Chapter 137

Division 45

REVIEW OF PUBLIC CONTRACTS

137-045-0010

Definitions

The following definitions apply to OAR chapter 137, division 045:

(1) "Agency" means " State agency" as defined in ORS 291.045.

(2) "Agency Contract Administration" means an action undertaken by an Agency in accordance with the terms of a Public Contract that does not amend the terms of a Public Contract other than as set forth in subsections (b) or (c) below. Agency Contract Administration does not include an assignment of rights or delegation of duties under a Public Contract to a third party. Examples of Agency Contract Administration include, but are not limited to, actions that result in:

(a) A notice to proceed, the exercise of an option, or any other exercise of a contractual right, whereby the Agency causes a Public Contract to be implemented in accordance with its terms;

(b) Changes only to named individuals and their contact information, such as authorized representatives, project managers or key persons even if those names and contact information are contained in the Public Contract; or

(c) Changes to correct typographical or other unintentional mistakes made in the drafting of a contract, or changes to correct the identifying information of the Public Contract used by the agency for administrative purposes, such as the agency's contract number.

(3) "Architectural and Engineering Services Contract" means a Public Contract for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services as defined in ORS 279C.100(2) or related services as defined in 279C.100(8).

(4) "Assistant Attorney General" means a person appointed by the Attorney General under ORS Chapter 180 as an Assistant Attorney General or as a Special Assistant Attorney General and who is authorized in writing by the Chief Counsel, General Counsel Division, to review and approve Public Contracts for legal sufficiency. Such authorization may be limited by the Public Contract type and amount.

(5) "Attorney in Charge of the Business Transactions Section" means the Assistant Attorney General the Attorney General appoints as Attorney in Charge of the Business Transactions Section, General Counsel Division, Department of Justice or an alternate designated by the Chief Counsel of the General Counsel Division.

(6) "Attorney General" means the Attorney General of the State of Oregon.

(7) "Chief Counsel of the General Counsel Division" means the Assistant Attorney General the Attorney General appoints as Chief Counsel of the General Counsel Division, Department of Justice or an alternate designated by the Attorney General.

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(8) “Cloud Service” means Internet-based computer services, including but not limited to, computer hosting, processing resources, application services, and data storage and access.

(9) "Emergency" means circumstances that could not have been reasonably foreseen and that create a substantial risk of loss, damage to property, interruption of services or threat to public health or safety and require prompt execution of a Public Contract to deal with the risk.

(10) "Federal Cooperative Agreement" means a Public Contract under which an Agency receives money or property from a federal agency for the purpose of supporting or stimulating an Agency program or activity and substantial involvement is expected between the federal agency and the Agency when carrying out the program or activity contemplated in the agreement. A Federal Cooperative Agreement does not include a procurement contract under 31 U.S.C. section 6303.

(11) "Grant" means:

(a) A Public Contract under which an Agency receives money, property or other value from a grantor for the purpose of supporting or stimulating an Agency program or activity, and in which no substantial involvement by grantor is anticipated in the contemplated program or activity other than activities associated with monitoring compliance with Grant conditions; or

(b) A Public Contract under which an Agency provides money, property or other value to a recipient for the purpose of supporting or stimulating a program or activity of the recipient, and in which no substantial involvement by Agency is anticipated in the contemplated program or activity other than activities associated with monitoring compliance with Grant conditions.

(12) "Information Technology," means goods or services, including a Cloud Service, that include but are not limited to all present and future forms of hardware, software, and services for data processing, office automation, and telecommunications, and maintenance and support for any of the foregoing.

(13) "Interagency Agreement" means any agreement solely between state officers, boards, commissions, departments, institutions, branches, or Agencies of this state.

(14) "Intergovernmental Agreement" means any agreement between an Agency and a unit of local government of this state, a public university listed in ORS 352.002, the United States, a United States governmental agency, an American Indian tribe or an agency of an American Indian tribe and includes Interstate Agreements and International Agreements.

(15) "International Agreement" means any agreement between an Agency and a nation or a public agency in any nation other than the United States.

(16) "Interstate Agreement" means any agreement between an Agency and a unit of local government or state agency of another state.

(17) "Last Reviewed Contract" means a Public Contract that has been approved for legal sufficiency and includes all amendments that were effective prior to an amendment that has been approved for legal sufficiency.

(18) "Non-Negotiable Public Contract" means a Public Contract that a) offers terms and conditions to an Agency without a commercially reasonable opportunity to negotiate, b) is attached to or included with goods or services available to the general public, and c) immediately becomes legally binding upon an

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Agency's use of the goods or services. A Non-Negotiable Public Contract may include, but is not limited to, Information Technology license agreements attached to or included with packaged or electronic copies of computer software.

(19) "Personal Services Contract" means a contract whose primary purpose is to acquire 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, a contract for the services of an accountant, physician or dentist, educator, consultant (including a provider under an Architectural and Engineering Services Contract), broadcaster, or artist (including a photographer, filmmaker, painter, weaver or sculptor).

(20) "Price Agreement" means an agreement, which may or may not be a binding contract, for the procurement of goods or services at a set price or prices, or at a price or prices established using a method prescribed by the agreement, which:

(a) May or may not provide a guarantee of a minimum or maximum purchase; or

(b) May provide for an initial order or minimum purchase combined with a continuing obligation to provide goods or services with no guarantee of a minimum or maximum additional purchase. Price Agreements are sometimes referred to as flexible services agreements, agreements to agree, master agreements, or retainer agreements.

(21) "Procurement Documents" means documents issued by an Agency defining the procurement process or soliciting offers from prospective contractors to enter into a Public Contract or a Price Agreement. "Procurement Documents" includes an invitation to bid, request for proposals, request for quotes, including request for quotes issued to one or more vendors who are parties to existing Price Agreements for the desired goods or services, or other similar document, including any associated exhibits, attachments, addenda, and the anticipated Public Contract. Special procurements for which public notice is required under ORS 279B.085(5) are Procurement Documents. The following are not Procurement Documents unless they invite offers from prospective contractors: a request for information, a request for qualifications, a prequalification of bidders, or a request for product prequalification.

