

**CONTRACTING FOR PROJECTS AND SERVICES:  
PREPARATION AND NEW DEVELOPMENTS**

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## **I. Introduction.**

This presentation represents a potpourri of contract issues, new and continuing.

## **II. Contracting for Services under ORS 279B.030 to 279B.036.**

**A. Step One: Determine Whether the Contract is Subject to the Statute.** A contract is subject to the bill if it is a “services” contract that “exceeds \$250,000.”

**1. Meaning of “Services.”** “Services” is defined in ORS 279A.010. It does NOT include the following:

**a. Public Improvement Contracts.** The operative sections of HB 2867 were added to ORS 279B, and do not apply to public improvement contracts under ORS 279C. (Note that there is some debate about this, but I think the better argument is that such contracts are exempt.)

**b. Contracts for Goods.** ORS 279A.010 and Chapter 279B distinguish between contracts for “goods” (e.g., personal or intellectual property) and contracts for “services.”

**c. Contracts That Are Exempt From Compliance With the Public Contracting Code by Law.**

**2. Meaning of “exceeds \$250,000.”** The determination must be based on a good-faith estimate considering the life of the contract (e.g., a \$100,000/yr contract that can be extended for five years would be a \$500,000 contract).

**B. Step Two: Determine Whether the Public Body Can Feasibly Perform the Services Itself.** If the contract is subject to the statute, the public body must next determine whether it is feasible to perform the contract with its own workforce and resources. If the public body determines that it is not feasible for it to perform the services, it does not have to conduct the cost analysis and may proceed with the procurement. The bill includes the following reasons that would support a finding that public body performance is not feasible:

**1. Lack of Specialized Capabilities, Experience, or Technical or Other Expertise Necessary.** In other words, if the public body doesn’t have the staff with the skills to do the work, it does not have to conduct the analysis. In order to make the determination, the public body has to compare its staffing and experience with that of a potential contractor.

**2. Special Circumstances Require the Public Body to Contract for Services.** Such circumstances include:

**a.** Required by Grant. The terms of a grant or other funding source require use of an independent contractor.

**b.** Required by Law. State or federal law (including administrative rules) requires the use of an independent contractor.

**c.** Services Incidental to Contract for Goods/Property. The services are incidental to a contract for purchasing or leasing real or personal property (e.g., software/hardware maintenance that is typically provided in conjunction with the procurement of computers, software, or copy machines, or lease of space where the landlord provides custodial services as part of the lease).

**d.** Required to Accomplish Public Policy. The agency can't accomplish policy, administrative, or legal goals (e.g., avoid conflicts of interest or obtain unbiased advice) without an independent contract.

**e.** Emergency Contracts. The contract is an emergency contract issued under ORS 279B.080.

**f.** Unacceptable Delay. The need for the services is so urgent, temporary, or occasional that attempting to perform the services with the public body's own forces would cause unacceptable delays (e.g., wind storm knocks trees down, maintenance department doesn't have enough staff and needs assistance, and hiring additional staff would cause undue delay and not make sense for the long term).

**g.** Services Will be Completed in Six Months or Less. If the services contract would be completed within six months from the date of execution, the public body doesn't have to conduct the cost analysis.

**3.** Other Reasons. ORS 279B.033(1)(b), which lists the above examples, begins with the phrase "including, but not limited to." This means that the public body could rely on other special circumstances or reasons in addition to those set forth in the bill if such circumstances or reasons would support a finding that it is not feasible for the public body to perform the services.

**4.** Written Feasibility Determination Required. The public body must make the feasibility determination in writing and include it in the public record.

**C. Step Three: Conduct a Cost Analysis.** If the contract is subject to the statute and the public body could feasibly perform the services itself, then the public body must conduct a cost analysis to determine whether performing the services in-house would cost more or less than contracting for the services. (For a more detailed description of the requirements for the cost analysis, review OAR 137-047-0250.) The cost analysis must be in writing and included in the public record.

**1.** Estimate the Public Body's Costs. This includes the following.

**a.** Wages/Benefits Costs: This includes the employees that would be directly involved in performing the services and employees who inspect, supervise, or monitor performance of the services.

**b.** Materials Costs: This includes transportation and storage.

**c.** Start-up and Termination Costs: This includes planning, training, transportation, and delivery.

**d.** Miscellaneous Costs: This does not include indirect overhead or supervision costs except to the extent that such costs are solely attributable to performing the services and would otherwise exist.

