in ORS 279C.305. This definition does not apply to OAR 125-247-0255 and 125-247-0260.

(67) "**Good Faith Dispute**" is defined in ORS 279C.580(5)(b) and means a documented dispute concerning:

(a) Unsatisfactory job progress;

(b) Defective work not remedied;

(c) Third-party claims filed or reasonable evidence that claims will be filed;

(d) Failure to make timely payments for labor, equipment and materials;

(e) Damage to the prime Contractor or subcontractor; or

(f) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.

(68) "**Goods**" means supplies, equipment, or materials, and any personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, that an Agency is authorized by law to procure.

(69) "**Goods and Services**" or "**Goods or Services**" is defined in ORS 279A.010 and for purposes of these Rules falls within the meaning of "Supplies and Services" (see the definition of “Supplies and Services” in this Rule). “Goods and Services” or “Goods or Services” does not include Personal Services. “Supplies and Services” includes Personal Services.

(70) "**Governor’s Policy Advisor for Economic and Business Equity**, formerly the **Advocate for Minority, Women and Emerging Small Business**", (also known as the Director of Economic & Business Equity), means the individual appointed by the Governor to advise the Governor, Legislature and Director's Office on issues related to the integration of disadvantaged, minority owned, woman owned, service disabled veteran owned, and emerging small businesses into the mainstream of the Oregon economy and business sector. The Governor’s Policy Advisor for Economic and Business Equity oversees the resolution of business concerns with Agencies impacting firms certified by the Certification Office for Business Inclusion and Diversity (COBID), formerly the Office of Minority, Women and Emerging Small Businesses, (also known as the Office of Economic & Business Equity). The Governor’s Policy Advisor for Economic and Business Equity is also charged with maintaining the Oregon Opportunity Register and Clearinghouse to facilitate the timely notice of business and contract opportunities to COBID certified firms, according to ORS 200.025.

(71) "**Grant**" is defined in ORS 279A.010(1)(k)(A) and means:

(a) An agreement under which an Agency receives money, property or other assistance, including but not limited to federal assistance that is characterized as a Grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, from a grantor for the purpose of supporting or stimulating a program or activity of the Agency and in which no substantial involvement by the grantor is anticipated in the program or activity other than involvement associated with monitoring compliance with the Grant conditions; or

(b) An agreement under which an Agency provides money, property or other assistance, including but not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, to a recipient for the purpose of supporting or stimulating a program or activity of the recipient and in which no substantial involvement by the Agency is anticipated in the program or activity other than involvement associated with monitoring compliance with the grant conditions.

(c) "Grant" does not include a Public Contract:

(A) For a Public Improvement for Public Works, as defined in ORS 279C.800; or

(B) For emergency Work, minor alterations or ordinary repair or maintenance necessary to preserve a Public Improvement, when under the Public Contract:

(i) An Agency pays moneys that the Agency has received under a Grant; and

(ii) Such payment is made in consideration for Contract performance intended to realize or to support the realization of the purposes for which Grant funds were provided to the Agency.

(72) "**Industrial Oil**" means any compressor, turbine or bearing oil, hydraulic oil, metal-working oil or refrigeration oil.

(73) “**Informal Selection**” means the procedure according to OAR 125-248-0210.

(74) **“Information Technology (IT)”** means:

(a) Any equipment or interconnected system or subsystem of equipment used in the acquisition, storage, manipulation, management, movement, control, security, display, switching, interchange, transmission, communication, or reception of data or information electronically;

(b) Any development, implementation, and maintenance of computer equipment, ancillary equipment, software, firmware, and related procedures and services, including support services, consulting services, software development and related resources; or

(c) Any computer programs, routines, or subroutines, including operating software, programming aids, application programs, and software products.

(75) "**Intermediate Procurement**" means a sourcing method according to ORS 279B.070 or OAR 125-249-0160.

(76) "**Interstate Cooperative Procurement**" is defined in OAR 125-246-0400.

(77) "**Invitation to Bid**" or "**ITB**" is defined in ORS 279B.005 and 279C.400 and means all documents, whether attached or incorporated by reference, used for soliciting Bids in accordance with ORS 279B.055, 279B.070 or 279C.335.

(78) "**Joint Cooperative Procurement**" is defined in OAR 125-246-0400.

(79) "**Judicial Department**" is defined in ORS 174.113 and means the Supreme Court, the Court of Appeals, the Oregon Tax Court, the circuit courts and all administrative divisions of those courts, whether denominated as boards, commissions, committees or departments or by any other designation. The Judicial Department includes:

(a) An entity created by statute for the purpose of giving advice only to the Judicial Department and that does not have members who are officers or employees of the Executive Department or Legislative Department;

(b) An entity created by the Judicial Department for the purpose of giving advice to the judicial department, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by the Judicial Department other than an entity described in paragraph (b) of this Subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the Judicial Department.

(80) "**Labor Dispute**" is defined in ORS 662.010 and includes any controversy concerning terms or conditions of employment, or concerning the association or representation of Persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(81) "**Land Surveyor**" is defined in ORS 279C.100(4) and means a Person who is registered and holds a valid certificate in the practice of land surveying in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002(5).

(82) "**Legally Flawed**" is defined in ORS 279B.405(1)(b) and means that a Solicitation Document contains terms or conditions that are contrary to law.

(83) "**Legislative Department**" is defined in ORS 174.114 and, subject to ORS 174.108, means the Legislative Assembly, the committees of the Legislative Assembly and all administrative divisions of the Legislative Assembly and its committees, whether denominated as boards, commissions or departments or by any other designation. The Legislative Department includes:

(a) An entity created by statute for the purpose of giving advice only to the Legislative Department and that does not have members who are officers or employees of the executive department or judicial department;

(b) An entity created by the Legislative Department for the purpose of giving advice to the legislative department, but that is not created by statute, if the document creating the entity indicates that the entity is a public body; and

(c) Any entity created by the Legislative Department by a document other than a statute and that is not an entity described in paragraph (b) of this Subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the Legislative Department.

(84) "**Locality**" is defined in ORS 279C.800(3) and means the following district in which the Public Works, or the major portion thereof, is to be performed:

(a) District 1, composed of Clatsop, Columbia and Tillamook Counties;

(b) District 2, composed of Clackamas, Multnomah and Washington Counties;

(c) District 3, composed of Marion, Polk and Yamhill Counties;

(d) District 4, composed of Benton, Lincoln and Linn Counties;

(e) District 5, composed of Lane County;

(f) District 6, composed of Douglas County;

(g) District 7, composed of Coos and Curry Counties;

(h) District 8, composed of Jackson and Josephine Counties;

(i) District 9, composed of Hood River, Sherman and Wasco Counties;

(j) District 10, composed of Crook, Deschutes and Jefferson Counties;

(k) District 11, composed of Klamath and Lake Counties;

(l) District 12, composed of Gilliam, Grant, Morrow, Umatilla and Wheeler Counties;

(m) District 13, composed of Baker, Union and Wallowa Counties; and

(n) District 14, composed of Harney and Malheur Counties.

(85) "**Lowest Responsible Bidder**" is defined in ORS 279A.010(1)(r) and means the lowest Bidder who:

(a) Has substantially complied with all prescribed Public Contracting procedures and requirements;

(b) Has met the standards of responsibility set forth in ORS 279B.110(2) or 279C.375;

(c) Has not been debarred or disqualified by the Agency under ORS 279B.130 or 279C.440; and

(d) Is not on the list created by the Oregon Construction Contractors Board under ORS 701.227, if the advertised contract is a Public Improvement Contract.

(86) "**Lubricating Oil**" means any oil intended for use in an internal combustion crankcase, transmission, gearbox or differential or an automobile, bus, truck, vessel, plane, train, heavy equipment or machinery powered by an internal combustion engine.

(87) "**Mandatory Use Contract**" means a Public Contract, Department Price Agreement, or other agreement that an Agency is required to use for the Procurement of Supplies and Services.

(88) "**Multistepped**" means more than one step, phase, tier, or round in a process used in Competitive Sealed Bidding or Competitive Sealed Proposals according to ORS 279B and OAR Division 247.

(89) "**Negotiations**" means to compare views, take counsel, and communicate with another so as to arrive at a voluntary, mutual agreement about a matter.

(90) "**Nonprofit Organization**" is defined in ORS 279C.810 and means an organization or group of organizations described in Section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under Section 501(a) of the Internal Revenue Code.

(91) "**Nonresident Offeror**" means an Offeror who is not a resident Offeror. For the meaning of residency, see the definition of “Resident Offeror.”

(92) "**Not-for-Profit Organization**" means a Nonprofit Corporation as defined in ORS 307.130(1)(c).

(93) "**OAR**" means the Oregon Administrative Rules.

(94) "**Offer**" means a response to a Solicitation, including: a Bid, Proposal, Quote or similar response to a Solicitation.

(95) "**Offeror**" means a Person who submits an Offer

(96) "**Offering**" means a Bid, Proposal, or Quote.

(97) "**OPB Certified Professional**" means an individual holding an active Oregon Procurement Basic Certification, issued by the State Chief Procurement Officer.

(98) "**Opening**" means the date, time and place specified in the Solicitation Document for the public opening of Written sealed Offers.

(99) “**Ordering Instrument**” or “**Order**” means a document used by an Authorized Agency in compliance with the Public Contracting Code, these Rules, and Department policies, for the general purpose of ordering Supplies and Services from one or more Providers.

(a) An Ordering Instrument or Order may also be known as a Purchase Order, Work Order, or other name assigned by an Agency.

(b) A Price Agreement may specify the use of Ordering Instruments.

(c) Absent a Price Agreement and subject to the Public Contracting Code, Rules, and Department policies, an Authorized Agency’s appropriate use of an Ordering Instrument is an Offer to purchase Supplies and Services from one or more Providers, and a Provider’s responsive and appropriate acceptance of the Offer creates a Public Contract.

(100) “**Ordinary Construction Services**” means those services that are not Public Improvements, are procured under ORS Chapter 279B, and are otherwise under ORS Chapter 279C, in accordance with OAR 125-249-0100(1) and 125-249-0140.

(101) "**Original Contract**" means the initial Contract or Price Agreement of the Department or an Authorized Agency. See OAR 125-246-0400 for the definition of "Original Contract" that the Public Contracting Code and Rules use for Cooperative Procurements only.

(102) "**ORPIN**" means the on-line electronic Oregon Procurement Information Network administered by the Department, as further described in OAR 125-246-0500.

(103) "**ORS**" means the Oregon Revised Statutes.

(104) "**Participant**” is defined in OAR 125-246-0400.

(105) "**Permissive Cooperative Procurement**" is defined in OAR 125-246-0400.

(106) "**Person**" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation or any other legal or commercial entity. "Person" is also defined in ORS 279C.500 and means the State Accident Insurance Fund Corporation and the Department of Revenue. “Person” is defined in ORS 279C.815 and means any employer, labor organization or any official representative of an employee or employer association.

(107) "**Personal Services**" under ORS 279B means services that require specialized skills, knowledge and resources in the application of technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment, including, without limitation, the services of an accountant, physician or dentist, educator, information technology professional, Consultant, broadcaster, or artist (including a photographer, filmmaker, painter, weaver or sculptor). "Personal Services" under ORS 279C includes the services of an Architect, Engineer, Photogrammetrist, Transportation Planner, Land Surveyor or Provider of Related Services as defined in ORS 279C.100, and that definition applies only to ORS 279C.100 to 279C.125, for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services.

(108) "**Personal Services Contract**" means a Contract or a member of a class of Contracts for Personal Services. Contracts for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services are a special class of Personal Services Contracts, defined in ORS 279C.100(5), and Providers under such Contracts are Consultants, as defined in OAR 125-248-0110(1).

(109) "**Prevailing Rate of Wage**" is defined in ORS 279C.800 and means the rate of hourly wage, including all fringe benefits, paid in the Locality to the majority of Workers employed on projects of similar character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries.

(110) “**Price Agreement**.”

(a) "Price Agreement" is defined in ORS 279A.010(1)(v) and means a Public Contract for the Procurement of Supplies and Services at a set price with:

(A) No guarantee of a minimum or maximum purchase; or

(B) An initial order or minimum purchase combined with a continuing Contractor obligation to provide Supplies and Services in which the Authorized Agency does not guarantee a minimum or maximum additional purchase.

(b) The set price may exist at the outset or be determined later by an Ordering Instrument.

(c) A “Price Agreement” as a Public Contract may collectively consist of an initial agreement, together with later Ordering Instruments, if any.

(A) The initial agreement may be known as an agreement to agree, a master agreement, a Price Agreement for any Supplies and Services, a services agreement, or a retainer agreement, if such agreement meets the requirements of this Rule’s definition.

(B) The Ordering Instrument may be known as a work order, purchase order, or task order, or by another name for ordering purposes and related to the initial agreement.

(111) "**Procurement**" means the act of purchasing, leasing, renting or otherwise acquiring or selling: Supplies and Services; Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services and Related Services; and Public Improvements. Procurement includes each function and procedure undertaken or required to be undertaken by an Authorized Agency to enter into a Public Contract, administer a Public Contract and obtain the performance of a Public Contract under the Public Contracting Code and these Rules. Procurement includes Contract Administration, and Contract Administration includes Amendments.

(112) "**Procurement Document**" collectively means the inclusive Solicitation Document and all documents either attached or incorporated by reference, and any changes thereto, used for any of the methods according to ORS 279A.200 through 279A.220, 279B.055 through 279B.085, 279C.100 through 279C.125, or 279C.300 through 2729C.450.

(113) “**Procurement File**” means any of the following files maintained by an Authorized Agency: a solicitation, Contract, Amendment, Work Order, or contract administration file, separately or collectively.

(114) "**Procurement Process**" means the process related to these acts, functions, and procedures of Procurement.

(115) "**Product Sample**" means the exact Goods or a representative portion of the Goods offered in an Offer, or the Goods requested in the Solicitation Document as a sample.

(116) "**Property**" is defined in ORS 279A.250 and means personal property.

(117) "**Proposal**" means a Written response to a Request for Proposals.

(118) "**Proposer**" means a Person who submits a proposal in response to a Request for Proposals, except for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services and Related Services according to OAR 125-248-0110, whereby "Proposer" means a Consultant who submits a proposal to an Authorized Agency in response to a Request for Proposals.

(119) "**Provider**" means collectively or in the alternative: the supplier, Contractor or Consultant, providing Supplies and Services or Public Improvements.

(120) "**Post-consumer Waste**" means a finished material that would normally be disposed of as solid waste, having completed its life cycle as a consumer item. "Post-consumer waste" does not include manufacturing waste.

(121) "**Public Agency**" is defined in ORS 279C.800 and means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter.

(122) "**Public Body**" is defined in ORS 174.109, subject to ORS 174.108, and means state government bodies, local government bodies and special government bodies.

(123) "**Public Contract**" is defined in ORS 279A.010(1)(z) and means a sale or other disposal, or a purchase, lease, rental or other acquisition, by an Authorized Agency of Supplies and Services, Public Improvements, Public Works, minor alterations, or ordinary repair or maintenance necessary to preserve a Public Improvement. "Public Contract" does not include Grants. For the purposes of these Rules, “Public Contract” means Contract.

(124) "**Public Contracting**" is defined in ORS 279A.010(1)(aa) and means Procurement activities described in the Public Contracting Code relating to obtaining, modifying or administering Public Contracts or Price Agreements.

(125) "**Public Contracting Code**" or "**Code**" is defined in ORS 279A.010(1)(bb) and means 279A, 279B and 279C.

(126) “**Public Improvement Contract**” means a Public Contract for a Public Improvement. “Public Improvement Contract” does not include a Public Contract for emergency Work, minor alterations, or ordinary repair or maintenance necessary to preserve a Public Improvement.

(127) “**Public Improvement**” is defined in ORS 279A.010(1)(cc) and means a project for construction, reconstruction or major renovation on real property by or for an Authorized Agency. “Public Improvement” does not include:

(a) Projects for which no funds of an Authorized Agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or

(b) Emergency Work, minor alteration, ordinary repair or maintenance necessary to preserve a Public Improvement.

(128) “**Public Works**” is defined in ORS 279C.800 and includes, but is not limited to: roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for or by any public agency, to serve the public interest, but does not include the reconstruction or renovation of privately owned property that is leased by a Public Agency.

(129) “**Purchase Order**” means an Ordering Instrument or Order, as defined in this Rule.

(130) “**Qualifications Based Selection (QBS)**” means the qualifications based selection process mandated by ORS 279C.110 for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services Contracts.

(131) “**Quote**” means a verbal or Written Offer obtained through an Intermediate Procurement according to either OAR 125-247-0270 or 125-249-0160.

(132) “**Recycled Material**” means any material that would otherwise be a useless, unwanted or discarded material except for the fact that the material still has useful physical or chemical properties after serving a specific purpose and can, therefore, be reused or recycled.

(133) “**Recycled Oil**” means used oil that has been prepared for reuse as a petroleum product by refining, re-refining, reclaiming, reprocessing or other means, provided that the preparation or use is operationally safe, environmentally sound and complies with all laws and regulations.

(134) “**Recycled Paper**” means a paper product with not less than:

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

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

(135) “**Recycled PETE**” means post-consumer polyethylene terephthalate material.

(136) “**Recycled Product**” means all materials, goods and supplies, not less than 50 percent of the total weight of which consists of secondary and post-consumer waste with not less than 10 percent of its total weight consisting of post-consumer waste. “Recycled Product” includes any product that could have been disposed of as solid waste, having completed its life cycle as a consumer item, but otherwise is refurbished for reuse without substantial alteration of the product’s form.

(137) “**Related Services**” is defined in ORS 279C.100(8).

(138) “Request for Proposals” or “RFP” is defined in ORS 279B.005 and means all documents, either attached or incorporated by reference, and any Addenda thereto, used for soliciting Proposals in accordance with ORS.279B.060, 279B.070 or 279C.405 and related rules.

(139) “**Request for Qualifications**” or “**RFQ**” means a Written document issued by an Authorized Agency and describing: the Authorized Agency's circumstances; the type of service(s) or Work desired; significant evaluation factors; their relative importance; if appropriate, price; and competitive qualifications. Contractors respond in Writing to the Authorized Agency by describing their experience and qualifications. The RFQ will not result in a Contract. It establishes a list of qualified Contractors in accordance with OAR 125-247-0550, 125-248-0220 or 125-249-0645.

(140) “**Request for Quotes**” means a Written or oral request for prices, rates or other conditions under which a potential Contractor would provide Supplies and Services or Public Improvements described in the request.

(141) “**Resident Bidder**” is defined in ORS 279A.120 and means a Bidder that has paid unemployment taxes or income taxes in this state during the 12 calendar months immediately preceding submission of the Bid, has a business address in this State, and has stated in the Bid whether the Bidder is a “Resident Bidder.”

(142) “**Resident Offeror**” means an Offeror that has paid unemployment taxes or income taxes in this state during the 12 calendar months immediately preceding submission of the Offer, has a business address in this State, and has stated in the Offer whether the Offeror is a “resident Offeror.”

(143) “**Responsible**” means meeting the standards set forth in OAR 125-247-0640 or 125-249-0390(2), and not debarred or disqualified by the Authorized Agency under OAR 125-247-0575 or 125-249-0370.

(144) “**Responsible Bidder**” or “**Responsible Proposer**” is defined in ORS 279A.105 and 279B.005 and means a person who meets the standards of responsibility as described in ORS 279B.110.

(145) “**Responsible Offeror**” means, as the context requires, a Responsible Bidder, Responsible Proposer or a Person who has submitted an Offer and meets the standards set forth in OAR 125-247-0640 or 125-249-0390(2), and who has not been debarred or disqualified by the Agency under OAR 125-247-0575 or 125-249-0370, respectively.

(146) “**Responsible Proposer**” or “**Responsible Bidder**” is defined in ORS 279B.005 and means a Person who meets the standards of responsibility described in ORS 279B.110.

(147) “**Responsive**” means having the characteristic of substantial compliance in all material respects with applicable solicitation requirements.

(148) “**Responsive Bid**” or “**Responsive Proposal**” is defined in ORS 279B.005 and means a Bid or Proposal that substantially complies with the Invitation to Bid or Request for Proposals, respectively, and all prescribed Procurement procedures and requirements.

(149) “**Responsive Offer**” means, as the context requires, a Responsive Bid, Responsive Proposal or other Offer that substantially complies in all material respects with applicable Solicitation requirements.

(150) “**Responsive Proposal**” or “**Responsive Bid**” is defined in ORS 279B.005 and means a bid or proposal that substantially complies with the Invitation to Bid or Request for Proposals and all prescribed procurement procedures and requirements.

(151) “**Retainage**” is defined in ORS 279C.550 and means the difference between the amount earned by a Contractor on a Public Contract and the amount paid on the contract by the Authorized Agency.

(152) “**Rules**” means these Public Contracting Rules of the Department including Divisions 246 through 249, unless otherwise indicated.

(153) “**Scope**” means the extent or range of view, outlook, application, operation, or effectiveness. Scope does not include the dollar amount of the Contract.

(154) “**Secondary Waste Materials**” means fragments of products or finished products of a manufacturing process that has converted a virgin resource into a commodity of real economic value. “Secondary Waste Materials” includes post-consumer waste. “Secondary Waste Materials” does not include excess virgin resources of the manufacturing process. For paper, “Secondary Waste Materials” does not include fibrous waste generated during the manufacturing process such as fibers recovered from waste water or trimmings of paper machine rolls, mill broke, wood slabs, chips, sawdust or other wood residue from a manufacturing process.

(155) “**Serial Negotiation**” means a Negotiation that is sequential, on-going, consecutive, alternating, or repetitive.

(156) “**Services**” or “**services**,” for the purpose of these Rules only, means Trade Services, Personal Services, or any combination thereof.

(157) “**Signature**” means any Written mark, word or symbol that is made or adopted by a Person with the intent to be bound and that is attached to or logically associated with a Written document to which the Person intends to be bound.

(158) “**Signed**” means, as the context requires, that a Written document contains a Signature or that the act of making a Signature has occurred.

(159) “**Small Procurement**” means a sourcing method according to ORS 279B.065.

(160) “**Sole-Source Procurement**” means a sourcing method by which an Authorized Agency awards a Contract without competition to a single source for Supplies and Services, when Written justification demonstrates no other source is available, in accordance with ORS 279B.075 and OAR 125-247-0275.

(161) "**Solicitation**" means:

(a) A request by an Authorized Agency for the purpose of soliciting Offers. This request may take the form of an Invitation for Bid, a Request for Proposal, a Request for Quotation, a Request for Qualifications or a similar document; or

(b) The process of notifying prospective Offerors that the Authorized Agency requests such Offers; or

(c) The Solicitation Document itself.

