

**Enrolled**  
**Senate Bill 1048**

Sponsored by Senator WAGNER; Representatives ANDERSEN, GAMBA, PHAM K, REYNOLDS (at the request of Governor Tina Kotek)

CHAPTER .....

AN ACT

Relating to a Department of Transportation small business assistance program; creating new provisions; amending ORS 279C.335; and prescribing an effective date.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1. (1) As used in this section, “qualified small business” means a business that meets the verification criteria set forth in subsection (3) of this section.**

**(2) The Department of Transportation shall establish a small business development program that aids qualified small businesses to compete for public improvement contracts that the department procures. In the program, the department, at a minimum, shall:**

**(a) Identify public improvements that are suitable for a qualified small business to undertake successfully as a general contractor;**

**(b) Provide a directory or repository of resources to assist a qualified small business in preparing competitive bids or proposals that meet the specifications set forth in solicitations for the department’s public improvement contracts;**

**(c) State in the department’s solicitation materials for public improvement contracts, that the department identifies under paragraph (a) of this subsection, that the department will receive bids or proposals solely from qualified small businesses;**

**(d) Designate department employees who have experience or familiarity with challenges that qualified small businesses face in competing for the department’s public improvement contracts to answer questions, and provide support, assistance and information related to preparing and submitting bids or proposals that is lawful and does not contravene the policies set forth in ORS 279A.015; and**

**(e) Evaluate bids and proposals from, and award public improvement contracts to, qualified small businesses on the basis of a determination of the best value to the state.**

**(3) The department shall determine that a business is a qualified small business if the business:**

**(a) Has registered with the United States Small Business Administration, or a successor agency, as a small disadvantaged business;**

**(b) Is certified as an emerging small business under ORS 200.055; or**

**(c) Meets other criteria the department establishes by rule.**

**(4) The department each year may enter into public improvement contracts with qualified small businesses under the program described in subsection (2) of this section that have an aggregated total value of not more than \$25,000,000 annually.**

(5) The department shall establish and convene a committee to advise the department concerning the program described in subsection (2) of this section. The committee may advise the department concerning which public improvements are suitable under subsection (2)(a) of this section, which resources would best enable qualified small businesses to prepare competitive bids or proposals, what kinds of support, assistance and information is appropriate under subsection (2)(d) of this section and any other matters related to the program described in subsection (2) of this section that the department determines are relevant.

(6) The department may adopt rules necessary to implement and administer the program described in subsection (2) this section.

(7)(a) No later than December 31 of each year, the department shall report, in the manner provided in ORS 192.245, to the Legislative Assembly concerning:

(A) The number of public improvement contracts the department identifies under subsection (2)(a) of this section;

(B) The number of public improvement contracts the department awards to qualified small businesses;

(C) The number of qualified small businesses to which the department provides assistance under the program;

(D) The type and size of the qualified small businesses that participate in the program;

(E) The aggregated value of public improvement contracts the department awards in connection with the program; and

(F) Such other information about the program that the department deems relevant to report.

(b) The department shall collect and compile data necessary to prepare and submit the report described in this subsection.

**SECTION 2.** ORS 279C.335 is amended to read:

279C.335. (1) A contracting agency may award a public improvement contract only in response to competitive bids, except for:

(a) A public improvement contract with a qualified nonprofit agency that provides employment opportunities for individuals with disabilities under ORS 279.835 to 279.855.

(b) A public improvement contract that is exempt under subsection (2) of this section.

(c) A public improvement contract with a value of less than \$10,000.

(d) A public improvement contract with a contract price that does not exceed \$100,000 made under procedures for competitive quotes in ORS 279C.412 and 279C.414.

(e) A contract to repair, maintain, improve or protect property the Department of Veterans' Affairs obtains under ORS 407.135 and 407.145 (1).

(f) An energy savings performance contract that a contracting agency enters into in accordance with rules of procedure adopted under ORS 279A.065.

(g) A public improvement contract with an estimated contract price of \$250,000 or less that a contracting agency awards to an emerging small business certified under ORS 200.055 and funds with moneys from the Emerging Small Business Account established under ORS 200.180. A contracting agency that awards a public contract exempted from competitive bidding under this paragraph shall solicit competitive quotes as provided in ORS 279C.414 before making the award.

**(h) A public improvement contract that the Department of Transportation awards to a qualified small business under the small business development program described in section 1 of this 2023 Act. The department may choose to award a public improvement contract described in this paragraph competitively or using other selection methods that comply with the policies set forth in ORS 279A.015.**

(2) Subject to subsection (4)(b) and (c) of this section, the Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation may exempt a public improvement contract or a class of public improvement contracts from the competitive bidding requirement of subsection (1) of this section after the Director of the Oregon Department of Administrative Services, the Director of

Transportation or the local contract review board approves the following findings that the contracting agency submits or, if a state agency is not the contracting agency, that the state agency that is seeking the exemption submits:

(a) The exemption is unlikely to encourage favoritism in awarding public improvement contracts or substantially diminish competition for public improvement contracts.