**2.** Estimate a Potential Contractor's Costs: This includes the following.

**a.** Wages/Benefits: This is determined by examining the wages/benefits of contractors and employees that:

**(i)** Work in the industry or business for the services.

**(ii)** Would be directly involved in performing the services, including inspection, supervision, or monitoring.

**b.** Materials Costs: This includes transportation and storage.

**c.** Miscellaneous Costs: This includes reasonably foreseeable fluctuations in the costs over the expected duration of the procurement.

**3.** Making the Determination to Contract. The public body may not contract for the services unless the cost analysis indicates that it would be less expensive to contract for services than to perform the services with the public body's own personnel. There are two exceptions to this requirement:

**a.** Exception 1: Even if the cost analysis indicates that contracting for the services would be less expensive, the public body may not do so if the sole reason that contracting is less expensive is because the wages/benefits cost estimate for contract personnel is lower than the wages/benefits cost estimate for public body employees.

**b.** Exception 2: Even if the cost analysis indicates that it would be less expensive for the public body to provide the services in house, the public body may contract for the services if the public body lacks the personnel and resources necessary to perform the contract in the time required. In this case, the public body needs to keep a written accounting of the analysis and provide it to the contract review board on a quarterly basis. (The difference between this exception and the feasibility determination in Section V(B) above is that, under this exception, the public body has

staff and resources necessary to do the work, but can't perform the work within the time frame necessary for the services.)

**D. Hicks v. Central Point School District, 270 Or App 532, \_\_\_\_ P3d \_\_\_\_ (2015).**

**1. Overview.** In this case, the District employed the statute and determined that it could save money by contracting out student transportation services. A laid-off district employee challenged that determination. The trial court granted summary judgment in favor of the District. The court of appeals found that the District's employee cost comparison was inadequate because the District based its conclusions about the vendors costs based upon assumptions about those costs, rather than on actual costs. The District pointed out that they could not obtain that data without going through the RFP, which they could not conduct until they complete the ORS 279B.030 process. The court was not impressed. I have attached the court's analysis below, but the bottom line is that you will have to obtain evidence of actual contractor costs. At least it is clear from the Court's opinion that the only way a contractor can obtain business from districts who have been providing the service is to share that information.

**2. The Court's Analysis:** The Court held:

"Turning finally to the merits, the question presented by plaintiff in her first assignment of error is whether the court erred in granting the district's motion for summary judgment and rejecting plaintiff's contention that the district violated ORS 279B.030(1)(a) by failing to correctly complete the cost analysis required by ORS 279B.033 before entering into a contract for transportation services with First Student. At the heart of plaintiff's argument is the view that the cost analyses of Robinson and Fairchild do not support the trial court's ruling on summary judgment because they were incomplete. We agree with plaintiff that, because both cost analyses omitted data that was central to the district's comparison of costs under ORS 279B.033(2)(a), the district's determination pursuant to ORS 279B.033(2)(a) that there were cost savings permitting it to proceed to procurement was "contrary to law." ORS 279B.145 (providing that determinations under ORS 279B.033 may be reviewed to determine whether they are, among other things, "contrary to law").

\* \* \*

In plaintiff's view, neither the Robinson nor the Fairchild cost analysis satisfies the "salary, wage, and benefits" comparison required by ORS 279B.033(2)(a). The Robinson analysis estimated the district's personnel costs based on the district's budget for the previous academic year (2010-2011), for a total of \$1,555,735 for all personnel costs related to transportation. The Robinson report then assumed the identical cost for the "potential contractor," explaining:

"The district cannot determine contractor's wage and benefit programs until RFP's have been received. We anticipate a contractor to pay a competitive wage relative to the services offered. Contractors have economies of scale for reduced health benefit costs. Due to this lack of information we are using the assumption that the cost will be equal to that of the District." (Emphasis added.) The Fairchild cost analysis similarly assumed that First Student would pay its employees the same wages and benefits as the district. This was despite Fairchild's knowledge that First Student's wages and benefits would likely be lower than the district's.