(162) "**Solicitation Document**" means an Invitation to Bid; a Request for Proposals; a Writing for a Small, Intermediate, Informal Selection, Competitive Quote, or Emergency Procurement; a Special Procurement Solicitation; or other document issued to invite Offers from prospective Contractors in accordance with ORS 279B or 279C. “Solicitation Document” includes related documents, either attached or incorporated by reference, and any changes thereto, issued by an Authorized Agency to establish an Original Contract that forms the basis for an Agency’s participation in a Procurement. The following examples are not Solicitation Documents because they do not invite offers from prospective Contractors: Request for Qualifications, a prequalification of Bidders, a request for information, and a request for product prequalification.

(163) “**Special Government Body**” is defined in ORS 174.117 and

(a) Means any of the following:

(A) A public corporation created under a statute of this State and specifically designated as a public corporation.

(B) A school district.

(C) A public charter school established under ORS Chapter 338.

(D) An education service district.

(E) A community college district or community college service district established under ORS Chapter 341.

(F) An intergovernmental body formed by two or more public bodies.

(G) Any entity that is created by statute, ordinance or resolution that is not part of state government or local government.

(H) Any entity that is not otherwise described in this Section that is:

(i) Not part of state government or local government;

(ii) Created according to authority granted by a statute, ordinance or resolution, but not directly created by that statute, ordinance or resolution; and

(iii) Identified as a governmental entity by the statute, ordinance or resolution authorizing the creation of the entity, without regard to the specific terms used by the statute, ordinance or resolution.

(b) Subject to ORS 174.117, “Special Government Body” includes:

(A) An entity created by statute for the purpose of giving advice only to a special government body;

(B) An entity created by a Special Government Body for the purpose of giving advice to the special government body, if the document creating the entity indicates that the entity is a public body; and

(C) Any entity created by a Special Government Body described in Subsection (a) of this Section, other than an entity described in paragraph (B) of this Subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the Special Government Body.

(164) “**Special Procurement**” means a sourcing method that may be a class Special Procurement, a contract-specific Special Procurement or both, unless the context requires otherwise in accordance with ORS 279B.085 and OAR 125-247-0287.

(a) “Class Special Procurement” is defined in ORS 279B.085 and means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of entering into a series of Contracts over time for the acquisition of a specified class of Supplies and Services.

(b) “Contract-specific Special Procurement” means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of entering into a single Contract or a number of related contracts for the acquisition of specified Supplies and Services on a one-time basis or for a single project.

(165) “**Specification**” is defined in ORS 279B.200(3) and means any description of the physical or functional characteristics, or of the nature of the Supplies and Services to be procured by an Agency. “Specification” includes: any requirement for inspecting, testing, or preparing the Supplies and Services for delivery and the quantities or qualities of Supplies and Services to be furnished under the Contract. Specifications generally will state the result to be obtained and occasionally may describe the method and manner of performance.

(166) “**State**” means the State of Oregon.

(167) "**State Contracting Agency**" is defined in ORS 279A.010 and 200.005(12) and means an Executive Department entity authorized by law to conduct a Procurement.

(168) “**State Government**,” subject to ORS 174.108, means the Executive Department, the Judicial Department and the Legislative Department.

(169) "**Statement of Work**" means all provisions of a Public Contract that specifically describe the Services or Work to be performed or Goods to be delivered by either the Contractor, its subcontractor(s), or the Agency, as applicable, including any related Technical Specifications, deadlines, or deliverables. For purposes of the definition of Statement of Work, "Technical Specifications" with respect to equipment, materials and Goods, means descriptions of dimensions, composition and manufacturer and quantities and units of measurement that describe quality, performance, and acceptance requirements. With respect to Services, "Technical Specifications" means quantities and units of measurement that describe quality, performance and acceptance requirements

(170) “**Substantial Completion**” is defined in ORS 12.135 and means the date when the contractee accepts in Writing the construction, alteration or repair of the improvement to real property or any designated portion thereof as having reached that state of completion when it may be used or occupied for its intended purpose or, if there is no such Written acceptance, the date of acceptance of the completed construction, alteration or repair of such improvement by the contractee.

(171) “**Supplies and Services**” includes “Supplies or Services” and collectively means Goods, Trade Services, Personal Services, and Ordinary Construction Services separately or in any combination of these terms thereof as appropriate within the context of the Rule. “Supplies and Services” includes the terms “goods and services,” “goods or services,” and “personal services” contained in ORS 279A and 279B. This term does not include Public Improvements or Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services, governed under ORS 279C.

(172) "**Surplus Property**" means all personal property, vehicles and titled equipment property received by the Department as surplus from federal government units, state agencies, local governments, and special government bodies for sale to state agencies, political subdivisions of the State, and private not-for-profit organizations or the general public or any combination thereof. See OAR 125-050.

(173) “**Sustainability**” is defined in ORS 184.421 and means using, developing and protecting resources in a manner that enables people to meet current needs and provides that future generations can also meet future needs, from the joint perspective of environmental, economic and community objectives.

(174) “**Threshold**” means a specific monetary limitation that distinguishes one Procurement method from another, triggers a requirement, or marks a point of reference or change in Rule. For example, the Thresholds of $10,000 to $150,000 distinguish Intermediate Procurements under ORS 279B from other methods.

(175) “**Trade Services**” means all remaining services that do not meet the definition for Personal Services.

(176) “**Unnecessarily Restrictive**” is defined in ORS 279B.405(1)(c) and means that Specifications limit competition arbitrarily, without reasonably promoting the fulfillment of the Procurement needs of an Agency.

(177) “**Used Oil**” is defined in ORS 459A.555 and means a petroleum-based oil which through use, storage or handling has become unsuitable for its original purpose due to the presence of impurities or loss of original properties.

(178) “**Virgin Oil**” means oil that has been refined from crude oil and that has not been used or contaminated with impurities.

(179) “**Work**” means the furnishing of all services, materials, equipment, labor, and incidentals necessary to successfully complete any individual item or the entire Contract and the carrying out and completion of all duties and obligations imposed by the Contract.

(180) “**Work Order**” means an Ordering Instrument related to Services, including any incidental Supplies.

(181) “**Writing**” means letters, characters and symbols inscribed on paper by hand, print, type or other method of impression, intended to represent or convey particular ideas or meanings. “Writing” when required or permitted by law, or required or permitted in a Solicitation Document, also means letters, characters and symbols made in electronic form and intended to represent or convey particular ideas or meanings.

(182) “**Written**” means existing in Writing.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.065, 279A.200, 279B.005 & 279C.110
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 9-2005, f. & cert. ef. 8-3-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 4-2013, f. 12-17-13, cert. ef. 1-1-14; DAS 3-2014, f. 12-29-14, cert. ef. 1-1-15; DAS 4-2015, f. 12-29-15, cert. ef. 1-1-16; DAS 4-2016, f. 12-22-16, cert. ef. 1-1-17; DAS 3-2018, f. 12-14-18 & cert. ef. 1-1-19

**COMMENTARY ON OAR 125-246-0110**

(1) **What is a Definition?** A “definition” means an explanation of the meaning of a word or phrase so it is clear. It may describe some characteristics of the word or phrase.

(2) **A Collection of Definitions.** One goal of OAR 125-246-0110 is to list most of the defined words and phrases found in the Public Contracting Code and these Rules. A few unique definitions may be found only within Rules where they are used. Many words and phrases in the Rules are not defined. Their meanings derive from common use.

(3) **Capitalizations.** Only capitalized words or phrases are defined. If a word or phrase is not capitalized in the Rules, use the common meanings found in Webster’s dictionary.

(4) **Definitions do not Contain Directions.** Look to the Rule(s) that use the defined word or phrase for requirements, limitations, permissions, and other substantive text. A definition may be limited in accordance with a Rule, and the reader must go to that Rule.

(5) **How to Read a Definition.** Take the words at face value. E.g., a positive statement does not imply negative generalizations or suggest exclusiveness, unless it says so.

(6) **Plain Language or Complex Definitions.** Some definitions in this Rule are plain and simple, while other definitions are quotations from various statutes. Some definitions are organized according to a specific focus.

**125-246-0120**

**Policies**

(1) These Rules simplify, clarify and modernize Public Contracting pursuant to ORS 279A.015(1).

(2) These Rules provide a foundation for ethical and fair dealing in Public Contracting, designed to instill public confidence pursuant to ORS 279A.015(2).

(3) The promotion of efficient use of resources pursuant to ORS 279A.015(3) includes but is not limited to Sustainability. Pursuant to ORS 184.421, "Sustainability" means using, developing and protecting resources in a manner that enables people to meet current needs and provides that future generations can also meet future needs, from the joint perspective of environmental, economic and community objectives. ORS 184.421(1) sets forth the goals for the State of Oregon regarding Sustainability and provides that in conducting internal operations, Agencies must, in cooperation with the Department, seek to achieve the following objectives:

(a) State purchases should be made so as to serve the broad, long term financial interests of Oregonians, including ensuring that environmental, economic and societal improvements are made so as to enhance environmental, economic and societal well-being;

(b) Investments in facilities, equipment and durable goods should reflect the highest feasible efficiency and lowest life cycle costs;

(c) Investments and expenditures should help promote improvements in the efficient use of energy, water and resources;

(d) State operations and purchases should help maintain vital and active downtown and main street communities;

(e) State purchases should help support opportunities for economically distressed communities and historically underemployed people;

(f) State operations should be conducted in ways that significantly increase the efficient use of energy, water and resources;

(g) State operations and purchases should reflect the efficient use and reuse of resources and reduction of contaminants released into the environment.

(4) These Rules clearly identify and implement each of the legislatively mandated socioeconomic programs identified pursuant to ORS 279A.015(4).

(5) "**Arriving at best value**" pursuant to ORS 279A.015(5) means selecting a Provider based on a determination of which Providers' proposals offer the best trade-off between price and performance, in which quality is considered an integral performance factor. The selection may be based on evaluation factors including but not limited to:

(a) The total cost of ownership, including the cost of acquiring, operating, maintaining and supporting Supply and Services, Public Improvements, and Architectural, Engineering and Land Surveying and Related Services, or any combination thereof, over its projected lifetime;

(b) The technical merit of the Proposer's proposal; and

(c) The probability of the Proposer performing the requirements stated in the Solicitation on time, with high quality and in a manner that accomplishes the stated business objectives.

(6) Authorized Agencies must conduct Public Contracting to further the policies set forth in ORS 279A.015, elsewhere in the Code, and in these Rules.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.015
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 9-2005, f. & cert. ef. 8-3-05

**125-246-0130**

**Application of the Code and Rules; Exceptions**

(1) **Code, Rules and Policies**. Except as set forth in this Section and ORS 279A.025, an Agency must exercise all rights, powers and authority related to Public Contracting in accordance with the Public Contracting Code, Rules, and applicable Department policies (Policies).

(2) **Exceptions for Contracts and Grants**. These Rules do not apply to the following:

(a) Contracts between Agencies;

(b) Contracts between Agencies and Public Bodies;

(c) Contracts between Agencies and the federal government;

(d) For Cooperative Procurements, any contractual relationship described in Subsections (2)(a) through (c) of this Rule. The Code, Rules, and policies apply to the contractual relationships between the Agencies and Providers, other states, tribes, other nations, and any of their public entities; and

(e) Grants.

(A) Agency as Recipient. If an Agency is a recipient in an agreement with a grantor, the definition of Grant in ORS 279A.010 and OAR 125-246-0110 determines if the agreement is subject to the Code and these Rules. If the grantor has substantial involvement in the program or activity of the Agency, the agreement is not a Grant. The agreement is subject to the Code and these Rules.

(B) Agency as Grantor. If an Agency is a grantor in an agreement with a recipient, the definition of Grant in ORS 279A.010 and OAR 125-246-0110 determines if the agreement is subject to the Code and these Rules. If the Agency has substantial involvement in the program or activity of the Agency’s recipient, the agreement is not a Grant. The agreement is subject to the Code and these Rules.

(3) **Exception for a Federal Program**. Authorized Agencies otherwise subject to the Code and these Rules may enter into Public Contracts under a federal program described in ORS 279A.180 and according to OAR 125-246-0360, without following the procedures set forth in ORS 279B.050 through 279B.085 and 125-247-0250 through 125-247-0690.

(4) **Exception when Procuring from Qualified Rehabilitation Facilities (QRFs)**. Agencies subject to the Code and these Rules are not subject to the methods set forth in ORS 279A.200 through 279A.225 (Cooperative Purchasing) or 279B.050 through 279B.085 (Sourcing Methods) and related Rules when the Agencies procure Supplies and Services according to ORS 279.835 through 279.855 and OAR 125-055-0010(1) (Acquisition of Supplies and Services from QRFs). Agencies are subject to the remainder of the Code and these Rules, including but not limited to delegation of authority in accordance with OAR 125-246-0170.

(5) **Exception for Correctional Industries**. Agencies otherwise subject to the Code and these Rules may enter into Contracts with correctional industries according to the Oregon Constitution, Article 1, Subsection 11, without being subject to the source selection procedures set forth in either ORS 279A.200 through 279A.225 (Cooperative Purchasing) or 279B.050 through 279B.085 (Sourcing Methods) and their respective rules.

(6) **Exception for Price Agreements**. Agencies otherwise subject to the Code and these Rules are not subject to the methods set forth in ORS 279A.200 through 279A.225 (Cooperative Purchasing) or 279B.050 through 279B.085 (Sourcing Methods) and related Rules when the Agencies procure Supplies and Services from a Department Price Agreement or other Price Agreement. Agencies are subject to the remainder of the Code and these Rules, including but not limited to delegation of authority in accordance with OAR 125-246-0170.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.025, 279A.050, 279A.055 & 279A.180
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 4-2013, f. 12-17-13, cert. ef. 1-1-14

**COMMENTARY ON OAR 125-246-0130: Revised January 1, 2014**

(1) **Subsection (2)(e) - Grants.**

(a) Grants do not constitute Public Contracts that are subject to the Public Contracting Code. ORS 279A.025(2)(d). The definition of “Grant” in ORS 279A.010(1)(k) has two facets.

(b) **Agency as Recipient.** The first is the situation in which an Agency receivesa grant of money from a private or government source. In that case, if the grantor will not be significantly involved in the program or government activity the grant moneys were intended to support, then the agreement under which the moneys were given to the Agency constitutes a Grant. The grantor’s mere monitoring of the grant recipient’s compliance with the grant conditions, like inspecting a completed project, requiring a report on the achievement of grant objectives, or auditing the expenditure of the moneys, does not convert the Grant into a Public Contract.

(c) **Agency as Grantor.** The second situation appears when the Agency givesmoney to an organization or program to support a governmental or social services activity of the recipient. The same test applies. If the Agency as grantor will become substantially involved in the recipient’s program or activity its money supports, then the transaction is a Public Contract and not a Grant. If the Agency as grantor will not become substantially involved in the recipient’s program or activity, the transaction qualifies as a Grant.

(d) **Example of Agency as Grantor.** To illustrate, if an Agency gives another government body money to fund the construction of a useful structure, but the Agency merely conducts an inspection of the completed structure and an audit of the expenditure of the moneys to ensure the recipient obeyed the grant conditions, the transaction remains a Grant that is not subject to the Code. However, if, in addition, the Agency also undertakes to maintain or repair the facility, or to help the grant recipient operate it, then the Agency has become substantially involved in the grant-assisted activity, and the transaction is a Public Contract.

(2) **Section (4).** Authorized Agencies procuring with qualified non-profit agencies described under Section (4) of this Rule remain subject to the Code and related Rules outside these methods, including: policy, authority and delegation, Contract Administration, ethics, and penalties. For an interpretation of specific applicable provisions, Agencies may consult with the Chief Procurement Officer.

**125-246-0135**

**Solicitation Templates; Contract Forms and Templates; Accountability for Advice (Director Verification)**

See OAR 137-046-0140.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 279A.157 & 279A.161
Hist.: DAS 4-2015, f. 12-29-15, cert. ef. 1-1-16; DAS 4-2016, f. 12-22-16, cert. ef. 1-1-17; DAS 3-2018, f. 12-14-18 & cert. ef. 1-1-19

**137-046-0140**

**Solicitation Document Templates; Contract Forms and Contract Templates; Accountability for Advice**

(1) The Attorney General and the Director of the Oregon Department of Administrative Services will make available to state agencies Solicitation Document templates, Contract forms, and Contract templates as described in 2015 Oregon Laws, chapter 646, section 2. State agencies shall use approved Solicitation Document templates, Contract forms or Contract templates as required by 2015 Oregon Laws, chapter 646, section 2.

(2) The Attorney General, in cooperation with the Oregon Department of Administrative Services, will develop and make available to state agencies the process the Attorney General and the department will use to approve and designate Solicitation Document templates, Contract forms and Contract templates for required use, including the process for revising, updating or approving agency-specific variations of the approved Solicitation Document templates, Contract forms, and Contract templates.

(3) Contract forms and Contract templates include amendments to Contracts, including change orders, purchase orders, and other ordering instruments issued under Contracts, when the amendments, change orders, purchase orders, or other ordering instruments provide for payment in excess of $150,000.

(4) The Attorney General may exempt from required use a Solicitation Document template, Contract form, or Contract template that is approved by the Attorney General, subject to any conditions the Attorney General may impose on the continued use of the exempted and approved Solicitation Document template, Contract form or Contract template.

(5) The Attorney General, in cooperation with the Department of Administrative Services, shall specify how state agencies may access the approved Solicitation Document templates, Contract forms or Contract templates and shall also provide a list of the Solicitation Document templates, Contract forms or Contract templates that are exempt from the required use.

(6) Before a State Contracting Agency executes a Contract with a Contract Price that exceeds $150,000, the State Contracting Agency must designate in Writing the state employee who will oversee a specific Contract, or specifically identified Contracts, or a specifically identified category of Contracts. The Written designation must identify the employee as the “Contract Administrator” for the Contract or Contracts. The director or other head of the State Contracting Agency (or that officer’s designee under 2015 Oregon Laws, chapter 646, section 4(2)) must verify that the Contract Administrator has read and understands all advice and recommendations given with respect to the Contract and Procurement. The director or other head of the State Contracting Agency (or that officer’s designee) shall sign and preserve as an Agency record a statement acknowledging that the officer reviewed the advice and recommendations, and made the verification, in accordance with 2015 Oregon Laws, chapter 646, section 4.

(7) As used in 2015 Oregon Laws, chapter 646, section 4, “advice and recommendations” means material advice and recommendations from the Oregon Department of Justice or the Oregon Department of Administrative Services to a State Contracting Agency with respect to a specific Contract and amendments to the Contract, or a Procurement that resulted in the Contract. The term does not include advice or recommendations provided to a State Contracting Agency that were not directed to a specific Contract or Procurement. For example, programmatic advice or recommendations that address the general scope of authority or required procedures of a State Contracting Agency program do not constitute advice and recommendations. Material advice or recommendations are Written communications that address: (i) subject matter that modifies or influences the meaning, performance, administration, or means of enforcement of a Contract; or (ii) the allocation of significant liabilities or risk under a Contract.

Stat. Auth.: ORS 279A.065, OL 2015, ch 646 (HB 2375)
Stats. Implemented: OL 2015, ch 646 (HB 2375)
Hist.: DOJ 18-2015, f. 12-31-15, cert. ef. 1-1-16

**125-246-0140**

**Procurement Authority**

(1) The Department must conduct all Procurements and administer the contracting for Supplies and Services; Architectural, Engineering and Land Surveying Services, and Related Services; and Public Improvements for the Agencies, unless delegated, according to ORS 279A.140 and 279C.105(1). Delegations of authority in accordance with OAR 125-246-0170 do not relieve the Department of this responsibility.

(2) For Agencies, the Department and its Director are the Contracting Agency described in the Public Contracting Code and represent the Agencies. Authorized Agencies receive delegated authority according to OAR 125-246-0170.

(3) After December 31, 2018, any person conducting a Procurement or administering a Contract for a state contracting agency, as defined in ORS 279A.010(1)(b), must have education, training, professional experience, or a combination thereof that, at a minimum, and in accordance with standards established by the Department pursuant to ORS 279A.159, adequately prepares the person to:

(a) Develop specifications and develop or adapt solicitation documents for a Procurement;

(b) Read critically, understand, interpret and apply terms and conditions set forth in Public Contracts of the scope and nature for which the person is or will be responsible;

(c) Draft scopes of work, statements of work, contract amendments, change orders, insurance requirements, notices and other documents and communications that are necessary to conduct a Procurement or administer a Public Contract of the scope and nature for which the person is or will be responsible;

(d) Monitor a contractor’s performance under a Public Contract to ensure that the contractor performs services, provides goods or supplies materials according to the schedule, pricing, specifications and terms and conditions set forth in the Public Contract;

(e) Manage relations between a state contracting agency and contractors so that contractors meet obligations to the state contracting agency and the state contracting agency meets obligations to contractors;

(f) Recognize and investigate emerging disputes or other risks, unique requirements, unusual situations or other issues that arise in connection with a Procurement and formulate appropriate responses and resolutions, seeking advice from legal counsel, risk management personnel or other persons when necessary;

(g) Understand auditing requirements and procedures that apply to Procurements of the scope and nature for which the person is or will be responsible and organize and maintain appropriate documentation and administrative practices that meet the auditing requirements; and

(h) Follow regular business and office procedures, implement applicable state contracting agency policies and procedures and otherwise conduct Procurements or administer Public Contracts for a state contracting agency in accordance with best practices.

(4) In addition to the requirements set forth in subsections (3)(a)-(h) of this rule, the Department may:

(a) Describe the contents and quality of a curriculum for an appropriate education or training program;

(b) Establish a passing score for an examination or assessment, if appropriate;

(c) Establish requirements for obtaining a certificate or other evidence of having completed the education or training program;

(d) Otherwise determine the skills and the level and depth of knowledge a person must have to fulfill the education or training program;

(e) Describe the length of service or other evidence of adequate experience required; and

(f) Establish levels or classifications of education and training or experience that are necessary for a person to conduct a Procurement or administer a Public Contract for a state contracting agency, according to:

(A) The complexity, scope or category of Procurements a state contracting agency conducts;

(B) The degree of responsibility a person will have for conducting a Procurement or administering a Public Contract; or

(C) Other criteria the Department may establish as appropriate.

(5) Any person conducting any part of a Procurement or any part of administering a Contract for a state contracting agency, after December 31, 2018, who does not have education, training, professional experience, or a combination thereof in accordance with the standards and requirements established by the Department pursuant to ORS 279A.159 and this rule, must

(a) have a Written delegation from a person who currently meets the standards and requirements established by the Department pursuant to ORS 279A.159 and this rule, and

(b) have their actions directly reviewed and approved by a person who currently meets the standards and requirements established by the Department pursuant to ORS 279A.159 and this rule.