(22) "Public Contract" means any contract, including any amendments, entered into by an Agency for the acquisition, disposition, purchase, exchange, lease, sale or transfer of rights of real or personal property, public improvements, or services, including any contract for repair or maintenance. An Intergovernmental Agreement entered into for any of the foregoing actions is a Public Contract. A Grant is a Public Contract. An Interagency Agreement is not a Public Contract. Agency Contract Administration is not a Public Contract.

(23) "Public Improvement Contract" means any Public Contract for construction, reconstruction, or major renovation on real property by or for an Agency.

(24) "Public Works" has the meaning set forth in ORS 279C.800(6).

(25) "Statement of Work" means all provisions of a Public Contract that expressly describe the services or activities to be performed or the goods to be delivered under the Public Contract, including any related Technical Specifications, deadlines, milestones, deliverables and delivery dates.

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Deleted: (23) "Requirements Contract" means a Public Contract that requires that all of the purchaser's requirements for the goods or services specified in the Public Contract for the period of time, or for the project(s) specified in the Public Contract, shall be purchased exclusively from the seller.¶
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(26) "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.

(27) "Telecommunications" means hardware, software and services for transmitting voice, data, video and images over a distance.

Statutory/Other Authority: ORS 291.047(3)

Statutes/Other Implemented: ORS 291.045, 291.047 & 291.049

History:

DOJ 28-2023, amend filed 12/29/2023, effective 01/01/2024

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 19-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

DOJ 3-1998, f. & cert. ef. 4-1-98

Temporary repealed by DOJ 3-1998, f. & cert. ef. 4-1-98

JD 5-1997(Temp), f. & cert. ef. 10-17-97

JD 4-1997(Temp), f. & cert. ef. 10-3-97

137-045-0015

Legal Sufficiency Approval

(1) Legal sufficiency review and approval pursuant to this rule does not affect any other applicable review or approval requirement, except that legal sufficiency approval of a Public Contract that is an Interstate Agreement or an International Agreement satisfies requirements for Attorney General review under ORS 190.430 and ORS 190.490, as applicable.

(2) The Attorney General provides legal sufficiency approval of a Public Contract solely for the benefit of Agencies, to determine compliance with this rule. Approval of a Public Contract for legal sufficiency is based upon the individual determination by the Assistant Attorney General reviewing the Public Contract and does not preclude the State of Oregon from later asserting any legally available claim or defense arising from or relating to the Public Contract.

(3) Approval of a Public Contract for legal sufficiency must be noted in written form by the Assistant Attorney General reviewing the Public Contract and must either be affixed directly to the Public Contract or set forth in a separate writing that identifies the Public Contract with particularity.

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(4) An Assistant Attorney General may approve Public Contracts as a group if they are substantially in the same form, are substantially for the same purpose and have the same expiration date or anticipated period of performance if the Assistant Attorney General identifies the manner in which individual contracts within the group may vary.

(5) Sections (5) and (6) are adopted to provide guidance to Agencies regarding criteria used for, and factors excluded from, the Attorney General's legal sufficiency approval of Public Contracts. Except as provided in section (6) and (7) of this rule, approval for legal sufficiency means that the reviewing Assistant Attorney General finds that:

(a) The Public Contract has been reduced to written form;

(b) The subject matter, promised performance and consideration of the Public Contract are within the Agency's statutory authority;

(c) The Public Contract, on its face, contains all the essential elements of a legally binding contract, such as a description of consideration (money, performance, or forbearance) when consideration is required;

(d) The Public Contract, on its face, complies with federal and State of Oregon statutes and administrative rules regulating the Public Contract, and all provisions required by Oregon law to be incorporated have been included;

(e) The Public Contract includes or requires, as required by Oregon law, execution of any certification;

(f) The Public Contract, on its face, does not violate any federal constitutional provision, or any State of Oregon constitutional limitation or prohibition, such as by creating unlawful "debt" under section 7, Article XI, of the Oregon Constitution, or impermissibly binding a future State of Oregon Legislative Assembly to fund the Public Contract;

(g) The Statement of Work or comparable provisions and business or commercial terms are sufficiently clear and definite under the circumstances to be enforceable; and

(h) The Public Contract allows the Agency, if appropriate, to terminate the Public Contract, declare defaults, and pursue its rights and remedies.

(6) Approval for legal sufficiency does not include:

(a) Consideration of facts or circumstances that are not apparent on the face of the Public Contract, unless the Assistant Attorney General reviewing the Public Contract has actual knowledge of those facts or circumstances;

(b) A determination that the individual signing the Public Contract on behalf of the Agency possesses lawful authority to do so;

(c) A determination that the technical provisions used in the Public Contract that are particular to a profession, trade or industry reflect the Agency's intentions, are appropriate to further the Agency's stated objectives or are sufficiently clear and definite to be enforceable;

(d) A determination that the Public Contract is a good business deal for the Agency, weighing relative risks and benefits, although the Assistant Attorney General reviewing the Public Contract may provide

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advice regarding significant risks and issues in any particular transaction. The Agency is responsible for risk assessment and the decision whether to proceed with a Public Contract despite exposure to risks;

(e) A determination that any particular remedy, whether or not expressly set forth in the Public Contract, will be available to the Agency. The requesting Agency may request the Assistant Attorney General reviewing the Public Contract to address the availability of specific remedies;

(f) A determination that the Public Contract complies with Grant conditions or federal funding requirements or contains terms or assurances required under a Grant or federal funding program other than those set forth in statute or administrative rule. The requesting Agency may request the Assistant Attorney General reviewing the Public Contract to address the compliance with Grant conditions, federal funding requirements, or required assurances applicable to the federal funding program;

(g) A stylistic or grammatical review, including spelling, punctuation and the like, unless such errors create ambiguity or otherwise are substantive. The Assistant Attorney General reviewing the Public Contract may address matters of this nature as time allows; however, these matters are primarily the responsibility of the Agency submitting a Public Contract for review; or

(h) A determination that, except for setting off amounts owed under the Public Contract, the Agency will have court-enforceable damages, specific performance, or setoff remedies under a Public Contract with another sovereign in the event the sovereign fails to comply with the contract's terms unless the Assistant Attorney General determines in a separate writing that any such remedies are available to the Agency.