Plaintiff asserts that this method of "estimating" the potential contractor's personnel costs is not an estimate at all within the meaning of ORS 279B.033; rather, it is an assumption. Plaintiff further asserts that the district's reliance on that assumption to prepare its cost analyses renders those analyses, and the related determination that those analyses authorized procurement, contrary to ORS 279B.033 and, thus, "contrary to law." Defendants do not directly respond to that contention, except to agree with the trial court's conclusion that it was a "very conservative (and defensible) assumption" in light of the absence of actual data," and not "so irrational as to violate the statute."

We conclude, based on the text of ORS 279B.033, that the district's reliance on assumptions in preparing the cost analysis required by the statutes rendered that cost analysis "contrary to law." As noted, ORS 279B.033 describes the cost analysis that must precede a contracting agency's decision to proceed with a procurement. The contracting agency's cost analysis "shall"

"[e]stimate the cost a potential contractor would incur in performing the services, including:

"(A) Average or actual salary or wage and benefit costs for contractors and employees who:

"(i) Work in the industry or business most closely involved in performing the services that the contracting agency intends to procure[.]" ORS 279B.033(1)(b).

The inclusion of an estimate of the potential contractor's personnel costs is mandatory, not optional. There are additional cost estimates that must be included in the cost analysis, but the estimate of personnel costs is especially significant, because the procurement process cannot proceed if the only cost saving is in personnel. ORS 279B.033(2)(a). The legislature emphasized that concern by specifically requiring the contracting agency to make a comparison of the estimated personnel costs of the contracting agency and the potential contractor. ORS 279B.033(2)(a) provides:

"The contracting agency may not proceed with the procurement if the sole reason that the costs estimated in subsection (1)(b) of this section are lower than the costs estimated in subsection (1)(a) of this section is because the costs estimated in subsection (1)(b)(A) of this section are lower than the costs estimated in subsection (1)(a)(A) of this section."

The statute unambiguously requires an "estimate" of the potential contractor's personnel costs.

In *Oregon Cable Telecommunications v. Dept. of Rev.*, 237 Or App 628, 636, 240 P3d 1122 (2010), we observed that the term "estimate" encompasses "the act of appraising or valuing: VALUATION, CALCULATION; 'a judgment made from usually mathematical calculation especially from incomplete data : a rough or approximate calculation[.]' " (Quoting Webster's Third New Int'l Dictionary 799 (unabridged ed 2002)). That definition is apt here: The "estimates" of personnel costs required by ORS 279B.033 require the act of appraisal or valuation based on calculations based on data. Although data may be incomplete, resulting in calculations that are "rough or approximate," we believe that, in enacting ORS 279B.033, the legislature intended for a contracting agency to go through the process of creating an "estimate": collecting data and making calculations and appraisals based on that data.

The legislative history of ORS 279B.030 and ORS 279B.033 confirms that the legislature understood and intended for the term "estimate" in those provisions to encompass the process of collecting information and assessing costs based on that information. The proponents of the measure frequently reiterated that the purpose of the estimate process was to collect information so that contracting agencies could make informed decisions about contracting.

\* \* \*

The district's decision to base its cost estimate for the potential contractor on an assumption circumvented the process intended by the legislature in ORS 279B.033. Because the district relied on assumptions about salary, wage, and benefit costs, and did not include estimates of actual salary, wage, and benefit costs for potential contractors as required by ORS 279B.033(1)(b), its cost analysis did not comply with the statute. The trial court therefore erred when it granted summary judgment to defendant on the ground that the undisputed facts demonstrated that the cost analyses complied with ORS 279B.033." 279 Or 549 to 554.

### **3. Interesting – and potentially troubling – procedural issue.**

The first and lengthier part of *Hicks* dealt with the jurisdiction of whether the plaintiff appropriately brought her claim as a declaratory judgement action under ORS 28.010 to 28.160, or should have been brought as a writ of review proceeding under ORS 34.010 to 34.102. The District argued that the determination was quasi-judicial and therefore

writ of review provided the exclusive remedy. The court disagreed, concluding the cost estimate was appropriately brought by writ of review. The potential issue for the future is that there is no time deadline to file a declaratory judgment action.

**4. Addressing Hicks.** Solicit the cost information from potential vendors either informally or formally via a request for information. The challenge is that much of that information will be considered proprietary, particularly in the types of services are considered for contacting: transportation, custodial, and landscaping.