A delegation under this Section must be in a form approved by the Chief Procurement Officer.

(6) The Department may provide any part or all of an education or training program that meets the standards established by the Department, or may approve any part or all of an education or training program that the Department may determine meets the standards and requirements established by the Department pursuant to ORS 279A.159 and this rule. The Department may phase in or specify incremental steps for meeting the standards and requirements under this rule.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.050(1)(2) & 279A.159
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 4-2016, f. 12-22-16, cert. ef. 1-1-17

**125-246-0150**

**Applicability of These Rules to Agencies**

Agencies subject to the authority of the Director of the Department must follow these Rules. If an Agency is partially independent of the authority of the Department and partially subject to the authority of the Department, that Agency is responsible for obtaining any legal determination related to these Rules.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.065
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10

**125-246-0165**

**Delegation Policy and Procedures**

(1) **Generally**.

(a) **Purpose**. This Rule describes the policy and procedures related to the delegation of authority under OAR 125-246-0170, including but not limited to:

(A) Policy of the Code;

(B) Individual Representation;

(C) Forms of Delegations and Revocations of Authority;

(D) Changes in Individual Representation;

(E) Procedural Requirements;

(F) Signature; and

(G) Commitment of Funds.

(b) This Rule applies to all delegations and sub-delegations of Authority (collectively, Delegations), modifications of Delegations, and revocations of Delegations under OAR 125-246-0170. This Rule does not delegate authority. All delegations of authority under the Rules are found solely in 125-246-0170.

(2) **Policy of the Code**. The policy of the Code is to clarify responsibilities, instill public confidence, promote efficient use of resources, implement socioeconomic programs, allow meaningful competition, and provide a structure that supports evolving procurement methods, according to ORS 279A.015. These Rules support this policy of the Code.

(3) **Individual Representation**. Public Contracting may be delegated only to an individual, representing the State's interests. Authority under these Rules may be delegated only to individuals acting on behalf of the Agencies and in accordance with this Rule, and OAR 125-246-0170(2)(a)(A). All individual delegatees must hold and use this Authority within the scope of their employment by the Agency and act on behalf of the Agency as the Agency’s representative. Sub-delegations may be in whole or in part according to ORS 279A.075. Any individual may decline a sub-delegation in whole or in part. A delegator or delegatee may also be referred to in this Rule as an “Authorized Individual.”

(4) **Forms of Delegations and Revocations of Authority**. ORS 279A.075 provides that the exercise of all authorities in the Code may be delegated and sub-delegated in whole or in part. The form of a Delegation or revocation of Authority by an Authorized Individual may be by:

(a) OAR 125-246-0170 by the Director of the Department;

(b) A Written external or internal policy by an authorized delegator or revoker;

(c) An Interagency Agreement, signed by the State Chief Procurement Officer and the Authorized Agency; or

(d) A letter or memorandum signed by an authorized delegator or revoker.

(5) **Changes in Individual Representation**. If an Agency determines that an Authorized Individual has ceased to represent that Agency for Procurement (Absent Individual), then:

(a) The Authority of the Absent Individual automatically reverts back to the individual who originally delegated the Authority to the Absent Individual. The Agency must determine who receives the reverted Authority in accordance with this Rule. If the Absent Individual is a head of an Agency or Designated Procurement Officer, the delegator of authority to that individual must notify the State Chief Procurement Officer within thirty (30) days after the change in representation.

(b) Sub-delegations, if any, by an Absent Individual remain in effect unless and until the Authority of any sub-delegatees is modified or revoked by an Authorized Individual.

(6) **Procedural Requirements**.

(a) **Compliance**. Authorized Agencies must maintain good contracting procedures in accordance with the Public Contracting Code, related Rules and policies of the Department. Delegation of Authority does not exempt anyone from the requirements of the Public Contracting Code, related Rules, and policies of the Department. Any individual receiving delegated Authority is responsible for following the Public Contracting Code, related Rules, and policies of the Department.

(b) **Modifications or Revocations**.

(A) **Authority**. Subject to the conditions of Subsection (ii) below, a Delegation may be modified or revoked by:

(i) The Director of the Department,

(ii) The State Chief Procurement Officer in accordance with OAR 125-246-0170(3)(b)(D) and 125-246-0170(3)(d)(J), or

(iii) The original authorized delegator or successor of this delegator who made this Delegation being modified or revoked.

(B) **Conditions**.

(i) This modification or revocation of a Delegation must be in Writing;

(ii) The delegatee must receive reasonable notice of the modification or revocation of the Delegation; and

(iii) This modification or revocation of a Delegation must be based upon a determination.

(c) **Maintenance of Documents**. The Authorized Agency must maintain copies of letters, memoranda, or agreements granting a Delegation.

(7) **Signature**. When an Authorized Agency has delegated Authority according to OAR 125-246-0170, the Authorized Agency's signature constitutes both the execution and approval of the Contract, except as provided in 125-246-0170(2)(a)(B)(i).

(8) **Commitment of Funds**. ORS 291 and 293, together with the policies of the State Controller’s Division of the Department, provide for public financial administration, including: appropriations, allotments by the Department, and an individual’s authority to commit or encumber funds, financially obligate the Agency, and decide to expend funds. This type of authority may be referred to as commitment, expenditure, obligation, expenditure decision or signature authority (collectively, Commitment of Funds).

(9) **Requests for Delegations**. Any Agency may submit a delegation request through ORPIN to the State Chief Procurement Officer for authority in accordance with the Public Contracting Code, this Rule, and any related policy of the Department. All requested Delegations must be approved in Writing by the State Chief Procurement Officer and based upon a consideration of relevant criteria as follows:

(a) The nature of the Supplies and Services to be provided;

(b) Resources of the Agency requesting the delegation, including trained and qualified contract officers and staff, the Agency’s experience and expertise, staff time available, and the degree of economy and efficiency to be achieved in meeting the state's requirements if authority is delegated;

(c) The Agency’s Procurement and public contracting past performance;

(d) Department’s resources to exercise the authority if it is not delegated; and

(e) Value added by the Agency if the authority is delegated.

(10) **Revocation of Delegations**. The State Chief Procurement Officer may revoke any delegation issued under section (9) of this Rule at any time by Written notice to the Designated Procurement Officer of the Agency, as defined in OAR 125-246-0170, based upon, but not limited to any of the following:

(a) Failure to comply with the requirements of the delegation;

(b) Failure to comply with the requirements of OAR 125-246-0170(2)(a)(A)

(c) Deficiencies evidenced by performance audits performed by the Department, the Secretary of State, or the Legislative Assembly;

(d) Failure to comply with the Department training requirements to obtain an Oregon Procurement Certification, or specific training described in the delegation;

(e) Lack of adequate experience in terms of procurement knowledge and any specialized knowledge pertinent to the authority delegated;

(f) The available resources of the Department to conduct the purchasing activities if authority is revoked; and

(g) The degree of economy and efficiency to be achieved in meeting the state’s requirements if authority is revoked.

(11) **Return of Delegations from Agencies to the State Chief Procurement Officer**. If an Agency needs assistance, an Agency may request that the State Chief Procurement Officer reclaim the authority previously delegated to the Agency. With sole discretion, the State Chief Procurement Officer may accept the reclamation request for assistance according to the responsibilities, resources, and needs of the Department and the Agency.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stat. Implemented: ORS 279A.050, 279A.075 & 279A.140
Hist.: DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 4-2013, f. 12-17-13, cert. ef. 1-1-14; DAS 3-2014, f. 12-29-14, cert. ef. 1-1-15; DAS 4-2016, f. 12-22-16, cert. ef. 1-1-17; DAS 3-2018, f. 12-14-18 & cert. ef. 1-1-19

**COMMENTARY ON OAR 125-246-0165**

**Delegation Requests: Subsection (9).** The Chief Procurement Officer’s review process and criteria for delegations of Procurement authority to Authorized Agencies will be set forth in policy of the Department, subject to change. The Department values triage and collaboration with Authorized Agencies, under reasonable circumstances, prior to making its determination to delegate or not delegate. Examples of factors that may be considered by the Chief Procurement Officer include:

(a) Whether the Authorized Agency is capable of carrying out the delegation according to the Public Contracting Code and related Rules by delegation, and as a result, add more value, enable a better optimal outcome, or promote greater efficiency. These factors may include: the Authorized Agency’s past performance reviews (if any); training; background; experience; the number of Authorized Agency OPB Certified Professionals or individuals otherwise capable of carrying out the delegation; the Contract’s complexity, value and anticipated numbers; and whether the Authorized Agency has sufficient staff resources to fulfill the delegation;

(b) Whether foreseeable consequences of the proposed delegation, include but are not limited to:

(A) Not requiring an Authorized Agency to accept a delegation beyond its resources to meet its responsibility,

(B) Not inadvertently impairing the Department’s funding and assessment model without any cost recovery,

(C) Whether any payments or credits should be adjusted as a result of the delegation, and

(c) Whether the proposed delegation will not negatively impact an existing or anticipated Price Agreement, the Oregon Cooperative Purchasing Program (ORCPP), the Products of Disabled Individuals Act, or other enterprise-wide strategic opportunities; and

(d) Whether the responsibilities and resources of the Department must support the proposed delegation and its conditions, such as a prior review of the Solicitation Document, prior review or approval of Contract or Amendment documents, or mentoring of the Authorized Agency.

**125-246-0170**

**Delegation of Authority**

(1) **Generally**.

(a) **Purpose**. This Rule delegates the procurement authority of the Department (Authority). Only this Rule delegates this Authority.

(b) **Authority of Agencies**. The Director of the Department delegates Authority to the Designated Procurement Officers of the Authorized Agencies in section (2) of this rule.

(c) **Authority of the State Chief Procurement Officer**. The Director of the Department delegates Authority to the State Chief Procurement Officer in Section (3) of this Rule.

(d) **Authority of Independent Agencies**. The Director of the Department delegates Authority in certain instances to Independent Agencies in Section (4) of this Rule.

(e) **Authority of the Director**. According to ORS 279A.140, the Department must conduct all Procurements, including Contract Administration, for the Agencies. Other Sections of the Code authorize specific actions by the Director of the Department. According to ORS 279A.050(1) and (2), this Authority of the Department vests only in the Director of the Department. The Director is ultimately responsible for the Procurement of the Agencies.

(2) **Delegation to Individuals in Agencies**.

(a) **Chain of Delegation and Responsibilities**.

(A) **Head and Designated Procurement Officer of the Agency**.

(i) **Conditional Delegation**. The Director of the Department delegates Authority, only as set forth in this Section (2), to the heads of Authorized Agencies, on the condition that the heads of Authorized Agencies subdelegate such Authority to their Agencies' Designated Procurement Officers, who may further subdelegate such Authority in accordance with policies of their Agencies (Chain of Delegation). Every Authorized Agency must appoint a Designated Procurement Officer to serve that Authorized Agency; if none is appointed, the head of the Agency is deemed to be the Designated Procurement Officer and assumes the Authority, duties and responsibilities of the Designated Procurement Officer (collectively, “Designated Procurement Officer”). The heads of the Agencies may not subdelegate Authority outside this Chain of Delegation, except as provided in subsection (2)(a)(B).

(ii) **Manner of Appointment**. The Authorized Agency determines its procedure for appointing its Designated Procurement Officer, and this Rule does not require or imply any inherent Authority in individual(s) or the Agency in order to make this appointment. The Agency must, in a form approved by the State Chief Procurement Officer, send a Written notice of its appointment of the Designated Procurement Officer to the State Chief Procurement Officer.

(B) **Exceptions: Head and Other Individuals of the Agency**.

(i) **Execution of Contracts**. Heads of Authorized Agencies may subdelegate the Authority to execute Contracts, as described in subsection (2)(b)(F), to other individuals within their respective Agency, provided this subdelegation is in accordance with a Written alternative subdelegation plan, maintained on file with the Agency’s Designated Procurement Officer.

(ii) Special Procurements of General or Special Counsel Authorized by the Attorney General, according to OAR 125-247-0295. Heads of Authorized Agencies may subdelegate the Authority to procure general or special counsel authorized by the Attorney General, as described in subsection (2)(d)(L), to other individuals within their respective Agency, provided the head of the Authorized Agency has determined that the individual receiving the subdelegation has the requisite skills and knowledge to carry out the subdelegation. Such subdelegations may be further subdelegated within that Authorized Agency, provided the subdelegator has determined that each individual receiving the Delegation has the requisite skills and knowledge to carry out the subdelegation.

(iii) **Chain of Delegation**. Authorized Individuals in accordance with Subsections (2)(a)(B)(i) and (ii) are included in the Chain of Delegation.

(C) **Responsibilities**. Each individual in the Chain of Delegation remains responsible for the exercise of Authority by that individual’s subdelegatees, and subdelegation does not waive this responsibility. Each delegator must determine and document that the delegatee is capable and accountable for the Procurement. The Designated Procurement Officer, appointed within each Authorized Agency, is responsible for all delegated procurement activity on behalf of the Authorized Agency, as described in this section (2), except as provided in subsection (2)(a)(B).

(b) **Duties and Responsibilities of Designated Procurement Officers**. The Authority, duties and responsibilities of the Designated Procurement Officer, according to (2)(a)(A), are as follows:

(A) Serve as the exclusive supervisor and manager of the Authorized Agency's Procurement system;

(B) Conduct, supervise and manage the Procurement and the Procurement Process for the Authorized Agency in accordance with the Code and these Rules, except for those Procurements conducted by a delegatee to whom the Designated Procurement Officer has delegated Authority;

(C) Prepare or monitor the use of Specifications or statements of work for all Procurements of the Authorized Agency;

(D) Issue Solicitations and implement other non-Solicitation methods for all Procurements of the Authorized Agency in accordance with the Code and these Rules;

(E) Award Contracts only as authorized in accordance with this Rule;

(F) Execute Contracts, which means causing the signing of Contracts and performance of all necessary formalities to bring the Contracts into their final, legally enforceable forms.

If the Designated Procurement Officer is unable to make a Commitment of Funds as described in OAR 125-246-0165(8), then the head of the Authorized Agency may follow an alternative subdelegation plan in accordance with Subsection (2)(a)(B)(i).

(G) Comply with the reporting requirements of the Code, these Rules, and Department policies;

(H) Monitor sourcing decisions, Procurements, development of Contracts, awarded Contracts, Contract compliance, spend, Delegations, Special Procurements and exemptions. Monitoring Contract development, awards, and compliance applies to all Delegations;

(I) Based upon the monitoring described in subsection (2)(b)(H), determine opportunities, establish targets, and utilize methods according to ORS 279A.200 through 279A.220 and 279B.055 through 279B.085 to optimize savings consistent with strategic sourcing; and

(J) Conduct Cost Analyses, approve Feasibility Determinations and Exceptions, and otherwise comply with OAR 125-247-0110.

(c) **Delegation by Rule Based Upon Thresholds**. By this Rule, the Director of the Department delegates authority to the heads of all Authorized Agencies, subject to section (2)(a)(A) and (B), for the following Procurements, including Contract Administration:

(A) Small Procurements of Supplies and Services up to and including the Threshold of $10,000, according to ORS 279B.065 and related Rules;

(B) Direct appointments of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services according to OAR 125-248-0200;

(C) Intermediate Procurements of Supplies and Services greater than $10,000 and not exceeding $150,000, and Amendments of Contracts resulting from Intermediate Procurements, according to ORS 279B.070, OAR 125-247-0270, and any related policy;

(D) Informal Selection Procedures of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services according to ORS 279C.110 and OAR 125-248-0210, provided that the Authorized Agency follows the requirements as set forth in the policy of the Department;

(E) Competitive Quotes for Public Improvements estimated not to exceed $100,000, provided that the Authorized Agency follows the requirements as set forth in the policy of the Department;

(F) Competitively Sealed Bidding not exceeding $150,000 and according to OAR 125-247-0255;

(G) Competitively Sealed Proposals not exceeding $150,000 and according to OAR 125-247-0260;

(H) Sole-Source Procurements not exceeding $150,000 and according to ORS 279B.075 and OAR 125-247-0275;

(I) Special Procurements in accordance with OAR 125-247-0287 not exceeding $150,000. This is the authority to use the Special Procurement. Approval of the Special Procurement method must be requested from the State Chief Procurement Officer pursuant to OAR 125-247-0287.

(J) Purchase of Used Personal Property Special Procurements not exceeding $150,000 and according to OAR 125-247-0288(9);

(K) Reverse Auctions Special Procurements not exceeding $150,000 and according to OAR 125-247-0288(10); and

(L) Contract Administration as follows:

(i) For Contracts and Ordering Instruments authorized according to this section (2)(c) and (d), the Contract Administration of these Public Contracts and Ordering Instruments, including but not limited to: appropriate payment approvals, ordering in accordance with the terms of Department Price Agreements, and the oversight of the Provider(s); but excluding the Contract Administration described in Subsection (v) below;

(ii) The daily or routine Contract Administration of Ordering Instruments placed against Department Price Agreements and Contracts procured by the Department on behalf of Agencies. This daily or routine Contract Administration includes but is not limited to: appropriate payment approvals, ordering in accordance with the terms of Department Price Agreements, and the oversight of the Provider(s);

(iii) Activities specified in Writing by the State Chief Procurement Officer or delegatee;

(iv) Activities specified in a related policy of the Department; and

(v) Despite subsection (2)(c)(L)(i) through (iv) above, this Delegation by subsection (2)(c)(L) does not include:

(I) The Contract Administration of Department Price Agreements; or

(II) For Contracts procured by the Department on behalf of Agencies, Amendments when the amended value of Contract exceeds $150,000; and terminations of such Contracts when the amended value of such Contract exceeds $150,000.

 (vi) A statewide Department Price Agreement should clearly state what, if any, threshold limitation applies to the delegated procurement authority to use the Price Agreement. If a Statewide Department Price Agreement is silent or unclear on the threshold limitation on the delegated procurement authority to use the Price Agreement, the Agency's delegated procurement authority to use the Price Agreement is not to exceed $150,000, unless the Agency has procurement authority greater than $150,000 in a form in accordance with OAR 125-246-0165(4).

(d) **Delegation by Rule Based Upon Type**. By this Rule, the Director of the Department delegates authority to the heads of all Authorized Agencies, subject to section (2)(a)(A) and (B), for the following Procurements, including Contract Administration:

(A) Emergency Procurements, in accordance with ORS 279B.080, 279C.335(5), OAR 125-248-0200, or related Rules;

(B) One-time, nonrepetitive Joint Cooperative Procurements in accordance with OAR 125-246-0400, provided that:

(i) No such Procurement results in a Permissive Cooperative Procurement that is open to any Agency outside of those Agencies jointly named in the original Procurement;

(ii) No such Procurement of Supplies and Services exceeds the Threshold of $150,000, including all Amendments, according to OAR 125-247-0805;

(iii) No such Procurement of Public Improvements exceeds $100,000, including Amendments according to OAR 125-249-0160 and 125-249-0910; and

(iv) The Authorized Agency must follow any related policy of the Department.

(C) Federal program Procurements not exceeding $150,000 or according to a delegation agreement with the State Chief Procurement Officer , and in accordance with ORS 279A.180 and related Rules;

(D) Client Services Special Procurements according to OAR 125-247-0288(1) and (2);

(E) Client Services procured under ORS 279B.055 through 279B.085 and related Rules, including all amendments according to OAR 125-247-0805;

(F) Renegotiations of Existing Contracts with Incumbent Contractors Special Procurements according to OAR 125-247-0288(3) and as follows: the Authorized Agency is limited to the same authority delegated to that Agency with regard to the Original Contract and any Amendments and may not collectively exceed any Threshold related to its authority to procure the Original Contract, except this limit may be exceeded with the prior Written approval of the State Chief Procurement Officer;

(G) Advertising Contracts Special Procurements according to OAR 125-247-0288(4);

(H) Equipment Repair and Overhaul Special Procurements according to OAR 125-247-0288(5);

(I) Contracts for Price Regulated Items Special Procurements according to OAR 125-247-0288(6);

(J) Investment Contracts Special Procurements according to OAR 125-247-0288(7);

(K) Food Contracts Special Procurements according to OAR 125-247-0288(8);

(L) Special Procurements of General or Special Counsel Authorized by the Attorney General, according to OAR 125-247-0295;

(M) Special Procurement(s) related to disaster response, according to OAR 125-247-0287;

(N) Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services (A&E) Procurement according to OAR 125-248-0200 through 125-248-0340;

(O) Brand Name Specification Determinations for Solicitations in accordance with OAR 125-247-0691; and

(P) Brand Name Specification Determinations for Sole Source Procurements not exceeding $150,000 and according to OAR 125-247-0691.

(Q) Selling or leasing of Supplies and Services in accordance with OAR 125-246-0800.

(R) Buy Decision in accordance with OAR 125-247-0200(1) and (2).

(i) A statewide Department Price Agreement should clearly state what, if any, threshold limitation applies to the delegated procurement authority to use the Price Agreement. If a Statewide Department Price Agreement is silent or unclear on the threshold limitation on the delegated procurement authority to use the Price Agreement, the Agency's delegated procurement authority to use the Price Agreement is not to exceed $150,000, unless the Agency has procurement authority greater than $150,000 in a form in accordance with OAR 125-246-0165(4).

(3) **Delegation to the State Chief Procurement Officer**.

(a) **Powers and Authorities**. The Director of the Department delegates to the State Chief Procurement Officer the rights, powers and authority vested in the Director of the Department to:

(A) Delegate and subdelegate these authorities in whole or in part according to ORS 279A.075;

(B) Approve Special Procurement requests, according to ORS 279B.085 and related Rules, and receive filed protests of approvals of Special Procurements, according to ORS 279B.400(1);

(C) Conduct hearings, approve agency Findings, approve exemption requests, and issue exemption orders, according to ORS 279C.335, ORS 279C.345, 279C.390, and related Rules;

(D) Create all procedures and Specifications required by the Public Contracting Code and these Rules;

(E) Receive, maintain, and act upon information contained in reports, including but not limited to ORS 279A.140(h) and 279C.355, as required by the Public Contracting Code and these Rules;

(F) Receive and resolve protests according to ORS 279B.400 to 279B.420 and Division 247 Rules, except for appeals from a decision of the State Chief Procurement Officer or delegatee;

(G) Receive notices, conduct hearings, and make decisions regarding prequalifications, debarments, and Disqualifications according to ORS 279A.110, 279B.425, 279C.450, 200.065(5), and 200.075(1), except for appeals from a decision of the State Chief Procurement Officer or delegatee;

(H) Approve expedited notices for Sole-Source Procurements according to OAR 125-247-0275;

(I) Procure and administer Cooperative Procurements and receive, hear, and resolve related protests and disputes, according to ORS 279A.200 through 279A.225 and OAR 125-246-0400;

(J) Approve General Service Administration federal programs or federal Contracts in accordance with OAR 125-246-0360;

(K) Authorize public notice of bids, proposals, and public improvement Contracts to be published electronically and according to ORS 279B.055(4)(c) and 279C.360(1);

(L) Approve the manner and character of retainage according to ORS 279C.560(1) and (5);

(M) Approve exemptions waiving or reducing the bid security or bonds for Public Improvement projects in accordance with ORS 279C.390(1);

(N) Approve electronic-filing (e-filing) in accordance with ORS 84.049, 84.052 and 84.064;

(O) Approve procurement-related activities required by other law; and

(P) Establish standards of required education, training, professional experience, or a combination thereof pursuant to ORS 279A.159, approve programs or persons that satisfy the standards, and determine any disputes, or requests for exception or sub-delegation.