(7) Approval of a Public Contract for legal sufficiency under these Division 045 rules is not a waiver by the Attorney General of the State of Oregon's immunity under the Eleventh Amendment to the United States Constitution from suit in United States federal courts or consent to the jurisdiction of such federal courts. No such waiver is effective unless given in writing by the Attorney General in the specific instance in which the waiver is sought to be enforced.

(8) An Assistant Attorney General may, at the time of or before approval of a Public Contract under these rules, provide to the Agency entering into the Public Contract written advice or reference to previously provided advice that describes particular legal or significant business risks presented by the Public Contract.

Statutory/Other Authority: ORS 291.045(7)

Statutes/Other Implemented: ORS 291.045 & 291.047

History:

DOJ 28-2023, amend filed 12/29/2023, effective 01/01/2024

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

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Reverted to DOJ 3-1998, f. & cert. ef. 4-1-98

DOJ 5-1999(Temp), f. 9-14-99, cert. ef. 9-15-99 thru 3-13-00

DOJ 3-1998, f. & cert. ef. 4-1-98

Temporary repealed by DOJ 3-1998, f. & cert. ef. 4-1-98

JD 5-1997(Temp), f. & cert. ef. 10-17-97

JD 4-1997(Temp), f. & cert. ef. 10-3-97

137-045-0020

Mixed Contracts

A mixed Public Contract requires the contractor to render certain services and provide the Agency with other kinds of services, goods or products. Classification of a mixed Public Contract as a Personal Services Contract, Architectural and Engineering Services Contract, Information Technology Contract, or other kind of Public Contract is determined by the mixed Public Contract's predominant purpose. A mixed Public Contract's predominant purpose is determined by whether the majority of the amounts paid or received under the mixed Public Contract will be for a particular kind of service (personal, architectural, engineering, land surveying or related services, Information Technology, or other kinds of service) or for the acquisition of goods or products.

Statutory/Other Authority: ORS 291.047(3)

Statutes/Other Implemented: ORS 291.045, 291.047 & OL 1997 & Ch. 869

History:

DOJ 28-2023, amend filed 12/29/2023, effective 01/01/2024

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 2-2001, f. & cert. ef. 1-18-01

DOJ 3-1998, f. & cert. ef. 4-1-98

137-045-0020(Temp) repealed by DOJ 3-1998, f. & cert. ef. 4-1-98

JD 5-1997(Temp), f. & cert. ef. 10-17-97

JD 4-1997(Temp), f. & cert. ef. 10-3-97

137-045-0030

Review of Public Contracts

(1) Except as described in section (2), before a Public Contract is binding on the State of Oregon, and before any service may be performed or payment may be made under the Public Contract, the Attorney General must approve for legal sufficiency in accordance with these rules:

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(a) Any Public Contract that is for or includes the acquisition of Information Technology that requests or provides for payment in excess of $150,000;

(b) Any Public Contract other than those described in subsection 1(a) above that requests or provides for payment in excess of $250,000;

(c) An amendment to a Public Contract described in subsection (1)(a) or 1(b), unless these rules otherwise exempt the amendment from such approval; or

(d) An amendment to a Public Contract that makes the amended Public Contract subject to legal sufficiency approval under subsection (1)(a) or 1(b).

(2) The legal sufficiency approval requirement described in section (1) does not apply to Public Contracts that are exempt from legal sufficiency approval under these division 045 rules.

(3) For purposes of determining whether a Public Contract exceeds the amounts set forth in section (1), a Public Contract requests or provides for payments in excess of the applicable amount if one of the following applies:

(a) The Public Contract expressly provides that the Agency will make or receive payments in money, services or goods over the anticipated term of the Public Contract with a value that will, in aggregate, exceed the applicable threshold, whether or not the total amount or value of the payments is expressly stated. For purposes of this subsection, when an agency is lending money, and the only payment to the Agency is in money, "payments" receivable by the Agency mean principal only;

(b) The Public Contract expressly provides for a guaranteed maximum price or a maximum not to exceed amount payable or receivable by the Agency with a value that exceeds the applicable threshold; or

(c) Based on historical or other data available to the Agency at the time of entering into the Public Contract, the Agency determines that the value of the benefit, loss or detriment to the Agency under the Public Contract will likely exceed the applicable threshold.

(4) An Agency shall not fragment or segregate transactions for purposes of circumventing the legal sufficiency approval requirement.

(5) A program or activity of a Grant recipient that is financed by the Grant does not constitute a service performed under a Public Contract for purposes of this rule.

Statutory/Other Authority: ORS 291.047(3)

Statutes/Other Implemented: ORS 291.047

History:

DOJ 28-2023, amend filed 12/29/2023, effective 01/01/2024

DOJ 9-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

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DOJ 17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

DOJ 3-1998, f. & cert. ef. 4-1-98

JD 5-1997(Temp), f. & cert. ef. 10-17-97

JD 4-1997(Temp), f. & cert. ef. 10-3-97

137-045-0035

Review of Anticipated Public Contracts and Price Agreements

(1) Except as provided in this rule, if an Agency expects a Public Contract resulting from a procurement to require legal sufficiency approval, the Agency must submit to the Attorney General for review both the Agency Procurement Documents and the anticipated Public Contract. The Agency must obtain authorization from an Assistant Attorney General to release the Procurement Documents before the Agency releases them. An Assistant Attorney General may waive the failure of an Agency to comply with this rule if the Assistant Attorney General determines that the resulting Public Contract is legally sufficient, and a re-solicitation of the Public Contract would not materially reduce the risk to the State. Addenda that solely extend the date that offers are due are not subject to the review requirements of this rule.