### **III. Independent Contractor or Employee?**

#### **A. Framework.**

Distinguishing between independent contractors and employees is a common issue faced by many public and private employers. Because numerous wage and tax obligations do not apply to independent contractors, many employers prefer to characterize workers as independent contractors. However, failing to accurately designate the classification of a worker can result in wage and overtime liability, employment and income tax liability, and penalties, including personal liability in some cases. *See, e.g.*, 26 USC §§ 3509, 7202; *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983) ("The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the [Fair Labor Standards Act] for unpaid wages."). Worker classification is a major focus of the Internal Revenue Service ("IRS") under its current National Research Project, and is subject to close scrutiny by the IRS.

Because various agencies apply different tests to distinguish between employees and independent contractors both at the federal and state level, the area of worker classification can be difficult. The cost of misclassification can be significant under both federal and Oregon rules. Under federal law where a business has misclassified an employee as an independent contractor, the business may be liable for all related employment taxes (Social Security/Medicare (FICA), unemployment (FUTA), and income tax withholding), as well as penalties. Similarly in Oregon, failure to properly classify workers can result in assessment of back taxes, interest, and penalties. *See, e.g.*, ORS 657.515.

#### **B. Federal Law - IRS.**

To determine the nature of the relationship, the IRS has adopted a three-category "common law" test, which examines (1) behavioral control, (2) financial control, and (3) the relationship of the parties. Each category incorporates numerous factors. The test is not mechanical or uniformly applied, and no one factor is determinative; however, it is possible if any one factor weighs in favor of an employer-employee relationship, the IRS will deem the worker to be an employee.



**1. Behavioral Control.** The behavioral control category examines whether the business has the right to control how the work is performed by the worker. Greater behavioral control exercised by a business tends to show that a worker is an employee. The analysis looks at the following factors:

- *Instructions* - More detailed instructions tend to show an employer-employee relationship.
- *Training* - Training is indicative of employer-employee behavioral control, as it shows that a business wants a worker to work in a certain way.
- *Evaluations* - Performance evaluations tend to show an employer-employee relationship.

**2. Financial Control.** The financial control category looks at whether the business has the right to control economic aspects of the job. Where more financial control is exercised by the business, it is more likely that the relationship will be viewed as that of employer-employee. Factors under this category are:

- *Investment* - Significant investment by the worker tends to support an independent contractor relationship.
- *Reimbursement of Business Expenses* - Reimbursement by the business of the worker's expenses tends to show employer-employee financial control.
- *Risk & Reward* - If risk and reward are borne by the worker and not the business, this tends to support independent contractor status.
- *Flat Fee or Wages* - Payment by flat fee rather than periodic labor charges tends to show independent contractor status.
- *Making Services Available on the Market* - If the worker advertises, seeks out business opportunities, and maintains a visible business location, this tends to support independent contractor status.

**3. Relationship of the Parties.** The final IRS category assesses the details of the relationship between the parties. Factors taken into consideration under this category are:

- *Employee Benefits* - Provision of benefits, including vacation, insurance, pension, sick days, and disability insurance, tend to show an employer-employee relationship.
- *Written Contracts* - The provisions of any written contract may speak to the intention behind the relationship.

- *Permanency of Relationship* - If a worker is hired on an indefinite basis rather than for a specific project or period of time, the IRS considers this evidence of intent to create an employer-employee relationship.
- *Key Services* - Where a worker provides services that are a key activity of the business, this tends to show an employer-employee relationship.

The old IRS factors set forth under Revenue Ruling 87-41 ("Rev Rul 87-41") have essentially been incorporated into the new common law test.<sup>1</sup>

Federal law provides some relief for worker classification issues under Section 530 of the '78 Revenue Act. A business may obtain Section 530 relief and be entitled to treat an employee as an independent contractor rather than an employee where: (1) the business does not treat the worker as an employee for any period, (2) the business does not treat any other individual holding a substantially similar position as an employee for any period, (3) all required tax returns are filed by the business consistent with this treatment, and (4) the business has a reasonable basis for treating the individual as an independent contractor.

### **C. Oregon Law - DOR & Employment Department.**

In Oregon, the DOR and Employment Department use a factors-based test set forth in ORS 670.600 for the purpose of distinguishing between independent contractors and employees. Generally speaking, the burden is on the service recipient business to establish that a worker is an independent contractor. *See, e.g.,* ORS 657.040(1) (for purposes of unemployment taxes, any worker providing services for remuneration is presumed to be an employee "unless and until" it is established that the worker falls under ORS 670.600). The ORS 670.600 test looks at whether a person is (1) free from direction and control in providing services, subject to the right of the service recipient business to specify the desired result, and (2) customarily engaged in an independently established business. If both prongs of the test are met, then an individual is an independent contractor and not an employee.