(Q) Approve requests for an exception to the prohibition on accepting a Bid or Proposal from a Contractor that advised or assisted a Contracting Agency to develop Specifications or Solicitation Documents according to ORS 279B.040; and

(R) Other procurement actions of the Department specifically required by these Rules.

(b) **Duties and Responsibilities of the State Chief Procurement Officer**. The authority, duties and responsibilities of the State Chief Procurement Officer are as follows:

(A) Conduct Procurements, including administration of Contracts, for Agencies.

(B) Develop and maintain State-wide Procurement rules, policies, procedures and standard contract terms and conditions as necessary to carry out the Public Contracting Code.

(C) Subdelegate authority in whole or part, in accordance with OAR 125-246-0165(9);

(D) Revoke authority delegated by the State Chief Procurement Officer or in accordance with OAR 125-246-0165(10);

(E) Maintain a file of Written subdelegation authority granted and revoked under these Rules in accordance with the law;

(F) Provide guidance and leadership on Procurement matters to Agencies and their employees;

(G) Establish standards of required education, training, or experience and provide training and instruction opportunities to assure Department staff and Agency staff are equipped with necessary knowledge and skills to comply with requirements of the Public Contracting Code, Rules, and Department policy related to Procurement;

(H) Monitor sourcing decisions, Procurements, development of Contracts, awarded Contract, Contract compliance, spend, Delegations, Special Procurements and exemptions. Report these matters to the Authorized Agency and Director as appropriate. Monitoring Contract development, awards, and compliance applies to all Delegations;

(I) Based upon monitoring described in subsection (3)(b)(H), determine opportunities, establish targets, and utilize methods according to ORS 279A.200 through 279A.220 and 279B.055 through 279B.085 to optimize savings consistent with strategic sourcing.

(J) Appoint procurement advisory committees to assist with Specifications, procurement decisions, and structural change that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competition according to ORS 279A.015.

(c) **Delegation by Rule Based Upon Threshold**. By this Rule, the Director of the Department delegates authority to the State Chief Procurement Officer for the following Procurements, including Contract Administration:

(A) Small Procurements of Supplies and Services on behalf of Agencies not to exceed $10,000 according to ORS 279B.065;

(B) Intermediate Procurements of Supplies and Services greater than $10,000 and not exceeding $150,000, and Amendments of Contracts resulting from Intermediate Procurements, on behalf of Agencies and according to ORS 279B.070 and OAR 125-247-0270;

(C) Informal Selection procedures of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services, on behalf of Agencies and according to ORS 279C.110 and OAR 125-248-0210;

(D) Competitive Quotes of Public Improvements estimated not to exceed $100,000, according to ORS 279C.410 notes and OAR 125-249-0160; and

(E) All Procurements exceeding the Thresholds for Intermediate Procurements, Informal Procurements, or Competitive Quotes, according to ORS 279B.070 and OAR-125-247-0270 (Supplies and Services); ORS 279C.110 and OAR 125-248-0210 (Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services); and ORS 279C.410 and OAR 125-249-0210 (Public Improvements), respectively.

(d) **Delegation by Rule Based Upon Type**. By this Rule, the Director of the Department delegates authority to the State Chief Procurement Officer for the following Procurements, including Contract Administration:

(A) Cooperative Procurements in accordance with ORS 279A.200 through 279A.225 and OAR 125-246-0400;

(B) Special Procurements according to ORS 279B.085 and related Rules;

(C) Sole-Source Procurements in accordance with ORS 279B.075 and OAR 125-247-0275;

(D) Emergency Procurements in accordance with ORS 279B.080, 279C.335(5), OAR 125-248-0200, or related Rules;

(E) Federal program Procurements in accordance with ORS 279A.180 and OAR 125-246-0360;

(F) Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services (A&E) Procurement according to OAR 125-248-0200 through 125-248-0340;

(G) Brand Name Specification Determinations for Solicitations in accordance with OAR 125-247-0691;

(H) Brand Name Specification Determinations for Sole Source Procurements according to OAR 125-247-0691;

(I) Selling or leasing of Supplies and Services in accordance with OAR 125-246-0800;

(J) All Procurements otherwise delegated to an Authorized Agency according to Section (2) if the State Chief Procurement Officer, at her or his own discretion, revokes and assumes this delegated authority, based upon a determination that any Authorized Agency refuses or fails to comply with any Delegation described in section (2); and

(K) Buy Decision in accordance with OAR 125-247-0200(1) and (2).

(4) Delegation to Independent Agencies.

(a) For purposes of this section, "Independent Agency" means an agency claiming Procurement authority independent from the Procurement authority of DAS.

(b) The Director of the Department delegates to Independent Agencies the same authority with the same application as delegated to Authorized Agencies under OAR 125-246-0170, as if the Independent Agencies are Authorized Agencies, upon the following condition: when an Independent Agency exercises this delegated authority, it must comply in that instance with the same DAS Rules applicable to an Authorized Agency.

(c) In relation to Independent Agencies, the Director of the Department delegates to the State Chief Procurement Officer those authorities described in OAR 125-246-0170(3) and the Public Contracting Code as they relate to Authorized Agencies.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.050, 279A.075 & 279A.140
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 9-2005, f. & cert. ef. 8-3-05; DAS 15-2005(Temp), f. & cert. ef. 12-22-05 thru 5-21-06; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 4-2013, f. 12-17-13, cert. ef. 1-1-14; DAS 3-2014, f. 12-29-14, cert. ef. 1-1-15; DAS 4-2016, f. 12-22-16, cert. ef. 1-1-17; DAS 3-2018, f. 12-14-18 & cert. ef. 1-1-19

**COMMENTARY ON OAR 125-246-0170**

**Strategic Sourcing: Subsections (2)(b)(I) and (3)(b)(I).** For guidance regarding strategic sourcing, see the Commentary on OAR 125-247-0010.

**125-246-0200**

**Affirmative Action; Limited Competition Permitted**

(1) For purposes of this rule:

(a) "Affirmative Action" is defined in ORS 279A.100 and means a program designed to ensure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age, or physical or mental disability, or a policy to give a preference in awarding public contracts to disabled veterans.

(b) "Disabled veteran" has the meaning given that term in ORS 408.225.

(2) Pursuant to ORS 279A.100, an Authorized Agency may, in carrying out an Affirmative Action goal, policy or program, by appropriate ordinance, resolution or rule, limit competition for a Public Contract~~s with an~~ estimated to cost ~~of~~ $50,000 or less, to contracting entities owned or controlled by persons described in subsection (1) of this rule, including but not limited to OAR 125-246-0314 (disabled veterans), and in accordance with any policies and procedures established by the Department.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.100
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 4-2016, f. 12-22-16, cert. ef. 1-1-17; DAS 3-2018, f. 12-14-18 & cert. ef. 1-1-19

**COMMENTARY ON OAR 125-246-0200**

(1) Authorized Agencies must use caution when they attempt to exercise their contracting authority under ORS 279A.100 to carry out affirmative action policies. Under “reverse discrimination” decisions, when race-conscious preferences, set asides or quotas are used in the award of public contracts or subcontracts, the courts will subject those practices to strict scrutiny under the Equal Protection Clause of the fourteenth amendment to the United States Constitution. Therefore, Authorized Agencies should consult with legal counsel before undertaking a solicitation that contains affirmative action elements.

(2) Nevertheless, the reverse discrimination cases leave available to Authorized Agencies an array of even-handed measures to encourage the participation of minority- and women-owned businesses in public contracts and subcontracts. For example, Agencies may publish rosters of minority, women-owned and emerging small business firms, segregated into their fields of specialization, to apprise prime contractors of the firms’ availability as subcontractors.

(3) Agencies may conduct outreach and advertising programs that instruct emerging potential contractors how to learn about the availability of state solicitations for contracting opportunities in their fields. Training programs to assist developing businesses in the preparation of bids and in writing effective proposals fall within these permissible methods. For individual solicitations, Authorized Agencies may conduct pre-bid and pre-proposal conferences to identify, for new competitors, the critical requirements their bids or proposals must satisfy. See OAR 125-247-0410 (Providing for Pre-Offer Conferences for Contracts for Supplies and Services).

(4) In addition, techniques that reduce businesses’ expenses in competing for public contracts can facilitate participation by emerging firms. Authorized Agencies should consider shortening and simplifying the required bid and proposal submissions whenever that is consistent with the complexity of the solicitation. Relaxed minimum experience requirements for contractors can promote opportunities for inexperienced or newly formed business entities. Authorized Agencies also may relieve bidders and proposers from the expenses of providing bid security and performance bonds in solicitations for Supplies and Services. For Public Improvement projects, an Agency that has been granted an exemption under ORS 279C.390(1) by the Chief Procurement Officer may waive or reduce bid security and performance and payment bond requirements. SeeOAR 125-249-0290 (bid security) and OAR 125-249-0460 (performance and payment bonds). However, the Chief Procurement Officer has no authority to grant relief from the requirement for Public Works Bonds, administered by the Bureau of Labor and Industries under ORS 279C.845, or contractor license bonds administered by the Construction Contractors Board under ORS 701.068.

(5) A set-aside or percentage quota program that is restricted only to emerging and small business enterprises probably will be lawful because those programs are race-neutral and gender-neutral. When an Authorized Agency decides to base the selection of contractors or subcontractors on factors that take into account race, ethnicity or gender, however, federal reverse discrimination decisions place significant restrictions on the Authorized Agencies’ ability to use set-aside or percentage participation goal programs.

(6) Under the reverse discrimination cases, the courts will uphold race-based government contracting and subcontracting programs only when the contracting agencies can present evidence that confirms that those programs constitute narrowly drawn endeavors to cure the harm of proven past discrimination. Generally, proof of this character will require an Authorized Agency to point to a disparity study and other evidence that demonstrates the existence of past or present discrimination against particular ethnic groups, and their resultant under-representation as participants in public contracts in the industry involved in those contracts. For examples of reverse discrimination decisions, see Adarand Constructors, Inc. v. Pena, 515 US 200 (1995);Coral Const. Co. v. King County, 941 F2d 910 (9th Cir 1991), cert den 502 US 1033 (1992); andWestern States Paving Co., Inc. v. Washington State, 407 F3d 983 (9th Cir 2005), cert den 546 US 1170 (2006).

**125-246-0210**

**Subcontracting to and Contracting with Emerging Small Businesses; Disqualification**

(1) As set forth in ORS 279A.105, a Contracting Agency may require a Contractor to subcontract some part of a Contract to, or to obtain materials to be used in performing the Contract from:

(a) A business enterprise that is certified under ORS 200.055 as an emerging small business; or

(b) A business enterprise that is:

(A) Certified under ORS 200.055 as an emerging small business; and

(B) Is located in or draws its Workforce from economically distressed areas, as designated by the Oregon Business Development Department.

(2) For purposes of ORS 279A.105, a subcontractor certified under ORS 200.055 as an emerging small business is located in or draws its Workforce from economically distressed areas if:

(a) Its principal place of business is located in an area designated as economically distressed by the Oregon Business Development Department according to administrative rules adopted by the Oregon Economic and Community Development Department; or

(b) The Contractor certifies in Writing to the Contracting Agency that a substantial number of the subcontractor's employees, or subcontractors that will manufacture or provide the Goods or perform the Services under the Contract, reside in an area designated as economically distressed by the Oregon Business Development Department according to administrative rules adopted by the Oregon Business Development Department. For the purposes of making the foregoing determination, the Contracting Agency must determine in each particular instance what proportion of a Contractor's subcontractor's employees or subcontractors constitutes a substantial number.

(3) **Discrimination in Subcontracting Prohibited**.

(a) Prohibition. An Offeror who competes for or is awarded a Public Contract may not discriminate against a subcontractor in the awarding of a subcontract because the subcontractor is a minority, woman, emerging small business enterprise certified under ORS 200.055 or against a business enterprise that is owned or controlled by or that employs a disabled veteran, as defined in ORS 408.225.

(b) Certification. Contracting Agencies must include in each Solicitation Document a requirement that Offerors certify in their Offers that the Offeror has not and will not discriminate, in violation of Subsection (3)(a), against a subcontractor in the awarding of a subcontract because the subcontractor is a minority, woman or emerging small business enterprise certified under ORS 200.055 or against a business enterprise that is owned or controlled by or that employs a disabled veteran, as defined in ORS 408.225.

(4) **Disqualification**.

(a) A Contracting Agency may disqualify a Person from consideration of award of the Contracting Agency's Contracts under ORS 200.065(5), or suspend a Person's right to bid on or participate in any Public Contract according to ORS 200.075(1) after providing the Person with notice and a reasonable opportunity to be heard in accordance with Subsections (d) and (e) of this Section.

(b) As provided in ORS 200.065 and 200.075 a Contracting Agency may disqualify or suspend a Person's right to submit an Offer or to participate in a Contract (e.g., act as a subcontractor) as follows:

(A) For a Disqualification under ORS 200.065, the Contracting Agency may disqualify a Person upon finding that the Person engaged in any of the activities made unlawful by ORS 200.065(1) or (2), or if the Person has been disqualified by another Contracting Agency according to ORS 200.065.

(B) For a Disqualification under ORS 200.075, the Contracting Agency may suspend a Person upon finding that the Person engaged in any of the acts prohibited by ORS 200.075(a) through (c).

(c) A Contracting Agency may disqualify or suspend a Person's right to submit Offers or participate in Public Contracts only for the length of time permitted by ORS 200.065 or 200.075, as applicable.

(d) The Contracting Agency must provide Written notice to the Person of a proposed Disqualification. The Agency must deliver the Written notice by personal service or by registered or certified mail, return receipt requested. This notice must:

(A) State that the Contracting Agency intends to disqualify or suspend the Person;

(B) Set forth the reasons for the Disqualification;

(C) Include a statement of the Person's right to a hearing if requested in Writing within the time stated in the notice and that if the Contracting Agency does not receive the Person's Written request for a hearing within the time stated, the Person must have waived the right to a hearing;

(D) Include a statement of the authority and jurisdiction under which the hearing will be held;

(E) Include a reference to the particular Sections of the statutes and rules involved;

(F) State the proposed Disqualification period; and

(G) State that the Person may be represented by legal counsel.

(e) **Hearing**. Upon the Contracting Agency’s receipt of the Person’s timely request, the Contracting Agency must promptly deliver written notification and this request to the Chief Procurement Officer. The Chief Procurement Officer must schedule a hearing upon its receipt of the Person's timely request. The Department must notify the Person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing before the hearing. The Chief Procurement Officer has the discretion to delegate authority under OAR 125-246-0170(3)(a)(G) and specify how the delegatee must review and hear Disqualifications.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.065, 279A.075, 279A.105 & 279A.110
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 4-2016, f. 12-22-16, cert. ef. 1-1-17

**COMMENTARY ON OAR 125-246-0210**

(1) Adapted OAR 137-046-0210, except deleted its references to “DBE.”

(2) **Notice of Disqualification.** The Department will notify the Person in Writing of its Disqualification, served personally or by registered or certified mail, return receipt requested. The notice must contain:

(a) The effective date and period of Disqualification;

(b) The grounds for Disqualification; and

(c) A statement of the Person's appeal rights and applicable appeal deadlines.

**125-246-0220**

**Governor’s Policy Advisor for Economic and Business Equity**

(1) The Governor’s Policy Advisor for Economic and Business Equity (formerly known as the “Director of Economic & Business Equity” and also known as the "Governor's Advocate's Office for Minority, Women and Emerging Small Business”) was created in the Office of the Governor, and the Governor’s Policy Advisor for Economic and Business Equity is the individual appointed by the Governor to advise the Governor, Legislature and Office of the Governor’s Policy Advisor for Economic and Business Equity on issues related to the integration of minority, women and emerging small business into the mainstream of the Oregon economy and business sector. The Governor’s Policy Advisor for Economic and Business Equity oversees the resolution of business concerns with Contracting Agencies impacting firms certified by the Certification Office for Business Inclusion and Diversity (COBID). Governor’s Policy Advisor for Economic and Business Equity is also charged with maintaining the Oregon Opportunity Register and Clearinghouse to facilitate the timely notice of business and contract opportunities to COBID certified.

(2) The **Certification Office for Business Inclusion and Diversity (COBID)** administers the certification process for the Disadvantaged Business Enterprise (DBE), Minority Business Enterprise (MBE), Women Business Enterprise (WBE), Emerging Small Business (ESB), and Service Disabled Veteran Business Enterprise (SDV) Programs. As the sole certification authority in Oregon for disadvantaged, minority owned, woman owned, service disabled veteran owned, and emerging small businesses, COBID provides certification services for disadvantaged, minority owned, woman owned, service disabled veteran owned, and emerging small businesses according to ORS 200.025 and 200.055.

(3) A "**Disadvantaged Business Enterprise**" means a small business concern which is at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of any corporation, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

(4) An "**Emerging Small Business**" is a business with its principal place of business located in this State; a business with average annual gross receipts over the last three years not exceeding monetary limitations determined by the Certification Office for Business Inclusion and Diversity (COBID) annually based on the Consumer Price Index and has fewer than 29 employees; an independent business (not a subsidiary, affiliate, or successor company of another business whose average gross receipts would exceed the stated limits); and a business properly licensed and legally registered in this State.

(5) A "**Minority or Women Business Enterprise**" is a small business concern which is at least 51 percent owned by one or more minorities or women, or in the case of a corporation, at least 51 percent of the stock of which is owned by one or more minorities or women, and whose management and daily business operations are controlled by one or more of such individuals, according to ORS 200.005.

(6) A “**Service Disabled Veteran Owned Business**” or “business that a service-disabled veteran owns” means a small business concern which is at least 51 percent owned by one or more service-disabled veterans, or in the case of a corporation, at least 51 percent of the stock of which is owned by one or more service-disabled veterans, and whose management and daily business operations are controlled by one or more of such individuals, according to ORS 200.005. “Service-disabled veteran” means a veteran who has a United States Department of Veterans Affairs disability rating of at least zero percent as a result of an injury or illness that the veteran incurred, or that was aggravated, during active military service and who received a discharge or release under other than dishonorable conditions.

(7) The general policy of the Department and these Rules is to expand economic opportunities for disadvantaged, minority owned, woman owned, service disabled veteran owned, and emerging small businesses by exposing them to contracting and subcontracting opportunities available through Public Contracts, according to ORS 279A.105 and based upon the Legislative findings set forth in ORS 200.015.

(8) Each State Contracting Agency, as defined by ORS 279A.010, must support the participation of DBEs, MBEs, WBEs, SDVs, and ESBs in its purchasing processes by notifying the Governor’s Policy Advisor for Economic and Business Equity as required under ORS 200.035.

(9) When a Public Improvement Contract is less than $100,000 and the Offerors are being drawn exclusively from a list of certified Emerging Small Businesses maintained by the COBID, the Contracting Agency may Contract without formal competitive sourcing methods after a good faith effort to obtain a minimum of three competitive Quotes from Emerging Small Businesses. To obtain maximum exposure for all firms and guard against favoritism, care must be taken to obtain Quotes from different firms each time the list is used. The Contracting Agency must keep a Written record of the source and amount of the Quotes received and comply with the applicable requirements of this Rule.

(10) In carrying out the policy of affirmative action, a Contracting Agency may rely upon ORS 279A.100 and advice of legal counsel regarding its application.

(11) No Special Procurement according to ORS 279B.085 and no exemption according to ORS 279C.335 approved by the State Chief Procurement Officer waives or excepts the requirement of notice to the Governor’s Policy Advisor for Economic and Business Equity in accordance with ORS 200.035 and any DAS policy.

(12) All State Contracting Agencies must comply with ORS 200.035, and applicable related Department statewide policy, notwithstanding the Public Contracting Code.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.100 & 279A.105
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 4-2016, f. 12-22-16, cert. ef. 1-1-17

**COMMENTARY ON OAR 125-246-0220**

(1) A state contracting agency must provide timely notice and information to the Governor’s Policy Advisor for Economic and Business Equity if the state contracting agency intends to advertise or solicit bids or proposals for a public contract with a contract price of $10,000 or more and shall notify the policy advisor when the state contracting agency has awarded the contract. See ORS 200.035.

(2) See also the DAS Statewide COBID Certified Firms (formerly MWESB) Policy No. 107-009-030.

**125-246-0300**

**Preference for Oregon Supplies and Services**

See OAR 137-046-0300.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.120
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 3-2011, f. 12-22-11, cert. ef. 1-1-12

**137-046-0300**

**Preference for Oregon Goods and Services**

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

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

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

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

(2) Determining if Offers are Identical. A Contracting Agency shall consider Offers identical in price, fitness, availability and quality as follows:

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

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

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

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

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

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

(5) Discretionary Preference and Award. Under ORS 279A.128, a Contracting Agency may provide, in a Solicitation Document for Goods, Services or Personal Services, a specified percentage preference of not more than ten percent for Goods fabricated or processed entirely in Oregon or Services or Personal Services performed entirely in Oregon. When the Contracting Agency provides for a preference under this Section, 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 Section in a Procurement for emergency work, minor alterations, ordinary repairs or maintenance of public improvements, or construction work that is described in ORS 297C.320.

Stat. Auth.: ORS 279A.065; OL 2011, ch 237
Stats. Implemented: ORS 279A.065; 279A.120 & 279A.128; OL 2011, ch 237
Hist.: DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05; DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06; DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12; DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12

**125-246-0310**

**Reciprocal Preferences**

(1) When evaluating Offers according to OAR 125-247-0255 through 125-247-0260, 125-249-0390 or 125-249-0640 through 125-249-0660, Authorized Agencies must add a percentage increase to the Offer of a Nonresident Offeror equal to the percentage, if any, of the preference that would be given to that Offeror in the state in which the Offeror resides. An Authorized Agency may rely on the list maintained by the Department according to ORS 279A.120(4) to determine:

(a) Whether the Nonresident Offeror’s state gives preference to in-state Offerors; and if so,

(b) The amount of such preference (Percentage).