(b) Awarding a public improvement contract under the exemption will likely result in substantial cost savings and other substantial benefits to the contracting agency or the state agency that seeks the exemption or, if the contract is for a public improvement described in ORS 279A.050 (3)(b), to the contracting agency or the public. In approving a finding under this paragraph, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board shall consider the type, cost and amount of the contract and, to the extent applicable to the particular public improvement contract or class of public improvement contracts, the following:

(A) How many persons are available to bid;

(B) The construction budget and the projected operating costs for the completed public improvement;

(C) Public benefits that may result from granting the exemption;

(D) Whether value engineering techniques may decrease the cost of the public improvement;

(E) The cost and availability of specialized expertise that is necessary for the public improvement;

(F) Any likely increases in public safety;

(G) Whether granting the exemption may reduce risks to the contracting agency, the state agency or the public that are related to the public improvement;

(H) Whether granting the exemption will affect the sources of funding for the public improvement;

(I) Whether granting the exemption will better enable the contracting agency to control the impact that market conditions may have on the cost of and time necessary to complete the public improvement;

(J) Whether granting the exemption will better enable the contracting agency to address the size and technical complexity of the public improvement;

(K) Whether the public improvement involves new construction or renovates or remodels an existing structure;

(L) Whether the public improvement will be occupied or unoccupied during construction;

(M) Whether the public improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions; and

(N) Whether the contracting agency or state agency has, or has retained under contract, and will use contracting agency or state agency personnel, consultants and legal counsel that have necessary expertise and substantial experience in alternative contracting methods to assist in developing the alternative contracting method that the contracting agency or state agency will use to award the public improvement contract and to help negotiate, administer and enforce the terms of the public improvement contract.

(c) As an alternative to the finding described in paragraph (b) of this subsection, if a contracting agency or state agency seeks an exemption that would allow the contracting agency or state agency to use an alternative contracting method that the contracting agency or state agency has not previously used, the contracting agency or state agency may make a finding that identifies the project as a pilot project for which the contracting agency or state agency intends to determine whether using the alternative contracting method actually results in substantial cost savings to the contracting agency, to the state agency or, if the contract is for a public improvement described in ORS 279A.050 (3)(b), to the contracting agency or the public. The contracting agency or state agency shall include an analysis and conclusion regarding actual cost savings, if any, in the evaluation required under ORS 279C.355.

(3) In making findings to support an exemption for a class of public improvement contracts, the contracting agency or state agency shall clearly identify the class using the class's defining characteristics. The characteristics must include a combination of project descriptions or locations, time periods, contract values, methods of procurement or other factors that distinguish the limited and related class of public improvement contracts from the agency's overall construction program. The agency may not identify a class solely by funding source, such as a particular bond fund, or by the method of procurement, but shall identify the class using characteristics that reasonably relate to the exemption criteria set forth in subsection (2) of this section.

(4) In granting exemptions under subsection (2) of this section, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board shall:

(a) If appropriate, direct the use of alternative contracting methods that take account of market realities and modern practices and are consistent with the public policy of encouraging competition.

(b) Require and approve or disapprove written findings by the contracting agency or state agency that support awarding a particular public improvement contract or a class of public improvement contracts, without the competitive bidding requirement of subsection (1) of this section. The findings must show that the exemption of a contract or class of contracts complies with the requirements of subsection (2) of this section.

(c) Require a contracting agency or state agency that procures construction manager/general contractor services to conduct the procurement in accordance with model rules the Attorney General adopts under ORS 279A.065 (3).

(5)(a) A contracting agency or state agency may hold a public hearing before approving the findings required by subsection (2) of this section and before the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board grants an exemption from the competitive bidding requirement for a public improvement contract or a class of public improvement contracts.

(b) Notification of a proposed exemption under subsection (2) of this section must be published in at least one trade newspaper of general statewide circulation a minimum of 14 days before the date on which the contracting agency intends to take action to approve or disapprove the exemption.

(c) The notice must state that in response to a written request, the contracting agency or state agency will hold a public hearing for the purpose of taking comments on the draft findings for an exemption from the competitive bidding requirement.

(d) If the contracting agency or state agency conducts a public hearing, the contracting agency or state agency shall offer an opportunity for any interested party to appear and comment.

(e) If a contracting agency or state agency must act promptly because of circumstances beyond the agency's control that do not constitute an emergency, notification of the proposed exemption may be published simultaneously with the agency's solicitation of contractors for the alternative public contracting method, as long as responses to the solicitation are due at least five days after the agency intends to take action to approve or disapprove the proposed exemption.

(6) The purpose of an exemption is to exempt one or more public improvement contracts from competitive bidding requirements. The representations in and the accuracy of the findings, including any general description of the resulting public improvement contract, are the bases for approving the findings and granting the exemption. The findings may describe anticipated features of the resulting public improvement contract, but the final parameters of the contract are those characteristics or specifics announced in the solicitation document.

(7) A public improvement contract awarded under the competitive bidding requirement of subsection (1) of this section may be amended only in accordance with rules adopted under ORS 279A.065.

(8) A public improvement contract that is excepted from the competitive bidding requirement under subsection (1)(a), (c), (d), (e), (f) or (g) of this section is not subject to the exemption requirements of subsection (2) of this section.

**SECTION 3.** (1) Section 1 of this 2023 Act and the amendments to ORS 279C.335 by section 2 of this 2023 Act become operative on January 2, 2024.

(2) The Department of Transportation may adopt rules and take any other action before the operative date specified in subsection (1) of this section that is necessary to enable the department, on and after the operative date specified in subsection (1) of this section, to undertake and exercise the duties, functions and powers conferred on the department by section 1 of this 2023 Act and the amendments to ORS 279C.335 by section 2 of this 2023 Act.

**SECTION 4.** This 2023 Act takes effect on the 91st day after the date on which the 2023 regular session of the Eighty-second Legislative Assembly adjourns sine die.

**Passed by Senate June 20, 2023**

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Lori L. Brocker, Secretary of Senate

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Rob Wagner, President of Senate

**Passed by House June 23, 2023**

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Dan Rayfield, Speaker of House

**Received by Governor:**

.....M.,....., 2023

**Approved:**

.....M.,....., 2023

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Tina Kotek, Governor

**Filed in Office of Secretary of State:**

.....M.,....., 2023

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Secretary of State