To show that he or she is engaged in an independent business under the Oregon test, a worker must do at least three of the following: (1) maintain a business location separate from that of the service recipient business or in a portion of the worker's home that is used primarily for the business, (2) bear the risk of loss—for example, because the

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<sup>1</sup> The 20 factors are: (1) instructions to worker; (2) training; (3) integration into business operations; (4) requirement that services be rendered personally; (5) hiring, supervising, and paying assistants; (6) continuing relationship (permanency); (7) setting the hours of work; (8) full-time work required; (9) working on employer premises; (10) setting the order or sequence of work; (11) requiring oral or written reports; (12) paying worker by the hour, week, or month; (13) payment of worker's business and/or traveling expenses; (14) furnishing worker's tools and materials; (15) significant investment by worker; (16) realization of profit or loss by worker; (17) working for more than one business at a time; (18) worker making services available to the general public; (19) firm's right to discharge worker; and (20) worker's right to terminate relationship. Rev Rul 87-41. Under the old test, it was possible if any one factor weighed in favor of an employment relationship, the IRS could find that the worker was an employee.

worker enters into fixed-price contracts, is required to correct defective work, warrants the services provided, or negotiates indemnification agreements or purchases liability insurance, (3) provide services to two or more persons in a 12-month period, or engage in routine advertising or solicitation for providing similar services, (4) make a significant investment in the business, such as purchasing equipment, paying for the premises where the services are provided, or paying for licenses or training, and (5) have the authority to hire and fire others in assisting with the work. ORS 670.600(3).

#### **D. Sample Policy.**

Following is a sample human resources policy that we developed to aid a public body client in appropriately determining the correct classification. It is necessarily simplified, but it provides a basis and process for alerting staff to the issue and ensuring compliance.

#### **I. Guidelines:**

Appropriate categorizing of individuals performing services for the Public Body is essential to avoid incurring substantial tax penalties and other liabilities. Decisions concerning the appropriate category will be made by Human Resources, in consultation with legal counsel as needed. APPROVAL MUST BE SECURED BEFORE COMMENCEMENT OF SERVICES.

***Employee:*** An individual performing services for the Public Body is to be regarded as an employee, whether the service is full-time or part-time, regular or temporary, unless it is clearly demonstrated that the relationship is that of a true independent contractor. An individual will be considered and treated as an employee if others in the same or substantially similar positions are employees.

***Independent Contractor:*** A person acts as an independent contractor if the Public Body directs and controls only the intended results and not the means and methods of accomplishing them. Doubtful cases of interpretation are to be resolved in favor of categorizing the individual as an employee. Specific cases will be decided on particular facts, but the following guidelines are instructive.

- A. Independent contractors generally have other clients and derive a substantial part of their income from sources outside the Public Body.
- B. The work of independent contractors is uniquely skilled or professional in nature and requires a considerable amount of independent judgment and specialized knowledge or training obtained elsewhere. Secretarial or clerical services will generally be regarded as being provided by employees.
- C. The place where the work is performed is one indicator of an individual's employment status, but is not determinative. Employees are usually paid for work performed on-site, while independent contractors can work on-site or at home or other locations off-site.

- D. It is the substance of the relationship, not what it is called, that is important. Use of a business name is not determinative, nor is simply calling the individual an independent contractor.
- E. Current employees who perform services for the Public Body outside of their regular duties will generally remain in an employer-employee relationship and will be paid through extra compensation, such as an overload stipend (exempt) or for all hours worked if paid hourly (nonexempt). Former employees will be hired back as full-time, part-time, or temporary employees.

If an individual is determined to be an independent contractor, certain provisions of Oregon law dealing with public contracts may apply. These provisions can be found at ORS chapters 279A, 279B, and 279C. If the Public Body determines that a relationship is an independent contractor relationship, it will also evaluate whether public contracting laws apply.

## **II. Procedures:**

- A. Before services begin, all actions necessary to engage an individual as a contractor or to hire the individual as an employee must be completed.
- B. A department seeking to enter an independent contractor relationship must complete the Independent Contractor Questionnaire. If the service provider falls under the employee classification, the department must submit a position requisition form and a job description if these do not already exist.
- C. The department must then submit the completed Questionnaire to Human Resources for review and approval.