(2) Authorized Agencies must add a percentage to the Offer that matches the Percentage described in Section (1) before determining Tie-Offers in accordance with OAR 125-246-0300.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.120
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10

**125-246-0314**

**Disabled Veterans Preference**

(1) **Generally**. The Public Contracting Code and these Rules may not be construed to prohibit an Authorized Agency from engaging in public contracting practices designed to promote affirmative action goals, policies or programs to give a preference in awarding Public Contracts to Disabled Veterans. In carrying out an affirmative action goal, policy or program, an Authorized Agency may limit competition for any Public Contract estimated to not exceed $50,000 to Disabled Veterans as defined in Section (2) (“Preference”).

(2) **Definition**. “Disabled Veteran” is defined in ORS 408.225. “Disabled Veteran” includes the individual as defined in ORS 408.225 and any business enterprise that one or more such individuals own or control, if the cumulative ownership or control by such individuals is 51% or greater.

(3) **Establishing the Preference**. In applying the Preference in section (1), the Authorized Agency may limit competition to Disabled Veterans or use a percentage for the Preference in a competitive procurement process. In either case, the process for a Contract may not exceed $50,000, and the Designated Procurement Officer of the Authorized Agency must make a written determination that supports the Preference.

(4) **Subcontracting**. An Authorized Agency may require a Contractor to subcontract some part of a Contract not to exceed $50,000 to, or obtain materials to be used in performing the Contract from, a Disabled Veteran.

(5) **Proof**. Under Section (3) or (4), an Authorized Agency may require that a Disabled Veteran produce proof of service–connected disability from the United States Department of Veterans Affairs. The proof of service–connected disability may be in the form of an:

(a) Award letter;

(b) Award card; or

(c) Other evidence acceptable to the Authorized Agency from the United States Department of Veterans Affairs.

(6) **Discrimination**. A Bidder or Proposer who competes for or is awarded a Public Contract may not discriminate against a subcontractor in awarding a subcontract because the subcontractor employs a Disabled Veteran or is a Disabled Veteran.

(7) **Debarment or Disqualification**.

(a) **Finding and Appeal**. An Authorized Agency may debar or disqualify a Bidder or Proposer (Offeror) under OAR 125-247-0575 or OAR 125-249-0370, if the Authorized Agency finds that the Offeror has violated Section (6). A debarred or disqualified Offeror may appeal under OAR 125-247-0750 or OAR 125-249-0370.

(b) **Limitation**. An Authorized Agency may not allege an occurrence of discrimination in subcontracting as a basis for debarring or disqualifying a Bidder or Proposer under Section (6) more than three (3) years after the alleged discriminatory conduct occurred or more than three (3) years after the Authorized Agency, in the exercise of reasonable diligence, should have discovered the conduct, whichever is later.

(8) **Certification**. An Offeror must certify in the documents accompanying its Offer that the Offeror has not discriminated and will not discriminate against a Disabled Veteran or a subcontractor that employs a Disabled Veteran in obtaining a required subcontract.

(9) **Violation**. After a Contractor is awarded a Public Contract and if the Contractor violates the certification made under Section (8), the Authorized Agency may regard the violation as a major breach of contract that permits the Authorized Agency to:

(a) Terminate the Contract; or

(b) Exercise any of the remedies for breach of contract that are reserved in the Contract.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 279A.100
Hist.: DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10

**COMMENTARY ON OAR 125-246-0314: New January 1, 2010**

(1) A “Disabled Veteran” may be any business enterprise that one or more such individuals own or control, if the cumulative ownership or control by such individuals is 51% or greater (Business). Authorized Agencies are advised to require evidence that the business meets this definition. Evidence may include but not be limited to: financial statements, tax returns, articles of incorporation, corporate by-laws, corporate meeting minutes, and a signed and notarized affidavit of certification. At a minimum, Authorized Agencies should require a signed affidavit of ownership, documenting the percentage of ownership by a Disabled Veteran.

(2) The 2009 Legislative Assembly amended ORS 279A.105(1) to permit Authorized Agencies to require contractors to subcontract part of a public contract to, or to obtain materials to be used in performing the contract from, business enterprises that are owned or controlled by disabled veterans (as defined in ORS 408.225). The enactment also declared that the Public Contracting Code may not be construed to prohibit giving a preference to disabled veterans in awarding public contracts. See Oregon Laws 2009, chapter 235 (Senate Bill 479).

(3) In addition, the legislation placed disabled veterans within the class to which an Authorized Agency may, under a rule adopted pursuant to ORS 279A.100(3), limit competition for any public contract for goods or services, or for any other public contract estimated to cost $50,000 or less. Oregon Laws 2009, chapter 235, §1(3), *amending* ORS 279A.100. The 2009 Act also amended ORS 279A.110 to prohibit bidders and proposers from discriminating, in awarding subcontracts, against business enterprises that are owned or controlled by a disabled veteran. DAS has implemented this legislation in OAR 125-246-0314.

**125-246-0316**

**Lighting Preference Relating to Mercury**

Authorized Agencies must comply with ORS 646A.566, including but not limited to:

(1) When making procurement decisions on lighting that contains mercury, an Agency must:

(a) Request information from potential suppliers on mercury content, energy use, lumen output and lighting lifetime;

(b) Issue specifications; and

(c) Favor lighting that contains mercury that meets the mercury content standards established by ORS 646A.564.

(2) After consultation with the Department of Environmental Quality, the Chief Procurement Officer may direct Agencies to use information and issue specifications to favor lighting in accordance with (1), and Agencies must follow the directions, if any.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 646A.566
Hist.: DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 3-2014, f. 12-29-14, cert. ef. 1-1-15

**125-246-0318**

**Oregon Employment Preference**

Authorized Agencies must comply with ORS 279B.112, including but not limited to the following requirements for a discretionary preference:

(1) An Authorized Agency may give a preference to an Offer including a personnel deployment disclosure form (Disclosure Form) that states that the Offeror will employ more workers within Oregon than a competing Offer if the Offers otherwise suit the Agency’s specifications for the procurement equally well.

(2) The Agency may state in the solicitation documents for any procurement (Solicitation) that the Agency will consider a Disclosure Form and may give a preference described in section (1) above. Then,

(a) An Offeror may submit a Disclosure Form with its Offer;

(b) If the Agency determines that the Offers suit the Agency’s specifications for the procurement equally well, then the Agency may consider any Disclosure Forms submitted with those Offers in evaluating the Offers; and

(c) The Agency may prefer the Offer with a Disclosure Form that indicates that the Offeror will employ more workers within Oregon than a competing Offer, with or without Disclosure Form information.

(3) The Disclosure Form submitted by an Offeror must state:

(a) The number of workers that the Offeror and its subcontractors plan to deploy to perform the work described in the Solicitation;

(b) The number of workers that the Offeror and its first-tier subcontractors will employ within Oregon; and

(c) The number of jobs in each of the categories described in subsections (3)(a) and (b) that would be a newly created job.

(4) The Agency may adopt its own form and contents for the Disclosure Form, unless the Chief Procurement Officer requires Agencies to use an approved form and contents of the Disclosure Form.

(5) The Agency may:

(a) Verify the information stated in the Disclosure Form before awarding a public contract; and

(b) Require that the contractor maintain a minimum number of workers and jobs over the term of the contract.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279B.112
Hist.: DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 3-2014, f. 12-29-14, cert. ef. 1-1-15

**125-246-0319**

**Federally Funded Transit Projects – Preference for Exceeding Federal Buy America Requirements**

See OAR 137-046-0330.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: Sec. 4, Ch. 52, OLs 2012
Hist.: DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12

**137-046-0330**

**Federally Funded Transit Projects — Preference for Exceeding Federal Buy America Requirements**

(1) A contracting agency, in its Solicitation Documents to award a contract for a transit project that will be funded in whole or in part with funds from the federal government or a federal government agency, may provide for the application of a preference in favor of an Offeror whose bid or proposal exceeds the applicable federal Buy America requirements.

(a) A contracting agency has discretion to adjust the amount or character of the preference to account for variations in the nature of the contract or project, and the degree to which each Offeror’s bid or proposal exceeds the federal Buy America requirements.

(b) For example, in an invitation to bid procurement the contracting agency may authorize a range of preference price percentages to account for the various degrees to which the bidders might exceed the federal Buy America requirements. In no event, however, may the percentage preference given to a bidder exceed ten percent of the total bid price.

(c) Similarly, under a request for proposals, the contracting agency may allocate and award evaluation points to reflect the degrees to which the proposers might exceed the applicable federal Buy America requirements. In no event, however, may those percentage points exceed ten percent of the total number of points available for award under the request for proposals.

Stat. Auth.: ORS 279A.065
Stats. Implemented: 2012 OL, ch 58
Hist.: DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12

**125-246-0320**

**Recycling; Definitions**

(1) "**Post-consumer Waste**" means a finished material that would normally be disposed of as solid waste, having completed its life cycle as a consumer item. "Post-consumer Waste" does not include manufacturing waste.

(2) "**Recycled Material**" means any material that would otherwise be a useless, unwanted or discarded material except for the fact that the material still has useful physical or chemical properties after serving a specific purpose and can, therefore, be reused or recycled.

(3) "**Recycled PETE Product**" means a product containing post-consumer polyethylene terephthalate material.

(4) "**Secondary Waste Materials**" means fragments of products or finished products of a manufacturing process that has converted a virgin resource into a commodity of real economic value, and includes post-consumer waste, but does not include excess virgin resources of the manufacturing process. For paper, "secondary waste materials" does not include fibrous waste generated during the manufacturing process such as fibers recovered from waste water or trimmings of paper machine rolls, mill broke, wood slabs, chips, sawdust or other wood residue from a manufacturing process.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.125, 279A.145, 279A.150, 279B.270 & 279B.280
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05

**COMMENTARY ON OAR 125-246-0320:**

Adapted OAR137-246-0320, except for Sections 4 through 9.

**125-246-0321**

**Recycling Policy**

(1) The Department promotes the Procurement by all Authorized Agencies of products made from Recycled Materials in accordance with ORS 279A.125 and 279B.270.

(2) When purchasing Goods, or pursuant to Subsection (2)(c), Personal Services that relate to the use of recovered resources and Recycled Materials, Authorized Agencies must:

(a) Review the procurement Specifications currently utilized in order to eliminate, wherever economically feasible, discrimination against the Procurement of recovered resources or Recycled Materials;

(b) Develop purchasing practices that, to the maximum extent economically feasible, assure purchase of materials which are recycled or which may be recycled or reused when discarded. The Department will make Recycled Products and materials available to Authorized Agencies whenever they can be obtained;

(c) Provide incentives for the maximum possible use of recovered resources and Recycled Materials, wherever economically feasible, in all procurement Specifications issued.

(3) Pursuant to ORS 279A.125, notwithstanding provisions of law requiring the Department to award a Contract to the lowest or best Offeror, the Department must give preference to the procurement of Goods manufactured from Recycled Materials, if the Recycled Product's costs do not exceed the costs of nonrecycled products by more than 5%, or a higher percentage if a Written determination is made by the Department . The requirements of ORS 279A.125 may be applied to Authorized Agencies by agreement or policy of the Department.

(4) The Offeror must indicate in the Offer, the materials considered relevant to the 5% preference. The 5% preference will only apply to the value of that portion of the Offer that offers non-paper products containing verifiable recycled contents.

(5) All Contracts must require Contractors to use, in the performance of the Contract Work, to the maximum extent economically feasible, Recycled Paper;

(a) All Contracts must require Contractors to use, in the performance of the Contract Work, to the maximum extent economically feasible, recycled PETE products, as well as other recycled plastic resin products. "Recycled PETE products" means a product containing post-consumer polyethylene terephthalate material. The Department must provide guidelines to Authorized Agencies and Contractors on the availability of necessary Goods that contain recycled PETE, as well as other recycled plastic resin supplies and materials; the Department must also identify suppliers able to provide necessary Goods containing recycled PETE, as well as other recycled plastic resin supplies and materials, pursuant to ORS 279A.150.

(b) All Authorized Agencies must include the following language in any Invitation to Bid or Request for Proposal: "Vendors must use recyclable products to the maximum extent economically feasible in the performance of the contract Work set forth in this document," pursuant to ORS 279B.270(2); and

(c) The Department must include Recycled Product purchasing information within publications and training programs provided to local governments requesting state government purchasing assistance, pursuant to ORS 279A.145.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.125, 279A.145, 279A.150, 279B.270 & 279B.280
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12

**125-246-0322**

**Preference for Recycled Materials**

(1) Notwithstanding provisions of law requiring an Authorized Agency to award a Contract to the lowest or best Offer of a Provider, and in accordance with ORS 279A.125 and Subsection (2) of this Section, an Authorized Agency charged with the Procurement of Goods for any public use must give preference to the Procurement of Goods manufactured from Recycled Materials whenever the Authorized Agency uses Competitive Sealed Bidding or Competitive Sealed Proposals pursuant to ORS 279B.055 or 279B.060, respectively, and as set forth in this Rule.

(2) In comparing Goods from two or more Offerors, if at least one Provider offers Goods manufactured from Recycled Materials and at least one Provider does not, an Authorized Agency must select the Provider offering Goods manufactured from Recycled Materials if each of the following four conditions exists:

(a) The Recycled Product is available;

(b) The Recycled Product meets applicable standards;

(c) The Recycled Product can be substituted for a comparable non-recycled product; and

(d) The Recycled Product's costs do not exceed the costs of non-recycled products by more than five percent (5%), or a higher percentage if a Written determination is made by the Authorized Agency and set forth in the Solicitation Document. When making this determination, the Authorized Agency must consider the costs of the Goods following any adjustments the Authorized Agency makes to the price of the Goods after evaluation pursuant to OAR 125-246-0310.

(3) For the purposes of this Section, an Authorized Agency must determine if Goods are manufactured from Recycled Materials in accordance with standards established by the Department .

(4) Providers must certify in their Offers:

(a) The minimum, if not exact, percentage of Recycled Product in all materials and supplies offered; and

(b) Both the post-consumer and secondary waste content thereof. Providers may certify a zero percent Recycled Product content. This certification applies to Public Improvement products and all other Procurements.

(5) To be eligible for a preference under ORS 279A.125 and this Rule:

(a) The Provider must indicate which materials and supplies contain verifiable recycled content; and

(b) Such products must meet the requirements of ORS 279A.125 and this Rule.

(6) A preference under ORS 279A.125 will only be applied to those products in the Offer that contain verifiable recycled content.

(7) Offers that contain false information about:

(a) The percentage of Recycled Product, post-consumer and secondary waste content; or

(b) Verifiable recycled content, must be rejected as nonresponsive, and the Provider offering false information may be deemed non-responsible.

(8) Contracts awarded as a result of a preference under ORS 279A.125 are subject to such investigation, including but not limited to, audits, plant visitations, examination of invoices, laboratory analysis, and other documents, etc., as the Department deems necessary to confirm that the products supplied therein contain the percentages of Recycled Product, post-consumer and secondary waste stated in the Offer.

(9) Failure to provide products containing the percentages of Recycled Product, post-consumer and secondary waste stated in the Offer may result in:

(a) The Provider reimbursing the State for the portion of the Contract Price that is attributable to the preference applied under ORS 279A.125;

(b) Contract termination; or

(c) Both (a) and (b), or such other remedies as the Department deems appropriate.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.125
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12

**125-246-0323**

**Recycled Paper and Paper Products**

(1) The Department promotes the use of Recycled Paper and paper products, and no less than 35% of Authorized Agency Procurements of paper products may be from Recycled Paper Products, pursuant to ORS 279A.155.

(2) The Department must make available to Agencies paper and paper products that contain significant quantities of Recycled Materials in all grades where it can be obtained. The Department and Authorized Agencies must purchase Recycled Paper and paper products when the cost of such Recycled Paper or paper products is no more than five (5%) higher than the cost of the same quality paper or paper products containing little or no Recycled Paper. The Department and Authorized Agencies must give a preference of up to five percent (5%) pursuant to ORS 279A.125(2), to suppliers of Recycled Paper and paper products, over the lowest price of non Recycled Paper and paper products if the fitness and quality of the Recycled Paper content paper meet Specification requirements and the type of Recycled Paper content is equivalent to the same type of virgin material.

(3) Except as provided in this Rule and regardless of cost, the Department must make Recycled Paper and paper products available to Authorized Agencies through a Recycled Paper agreement. Authorized Agencies that find it economically feasible to exceed the incentive in Section (2) of this Rule for Recycled Paper may do so either by use of agreements for Recycled Paper or by indicating on their purchase request the percentage of Recycled Paper incentive, which is economically feasible for them.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.125 & 270A.155
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12

**125-246-0324**

**Recycling: Food Service and Food Packaging**

(1) The Department promotes the use of recyclable or biodegradable products for food service and packaging.

(2) The five percent (5%) preference in ORS 279A.125(2) must apply to purchases of Recycled Products for food service and packaging that are not paper products. The minimum purchase in ORS 279A.155 of at least thirty-five percent (35%) must apply to purchases of Recycled Products for food service and food packaging that are 100% paper or paper products.

(3) Recyclable or Biodegradable Products for food service and packaging will be made available for purchase by Authorized Agencies.

(4) Authorized Agencies are required to purchase recyclable or biodegradable food service and packaging products when purchasing supplies.

(5) The Department must include a provision in all food service Contracts and extensions to such Contracts, requiring the use of recyclable or biodegradable food service products when such products are readily available, meaning deliverable within thirty (30) days of placement of an order by the food service Contractor to its supplier. This period of time may be less or more, as industry standards for various commodities indicate.

(6) The Department must encourage its suppliers to provide biodegradable or Recycled Products as substitutes.

(7) The Department must use best efforts to obtain and use biodegradable or Recyclable Products as substitutes for products that are non-biodegradable or non-recyclable.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.125 & 270A.155
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05

**125-246-0330**

**Supplier Requirements**

(1) **Requirements to Transact Business in Oregon**.

(a) A Contractor who is a corporation, partnership, or who has an assumed business name must be registered with the Secretary of State Office in accordance with ORS Chapters 58, 60, 62, 63, 65, 67, 70, and 648. This registration is the obligation of the Contractor, not the Agency.

(b) In addition, for Contracts requiring the services of one or more architects, engineers, and land surveyors, these Consultants must be registered with the appropriate licensing boards under the provisions of ORS 671.020, 672.020, and 672.025.

(c) The statutory requirements for contracting firms to register with the Secretary of State’s Office may be subject to a limited number of exceptions under federal law. For example, national banks, when they contract with Authorized Agencies, are not subject to the registration requirement.

(d) The Contractor or Consultant must be registered at the time of the execution of the Contract and during the entire term of the Contract.

(2) **Tax Compliance**.

(a) No Contract or other agreement for more than $1,000 may be entered into, renewed or extended with any Person unless the Person certifies in Writing, under penalty of perjury, that the Person is not in violation of any tax laws in accordance with ORS 305.380(4), and 305.385(6) and (7).

(b) Agency must determine that a Bidder or Proposer is responsible under ORS 279B.110, OAR 125-247-0500 and 125-247-0640. In order to make this determination, a Bidder or Proposer must demonstrate to the Agency that the Bidder or Proposer has complied with the tax laws of this state or a political subdivision of this state, including ORS 305.620 and ORS chapters 316, 317 and 318, any tax provisions imposed by a political subdivision that apply to the Offeror or to the performance of the Contract, and any rules and regulations that implement or enforce those tax laws. The Bidder or Proposer must demonstrate compliance by attesting in Writing, that the Bidder or Proposer has complied with the tax laws of this state or a political subdivision of this state, including ORS 305.620 and ORS chapters 316, 317 and 318, any tax provisions imposed by a political subdivision that apply to the Offeror or to the performance of the Contract, and any rules and regulations that implement or enforce those tax laws. (Attestation).

(A) Agency may determine which Bidder or Proposer must submit an Attestation and the timing and manner of the submittal.

(B) Agency may allow the Bidder or Proposer to electronically transmit the Attestation, and Agency may maintain the electronically transmitted Attestation in lieu of the original Attestation.

(C) A Contracting Agency may exercise discretion in determining whether a particular form of attesting to compliance with the tax laws is “credible and convenient” under ORS 279B.110(2)(e), taking into consideration the circumstances in which the Attestation is made and the consequences of making a false Attestation. Therefore, a Contracting Agency may find acceptable forms of Attestation that range from a notarized statement to a less formal document that records the Offeror’s Attestation. However, State Contracting Agencies may not accept the certificate of compliance with tax laws required by ORS 305.385 unless that certificate embraces, in addition to the tax laws described in ORS 305.380, the tax laws of political subdivisions.

(D) An Attestation attests to the Bidder or Proposer’s current compliance with tax laws. During the period Bidder or Proposer is in compliance, a Bidder or Proposer may submit a copy of the same Attestation to multiple Agencies or for multiple Invitations to Bid or Requests for Proposals, and an Agency is not required to obtain a new original Attestation from a Bidder or Proposer for each Procurement.

(E) The Bidder or Proposer is responsible for determining whether the Bidder or Proposer is in compliance with tax laws. If applicable, compliance with tax laws may not require payment of taxes.

(3) **Net Neutrality.**

(a) Definitions. For purposes of this section, the following terms are defined in Oregon Laws 2018, Chapter 88 (HB 4155) and mean:

(A) "Broadband Internet access service":

(i) A mass-market retail Internet access service provided by wire or radio that enables a person to transmit data to or receive data between the person's customer premises equipment, including mobile devices, and all, or substantially all, Internet endpoints;

(ii) Any service that the Public Utility Commission finds is providing a service that is the functional equivalent of the service described in sub-subparagraph (i) of this subparagraph; or

(iii) Any service that is incidental to or that enables the operation of the service described in sub-subparagraph (i) of this subparagraph.

(B) "Broadband Internet access service" does not include dial-up Internet access service.

(C) "Broadband Internet access service provider" means a person or Public Body that provides broadband Internet access service.

(D) "Content, applications or services" means all traffic transmitted to or from end users of a broadband Internet access service.

(E) "Edge provider" means any person that provides content, applications or services over the Internet, and any person that provides a device used for accessing content, applications or services over the Internet.

(F) "End user" means any person that uses a broadband Internet access service.

(G) "Fixed broadband Internet access service" means broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, including fixed satellite services and licensed and unlicensed fixed wireless services.

(H) "Mobile broadband Internet access service" means broadband Internet access service that serves end users primarily using mobile stations.

(I) "Nonharmful device" means a device the Public Utility Commission determines by rule to be nonharmful to broadband Internet access services.

(J) "Paid prioritization" means a broadband Internet access service provider's management of its network to directly or indirectly favor some traffic over other traffic, including through traffic shaping, prioritization, resource reservation or other forms of preferential traffic management, either in exchange for consideration from a third party or to benefit an affiliated entity.