(2) Review of the Procurement Documents includes determining what law applies to the procurement and applying that law to the Procurement Documents to determine whether the procurement process complies with applicable law and the Agency's reasonable interpretations of its own rules. The reviewing attorney is not required to inquire into facts concerning the procurement process that are not apparent on the face of the documents. The Assistant Attorney General may require changes to the Procurement Documents that are necessary for compliance with applicable law. If the Assistant Attorney General determines that nothing in the Procurement Documents, or otherwise apparent to the attorney, would prevent approval of the anticipated Public Contract for legal sufficiency, the attorney shall authorize release of the Procurement Documents. The Assistant Attorney General may condition an authorization to release Procurement Documents as necessary for compliance with these rules. Authorization to release the Procurement Documents does not ensure subsequent legal sufficiency approval of the Public Contract contemplated by the procurement. Authorization to release the Procurement Documents includes a determination that the solicitation process on the face of the Procurement Documents complies with applicable statutes or rules.

Statutory/Other Authority: ORS 291.047(3)

Statutes/Other Implemented: ORS 291.047

History:

DOJ 1-2024, temporary amend filed 01/03/2024, effective 01/03/2024 through 06/30/2024

DOJ 28-2023, amend filed 12/29/2023, effective 01/01/2024

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

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DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 19-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

137-045-0050

Exemptions from Legal Sufficiency Approval Based on Risk Assessment

The Attorney General has determined that the degree of risk to Agencies is not materially reduced by legal review and approval of certain Public Contracts. The Attorney General exempts from the legal sufficiency approval requirement under ORS 291.047 the Public Contracts listed below:

(1) Adoption Assistance Agreements. A document of understanding between the Oregon Department of Human Services and adoptive parents of a special needs child as defined under title IV-E at section 473(c) of the Social Security Act.

(2) Amendments to Public Contracts other than for Public Improvements, Public Works, and Loans. A written amendment to a Public Contract that is not for a Public Improvement, Public Works, or loan, if (a), (b) and (c) below apply:

(a) The Public Contract being amended was approved for legal sufficiency.

(b) The amendment only modifies the Public Contract or any related payment amounts in one or more of the following ways:

(A) Amends the Statement of Work to require the contractor to provide additional or fewer goods, services, or other work that are specified by Last Reviewed Contract; or

(B) Amends the expiration date of the Public Contract; Technical Specifications; time; or place, quantity or form of delivery, or price; or

(C) Any provisions as specified in writing at the time of approval by the Assistant Attorney General who provided legal sufficiency approval of the Last Reviewed Contract, based on the Assistant Attorney General's finding that the degree of risk assumed by the Agency will not be materially reduced by legal review and approval of the provisions.

(c) The aggregate increase in payments scheduled to be made by the Agency, or the aggregate decrease in payments scheduled to be received by the Agency, under the amendment, and all prior amendments exempted from the legal sufficiency approval requirement under this section subsequent to the Last Reviewed Contract, does not exceed the greater of:

(A) $250,000; or

(B) Any limits specified in writing at the time of legal sufficiency approval of the Last Reviewed Contract by the Assistant Attorney General based on their finding that the degree of risk assumed by the Agency will not be materially reduced by review of amendments that do not increase payments over the limits specified by the Assistant Attorney General.

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(3) Amendments to Public Improvement Contracts or Public Contracts for a Public Work if (a), (b), or (c) below apply:

(a) A written change order or other amendment to a Public Improvement Contract or a Public Contract for a Public Work, other than a construction manager/general contractor contract, as provided in subsection (3)(b) below, or a design-build contract or energy savings performance contract as provided in subsection (3)(c) of this section, if all of the following apply:

(A) The Public Improvement Contract or the Public Contract for a Public Work being amended was approved for legal sufficiency.

(B) The change order or other amendment is within the general scope of the Public Improvement Contract or the Public Contract for a Public Work.

(C) The change order or other amendment is implemented in accordance with the provisions of the Public Improvement Contract or the Public Contract for a Public Work governing change orders and other types of amendments.

(D) The change order or other amendment modifies only one or both of the following and related payment amounts as necessary:

(i) The Statement of Work to require the contractor to provide additional or fewer materials, tools, equipment, labor or professional or non-professional services within the general scope of the Last Reviewed Contract;

(ii) The substantial completion date, the final completion date, or interim milestone dates of the Public Improvement Contract or the Public Contract for a Public Work; Technical Specifications; time, place, quantity or form of delivery of materials, tools, equipment or services; or price.

(E) Any increase in Agency payments under the change order or other amendment does not exceed ten percent (10%) of the total amount of Agency payments scheduled to be made under the Last Reviewed Contract, and the aggregate increase in Agency payments scheduled to be made under that change order or other amendment, and all prior change orders or other amendments effective after the Last Reviewed Contract do not exceed thirty-three percent (33%) of that total amount.

(b) An amendment to a CM/GC contract (as defined in OAR 137-049-0610) that complies with either paragraph (3)(b)(A) or (B) below, whether the amendment is in the form of a change order or other amendment:

(A) The amendment is made before construction services have been authorized under the CM/GC contract and;

(i) The CM/GC contract was approved for legal sufficiency;

(ii) The amendment is implemented in accordance with the provisions of the CM/GC contract governing change orders and other amendments; and

(iii) The amendment modifies only one or more of the following and related payment amounts as necessary:

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(I) The Statement of Work to require the CM/GC to provide additional or fewer materials, equipment, or pre-construction services within the general scope of the Last Reviewed Contract.

(II) The substantial completion date, the final completion date, or interim milestone dates of the CM/GC contract; Technical Specifications; time, place, quantity or form of delivery of services; or price.