**IV. Planning for a Bond Construction Program.** Getting your legal ducks in a row as part of the pre-bond construction planning process can save you a lot of time and grief (and legal fees) during the procurement and construction phase.

### **A. Review and Update Your Public Contracting Rules.**

- 1.** Attorney General Model Rules apply in the absence of local rules. ORS 279C.065(4). Local rules required to be reviewed and updated every two years following revisions to model rules. ORS 279C.065(5)(b).
- 2.** It is important to have local rules that address delegation of contracting authority.
  - a.** ORS 332.075(2) and (3) provide that the School Board must approve all contracts except as expressly delegated to the superintendent or superintendent's designee.
  - b.** ORS 332.075(2) provides that any District official that executes a contract without delegated authority is *personally liable* for the contract amount.

c. ORS 279A.075 provides that contracting authority can be delegated under the public contracting code.

d. Contracts entered into without authority are potentially void.

3. Provide for delegation of authority under certain dollar amounts.

4. Provide for delegation in certain circumstances, such as emergencies.

5. Provide for delegation to designees.

6. Address Personal Services Contracts, Class Special Procurements, and Exemptions from Competitive Bidding, none of which are addressed in the Model Rules.

## **B. Update the District's form solicitation documents.**

1. Review form Invitations to Bid (ITB) and Request for Proposals (RFP) documents for compliance with current public contracting code/model rules.

2. Include provisions for protest of the solicitation documents and protest of award.

3. Be sure to include procedures to clarify/protest the RFP documents and to protest award of contract.

## **C. Develop and/or Update the District's Form Construction and Design Contracts.**

1. Ensure the District's form contracts are up to date, coordinated, and meet the needs of the planned project delivery method.

2. Ensure that form contracts contain the required public contracting code certifications and provisions. (OAR 137-49-200(1)(c) contains a handy check list of the mandatory provisions.)

3. Work your insurance provider to make sure that the mandatory insurance requirements are up to date, sufficient for the particular project, and interrelate with the District's insurance policies.

4. Do all of the above before your solicit for your first project.

5. Once they are in place, appropriately fill out and comply with your form agreements.

## **D. Contract Forms: Sources.**

1. American Institute of Architects (AIA) Form Agreements.
  - a. A101 (standard construction contract).
  - b. A133 (CM/GC contract)
  - c. A201 (General Conditions)
  - d. B101 (Architect).
2. Associated General Contractors (AGC) Consensus Documents.

**Note: Use of AIA and Consensus Documents requires purchasing a user license. Both sets of documents require revisions to make them more owner-friendly and to comply with the Public Contracting Code.**

3. DAS/State Agency Contracts.

4. Other Districts/Consultants. Be very careful before using form contracts obtained from consultants or other districts. They may be out of date or not represent best legal practices. Always have your own attorney review.

5. Your School District Legal Counsel.

**E. Determine the Appropriate Contracting Method for Each Project and Build the Necessary Procedural Steps into the Schedule.**

1. Design/Bid/Build.

a. 279C.300 establishes competitive bidding as the default setting under the Public Contracting Code for all construction contracts over \$100,000. Use of most of the other alternative methods first requires the School Board, acting as the local contract review board, to hold a hearing and approve an exemption from competitive bidding. See ORS 279C.330 – 279C.335.

**Note: The definitions, factors and required findings for taking an exemption from competitive bidding were substantially amended effective July 1, 2014.**

b. Design/Bid/Build describes the construction process. The District retains an architect and/or engineer who designs the project. Upon completion of the design, the District issues an invitation to bid (ITB) based upon the design, and awards the contract to the responsive and responsible bidder submitting the lowest hard bid. The contractor then constructs the project at the bid price.

**c.** Design/Bid/Build works best for: greenfield new construction, minor additions, specific projects such as roofing, paving, new ball field surfaces, etc.

**d.** Prequalification can be used to make sure that contractors bidding on the project have the required expertise/experience.

**2.** Request for Proposals ("RFP").

**a.** ORS 279C.400 authorizes use of a competitive RFP process for soliciting a construction contract, but only if an exemption from competitive bidding is first approved by the School Board. See 279C.400(1).