(K) "Public Body" is defined in ORS 174.109, and means state government bodies, local government bodies, and special government bodies.

(b) Except as provided in subsection (d) below, no Public Body, as defined in ORS 174.109, may contract with, or enter into a renewal or extension of an existing contract with, a broadband internet access service provider that, at any time on or after January 1, 2019:

(A) Engages in paid prioritization;

(B) Blocks lawful content, applications or services or nonharmful devices;

(C) Impairs or degrades lawful Internet traffic for the purpose of discriminating against or favoring certain Internet content, applications or services or the use of nonharmful devices;

(D) Unreasonably interferes with or unreasonably disadvantages an end user's ability to select, access and use the broadband Internet access service or lawful Internet content, applications or services or devices of the end user's choice; or

(E) Unreasonably interferes with or unreasonably disadvantages an edge provider's ability to make devices or lawful content, applications or services available to end users.

(c) For the purposes of this Rule, a Public Body contracts with a broadband internet access service provider if the Public Body procures, or provides funding for the procurement of, broadband internet access service, including fixed broadband internet access service or mobile broadband internet access service, from the broadband internet access service provider.

(d) Notwithstanding subsection (b) of this Rule, a Public Body may contract with a broadband internet access service provider that:

(A) Is the sole provider of fixed broadband internet access service to the geographic location subject to the contract;

(B) Engages in any of the activities described in subsection (3)(b) of this Rule in the process of addressing copyright infringement or other unlawful activity or the needs of emergency communications, law enforcement, public safety or national security authorities;

(C) Engages in paid prioritization if the Public Utility Commission determines that the broadband Internet access service provider's paid prioritization provides significant public interest benefits and does not harm the open nature of the provided broadband Internet access service;

(D) Engages in any activities described in subsection (3)(b) to (d) of this section if the Public Utility Commission determines that the broadband Internet access service provider's engagement in the activity is reasonable network management. An activity is reasonable network management if the activity:

(i) Has a technical network management justification;

(ii) Does not include other business practices; and

(iii) Is narrowly tailored to achieve a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service; or

(E) Engaged in any of the activities described in subsection (b) of this section at any time on or after January 1, 2019 if:

(i) The broadband Internet access service provider certifies in a Signed Writing that it has ceased engaging in all of the activities described in subsection (b) of this section; and

(ii) The Public Utility Commission determines that allowing a Public Body to contract with the broadband Internet access service provider provides significant public interest benefits.

(e) A broadband Internet access service provider engaged in the provision of broadband Internet access service to a Public Body must publicly disclose information regarding the provider's network management practices and performance characteristics and the commercial terms of the provider's broadband Internet access service sufficient for end users to verify that the service is provided in compliance with Oregon Laws 2018, Chapter 88 (HB 4155), applicable Public Utility Commission rules, and this Rule.

(f) The Legislative Assembly has directed the Public Utility Commission to specify, by rule, the manner and form in which provider disclosures must be made.

(g) A broadband Internet access service provider that is engaged in or may engage in the provision of broadband Internet access service to a Public Body must certify in a Signed Writing that it is in compliance with Oregon Laws 2018, Chapter 88 (HB 4155) and applicable Public Utility Commission rules, and will remain in compliance throughout the term of the Public Body Contract.

(4) Debt Collection.

(a) Definitions. For purposes of this section:

(A) "State Agency" means any agency within the Executive Department as defined in ORS 174.112, other than the Oregon Secretary of State, Oregon State Treasury, Oregon Department of Justice, and Oregon Bureau of Labor and Industries.

(B) "Liquidated Debt" is defined in the Oregon Accounting Manual number 35.30.30.

(C) "Delinquent Debt" is a receivable for which payment has not been received by the due date.

(b) State Agencies must consider, where appropriate, Liquidated Debt and Delinquent Debt owed to the State when evaluating vendors on state Price Agreements, when issuing Purchase Orders or similar ordering documents, or when entering into new Contracts with vendors when the Contract value exceeds $150,000, to the extent not prohibited by law.

(c) State Agencies, to the extent not prohibited by law, must include in Public Contracts provisions that allow State Agencies to recoup Liquidated Debt and Delinquent Debt owed by vendors to any State Agency.

(d) Subject to policies established by DAS, State Agencies must make efforts to recover Liquidated Debt and Delinquent Debt from entities to which State Agencies are remitting significant payments.

(5) **Pay Equity Certificate**. A Bidder or Proposer in any State Contracting Agency procurements must demonstrate to the Agency that the Bidder or Proposer possesses an unexpired certificate, issued by the Oregon Department of Administrative Services in accordance with ORS 279A.167, if the Offeror employs 50 or more full-time workers at the time of the Closing and the estimated Contract price exceeds $500,000. Unless the certificate provides otherwise, the certificate shall be unexpired for a period of three years from the date issued.

(6) **Policy And Practice Preventing Sexual Harassment, Sexual Assault And Discrimination Against Members of a Protected Class; Notice; Exceptions.**

(a) Except as provided in subsection (4)(f) of this Rule, no State Contracting Agency may enter into a Public Contract with an anticipated Contract Price, including all amendments, of $150,000 or more, with a prospective Contractor unless that Contractor certifies in a Signed Writing that the prospective Contractor has a policy and practice of preventing:

(A) sexual harassment;

(B) sexual assault; and

(C) discrimination against employees who are members of a protected class.

(b) The Contractor’s policy and practice must include, at a minimum:

(A) A Written notice to each employee that clearly prohibits and specifies disciplinary measures for conduct that constitutes sexual harassment, sexual assault, or discrimination against a member of a protected class;

(B) A clear process that:

(i) Enables an employee that experiences or witnesses conduct that constitutes sexual harassment, sexual assault or discrimination against a member of a protected class to report and stop the conduct; and

(ii) Guides the prospective Contractor in responding to the report, resolving the issues identified in the report, and disciplining employees who engage in prohibited conduct;

(C) A regular Written procedure for submitting a report that identifies the specific individuals to whom an employee may submit the report and the individuals who have responsibility for resolving issues identified in the report;

(D) A practice of treating as confidential, to the extent permitted by law, any report that an employee makes under the Contractor’s policy and practice;

(E) A prohibition against retaliating against an employee who experiences; witnesses, or reports, conduct that constitutes sexual harassment, sexual assault or discrimination against a member of a protected class;

(F) A prohibition against discrimination in providing benefits to an employee or a dependent of the employee based on the employee’s membership in a protected class or the membership of the employee’s dependent in a protected class; and

(G) A prohibition on denying benefits to an employee or a dependent of the employee based solely on the employee’s gender identity or the gender identity of the employee’s dependent, if the prospective Contractor provides health insurance or health care benefits.

(c) A prospective Contractor may provide the required Written notice by means of a printed or electronic employee handbook.

(d) The Department may develop and make available on the Department’s website an electronic template or other guidance for prospective Contractors in meeting these notice requirements. The Department may provide suggested language, forms, or other guidance to help enable prospective Contractors to satisfy the requirements of this Rule, or may approve any part or all of a Contractor’s policy and practice that the Department may determine meets the requirements of this Rule.

(e) A Public Contract with a Contract Price of $150,000 or more must include as a material term of the Public Contract that the Contractor certify in Writing:

(A) that the Contractor has a policy and practice that meets the requirements of this Rule, and

(B) that the Contractor will maintain the policy and practice in force during the entire term of the Public Contract.

(f) A State Contracting Agency may enter into a Public Contract described in this Rule with a prospective Contractor that has not provided the Written certification if:

(A) The State Contracting Agency conducted the procurement under ORS 279B.075, 279B.080 or 279B.085; or

(B) Only one prospective Contractor submitted a bid or proposal in response to the State Contracting Agency’s solicitation.

(g) As used in this Rule:

(A) “Discrimination” means conduct that has the purpose or effect of creating employment conditions for an individual that are intimidating, hostile or offensive or that show animosity, resentment, anger, prejudice or ill will to others primarily because of the individual’s identification with or membership in a protected class.

(B) “Protected class” means a group of people that state or federal law protects from employment discrimination including, but not limited to, a group in which membership depends on an ascribed association or identification, or an individual’s voluntary association or identification with other individuals, on the basis of one or more of these characteristics:

(i) Race, color or ethnicity;

(ii) National origin;

(iii) Sex;

(iv) Gender, including actual or perceived gender identity;

(v) Sexual orientation;

(vi) Disability;

(vii) Age;

(viii) Marital status; or

(ix) Religion.

(C) “Sexual assault” means any unwanted sexual contact, as defined in ORS 163.305.

(D) “Sexual harassment” means:

(i) A request or demand for sexual favors in an implicit or explicit exchange for an employment-related benefit or as a means of avoiding an employment-related detriment; or

(ii) Unwelcome conduct of a sexual nature that has the purpose or effect of interfering with a person’s ability to perform job duties or that creates an intimidating, offensive or hostile work environment.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070

Stats. Implemented:ORS 279A.112, 279A.140, 279A.167, Or. Laws 2018 ch. 88 (HB 4155), 279B.110(1), 279C.105(1), Governor’s Executive Order 17-09

Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 3-2014, f. 12-29-14, cert. ef. 1-1-15; DAS 4-2015, f. 12-29-15, cert. ef. 1-1-16, f. 12-28-17, cert. ef. 1-1-18; DAS 3-2018, f. 12-14-18 & cert. ef. 1-1-19

**COMMENTARY ON OAR 125-246-0330: Revised January 1, 2015**

(1) Sections(1) and (2) of this Rule once applied only to Personal Services Contracts. The entirety of this Rule now applies to all Contracts with one or more Persons.

(2) The statutory requirements, reflected in Section (2) of this Rule, for contracting firms to register with the Secretary of State’s Office may be subject to a limited number of exceptions under federal law. For example, national banks, when they contract with Authorized Agencies, are not subject to the registration requirement.

**125-246-0333**

**Independent Contractors**

(1) An Authorized Agency may, within the limits of its delegation under OAR 125-246-0170 and its legislatively approved budget, Contract for Services with Providers who are Independent Contractors.

(2) "**Independent Contractor**" means a Person who provides services to an Authorized Agency in which the Authorized Agency neither controls nor has the right to control the means or manner by which Work is performed. The Authorized Agency may control the results of the services, but not control the means or manner of Contractor's performance of the Work.

(3) Within the parameters of employment, Workers' compensation, and other relevant state and federal laws, and after determining that the contract will not violate any collective bargaining agreements, an Authorized Agency may contract for Services when:

(a) The Work cannot be done in a reasonable time with the Authorized Agency's own Workforce;

(b) An independent and impartial evaluation is required; or

(c) It will be less expensive to contract for the Work.

(4) The Authorized Agency may not use Services Contracts to obtain and pay for the services of an employee. If a Contractor is not an Independent Contractor, the Authorized Agency may not enter into a Services Contract with the Contractor; instead, the Authorized Agency must follow personnel policies for employment options.

(5) **Independent Contractor Status**. The Authorized Agency must develop a Statement of Work for Services, including Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services, that will not result in an employee relationship with the potential Contractor. Contractors must complete the Independent Contractor Certification either as a contract provision or on a form approved by the Chief Procurement Officer (Independent Contractor Certification). If the Contractor cannot certify Independent Contractor status, the Authorized Agency may not contract with the Contractor using a Services Contract, including Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services, except as otherwise allowed in Subsection (5)(f) of this Rule:

(a) An Independent Contractor Certification must be part of each Contract;

(b) If the Contractor is a corporation, the Independent Contractor Certification is still required.

(c) If the nature of the Services or project is such that an employee/employer relationship will exist, the Authorized Agency must hire the individual through normal personnel procedures.

(d) The Contract must include the Contractor's legal name and address. Either the Contract or a separate cover sheet for the Contract must include the Contractor’s Social Security or federal tax identification number.

(e) The Contract must provide that the Contractor is responsible for federal Social Security, except those categories excluded by law, and for any federal or state taxes applicable to the contract payment.

(f) When a Contractor cannot certify that the Contractor meets the definition of “independent contractor,” is customarily engaged in an independently established business, and meets at least three of the requirements for such a business in accordance with ORS 670.600, then the Authorized Agency may contract with the Contractor only if the Designated Procurement Officer of the Authorized Agency approves the Contract upon a determination that the Contractor is an Independent Contractor and the Contract will not result in undue risk to the State.

(g) For compliance with the tax laws in accordance with ORS 279B.110, see OAR 125-246-0330.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.140
Hist.: DAS 6-2008, f. & cert. ef. 7-2-08; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 3-2014, f. 12-29-14, cert. ef. 1-1-15

**125-246-0335**

**Authority and Standards for Personal Services Contracts**

(1) **Application**. For the purposes of this Rule only, "Personal Services" includes Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services.

(2) **Identification of Personal Services Contracts**.

(a) According to ORS 279A.140(2)(h), the Chief Procurement Officer may designate Contracts or classes of Contracts as Personal Services Contracts for the purposes of reporting Personal Services Contracts in accordance with ORS 279A.140 and identifying the appropriate required procedures in accordance with ORS 279A.070 and 279A.140. In the event of uncertainty or disagreement as to the status of any particular Contract or class of Contracts, the Chief Procurement Officer may determine whether a particular contract is a Personal Services Contract.

(b) The Authorized Agency must identify within the Contract that the Authorized Agency is contracting for Personal Services. A failure to adequately describe Personal Services within the Contract will not invalidate the Procurement or Contract if the Authorized Agency properly used a sourcing method according to ORS 279B.055 through 279B.085 or 279C.100 through 279C.125 and substantially followed the related Rules.

(3) **Contracting Out for Services Provided by Employees**.

(a) Where the Authorized Agency is contemplating contracting for Work performed by Authorized Agency employees represented by a labor organization, the Authorized Agency must review the relevant collective bargaining agreement to ensure the contract complies with the provisions and, if applicable, the requirements of ORS 279A.140.

(b) Whenever the Authorized Agency pays more in a given 12-month period to a Provider under a Personal Services Contract for services historically performed by state employees than would have been paid to the Authorized Agency employee performing the same Work, the Authorized Agency must report that fact, with a justifying statement to the Department. The report must be made at the conclusion of each fiscal year.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.140
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12

**125-246-0345**

**Procedures for Personal Services Contracts**

(1) **Contract and Amendment Forms for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services**. Authorized Agencies must comply with OAR 125-248-0300(1).

(2) **Other Forms for Personal Services Contracts and Amendments**. Authorized Agencies must use one of the forms provided or approved by the Chief Procurement Officer for Personal Services Contracts and Amendments (Forms).

(a) **Revised Forms**.

(A) **Designated Procurement Officer Approval up to $150,000**. For revised Forms up to a cumulative value of $150,000 and before an Authorized Agency may use a revised Form, it must obtain its Designated Procurement Officer’s approval of any revisions to the Form’s terms and conditions. The Designated Procurement Officer’s approval is not required for revisions to Form exhibits that are unrelated to terms and conditions.

(B) **Department of Justice Approval over $150,000**. For revised Forms exceeding a cumulative value of $150,000 and before an Authorized Agency may use a revised Form, it must obtain Department of Justice approval of any revisions to the revised Form’s terms and conditions. The Department of Justice approval is not required for revisions to Form exhibits that are unrelated to terms and conditions. The Department of Justice approval may be delivered by facsimile, email, letter or any other objective means of approval.

(b) Upon an Authorized Agency's request, the Department of Justice may approve a revised Form for repeated use for a specific class or classes of transactions.

(c) The Authorized Agency must review the approved Form at least every two years. If upon review the Authorized Agency revises the Form, the Authorized Agency must obtain Department of Justice approval before using the revised Form.

(3) **Screening, Selection, Evaluation and Award Procedures**. An Authorized Agency must follow the procedures set forth in Division 248 of these Rules when contracting for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services. For all other Personal Services Contracts, an Authorized Agency must select a sourcing method from the seven methods available according to ORS 279B.055 through 279B.085 and follow the screening, selection, evaluation and award procedures set forth for the selected sourcing method in Division 247 of these Rules.

(4) **Amendments and Reinstatements**. The procedures for Amendments and reinstatements are found in OAR 125-247-0805, 125-248-0340, and 125-246-0570, respectively. Procedures for Amendments and reinstatements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services are found in OAR 125-248-0340 and 125-248-0310, respectively.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.70 & 279A.140(h)(B)
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12

**125-246-0350**

**Approval of Personal Services Contracts**

(1) **Application**. For the purposes of this Rule only, "Personal Services" includes Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services.

(2) **Chief Procurement Officer Approval**. Except as provided in OAR 125-246-0170, the Chief Procurement Officer or delegate must approve all Personal Services Contracts exceeding $150,000 before the Authorized Agency executes the Contract.

(3) **Requisite Approvals First**. All requisite approvals must be obtained, including the approval of the Attorney General, if required, before any Personal Services Contract entered into by an Authorized Agency becomes binding upon the State and before any service may be performed or payment made under the Contract, unless:

(a) The Contract is exempt from the prohibition against services being performed before review for legal sufficiency is obtained under ORS 291.047(6); or

(b) The Chief Procurement Officer or delegate authorizes an Authorized Agency to acquire services before obtaining all requisite approvals in accordance with OAR 125-246-0351.

(4) **Approval after Legal Sufficiency Review**. The Chief Procurement Officer may not approve a Personal Services Contract before the Attorney General approves this Personal Services Contract under ORS 291.047.

(5) **Types of Approvals**.

(a) When Attorney General legal sufficiency approval is required under ORS 291.047, the Authorized Agency must seek legal approval;

(b) When an Authorized Agency contracts for services normally provided by another Authorized Agency or for services for which another Authorized Agency has statutory responsibilities, the Authorized Agency is required to seek the other Authorized Agency's approvals, prior to final approval by the Chief Procurement Officer. Examples of these special approvals include, but are not limited to:

(A) Department, Risk Management Services, for providing tort liability coverage.

(B) Department, Enterprise Goods and Services Division, Publishing and Distribution, for printing services;

(C) Department, Enterprise Goods and Services Division, for accounting services;

(D) Office of the Treasurer, Debt Management Division, for financial and bond counsel services (bond counsel services also require the approval of the Attorney General); and

(E) State Chief Information Office, for information-system related and telecommunications services. A state agency, as defined in ORS 279A.010(1), must obtain any review or approval in accordance with OAR 125-247-0185. A state agency is also encouraged to use the Chief Information Office as a resource in carrying out information system-related projects. This may include:

(i) Assistance to the state agency in developing Statements of Work related to information system projects;

(ii) Reviews to assure consistency with State standards and direction; and

(iii) A listing of vendors that provide information system-related services.

(c) The Authorized Agency's and Contractor's execution must be obtained;

(d) The Chief Procurement Officer approval, when required, is last.

(6) **Attorney or Financial Auditing Services**.

(a) The Attorney General has sole authority to contract for attorney services. Only the Attorney General may grant exceptions in Writing on a case-by-case basis;

(b) The Secretary of State Audits Division has sole authority to contract for financial auditing services. Only the Secretary of State Audits Division may grant exceptions in Writing on a case-by-case basis.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.140(2)
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 4-2013, f. 12-17-13, cert. ef. 1-1-14; DAS 3-2014, f. 12-29-14, cert. ef. 1-1-15; DAS 4-2016, f. 12-22-16, cert. ef. 1-1-17

**125-246-0351**

**Acquiring Services before Obtaining Requisite Approvals of a Personal Services Contract**

(1) **Application**. For the purposes of this Rule only, "Personal Services" includes Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services. “Requisite approvals” are defined in OAR 125-246-0350.

(2) Personal Services may be performed before all requisite approvals are obtained under a Personal Services Contract if the Personal Services Contract is exempt from the prohibition against services being performed before review for legal sufficiency is obtained under ORS 291.047(6).

(3) The process set forth in this Rule is intended to allow Authorized Agencies to acquire services before obtaining all requisite approvals for those Personal Services Contracts that call for payments of less than the Threshold for legal sufficiency review by the Attorney General.

(4) The Chief Procurement Officer may authorize an Authorized Agency to acquire services before obtaining all requisite approvals when circumstances exist that require prompt action to protect the interests of the State. An Authorized Agency may seek such authorization for a Personal Services Contract or a class of Personal Services Contracts to address specific recurring needs to acquire services on short notice. An Authorized Agency seeking the Chief Procurement Officer’s authorization must describe particular circumstances that make it impracticable to obtain all requisite approvals before acquiring services. The Chief Procurement Officer will only authorize an Authorized Agency to acquire services before obtaining all requisite approvals if the Authorized Agency follows the procedures set forth in this Rule. The Chief Procurement Officer’s authorization according to this Rule only allows the Authorized Agency to acquire services before obtaining all requisite approvals. It does not authorize the Authorized Agency to make any payments before obtaining all requisite approvals.

(5) The Authorized Agency seeking the Chief Procurement Officer’s authorization to acquire services before obtaining all requisite approvals must provide:

(a) Written findings to the Chief Procurement Officer that describe the specific recurring circumstances that require the Authorized Agency to take prompt action to protect the interests of the State because they create substantial risk of loss, damage, interruption of services or threat to public health or safety. The Authorized Agency must also describe why, under these specific circumstances, it will be impracticable to obtain all requisite approvals before acquiring services;

(b) The Personal Services Contract form that the Authorized Agency will use for the Contract entered into after acquiring services, but before making payments.

(c) Documentation demonstrating that the Authorized Agency has established procedures to administer the Contract or class of Contracts, for which it seeks authorization.

(6) The Chief Procurement Officer after review of the material required by Section (5) above, may authorize the Authorized Agency to acquire the specific services under the specific circumstances described in response to Section (5)(a) above before obtaining all requisite approvals. If the Chief Procurement Officer provides authorization, the Chief Procurement Officer will do so in Writing, subject to any conditions or limitations the Chief Procurement Officer deems appropriate, including but not limited to the duration of the authorization, and any other terms and conditions the Chief Procurement Officer may determine are appropriate.

(7) If Authorized Agency acquires services before obtaining all requisite approvals when authorized by the Chief Procurement Officer, the Authorized Agency, as soon as practicable after acquiring the services, must enter into a Written Contract in the form submitted by the Authorized Agency and approved by the Chief Procurement Officer. The Authorized Agency must not revise the terms of the approved Contract form submitted by Authorized Agency without the Chief Procurement Officer’s approval.

(8) The Authorized Agency must not make any payments for services before obtaining all requisite approvals.

(9) The Chief Procurement Officer authorization to perform services before obtaining all requisite approvals does not exempt the Authorized Agency from obtaining legal sufficiency review, if required under the provisions of ORS 291.047.