(iv) Any increase in Agency payments under the amendment does not exceed ten percent (10%) of the total amount of Agency payments scheduled to be made under the Last Reviewed Contract, and the aggregate increase in Agency payments scheduled to be made under that amendment and all prior amendments subsequent to the Last Reviewed Contract do not exceed thirty-three percent (33%) of that total amount.

(B) The amendment is made after construction services have been authorized under the CM/GC contract and complies with all of the following:

(i) The CM/GC contract being amended was approved for legal sufficiency;

(ii) The amendment is implemented in accordance with the provisions of the CM/GC contract governing change orders and other types of amendments;

(iii) The amendment is not the first amendment that authorizes construction services under the CM/GC contract;

(iv) The amendment does not establish the guaranteed maximum price ("GMP") under the CM/GC contract; and

(v) The amendment modifies only one or both of the following and related payment amounts as necessary.

(I) The Statement of Work to require the CM/GC to provide additional or fewer materials, tools, equipment, labor or professional or non-professional services within the general scope of the Last Reviewed Contract.

(II) The substantial completion date, the final completion date, or interim milestone dates of the CM/GC contract; Technical Specifications; time, place, quantity or form of delivery of materials, tools, equipment or services; or the price.

(vi) The amendment does not increase the contract price (whether a GMP, fixed price, lump sum or other price) established under the Last Reviewed Contract by more than $500,000.

(vii) The amendment and all prior amendments subsequent to the Last Reviewed Contract in the aggregate do not increase the contract price (whether a GMP, fixed price, lump sum or other price) established under the Last Reviewed Contract by more than ten percent (10%).

(c) An amendment to a Design-Build contract (as defined in OAR 137-049-0610), or an amendment to an Energy Savings Performance Contract (as defined in ORS 279A.010(1)(g)) that is in the construction phase, whether the amendment is in the form of a change order or a conventional amendment, if all of the following apply:

(A) The contract being amended was approved for legal sufficiency;

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(B) The amendment is implemented in accordance with the provisions of the Design-Build or Energy Savings Performance Contract governing change orders and other types of amendments;

(C) The amendment modifies only one or both of the following and related payment obligations as necessary:

(i) The Statement of Work to require the Design/Builder or Energy Savings Performance Contract contractor, as applicable, to provide additional or fewer materials, tools, equipment, labor or professional or non-professional services within the general scope of the Last Reviewed Contract;

(ii) The substantial completion date, the final completion date, or interim milestone dates of the contract; Technical Specifications; time, place, quantity or form of delivery of materials, tools, equipment or services; or the price;

(D) The amendment does not increase the contract price (whether a GMP, fixed price, lump sum or other price) established under the Last Reviewed Contract by more than $500,000 or five percent (5%), whichever is less; and

(E) The amendment and all prior amendments subsequent to the Last Reviewed Contract in the aggregate do not increase the contract price (whether a GMP, fixed price, lump sum or other price) established under the Last Reviewed Contract by more than $500,000 or ten percent (10%), whichever is less.

(d) For purposes of this rule, “change order” means a mutually agreed upon change order or a unilateral construction change directive or similar instruction issued by the Agency or its authorized representative to the contractor requiring a change in the work within the general scope of a Public Improvement Contract or the Public Contract for a Public Work and issued under the provisions of the Public Improvement Contract or the Public Contract for a Public Work governing the implementation, addition, reduction or other revisions to the work and, if applicable, adjusting the contract price or contract time for the changed work.

(4) Bonds and Confirmation Statements, if (a) or (b) below apply:

(a) An agreement entered into, issued or established in connection with the issuance of a bond or other borrowing of the State of Oregon, including an interest rate exchange agreement and any associated confirmation statement, if the Oregon State Treasurer has issued or authorized the bond or other borrowing obligation to which the agreement relates and if bond counsel appointed in accordance with applicable law has issued an approving opinion for the benefit or use of purchasers of the bond or other borrowing with respect to the enforceability of the bond or other borrowing upon closing of the transaction; or

(b) A confirmation statement associated with an Agency's investment-related interest rate or currency swap agreement or other investment transaction, if the agreement under which the confirmation statement arises has been approved for legal sufficiency or is exempt from legal sufficiency approval.

(5) Conflict Counsel Contracts. Contracts entered into by Agencies for legal counsel pursuant to ORS 180.235 using, without substantial revision, a contract form approved by the Department of Justice.

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(6) Employment Agreements. Employment agreements and collective bargaining agreements negotiated under applicable federal or state laws, including collective bargaining agreements entered into pursuant to ORS 410.612. Agreements with third-party providers of temporary services are not exempt.

(7) Federal Contracts. A contract with a federal agency consisting substantially of provisions prescribed in Federal Acquisition Regulations or federal agency supplemental acquisition clauses (48 CFR), except a contract allowed under Section 211 of the federal E-Government Act of 2002.

(8) Federal Cooperative Agreements. A Federal Cooperative Agreement.

(9) Federal Grants. A grant from a federal agency under which an Agency is the grantee, provided that the Agency has a grants coordinator.

(10) Federal Pass-Through Grants. A Grant under which an Agency passes through to another recipient all or a portion of the money or property received by the Agency under a Grant from a federal agency, provided that:

(a) The Agency does not add to or modify the federal grant except as necessary to provide for proper administration; and

(b) The Grant contains a clause substantially in the following form: "The recipient of grant funds, pursuant to this agreement with the State of Oregon, shall assume sole liability for recipient's breach of the conditions of the grant, and shall, upon recipient's breach of grant conditions that causes or requires the State of Oregon to return funds to the grantor, hold harmless and indemnify the State of Oregon for an amount equal to the funds which the State of Oregon is required to pay to grantor."

(11) Foster Care Agreements. An agreement between the Oregon Department of Human Services or the Oregon Youth Authority and a foster parent for the provision of foster care to an individual under the age of 21, or a youth placed with the Oregon Department of Human Services or Oregon Youth Authority pursuant to ORS 419C.478.

(12) Home Care Services Agreements. An agreement for the provision of and payment for home care services as defined in ORS 410.600(8).