**b.** Use of an RFP allows the contract to be solicited based upon factors other than or in addition to price. The RFP contains a set of evaluation factors based on the needs of the specific process. The evaluation team ranks the proposals based on the factors and awards the contract to the highest-ranked proposer rather than the low bidder.

**c.** An RFP Process is best used when special expertise or experience is important: science labs, roof replacement with solar, or where new product or method of construction requires special expertise.

**3.** Construction Manager/General Contractor.

**a.** Under the CM/GC contracting method:

**(i)** The contractor is solicited prior to completion of the design phase pursuant to a competitive RFP process.

**(ii)** The contractor works with the owner and architect to develop the final plans with the goal of improved constructability and fewer change orders.

**(iii)** At the end of the design phase, the owner and contractor negotiate and agree on a guaranteed maximum price (GMP) and the construction schedule for the construction phase of the projects.

**(iv)** Generally, execution of the GMP Amendment starts the construction phase of the project. Early work, such as site-clearing, can begin prior to establishment of a GMP through an early-work amendment.

**b.** CM/GC is the most commonly used alternative contracting method by local governments and is best used for large, complex projects such as major expansions and remodels of existing schools (and particularly where students will be on-site during all or part of the project).

**c.** Contrary to popular belief, CM/GC requires the most owner involvement to be successful. Either the District needs someone experienced on staff or needs to hire a construction management firm with such experience.

**d.** Use of the GM/GC contracting process requires an exemption from competitive bidding.

**e.** The CM/GC alternative contract requirements were significantly modified effective July 1, 2014. Be sure to review the changes made in ORS 279C.337 and the Attorney-General's Model Public Contracting Rules. Note that compliance the Attorney-General's CM/GC rules is now mandatory. Local contracting agencies may not have different rules.

**f.** Unlike other constructions, prevailing wages on a CM/GC contract are not determined at the time of solicitation. Instead, rates are set at the time the contract enters the construction phase or until a binding agreement for construction is entered into, whichever occurs first. OAR 660-025-0020(6). This would generally happen at the time the GMP Amendment is executed, but if the CM/GC performs early work, then it would occur upon the execution of the Early Work Amendment. The GMP Amendment or the Early Work Amendment, if applicable, must contain the appropriate references to the rates.

#### **4. Other Alternative Contracting Methods.**

**a.** Design/Build: This alternative method results in a single contract for both design and construction services, and generally involves the development of a GMP similar to a CM/GC. Use requires an exemption for competitive bidding and the contract is solicited by RFP.

**b.** Energy Savings Performance Contracts (ESPC): This is a version of a design/build contract where the District uses an RFP to solicit a qualified energy service company to identify energy-saving projects that guarantee a specific energy savings, and the compensation is based in part on the delivery of the promised energy savings. An ESPC contract is statutorily exempt from competitive bidding and so no special exemption is necessary – as long as it is solicited and complies with requirements of the Attorney General's Model Rules. See ORS 279C.335(1)(f); OAR 137-049-0690.

**c.** RFQ/RFP: Under this method, the contracting agency narrows the field and obtains information through use of a request for qualifications (RFQ) prior to issuance of an RFP. The RFP is then issued only to the qualified firms.

#### **5. Qualification Based Selection (QBS) for Design Professionals.**

**a.** The 2011 legislature extended the requirement to use the qualifications-based selection process ("QBS") to local governments, including school districts, for the solicitation of architectural, engineering, land surveying,



photogrammetric mapping, transportation planning, and related contracts. ORS 279C.100 to 279C.125. Previously, it only applied to state agencies.

**b.** Under QBS, the contracting agency is prohibited from soliciting or using pricing information as part of the selection process. See ORS 279C.110(1). Once the preferred candidate has been determined, the contracting agency may request pricing information and negotiate the fee. ORS 279C.110(5).

**6. Important Websites:**

**a.** Current Attorney General Model Public Contracting Rules, OAR Chapter 137 Divisions 46, 47, 48, 49:  
[http://arcweb.sos.state.or.us/pages/rules/oars\\_100/oar\\_137/137\\_tofc.html](http://arcweb.sos.state.or.us/pages/rules/oars_100/oar_137/137_tofc.html).

**b.** Information regarding amendments to the Model Rules:  
[http://www.doj.state.or.us/ca/business\\_transactions.shtml](http://www.doj.state.or.us/ca/business_transactions.shtml).