(10) An Authorized Agency authorized to perform services before obtaining all requisite approvals must follow all applicable screening and selection requirements unless otherwise exempt from those requirements.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.140(2)
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 3-2014, f. 12-29-14, cert. ef. 1-1-15

**125-246-0353**

**Reporting Requirements for Personal Services Contracts**

(1) **Application**. For the purposes of this Rule only, "Personal Services" includes Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and Related Services.

(2) The Department maintains for state agencies an electronic reporting system within ORPIN for reporting Personal Services Contracts. Each state agency that is not exempt from the Public Contracting Code must report in ORPIN each Personal Services Contract and Amendment. The report must include the state agency name, not-to-exceed amount of the Contract, the name of the Contractor, the duration of the Contract, its basic purpose, and a copy of the Personal Services Contract or Amendment. Whenever a state agency pays more in a calendar year under a Personal Services Contract for services historically performed by state employees than the state agency would have paid to the state agency’s employees performing the same Work, the state agency must so report through ORPIN and include in the report a statement of justification for the greater costs, according to ORS 279A.140(2)(h)(A)(i).

(3) The Department must submit a report to the Legislature summarizing state agency Personal Services Contracts. This report must include the name of the state agency, the not-to-exceed amount of the Contracts, the name(s) of Contractor(s), the duration of Contract(s) and the basic purpose of the Contract(s). The report must also include the total dollar figure of all Personal Services Contracts for each fiscal year.

(4) The Department maintains an electronic file of Personal Services Contracts report forms for public review. The electronic file includes a justification statement, when applicable, and documentation of the selection process for each Contract.

(5) The state agency must keep in the Procurement File all Personal Services Contracts, justification statements, when applicable, documentation of the selection process for each Contract, and the report forms in compliance with OAR 166-300-0015(7) and any other applicable laws.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.140(h)(A)
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12

**125-246-0360**

**Purchases Through Federal Programs**

(1) **Exemption**. An Authorized Agency may purchase certain authorized Supplies and Services through General Service Administration (GSA) federal programs or federal Contracts (Federal Programs) without Competitive Sealed Bidding, Competitive Sealed Proposals or other competition required under ORS 279B.050 to 279B.085, provided that the Authorized Agency has federal authorization to purchase through the Federal Program and follows the procedures set forth in this rule.

(2) **Federal Authorization**.

(a) The Federal Programs named in ORS 279A.180 are accessible to Authorized Agencies for purchasing Supplies and Services. In addition, by this Rule, the Director of the Department (Director) hereby makes the determination according to ORS 279A.180, that the GSA Order of 2000 and any subsequent revisions or updating of this GSA Order of 2000 (GSA Orders) describe other Federal Programs that, under federal law, are similar to 10 U.S.C. 381 or Section 211 of the Electronic Government Act of 2002 in effectuating or promoting transfers of property to Authorized Agencies; therefore, Authorized Agencies may purchase through those Federal Programs described in a GSA Order without making individual requests for determination to the Director.

(b) If an Authorized Agency desires to purchase through another Federal Program that is not expressly named in ORS 279A.180 or a GSA Order, the Authorized Agency must request in Writing a determination from the Director or the Director's designated representative. In the request, the Authorized Agency must document that the federal government has authorized states, including the Authorized Agency, to purchase through the proposed Federal Program. The request of the Authorized Agency and the determination by the Director or representative must be limited to those other Federal Programs described in ORS 279A.180 that, under federal law, are similar to 10 U.S.C. 381 or Section 211 of the Electronic Government Act of 2002 in effectuating or promoting transfers of property to Authorized Agencies.

(c) If no federal authorization exists as described in Sections (2)(a) and (b) of the Rule, then an Authorized Agency is not permitted to purchase through any Federal Program.

(3) **Procedures**. To purchase through a Federal Program, an Authorized Agency must document in its Procurement File that:

(a) The federal authority for the Authorized Agency to purchase through the Federal Program, referring to ORS 279A.180, a GSA Order, or the Chief Procurement Officer’s approval of an Authorized Agency's request.

(b) The acquisition meets the Authorized Agency's needs;

(c) The price and other terms of the acquisition are Advantageous to the State;

(d) No mandatory Department Price Agreement for the authorized Supplies and Services exists, based upon the Authorized Agency's inquiry through ORPIN;

(e) The Authorized Agency has considered the acquisition's impact upon local business as follows:

(A) If the Procurement is in excess of $10,000, the Authorized Agency has given timely notice through ORPIN of its needs, reasons, and intent to procure through a Federal Program;

(B) The Authorized Agency has provided a reasonable time period under the circumstances for individuals to respond to the notice and send Written comments to the Authorized Agency; and

(C) The Authorized Agency has considered any comments and replied, if appropriate, before proceeding with its Procurement through a Federal Program. This Rule provides for an informal opportunity to comment to and be considered by the Authorized Agency, instead of the formal notice requirements for Solicitations in excess of $10,000 according to ORS 200.035.

(f) State and local preference programs, including but not limited to Inmate Labor in accordance with the Oregon Constitution, Article I, Section 41, Products of Disabled Individuals Program of ORS 279.835 to 850, and state requirements Contracts under OAR 125-247-0296, are not waived or otherwise adversely affected by an acquisition through a Federal Program;

(g) The Authorized Agency has complied with OAR 137-045-0010 to 137-045-0090, and if it is required, obtained a legal sufficiency review or exemption from the Department of Justice; and

(h) The Authorized Agency is informed of its Federal Program's Procurement Process, including:

(A) Voluntary and Direct Contract. The Authorized Agency and Contractors participate voluntarily. The Contractors make direct deliveries to the Authorized Agency and retain the right to decline orders on a case-by-case basis, for any reason, within a five-Day period of receipt of that order;

(B) Funding Fee. The price of a Federal Program Contract includes a GSA industrial funding fee to cover GSA administrative costs to operate the Federal Program;

(C) New Contract. When a Contractor accepts an order from an Authorized Agency, a new Contract is formed. The Contract's terms and conditions are incorporated by reference; and

(D) Additional Terms and Conditions. The Authorized Agency may add to its Contract such significant, substantial contract terms and conditions as are required by State statutes or rules, if such additions do not conflict with the Federal Program's Contract terms and conditions. Examples of such terms and conditions include, but are not limited to:

(i) Prompt Payment. The Authorized Agency may apply the terms and conditions of Oregon's prompt payment law to its Contracts, but if the Authorized Agency fails to make this addition, then the Authorized Agency may be subject to the Federal Prompt Payment Act, 31 U.S.C. sec. 3901 et seq., as implemented at subpart 32.9 of the Federal Acquisition Regulation (FAR);

(ii) Commercial Terms. Patent indemnity and other commercial terms and conditions may be added if they do not conflict with the Federal Program's terms and conditions; and

(iii) Conflict Resolution. The Authorized Agency may revise the Contract's dispute resolution provision to use Alternative Dispute Resolution (ADR) to the extent authorized by law.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070

Stats. Implemented: ORS 279A.180
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 4-2013, f. 12-17-13, cert. ef. 1-1-14; DAS 4-2016, f. 12-22-16, cert. ef. 1-1-17

**COMMENTARY ON OAR 125-246-0360**

(1) This Rule emphasizes the importance of the decision by the Authorized Agency to procure through Federal Programs and requires the Authorized Agency to consider the possible economic and community impacts upon the State of Oregon. Economic impacts include the effect on pricing, because Department Price Agreements achieve discounted prices for the benefit of Authorized Agencies based upon the aggregated volume and community of buyers.

(2) The Authorized Agency must also be informed about the federal Procurement Process and in particular, that competition may not occur in the selection of some federal Contractors, and

(3) Required federal terms and conditions may conflict with Oregon terms and conditions. This Rule does not apply to applications for federal Grants or Federal Surplus Property programs.

**125-246-0365**

**ORS 190 Agreements**

(1) **Reporting 190 Agreements through ORPIN**. A state agency that enters into an agreement under ORS 190.110, 190.420 or 190.485, or an agreement under ORS 190.112 or under ORS 660.342, must submit a summary of the agreement through ORPIN within the 30-day period immediately following the effective date of the agreement. For the purpose of this Rule only, “state agency” is defined in ORS 190. The summary must include the following information:

(a) Names of the parties to the agreement;

(b) Date of the agreement;

(c) Subject matter of the agreement; and

(d) The agency through which a person may obtain a copy of the agreement.

(2) **Interstate and International Agreements**. Following ORS 190, each Agency may enter into Interstate and International Agreements through negotiation, direct award, direct appointment, or in any other manner that satisfies the legal requirements for such Agreements.

(3) **Tribal Agreements**. Following ORS 190, each Agency may enter into Tribal Agreements through negotiation, direct award, direct appointment, or in any other manner that satisfies the legal requirements for such Agreements.

(4) **Interagency and Intergovernmental Agreements**. Following ORS 190, each Agency may enter into Interagency and Intergovernmental Agreements through negotiation, direct award, direct appointment, or in any other manner that satisfies the legal requirements for such Agreements.

(5) All Interstate, International, Tribal, Interagency and Intergovernmental Agreements, when required, are subject to review and approval by the Attorney General.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 190.110, 190.112, 190.420, 190.485, 279B.085, 660.342
Hist.: DAS 6-2008, f. & cert. ef. 7-2-08; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10

**125-246-0400**

**Cooperative Procurement; Purpose, Policy, and Definitions**

(1) See OAR 137-046-0400 through 137-046-0480.

(2) Regardless of OAR 137-046-0400 through 137-046-0480, Authorized Agencies must comply with the following provisions:

(a) **Adaptation of Model Rules for Agency Use**. The following words found in those Model Rules expressly adopted by the Department are replaced by the words as defined in this subsection (2)(a):

(A) “**Administering Contracting Agency**” is replaced by “**Administrator**.”

(B) “**Purchasing Contracting Agency**” is replaced by “**Participant**.”

(b) **Definitions**. For the purposes of these Cooperative Procurement Rules only, the following definitions apply to Cooperative Procurement:

(A) An “**Administrator**” means a governmental body that solicits and establishes the Original Contract for Supplies and Services or Public Improvements in a Cooperative Procurement. “Administrator” means the Chief Procurement Officer or subject to the approval of the Chief Procurement Officer: an Agency, another Public Body within the state of Oregon, or a governmental body outside the state of Oregon. An Administrator has the same rights and responsibilities as an Administering Contracting Agency under ORS 279A.200 through 279A.225.

(B) "**Contract**" means a Public Contract or Price Agreement resulting from a Cooperative Procurement by an Administrator.

(C) "**Cooperative Procurement**" means a Procurement conducted by an Administrator or on behalf of one or more Participants. Cooperative Procurement includes but is not limited to multiparty Contracts and Price Agreements.

(D) "**Cooperative Procurement Group**" means:

(i) A group of Agencies, Public Bodies within the state of Oregon or any governmental body outside the state of Oregon, separately or in any combination;

(ii) Approved by the Chief Procurement Officer; and

(iii) Joined through an intergovernmental agreement for the purposes of facilitating a Cooperative Procurement.

(E) "**Interstate Cooperative Procurement**" means a Permissive Cooperative Procurement in which the Administrator is authorized under that governmental body's laws, rules, or regulations to enter into Public Contracts and in which one or more of the Participants are located outside the State of Oregon.

(F) "**Joint Cooperative Procurement**" means a Cooperative Procurement that identifies:

(i) The Participants or the Cooperative Procurement Group; and

(ii) The contract requirements or estimated contract requirements for the Original Contract.

(G) "**Original Contract**" means the initial Contract or Price Agreement awarded under a Cooperative Procurement by an Administrator.

(H) A “**Participant**” means a governmental body that procures Goods, Services, or Public Improvements from a Provider based on the Original Contract established by an Administrator in a Cooperative Procurement. For the purpose of the Cooperative Procurement Rules, the procured Services include Architectural, Engineering and Land Surveying Services, and Related Services. A Participant may be the Chief Procurement Officer or, subject to the approval of the Chief Procurement Officer: an Authorized Agency, a local Public Body, a state agency with independence under ORS 279A.050, or a governmental body located outside the State of Oregon. A Participant has the same rights and responsibilities as a Participating or Purchasing Contracting Agency under ORS 279A.200 through 279A.225.

(I) "**Permissive Cooperative Procurement**" means a Cooperative Procurement in which the Participants are not identified.

(c) **Authority for Cooperative Procurements**.

(A) The Chief Procurement Officer will enter into Cooperative Procurements on behalf of Agencies, unless an Authorized Agency receives a delegation of authority according to OAR 125-246-0170 to act as an Administrator or Participant.

(B) Subject to a delegation of authority described in subsection (2)(c)(A) of this Rule, an Administrator or Participant may participate in, sponsor, conduct or administer Joint Cooperative Procurements, Permissive Cooperative Procurements and Interstate Cooperative Procurements in accordance with ORS 279A.200 through 279A.225 and these Rules.

(C) For Permissive Cooperative Procurements, each Participant that participates after the Award of the Original Contract must determine, in Writing, whether the Solicitation and award process for the Original Contract arising out of a Cooperative Procurement is substantially equivalent to those identified in ORS 279B.055, 279B.060 or 279B.085, consistent with 279A.200(2). The Participant must maintain this Written determination in the Participant’s Procurement File.

(d) **Responsibilities**.

(A) The Administrator of a Cooperative Procurement may establish any terms and conditions necessary to allow other Participating Authorized Agencies or Cooperative Procurement Groups of which the Participant is a member (collectively, "Participant”) to participate in a Cooperative Procurement. The Administrator may require Participants to enter into a Written agreement that establishes the terms and conditions for participation in a Cooperative Procurement. These terms and conditions may include, but are not limited to: the establishment of any administrative fees for the Administrator, whether each Person must enter into a Written agreement with the Administrator, and any other matters related to the administration of the Cooperative Procurement source selection and the resulting Original Contract. The Administrator may include provisions in the Solicitation Document for a Cooperative Procurement and advertise the Solicitation Document in a manner to assist Participants’ compliance with the Code and these Rules.

(B) In administering or applying these Rules, the Administrator must collaboratively review and compare the procurement needs and requirements of both the Administrator and the respective Participant(s) for the purpose of using a Cooperative Procurement to achieve cost savings (for examples: lowest total cost of acquisition, least time to procure, process streamlining, Return on Investment calculation based on a comparison of the total costs of individual Authorized Agency Procurements versus a Cooperative Procurement).

(C) If a Participant enters into a Contract based on a Cooperative Procurement, the Participant must comply with the Code, these Rules, and any terms and conditions set out by the Administrator, including:

(i) The extent to which the Participant may participate in the Cooperative Procurement;

(ii) The advertisement of the Solicitation Document for the Cooperative Procurement; and

(iii) Public notice of the Participant’s intent to establish Contracts based on a Cooperative Procurement.

(D) Joint, Permissive, and Interstate Cooperative Procurement Solicitations must comply with OAR 125-247-0305.

(e) Amendments of Cooperative Procurements must comply with OAR 125-247-0805.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 279A.050, 279A.065(5), 279A.070, 279A.140, 279A.205, 279A.210, 279A.215, 279A.220, 279A.225
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 4-2013, f. 12-17-13, cert. ef. 1-1-14

**Cooperative Procurement**

**137-046-0400**

Authority for Cooperative Procurements

(1) Contracting Agencies may participate in, sponsor, conduct or administer Joint Cooperative Procurements, Permissive Cooperative Procurements and Interstate Cooperative Procurements in accordance with ORS 279A.200 through 279A.225.

(2) Each Purchasing Contracting Agency shall determine in Writing whether the solicitation and award process for an Original Contract arising out of a Cooperative Procurement is substantially equivalent to those identified in ORS 279B.055, 279B.060 or 279B.085, consistent with 279A.200(2).

Stat. Auth.: ORS 279A.065
Stats. Implemented: ORS 279A.065 & 279A.205
Hist.: DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05; DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

**137-046-0410**

**Responsibilities of Administering Contracting Agencies and Purchasing Contracting Agencies**

(1) If a Contracting Agency is an Administering Contracting Agency of a Cooperative Procurement, the Contracting Agency may establish the conditions under which Persons may participate in the Cooperative Procurement administered by the Administering Contracting Agency. Such conditions may include, without limitation, whether each Person who participates in the Cooperative Procurement must pay administrative fees to the Administering Contracting Agency, whether each Person must enter into a Written agreement with the Administering Contracting Agency, and any other matters related to the administration of the Cooperative Procurement and the resulting Original Contract. A Contracting Agency that acts as an Administering Contracting Agency may, but is not required to, include provisions in the Solicitation Document for a Cooperative Procurement and advertise the Solicitation Document in a manner to assist Purchasing Contracting Agencies' compliance with the Code or these Model Rules.

(2) If a Contracting Agency acting as a Purchasing Contracting Agency enters into a Contract based on a Cooperative Procurement, the Contracting Agency shall comply with the Code and these Model Rules, including without limitation those sections of the Code and these Model Rules that govern:

(a) The extent to which the Purchasing Contracting Agency may participate in the Cooperative Procurement;

(b) The advertisement of the Solicitation Document related to the Cooperative Procurement; and

(c) Public notice of the Purchasing Contracting Agency's intent to establish Contracts based on a Cooperative Procurement.

Stat. Auth.: ORS 279A.065
Stats. Implemented: ORS 279A.065 & 279A.205
Hist.: DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05; DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

**137-046-0420**

**Joint Cooperative Procurements**

A Contracting Agency that chooses to participate in, sponsor, conduct or administer a Joint Cooperative Procurement may do so only in accordance with ORS 279A.210.

Stat. Auth.: ORS 279A.065
Stats. Implemented: ORS 279A.065 & 279A.210
Hist.: DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

**137-046-0430**

**Permissive Cooperative Procurements**

A Contracting Agency that chooses to participate in, sponsor, conduct or administer a Permissive Cooperative Procurement may do so only in accordance with ORS 279A.215.

Stat. Auth.: ORS 279A.065
Stats. Implemented: ORS 279A.065 & 279A.215
Hist.: DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

**137-046-0440**

**Advertisements of Intent to Establish Contracts through a Permissive Cooperative Procurement**

(1) For purposes of determining whether a Purchasing Contracting Agency must give notice of intent to establish a Contract through a Permissive Cooperative Procurement as required by ORS 279A.215(2)(a), the estimated amount of the procurement will exceed $250,000 if:

(a) The Purchasing Contracting Agency's Contract arising out of the Permissive Cooperative Procurement expressly provides that the Purchasing Contracting Agency will make payments over the term of the Contract that will, in aggregate, exceed $250,000, whether or not the total amount or value of the payments is expressly stated;

(b) The Purchasing Contracting Agency's Contract arising out of the Permissive Cooperative Procurement expressly provides for payment, whether in a fixed amount or up to a stated maximum amount, that exceeds $250,000; or

(c) At the time the Purchasing Contracting Agency enters into the Contract, the Purchasing Contracting Agency reasonably contemplates, based on historical or other data available to the Purchasing Contracting Agency, that the total payments it will make for Goods or Services, or both, or Personal Services, under the Contract will, in aggregate, exceed $250,000 over the anticipated duration of the Contract.

(2) An Administering Contracting Agency that intends to establish a Contract arising out of the Permissive Cooperative Procurement it administers may satisfy the notice requirements set forth in ORS 279A.215(2)(a) by including the information required by 279A.215(2)(b) in the Solicitation Document related to the Permissive Cooperative Procurement, and including instructions in the Solicitation Document to potential Offerors describing how they may submit comments in response to the Administering Contracting Agency's intent to establish a Contract through the Permissive Cooperative Procurement. The content and timing of such notice shall comply in all respects with 279A.215(2), 279A.215(3) and these Model Rules.

Stat. Auth.: ORS 279A.065
Stats. Implemented: ORS 279A.065 & 279A.215
Hist.: DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05; DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

**137-046-0450**

**Interstate Cooperative Procurements**

A Contracting Agency that chooses to participate in, sponsor, conduct or administer an Interstate Cooperative Procurement may do so only in accordance with ORS 279A.220.

Stat. Auth.: ORS 279A.065
Stats. Implemented: ORS 279A.065 & 279A.220
Hist.: DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

**137-046-0460**

**Advertisements of Interstate Cooperative Procurements**

(1) The Solicitation Document for an Interstate Cooperative Procurement is advertised in Oregon for purposes of ORS 279A.220(2)(a) if it is advertised in Oregon in compliance with 279B.055(4) or 279B.060(4) by:

(a) The Administering Contracting Agency;

(b) The Purchasing Contracting Agency;

(c) The Cooperative Procurement Group, or a member of the Cooperative Procurement Group, of which the Purchasing Contracting Agency is a member; or

(d) Another Purchasing Contracting Agency that is subject to the Code, so long as such advertisement would, if given by the Purchasing Contracting Agency, comply with ORS 279B.055(4) or 279B.060(4) with respect to the Purchasing Contracting Agency.

(2) A Purchasing Contracting Agency or the Cooperative Procurement Group of which the Purchasing Contracting Agency is a member satisfies the advertisement requirement under ORS 279A.220(2)(b) if the notice is advertised in the same manner as provided in 279B.055(4)(b) and (c).

Stat. Auth.: ORS 279A.065
Stats. Implemented: ORS 279A.065 & 279A.220
Hist.: DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05; DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

**137-046-0470**

**Protests and Disputes**

(1) An Offeror or potential Offeror wishing to protest the procurement process, the contents of a solicitation document related to a Cooperative Procurement or the award or proposed award of an Original Contract shall make the protest in accordance with ORS 279B.400 through 279B.425 unless the Administering Contracting Agency is not subject to the Code. If the Administering Contracting Agency is not subject to the Code, then the Offeror or potential Offeror shall make the protest in accordance with the processes and procedures established by the Administering Contracting Agency.

(2) Any other protests related to a Cooperative Procurement, or disputes related to a Contract arising out of a Cooperative Procurement, shall be made and resolved as set forth in ORS 279A.225.

(3) The failure of a Purchasing Contracting Agency to exercise any rights or remedies it has under a Contract entered into through a Cooperative Procurement shall not affect the rights or remedies of any other Contracting Agency that participates in the Cooperative Procurement, including the Administering Contracting Agency, and shall not prevent any other Purchasing Contracting Agency from exercising any rights or seeking any remedies that may be available to it under its own Contract arising out of the Cooperative Procurement.

Stat. Auth.: ORS 279A.065
Stats. Implemented: ORS 279A.065 & 279A.225
Hist.: DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05; DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

**137-046-0480**

**Contract Amendments**

A Purchasing Contracting Agency may amend a Contract entered into pursuant to a Cooperative Procurement as set forth in OAR 137-047-0800.