(13) Membership Agreements. A Public Contract that requests or provides for the payment of dues or fees in consideration of membership of individual officers, employees or agents of the State of Oregon in a club, institution, or association in which the State of Oregon acquires no ownership interest. This exemption does not apply if the membership is for an Agency of the State of Oregon.

(14) Non-Negotiable Public Contracts. A Non-Negotiable Public Contract.

(15) Prescribed Contracts. An agreement that is in the form prescribed in Procurement Documents and any conditions on authorization for release under OAR 137-045-0035. Prescribed Contracts do not vary from the form prescribed in Procurement Documents other than to fill in blanks in the form, as is commonly done with invitations to bid for goods and services other than personal services.

(16) Resulting Contracts. A contract formed by a purchase order, work order, task order or a similar ordering instrument for the purchase of goods or services under a Price Agreement, provided that the Assistant Attorney General who reviewed the Price Agreement specified that resulting contracts are

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exempt from further legal sufficiency review and approval, and the ordering instrument issued by the Agency complies with any conditions set by the Assistant Attorney General in the approval.

(17) Settlement Agreements. Agreements settling disputed claims that do not have the effect of amending Public Contracts that are subject to the legal sufficiency approval requirement.

(18) Amendments to Loan Contracts. A written amendment to a Public Contract solely for an Agency loan of money to another party that requires repayment to the Agency, if all of the following apply:

(a) The Public Contract being amended was approved for legal sufficiency;

(b) The amendment modifies only:

(A) The description of the project being financed only to the extent that the modified project remains eligible for financing by the same source of funds as the project before modification; or

(B) Business terms in the Public Contract that:

(i) Except as provided in subsection (18)(c), do not increase or decrease the total principal repayment obligations under the Public Contract;

(ii) Change the interest rate or payment due dates, except for the final maturity date; or

(iii) Describe the non-financial terms and conditions of performance, such as performance start or completion dates for the project being financed or job creation or retention requirements; and

(c) The aggregate increase in the loan amount under the amendment or the aggregate decrease in principal payments scheduled to be received by the Agency, and all prior amendments exempted from the legal sufficiency approval requirement subsequent to the Last Reviewed Contract, does not exceed the greater of:

(A) $250,000; or

(B) Any amounts specified in writing at the time of approval by the Assistant Attorney General who provided legal sufficiency approval of the Last Reviewed Contract.

Statutory/Other Authority: ORS 291.047(4), 190.430 & 190.490

Statutes/Other Implemented: ORS 291.047, 190.430 & 190.490

History:

DOJ 28-2023, amend filed 12/29/2023, effective 01/01/2024

Reverted to DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 12-2014(Temp), f. 9-25-14, cert. ef. 10-1-14 thru 11-14-14

DOJ 11-2014(Temp), f. & cert. ef. 7-11-14 thru 9-30-14

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

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Deleted: (18) Personal Services Contracts, Information Technology Contracts and Architectural and Engineering Services Contracts not calling for or providing for payment in excess of $150,000.¶
(19) Technology Transfer and Related Agreements. Agreements that govern the transfer of tangible research materials between Oregon University System ("OUS") and another organization, agreements with a predominant purpose to grant a license to OUS intellectual property and related agreements. Related agreements are agreements to manage interests in OUS intellectual property, agreements to combine management of interests in OUS intellectual property with management of interests in intellectual property from other parties, agreements that transfer ownership of intellectual property between OUS and other parties, agreements governing revenue sharing from licensing, and confidentiality agreements regarding intellectual property.¶

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DOJ 10-2009, f. 7-2-09, cert. ef. 7-6-09

DOJ 2-2009(Temp), f. & cert. ef. 2-26-09 thru 8-25-09

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 19-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

DOJ 3-1998, f. & cert. ef. 4-1-98

JD 5-1997(Temp), f. & cert. ef. 10-17-97

JD 4-1997(Temp), f. & cert. ef. 10-3-97

137-045-0052

Exemptions from ORS 190.430 and ORS 190.490 review

Contracts that are not subject to the requirement for legal sufficiency review and approval under ORS 291.047 or these chapter 137, division 045 rules are exempt from the Attorney General review requirements under ORS 190.430 and 190.490.

Statutory/Other Authority: ORS 190.430 & 190.490

Statutes/Other Implemented: ORS 190.430 & 190.490

History:

DOJ 28-2023, amend filed 12/29/2023, effective 01/01/2024

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 10-2009, f. 7-2-09, cert. ef. 7-6-09

137-045-0060

Class Exemptions Based on Attorney General's Pre-Approval

(1) The Attorney General may exempt Public Contracts falling within a class from the legal sufficiency approval requirement. The Attorney General delegates to the Chief Counsel of the General Counsel Division and the Attorney-in-Charge of the Business Transactions Section the authority to exempt Public Contracts falling within a class, and to otherwise act on behalf of the Attorney General, in accordance with this rule. The Chief Counsel of the General Counsel Division may delegate this authority to Assistant Attorneys General, subject to any limitations established by the Chief Counsel.

(2) An Agency requesting an exemption for Public Contracts falling within a class must submit a written request to the Attorney General in the same manner that Agencies submit other requests for review and approval of Public Contracts under these Division 045 rules. The request must be signed by an executive officer of the Agency who is responsible for oversight of the subject Public Contracts and must be include:

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Special Public Contract Exemption Program for Exemptions from Legal Sufficiency Approval Based on Risk Assessment¶
(1) In addition to the Public Contracts described in OAR 137-045-0050, the Attorney General has determined that the degree of risk assumed by Agencies is not materially reduced by legal review and approval of individual Public Contracts that satisfy the requirements of the Special Public Contract Exemption Program and fall within the types of contract described in this rule. The Attorney General exempts from the legal sufficiency approval requirement the Public Contracts that satisfy the requirements of the Special Public Contract Exemption Program and fall within the types of contract described in this rule.¶
(2) The requirements of the Special Public Contract Exemption Program are:¶ ... [1]