**c.** Currently BOLI Administrative Rules, OAR Chapter 839, Division 25:  
[http://arcweb.sos.state.or.us/pages/rules/oars\\_800/oar\\_839/839\\_025.html](http://arcweb.sos.state.or.us/pages/rules/oars_800/oar_839/839_025.html).

**d.** BOLI Prevailing Wage Rate Publications:  
[http://www.oregon.gov/boli/WHD/PWR/pages/pwr\\_state.aspx](http://www.oregon.gov/boli/WHD/PWR/pages/pwr_state.aspx).

**e.** BOLI Definitions of Covered Occupations:  
[http://www.oregon.gov/boli/WHD/PWR/docs/defs\\_occs.pdf](http://www.oregon.gov/boli/WHD/PWR/docs/defs_occs.pdf).

**f.** U.S. Department of Labor Davis-Bacon wage determinations: <http://www.wdol.gov/dba.aspx>.

**V. Miscellaneous Things to Watch Out For.**

**A. SB 675.** The 2015 legislature enacted a modification to the tax certification language.

**1.** ITBs and RFPs need to contain substantially the following language:

"Proposer/Bidder certifies that Proper/Bidder has complied with the applicable tax laws of the state or a political subdivision of the state, including ORS 305.620 and ORS Chapters 316, 317, and 318."

**2.** The contract must include substantially the following language:

"Contractor represents and warrants that Contractor has complied with the applicable tax laws of this state or a political subdivision of this state, including but not limited to ORS 305.620 and ORS chapters 316, 317 and 318. Contractor covenants that contractor will continue to comply with the tax laws of this state or a political subdivision of this state during the term

of this contract. Failure by the Contractor to comply with the applicable tax laws of this state or a political subdivision of this state before the execution of this Contract or during the term of this Contract is a default for which the District may terminate this Contract and seek damages and other relief available under the terms of this Contract or under applicable law."

**3. Referenced Tax Laws:**

**a.** ORS 305.620 (local income or sales taxes collected by the state).

**b.** ORS Ch. 316 (Personal Income Tax)

**c.** ORS Ch. 317 (Corporate Excise Tax)

**d.** ORS Ch. 318 (Corporate Income Tax).

**4.** The text of SB 675 can be review at:  
<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB675/Enrolled>

**B. COPPA/SB 187.**

**1.** The Children's Online Privacy Protection Act ("COPPA") imposes requirements on websites and other online service providers (and their third-party service providers) including, without limitation, to (a) make known the information they collect, use, and disclose regarding children under 13, (b) obtain consent from parents before collecting, using, or disclosing that information, and (3) protect that information (15 U.S.C. 6501-6505; 16 CFR Part 312). Failure to comply with COPPA can result in injunctive relief, civil penalties, damages, restitution, or other compensation, and the imposition of continued/heightened regulatory oversight and compliance requirements. All Services provided by Contractor under this agreement will comply with COPPA, and any applicable state laws governing similar types of data

**2.** The Oregon Student Information Protection Act was enacted in by SB 187 (2015) and becomes effective July 1, 2016), and is essentially Oregon's version of COPPA. It can be reviewed at:  
<https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/SB187/Enrolled>.

**3.** Contracts for online services should include compliance requirements for both.

**C. OMB "Supercircular."** On December 26, 2013, the United States Office of Management and Budget ("OMB") issued new comprehensive and uniform guidelines for the procurement of contracts funded by federal awards, which became effective one year later on December 26, 2014. But non-federal agencies were not obligated to comply immediately with the guidelines because OMB provided an optional two-year

grace period for compliance. *See* 80 Fed Reg 54407-01 (Sept. 10, 2015) (OMB); 80 Fed Reg 67261-01 (Nov. 2, 2015) (Department of Education). This grace period ends December 26, 2016. Districts will want to review the solicitation requirements to make sure that they are in compliance with the new requirements when soliciting contracts funded with federal funds. More information can be obtained at:

1. <http://www.plantemoran.com/perspectives/articles/2014/Pages/omb-s-uniform-grant-guidance.aspx>

2. <http://www.bakertilly.com/insights/understanding-procurement-changes-to-omb-uniform-guidance/>

## **VI. Conclusion**

This is intended to be an overview of the law surrounding these issues, and not legal advice. School districts should consult their own legal counsel.