Stat. Auth.: ORS 279A.065
Stats. Implemented: ORS 279A.065
Hist.: DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05; DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

**COMMENTARY ON OAR 125-246-0400: Revised January 1, 2014**

**Purchases from Local Contracts or Other States’ Contracts.** Nothing in the Code or these Cooperative Procurement Rules prohibits the Department or an Authorized Agency from making purchases under a local or foreign state Contract arising from a Cooperative Procurement. The Department or an Authorized Agency must comply with these Cooperative Procurement Rules when doing so. Only the Department, another governmental body, domestic or foreign, approved by the Chief Procurement Officer, or an Authorized Agency according to a delegation agreement with the Chief Procurement Officer may make such purchases.

**125-246-0500**

**Oregon Procurement Information Network (ORPIN)**

(1) The Oregon Procurement Information Network, known as ORPIN, an Internet-based, on-line system, is the official publication forum for state Procurement notices and advertisements, as functionality allows, by the Department and all Agencies.

(2) All state Agencies must use ORPIN to comply with the reporting requirements for:

(a) Personal Services Contracts in accordance with OAR 125-246-0353;

(b) Agreements under ORS 190 in accordance with OAR 125-246-0365; and

(c) Special Procurements in accordance with OAR 125-247-0287(12).

(3) In accordance with ORS 200.035, any applicable related Governor's Executive Order regarding Oregon Minority-Owned, Women-Owned, Service-Disabled Veteran Owned, and Emerging Small Businesses, and applicable related Department statewide policy, all State Contracting Agencies, as defined in ORS 279A.010, must use ORPIN or other Electronic Procurement System approved by the State Chief Procurement Officer. to:

(a) Give Timely Notice of the State Contracting Agency's intent to advertise or solicit Bids or Proposals; and

(b) Give Timely Notice when the Contract is awarded. As used in ORS 200.035 and this Rule, "Timely Notice" means at the time the State Contracting Agency advertises or solicits Bids or Proposals and at the time the State Contracting Agency publicly releases the Contract.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.065, 279A.070 & 279A.140
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 4-2013, f. 12-17-13, cert. ef. 1-1-14; DAS 4-2015, f. 12-29-15, cert. ef. 1-1-16; DAS 3-2018, f. 12-14-18 & cert. ef. 1-1-19

**125-246-0555**

**Contract Administration; General Provisions**

(1) **Authority**. Procurements include Contract Administration. The authority for an Authorized Agency to conduct Contract Administration is found in OAR 125-246-0170, and is subject to the requirements of ORS 279A.159 and OAR 125-246-0140.

(2) **Contract Administrator**. The Authorized Agency must appoint, in Writing, a Contract Administrator to represent the Authorized Agency for each Contract. The Contract Administrator may delegate in Writing a portion of the Contract Administrator's responsibilities to a technical representative for specific day-to-day administrative activities for each Contract, including communications according to OAR 125-246-0635.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.050, 279A.065(5), 279A.070, 279A.140, 279A.159
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 4-2016, f. 12-22-16, cert. ef. 1-1-17

**COMMENTARY ON OAR 125-246-0555**

Best practices for Contract Administration means the timely delivery of specified deliverables and achievement of a Contract’s specified results within the framework of the Contract. Examples of deliverables include but are not limited to: delivery of product, completion of services, reports, and testing and acceptance of Supplies and Services. Contract Administration is the third phase in the procurement cycle, following the first phase of concepts and the second phase of the Solicitation and Award. The Contract Administration phase includes but is not limited to: timely accurate payment for Supplies and Services delivered, Amendments, expiration, termination, reinstatements, ratifications, and close out activities. This term for the third phase is distinguished from contract management, which includes the second and third phases of Procurement.

**125-246-0556**

**Procurement Files**

(1) **Application**. This Rule applies to Procurement Files, as defined in OAR 125-246-0110.

(2) **Required Documentation**. All Procurement Files must contain:

(a) All Written documents delivered to an Agency from the Department, whether the documents relate to approvals, revocations, orders, modifications, or other actions (Actions), related to the documents’ subject matter and Action;

(b) An executed Contract, if awarded, and any Ordering Instruments and Amendments (collectively, Contract);

(c) The record of the actions used to develop and administer the Contract;

(d) A copy of the Solicitation, if any;

(e) The Contract Administrator and any delegates;

(f) Any required findings or statement of justification for the selection of the Provider and sourcing method according to ORS 279A.200 through 279A.220 (Cooperative Procurement); 279B.055 through 085 (seven methods for Supplies and Services); 279C.100 through 279C.125 (Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services); or ORS 279C.300 through 279C.450 (Public Improvements);

(g) Documentation of Contract Administration according to OAR 125-246-0555 and if required by the selected procurement method:

(A) A list of prospective Providers notified of any Solicitation;

(B) The method used to advertise or notify prospective Providers;

(C) A copy of each Offer that resulted in the Award of a Contract;

(D) The record of any Negotiation of the Statement of Work and results;

(E) A record of all material Communications regarding the Solicitation by interested Providers according to OAR 125-246-0635;

(F) All information describing how the Provider was selected, including the method and basis for awarding the Contract;

(G) A copy of the Request for Special Procurement, if any;

(H) Documentation for a Federal Program purchase according to OAR 125-246-0360; and

(I) Documentation related to Cooperative Procurements according to OAR 125-246-0400.

(3) **Time Period**. The Agency must maintain Procurement Files, including all documentation, for a period in compliance with OAR 166-300-0015(8) and any other applicable laws. Procurement Files must be made immediately available for review upon the request of the Department.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 279A.050, 279A.065(5), 279A.070, 279A.140
Hist.: DAS 6-2008, f. & cert. ef. 7-2-08; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12; DAS 4-2013, f. 12-17-13, cert. ef. 1-1-14

**125-246-0570**

**Reinstatement of Expired Contract; Retroactive Approval of Existing Contract**

(1) **Application**. This Rule applies to the reinstatement of expired or terminated Contracts (expired Contracts) and the retroactive approval of existing Contracts procured by Authorized Agencies for Supplies and Services and for Architectural, Engineering and Land Surveying Services or Related Services (“Contracts”). This Rule does not apply to mistakes that may occur in the solicitation process (see OAR 125-247-0470).

(2) **Requirements to Reinstate an Expired Contract**.

(a) Before expiration, the Contract was properly signed by all parties;

(b) Then the signed Contract expired;

(c) The Agency reinstates the Contract:

(A) To fulfill its term, up to the maximum time period provided in the Contract or Solicitation; or

(B) To complete one or more deliverable(s) included within the Contract’s Scope at the time of its expiration;

(d) The Agency documents in the Procurement File the deliverable(s) to be completed at the time of the expired Contract’s reinstatement; and

(e) If the Contractor has performed work under the Contract, the reinstatement does not apply to payments made for work performed between the expiration of the Contract and the date of any reinstatement.

(3) **Requirements to Retroactively Approve an Existing Contract**.

(a) The Contract exists and has not expired;

(b) The Contract was signed by all parties except that the required approval of the DPO or CPO was lacking;

(c) If the Contractor has performed work under the Contract, the retroactive approval does not apply to payments made for work performed between the start of the Contract and the date of any retroactive approval.

(4) **Process**. For either a reinstatement of an expired Contract or retroactive approval of an existing Contract, the requesting Agency must meet the following conditions:

(a) The Agency must submit a Written request to the Agency’s Designated Procurement Officer (DPO) if the Agency is authorized under OAR 125-246-0170, or if not, to the Chief Procurement Officer (CPO) with authority under 125-246-0170 (Request). If the Request is submitted to the DPO, the Agency must also follow its internal procedures.

(b) The Request must explain the following:

(A) The proposed reinstatement of the expired Contract or retroactive approval of the existing Contract.

(B) The background facts that led to the Request;

(C) The good faith basis for making the Request;

(D) The need for reinstatement of an expired Contract or retroactive approval of an existing Contract due to unforeseen or unavoidable conditions;

(E) The steps to prevent a reoccurrence. For examples:

(i) Improvement of Agency’s internal policies and procedures; and

(ii) Provision of new training or retraining; and

(F) Acknowledgement that the Request is in the best interest of the Agency.

(c) Obtain all other approvals required for the Contract, including but not limited to: Attorney General’s approval of legal sufficiency under ORS 291.047 or ratification under 291.049. The Authorized Agency must obtain all other approvals required for the Contract before any reinstatement, extension of time under Subsection (6), or retroactive approval becomes binding.

(d) The DPO or CPO, as described in Subsection (3)(a), must approve the Request.

(5) **Effect of Approval**.

(a) An approved reinstatement of an expired Contract makes the Contract in full force and effect, as if it had not expired.

(b) An approved retroactive approval of an existing Contract makes the Contract in full force and effect, as if it had been approved by the DPO or CPO when the Contract was formed.

(c) The DPO or CPO, as appropriate, may create any related Contract documents to implement the reinstatement or retroactive approval.

(d) The Agency may make an approved payment after any related Contract documents are signed by the necessary parties.

(6) **Amendments of a Reinstated Contract**.

(a) If the Agency requests reinstatement of an expired Contract, the Request of the Agency may also include a request to amend the reinstated Contract for time only. The DPO or CPO, as appropriate, may approve this Request, including the amendment.

(b) The Agency may amend a reinstated or retroactively approved Contract for purposes other than time in accordance with OAR 125-247-0805.

(7) An Authorized Agency may combine in one document a Reinstatement of a Contract in accordance with this Rule, Retroactive Approvals of that Contract in accordance with OAR 125-246-0570, and its Amendment in accordance with 125-247-0805, as needed.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.050, 279A.065(5), 279A.070 & 279A.140

Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 5-2006, f. & cert. ef. 5-31-06; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 3-2011, f. 12-22-11, cert. ef. 1-1-12; DAS 4-2013, f. 12-17-13, cert. ef. 1-1-14; DAS 4-2016, f. 12-22-16, cert. ef. 1-1-17

**125-246-0576**

**Payment Authorization for Cost Overruns for Services Contracts**

(1) Payments on Contracts for Trade or Personal Services that exceed the maximum contract consideration (Cost Overruns) require approval (Approval). If the aggregated value of the Contract, including Cost Overruns, does not exceed $150,000, the Designated Procurement Officer of the requesting Authorized Agency may approve the Cost Overruns in accordance with Section (2) of this Rule. If the aggregated value of the Contract, including Cost Overruns, exceeds $150,000, the Chief Procurement Officer may approve the Cost Overruns in accordance with Section (2) of this Rule. The Cost Overruns may also require approval from the Department of Justice pursuant to ORS 291.047 and 291.049.

(2) Approval may be provided if:

(a) The Original Contract was duly executed and, if required, approved by the Department and the Attorney General;

(b) Payments relate to Services that were provided during the term of the Contract;

(c) The cost overrun is not associated with any change in the Statement of Work set out in the Original Contract;

(d) The cost overrun arose out of extraordinary circumstances or conditions encountered in the course of contract performance that were reasonably not anticipated at the time the Original Contract, or the most recent Amendment, if any, was signed. Such circumstances include, but are not limited to: emergencies arising in the course of the Contract that require prompt action to protect the Work already completed, compliance with official or judicial commands or directives issued during contract performance or insurance that the purpose of the Contract will be realized;

(e) The cost overrun was incurred in good faith, results from the good faith performance by the Contractor, and is no greater than the prescribed hourly rate or the reasonable value of the additional Work or performance rendered;

(f) The aggregated value of the Contract, including the Cost Overrun, and the Contract’s objective are within the procurement authority of the Authorized Agency pursuant to OAR 125-246-0170, and the Authorized Agency currently has funds available for payment under the Contract; and

(g) The Agency must prepare a Written report that describes the Authorized Agency's discovery of the Cost Overrun, the reasons for the Cost Overrun, and the Agency’s satisfaction of the conditions set forth in this Section (2) (Report). The Authorized Agency must maintain this Report in its Procurement File and make this Report available to the Department upon request.

(h) The Designated Procurement Officer of the Authorized Agency approves in Writing the payment of the overrun, or such portion of the overrun amount as the Designated Procurement Officer of the Authorized Agency determines may be paid consistent with the conditions of this Rule. If the Designated Procurement Officer of the Authorized Agency has signed the Contract, or has immediate supervisory responsibility over performance of the Contract, that Person must designate an alternate delegate to grant or deny Written approval of payment.

(3) The Authorized Agency must obtain any Attorney General's approval of the Contract Amendment, if such approval is required by ORS 291.047, before making any Cost Overrun payment.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 279A.050, 279A.065(5), 279A.070, 279A.140
Hist.: DAS 5-2006, f. & cert. ef. 5-31-06; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12

**125-246-0580**

**Dispute Resolution**

Pursuant to ORS 183.502, Authorized Agencies are authorized and encouraged to use alternative dispute resolution (ADR), including collaborative forms of dispute resolution such as mediation, facilitation and collaborative rulemaking. The Attorney General's Model Rules on ADR are designed to assist Authorized Agencies in the assessment and appropriate use of collaborative ADR, as set forth in the Oregon Attorney General's Administrative Law Manual and Uniform and Model Rules of Procedure under the Administrative Procedures Act, October 3, 2001.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 279A.050, 279A.065(5), 279A.070, 279A.140
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05

**125-246-0600**

**Policy**

These Rules supplement and do not replace ORS 244.010 through 244.400, for the purpose of applying the policy of ORS 244.010 to Oregon Public Contracting under the Public Contracting Code and these Rules. Oregon Public Contracting is a public trust. The Agencies and Contractors involved in Public Contracting must safeguard this public trust.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 279A.015, 279A.065(5)(a), 279A.070, 279A.140
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05

**125-246-0605**

**Selection and Award of Public Contracts**

(1) Agency officers, employees or agents involved in the process of the selection and award of Public Contracts must carefully review the provisions of ORS 244.040.

(2) Agency officers, employees and agents are prohibited from soliciting or receiving Gifts, which means something of economic value given to a public official or the public official's relative without an exchange of valuable consideration of equivalent value, including the full or partial forgiveness of indebtedness, and which is not extended to others who are not public officials or the relatives of public officials on the same terms and conditions; and something of economic value given to a public official or the public official's relative for valuable consideration less than that required from others who are not public officials.

(3) Agency officers, employees and agents are prohibited from using their official position for personal or financial gain.

(4) Agency officers, employees and agents are prohibited from using confidential information gained in the course of the screening and selection procedures for personal or financial gain.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 279A.015, 279A.065(5)(a), 279A.070, 279A.140
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05

**125-246-0610**

**Appointments to Advisory Committees**

The Director, Chief Procurement Officer, Designated Procurement Officer or a delegatee may appoint procurement advisory committees to assist with Specifications, procurement decisions, and structural change that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competition pursuant to ORS 279A.015.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 279A.015, 279A.065(5)(a), 279A.070, 279A.140
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05

**125-246-0615**

**Nonretaliation**

This Rule prohibits retaliation against anyone who complies with the Public Contracting Code and these Rules. Any officer, employee or agent of an Agency or Provider who engages in retaliation action will be subject to Penalties pursuant to ORS 279A.990, 244.350 to 244.400 and related rules. Also, any Provider who engages in a retaliation action may be debarred.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 279A.015, 279A.065(5)(a), 279A.070, 279A.140
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05

**125-246-0620**

**Specifications**

(1) Agencies and Providers must not develop Specifications that primarily benefit a Provider, directly or indirectly, to the detriment of an Agency or the best interest of the State.

(2) Agencies must not develop Specifications that inhibit or tend to discourage Public Contracting with Qualified Rehabilitation Facilities under ORS 279.835 through 279.855 and OAR 125-055-0005 through 125-055-0045 where those Specifications inhibit or tend to discourage the acquisition of QRF-produced Supplies and Services without reasonably promoting the satisfaction of bona fide, practical procurement needs of the Agency.

(3) Agencies and Providers must not develop Specifications that inhibit or tend to discourage Public Contracting under other public procurement laws or policies of the Department.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 279A.015, 279A.065(5)(a), 279A.070, 279A.140
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05

**125-246-0621**

**Anti-Trust Laws**

(1) Authorized Agencies must be generally informed about anti-trust laws and their prohibitions, including the prohibition of any Contract or conspiracy in restraint of trade. Violations of anti-trust laws include but are not limited to the attempt of any Person(s) to monopolize or to conspire with any other Person(s) to monopolize any trade of commerce.

(2) Violations of anti-trust laws harm competition and the policies of ORS 279A.015. Also see OAR 125-247-0500, 125-247-0575, 125-249-0370 and 125-249-0390.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 646.725 and 646.730
Hist.: DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10

**COMMENTARY ON OAR 125-246-0621: New January 1, 2010**

(1) The Public Procurement Dictionary of Terms, published by the National Institute of Governmental Purchasing, Inc. (2008), provides the following definitions:

(a) **Bid Rigging.** The agreement among potential competitors to manipulate the competitive bidding process, for example, by agreeing not to bid, to bid a specific price, to rotate bidding, or to give kickbacks to purchasers.

(b) **Price Fixing.** Explicit agreements among producers regarding the prices at which goods are to be sold. See Sherman Antitrust Act and the Clayton Act.

(2) Agencies should report to the Department of Justice evidence of Bid Rigging or Price Fixing.

**125-246-0625**

**Sole-Source**

Authorized Agencies may not select a Sole-Source Procurement pursuant to ORS 279B.075 and avoid a competitive Procurement if the purpose of the selection is to primarily benefit the Provider, directly or indirectly, to the detriment of an Authorized Agency or the best interest of the State.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 279A.015, 279A.065(5)(a), 279A.070, 279A.140
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05

**125-246-0630**

**Fragmentation**

A Procurement may not be artificially divided or fragmented so as to constitute a Small Procurement, pursuant to ORS 279B.065, or an Intermediate Procurement, pursuant to ORS 279B.070.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070
Stats. Implemented: ORS 279A.015, 279A.065(5)(a), 279A.070, 279B.065
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05

**125-246-0635**

**Authorized Agency and Provider Communications**

(1) **Research Phase**. Authorized Agencies are encouraged to conduct research with Providers who can meet the State's needs. This research includes but is not limited to: meetings, industry presentations, and demonstrations with any Providers that, in the Agency's discretion, may be able to meet an Agency's need. Authorized Agencies must document the items discussed during the research phase of Solicitation development. The research phase ends the day of a Solicitation release or request for a Quote according to an Intermediate Procurement, unless the Solicitation or Intermediate Procurement provides for a different process that permits on-going research.

(2) **Solicitation and Contracting Phase**. Any communication between an Authorized Agency and Providers regarding a Solicitation, that occurs after the Solicitation release or request for a Quote and before the Award of a Contract, must only be made within the context of the Solicitation Document or Intermediate Procurement requirements (Communication). This Communication may allow for Discussions, Negotiations, Addenda, Providers' questions, and the Agency's answers to Providers' questions about terms and conditions, Specifications, Amendments, or related matters. During this phase, telephone conversations and meetings must be documented in the Procurement File. Written inquiries regarding the Solicitation should be responded to by the Authorized Agency in Writing. A record of all material Communications regarding the Solicitation by interested Providers must be made a part of the Procurement File according to OAR 125-246-0556.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.015, 279A.065(5)(a), 279A.070 & 279A.140
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 11-2009, f. 12-30-09, cert. ef. 1-1-10

**COMMENTARY ON OAR 125-246-0635: Revised January 1, 2010**

The Chief Procurement Officer and Agencies may collaborate with stakeholders and develop these Rules on Ethics in Public Contracting to address other considerations, including but not limited to: contingency fees, uses of sourcing methods, Amendments, and Provider-Agency relations.

**125-246-0800**

**Policy; Applicability; Methods**

(1) **Policy**. A sound and responsive Public Contracting system, according to ORS 279A.015, may include purchasing, selling, and leasing activities. By definition, a Public Contract includes sales and leases by Agencies according to ORS 279A.010(1)(z). The policies of ORS 279A.015 apply to public selling and leasing activities.

(2) **Applicability**. This Rule applies to the sales and leases of Supplies and Services. This Rule does not apply to residential property or the public selling activity of Agencies specifically exempted from the Public Contracting Code by another provision of law or specifically authorized to conduct public selling or leasing activity by another provision of law. The sale or lease of Supplies and Services includes but is not limited to: concessions, software rights, and personal property.

(3) **Methods**. Agencies must use a method, as feasible for selling or leasing, according to ORS 279B.055 through 279B.085. For the sale of Goods, the value of the sale transactions for the purpose of selecting the appropriate sourcing method must be based on the gross amount of receipts.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.010(x), 279A.015, 279A.050(1)(2), 279A.065(5)(a) & 279A.070
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 6-2008, f. & cert. ef. 7-2-08; DAS 3-2012, f. 11-29-12, cert. ef. 12-1-12

**COMMENTARY ON OAR 125-246-0800: Revised December 1, 2012**

(1) **Examples.** An Agency might be authorized to sell or lease a variety of items and services, including handbooks, inmate desks, signage, space in facilities, concessions, licenses of technology applications, and expert services. Agencies have used sales methods that include Requests for Proposals and Negotiations to perform their sales functions. This Rule and Commentary does not address the complexities of selling; Authorized Agencies are advised to follow the policies of the Department and consult with the Chief Procurement Officer.

(2) **Leases of Real Property.** An Authorized Agency that does not have real property leasing authority granted to it by statutes that are specific to that Agency nevertheless may grant leases in its real property, including its facilities and spaces in its facilities, when the property is not needed for public use or when the leasing may further the public interest. ORS 270.110(1). A lease constitutes a sale of an interest in real property. However, an Authorized Agency’s lease of real property does not fall within the definition of a “public contract” under ORS 279A.010(1)(z) that would subject the lease to the general rule that requires competition for public contracts. Therefore, Authorized Agencies must rely on their own rules that establish leasing requirements and policies when entering into leases of their real property with private parties. Real property leases with other public bodies can be established under ORS chapter 190.

(3) **Agency as Provider.** If an Agency responds as a prospective Provider to a Solicitation of a private entity, the Agency is advised to ensure that any resulting Contract terms and conditions comply with Oregon law.

**125-246-0900**

**Penalties**

(1) Any violation of ORS 279A.140, 279A.280, or 279B.270 must be punished as described in 291.990, pursuant to 279A.990(1).

(2) Upon notice to the Department of an alleged violation pursuant to ORS 279A.990(1), the Department, at its own discretion, may provide to an individual of an Agency or an Agency an optional administrative process with an opportunity for remedy prior or parallel to a legal process leading to conviction or a Department certification leading to other penalties provided by ORS 291.990. This Rule and administrative process may address related considerations, including but not limited to:

(a) What specific actions are interpreted as violations giving rise to penalties;

(b) Applicability to individuals of Agencies and Agencies, regardless of whether delegated authority existed pursuant to OAR 125-246-0170; and

(c) The placement of responsibility for violations along the chain of delegated responsibility.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
Stats. Implemented: ORS 279A.990
Hist.: DAS 4-2004, f. 11-23-04, cert. ef. 3-1-05; DAS 4-2013, f. 12-17-13, cert. ef. 1-1-14