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(a) A statement that the exemption request is made pursuant to this rule;

(b) Citation to the requesting Agency's statutory authority for procuring and entering into the Public Contracts within the class;

(c) A description of the nature of the business proposed to be transacted under Public Contracts within the class, and the extent to which such business is or is not substantially the same from transaction to transaction within the class;

(d) A description of the circumstances in which the Public Contracts within the class will be used;

(e) Either:

(A) Samples of the proposed form or forms of the Public Contracts within the class, any form of amendment, and the form purchase order or other ordering instrument, if any, to be used in connection with the Public Contracts within the class; or

(B) A request that the Attorney General assist the Agency in developing the form or forms of the Public Contracts within the class, any form of amendment, and the form purchase order or other ordering instrument to be used in connection with the Public Contacts within the class;

and

(f) A description of the Agency's internal contract approval process and signatures required for the Public Contracts within the class.

(3) Following the submission of the request the Agency will provide any other information requested by the Assistant Attorney General responsible for reviewing and granting or denying the request for exemption.

(4) If the Attorney General determines that the degree of risk assumed by an Agency is not materially reduced by legal review and approval of individual Public Contracts falling within the class, the Attorney General will provide the Agency a written exemption, subject to any terms, conditions or limitations the Attorney General deems appropriate, which may include, but are not limited to:

(a) A limit on the duration of the exemption;

(b)Restrictions or conditions on the use of the forms of Public Contract, amendment, or purchase order or similar ordering instrument referenced in the written exemption;

(c) A requirement that the individual or individuals at the Agency who are responsible for entering into and administering the Public Contract subject to the exemption satisfactorily complete and periodically update any training related to review and administration of the type of contract or contracts subject to the exemption, or otherwise demonstrate to the satisfaction of the Attorney General that such individuals possess the appropriate training, certification, or experience to effectively enter into and administer the Public Contracts subject to the exemption.

(d) The extent to which the agency may, without further review by the Attorney General:

(A) Modify the terms and conditions of individual contracts subject to the exemption, including Technical Specifications or the Statement of Work;

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(A) The nature

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(B) The form of Public Contract and any form of amendment submitted in accordance with OAR 137-045-0060(1)(e) do not vary from transaction to transaction, other than one or more of the following and related payment obligations, as necessary: the expiration date or project completion date of the Public Contract; Technical Specifications; time, place, quantity or form of delivery; price; or other provisions as specified in the statement; and¶
(C) The Agency will not modify the form of Public Contract and any form of amendment, other than as specifically provided for in OAR 137-045-0060(1)(g)(B) above, without review and approval for legal sufficiency by the Attorney General, nor will the Agency use such Public Contract other than in transactions described in the exemption

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(B) Select among alternative terms for specific provisions of the contracts subject to the exemption, and the conditions under which such alternative terms may be used; or

(C) Include provisions drafted by the Agency in any contract subject to the exemption without requiring additional review by the Attorney General, which provisions may include Technical Specifications or descriptions of the good, services, or activities that are the subject of any Public Contract subject to the exemption.

(5) (a) An Agency granted an exemption under section 4 shall, at the Attorney General's request or according to a schedule and procedures set forth in the written exemption, submit to the Attorney General one or more exempted Public Contracts entered into under the exemption for review for compliance with the terms, conditions, or limitations established in the written exemption.

(b) Depending upon the results of any such review conducted under subsection 5(a), the Attorney General may take action, including, but not limited to:

(A) Provide comments to the Agency summarizing the results of the Attorney General's review;

(B) Require changes to preapproved provisions of the form of contract, amendment, or purchase order or similar ordering instruments subject to the exemption;

(C) Modify the conditions of the exemption to address any issues discovered during the Attorney General's review;

(D) Modify the conditions of the exemption or suspend the exemption indefinitely or until the Agency satisfies or completes, to the Attorney General's satisfaction, any remedial activities requested by the Attorney General to address any issues discovered during the review conducted under subsection (5)(a); or

(E) Terminate the exemption.

(c) The Attorney General's costs for conducting the activities specified in section (5) of this rule shall be at the expense of the Agency unless otherwise agreed.

(6) The expiration, revocation, or modification of an exemption granted under this rule shall not affect the validity of Public Contracts entered into under the exemption before the expiration, revocation or modification.

Statutory/Other Authority: ORS 291.047(5)

Statutes/Other Implemented: ORS 291.047(5)(a)

History:

DOJ 28-2023, amend filed 12/29/2023, effective 01/01/2024

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 17-2003, f. & cert. ef. 12-9-03

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DOJ 2-2001, f. & cert. ef. 1-18-01

DOJ 3-1998, f. & cert. ef. 4-1-98

137-045-0060(Temp) repealed by DOJ 3-1998, f. & cert. ef. 4-1-98

JD 5-1997(Temp), f. & cert. ef. 10-17-97

JD 4-1997(Temp), f. & cert. ef. 10-3-97

137-045-0070

Emergency Public Contract Exemption

(1) A Public Contract entered into in an Emergency is exempt from the legal sufficiency approval requirement.

(2) An Agency that enters into a Public Contract that is exempt under section (1) of this rule must prepare and maintain in its files documentation that contains:

(a) A concise summary of the circumstances that constitute the Emergency and the character of the risk of loss, damage, interruption of services or threat to public health or safety created or anticipated to be created by the Emergency circumstances;

(b) A statement of the reason or reasons why the prompt execution of the proposed Public Contract was required to deal with the risk created or anticipated to be created by the Emergency circumstances;

(c) A brief description of the services or goods to be provided under the Public Contract, together with its anticipated cost; and

(d) A brief explanation of how the Public Contract, in terms of duration, services or goods provided under it, was restricted to the scope reasonably necessary to adequately deal only with the risk created or anticipated to be created by the Emergency circumstances.

(3) Each Agency shall submit to the Attorney in Charge, Business Transactions Section, within a reasonable time following the end of the Agency's fiscal year, a report of each Public Contract that is exempt from review under section (1) of this rule entered into by the Agency during the fiscal year. In addition, at the request of the Attorney in Charge, Business Transactions Section, the Agency will delivery copies of documentation required by this rule to the Attorney in Charge, Business Transactions Section.

Statutory/Other Authority: ORS 291.047(5)

Statutes/Other Implemented: ORS 291.047(5)(b)

History:

DOJ 28-2023, amend filed 12/29/2023, effective 01/01/2024

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

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DOJ 19-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

137-045-0080

Authorization of Services Prior to Legal Sufficiency Approval

At an Agency's request and upon the Agency's compliance with the procedures set forth in this rule, the Attorney General, through the Attorney in Charge of the Business Transactions Section, or other Assistant Attorney General designated by the Chief Counsel of the General Counsel Division, may authorize services to be performed under specific types of written Public Contracts or under written Public Contracts for specific Agency programs, before legal sufficiency approval as follows:

(1) An Agency requesting authorization for performance of services under Public Contracts prior to legal sufficiency approval must submit a written authorization request signed by an executive officer of the Agency who is responsible for oversight of the Public Contracts to the Attorney in Charge of the Business Transactions Section or other Assistant Attorney General designated by the Chief Counsel of the General Counsel Division. The request must include:

(a) A statement that the authorization request is made pursuant to this rule;

(b) A description of the specific type of Public Contracts within the authorization request and a description of the circumstances in which the Agency will use these Public Contracts, or a description of the specific program for which the Agency will use the Public Contracts to be covered by the authorization;

(c) A citation to the requesting Agency's statutory authority for entering into the specific type of Public Contracts to be covered by the authorization;

(d) The form of Public Contracts comprising the type of Public Contracts within the exemption request or the form of Public Contracts used for the specific Agency program;

(e) A description of the Agency's internal contract approval process and the signatures required for the type of Public Contracts within the authorization request; and

(f) Any other information that the Attorney General requests in connection with the authorization request.

(2) If the Attorney General determines that the authorization for performance of services prior to legal sufficiency approval will not result in undue risk to the State of Oregon under the type of Public Contracts within the authorization request or under Public Contracts used for the specific Agency program described in accordance with section (1) of this rule, the Attorney General may authorize the services under those Public Contracts prior to legal sufficiency approval.

(3) If the Attorney General authorizes services under a Public Contract prior to legal sufficiency approval, the Attorney General, through the Attorney in Charge of the Business Transactions Section, or other Assistant Attorney General designated by the Chief Counsel of the General Counsel Division will provide the Agency with a written pre-approval service authorization, subject to any conditions or limitations

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the Attorney General deems appropriate, including but not limited to a condition that the Public Contract may not be amended prior to legal sufficiency approval.

(4) Any Public Contract under which the Attorney General authorizes services to be performed before approval for legal sufficiency must be submitted to the Attorney General, through the Attorney in Charge of the Business Transactions Section or other Assistant Attorney General designated by the Chief Counsel of the General Counsel Division, for legal sufficiency approval within a reasonable time after the Public Contract is signed by the parties, but in all cases before the Agency makes any payments under the Public Contract. As a condition for legal sufficiency approval, the Attorney in Charge of the Business Transactions Section, or other Assistant Attorney General designated by the Chief Counsel of the General Counsel Division may require that the Public Contract be amended as necessary to make it legally sufficient.

(5) After the Public Contract has been approved for legal sufficiency, the Agency may make payments on the Public Contract even if the payments are for services rendered prior to legal sufficiency approval. An Agency is not authorized to make payments on the Public Contract before the Public Contract is approved for legal sufficiency and all other required approvals are obtained.

(6) The Attorney General, through the Attorney in Charge of the Business Transactions Section, or other Assistant Attorney General designated by the Chief Counsel of the General Counsel Division, may at any time review an authorization for pre-approval services granted under this rule. The Attorney General, through the Attorney in Charge of the Business Transactions Section, or other Assistant Attorney General designated by the Chief Counsel of the General Counsel Division may revoke or modify such authorization at any time upon written notice to the Agency that it is in the best interest of the State of Oregon that such authorization be revoked or modified. Revocation or modification of an authorization for pre-approval services granted under this rule shall not affect the validity of Public Contracts entered into under the authorization prior to the revocation or modification.

Statutory/Other Authority: ORS 291.047(3) & 291.047(6)

Statutes/Other Implemented: ORS 291.047(6)

History:

DOJ 28-2023, amend filed 12/29/2023, effective 01/01/2024

DOJ 19-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 2-2001, f. & cert. ef. 1-18-01

137-045-0090

Ratification of Public Contracts

Before ratifying a Public Contract under ORS 291.049, an Agency shall do all of the following:

(1) Submit to the Attorney in Charge, of the Business Transactions Section or other Assistant Attorney General designated by the Attorney in Charge of the Business Transactions Section or the Chief Counsel of the General Counsel Division, a copy of the Public Contract and the proposed ratification document.

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Following the approval of the Public Contract pursuant to section (3) of this rule an executive officer of an Agency who is responsible for oversight of the Public Contract may ratify the Public Contract by signing the ratification document.

(2) The ratification document submitted pursuant to section (1) of this rule must contain:

(a) An explanation of why performance began before the Public Contract was approved by the Attorney General for legal sufficiency;

(b) A description of the steps being taken to prevent similar occurrences in the future; and

(c) A proposed ratification of the Public Contract.

(3) Obtain approval of the Public Contract for legal sufficiency from the Attorney General, through the Attorney in Charge of the Business Transactions Section, or other Assistant Attorney General designated as set forth in section (1); and

(4) Obtain all other approvals required for the Public Contract.

Statutory/Other Authority: ORS 291.049(3)

Statutes/Other Implemented: ORS 291.049

History:

DOJ 28-2023, amend filed 12/29/2023, effective 01/01/2024

DOJ 9-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

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