



# OKLAHOMA

## STATUTES

### TITLE 61

## Public Buildings and Public Works

(Includes Revisions through 2011 Legislative Session)

**Notice:** These statutes were compiled to assist agencies and citizens doing business with the Construction and Properties Division. Although we have made every effort to assure they are correct, they are not warranted as to accuracy. In addition to the official published version, Oklahoma statutes may be accessed at several state websites, which include [www.oscn.net](http://www.oscn.net) and [www.lsb.state.ok.us](http://www.lsb.state.ok.us)

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**§ 1. Contracts Exceeding Certain Amount - Bond - Irrevocable Letter of Credit - Affidavit of Payment**

A. Prior to an award of a contract exceeding Fifty Thousand Dollars (\$50,000.00) for construction or repair of a public building or structure, or improvement to real property, the person that receives the award shall:

1. Furnish a bond with good and sufficient sureties payable to the state in a sum not less than the total sum of the contract; or

2. Cause an irrevocable letter of credit, containing terms the Department of Central Services prescribes, to be issued for the benefit of the state by a financial institution insured by the Federal Deposit Insurance Corporation in a sum not less than the total sum of the contract.

B. The bond or irrevocable letter of credit shall ensure the proper and prompt completion of the work in accordance with the contract and shall ensure that the contractor shall pay all indebtedness the contractor incurs for the contractor's subcontractors and all suppliers of labor, material, rental of machinery or equipment, and repair of and parts for equipment the contract requires the contractor to furnish.

C. For a contract not exceeding Fifty Thousand Dollars (\$50,000.00), in lieu of a bond or irrevocable letter of credit, the contractor shall submit an affidavit of the payment of all indebtedness incurred by the contractor, the contractor's subcontractors, and all suppliers of labor, material, rented machinery or equipment, and repair of and parts for equipment used or consumed in the performance of the contract. The execution of the affidavit with knowledge that any of the contents of the affidavit are false, upon conviction, shall constitute perjury, punishable as provided for by law.

**§ 1.1. Repealed by Laws 2006, SB 558, c. 271, § 37, emerg. eff. July 1, 2006**

**§ 2. Filing of Bond - Action on Bond - Subcontractors.**

A. Bonds shall be filed in the office of the agency, institution, department, commission, municipality or government instrumentality that is authorized by law and does enter into contracts for the construction of public improvements or buildings, or repairs to the same; and the officer with whom the bond is filed shall furnish a copy thereof to any person claiming any rights thereunder. Any person to whom there is due any sum for labor, material or repair to machinery or equipment, furnished as stated in Section 1 of this title, the heirs or assigns of such person, may bring an action on the bond for the recovery of the indebtedness, provided that no action shall be brought on the bond after one (1) year from the day on which the last of the labor was performed or material or parts furnished for which the claim is made.

B. Any person having direct contractual relationship with a subcontractor performing work on the contract, but no contractual relationship express or implied with the contractor furnishing the payment bond, shall have a right of action upon the payment bond only upon giving written notice to the contractor and surety on the payment bond within ninety (90) days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material or parts for which the claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material or parts were furnished or supplied or for whom the labor was done or performed. The notice shall be served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office or conducts business, together with a copy thereof to the surety or sureties on the payment bond.

C. 1. The bond or irrevocable letter of credit issued to the Oklahoma Department of Transportation or the Oklahoma Turnpike Authority, pursuant to this section, shall also provide that the contractor shall pay all state and local taxes accruing as a result of the contract, any

liquidated damages as provided by the contract and any overpayment of progressive estimates resulting in a balance due and owing the Oklahoma Department of Transportation or the Oklahoma Turnpike Authority.

2. A claim against the bond or irrevocable letter of credit for delinquent taxes shall be made by the public entity to which the tax was payable. The claim shall be made within six (6) months from the date on which the tax became delinquent. Notice of the delinquent tax shall be sent by certified mail to the surety, and a copy of the notice shall be sent to the contractor. Nothing in this paragraph shall be construed to release, at any time, the contractor from responsibility for full payment of all taxes.

3. A claim against the bond or irrevocable letter of credit for overpayment on progressive estimates shall be made by the public entity within one (1) year from the date of final acceptance of the project. Notice of the overpayment shall be sent by certified mail to the surety and a copy of the notice shall be sent to the contractor. Nothing in this paragraph shall be construed as to release, at any time, the contractor from the responsibility of refunding any amount overpaid on progressive estimates which are due and owing the Oklahoma Department of Transportation.

### **§ 3. Working Day for Public Employees.**

A. Except as provided in subsection B of this section, eight (8) hours shall constitute a day's work for all public employees not otherwise exempt from or covered by special provisions under the federal Fair Labor Standards Act, 29 U.S.C.A., Section 201 et seq. and regulations thereto. In cases where it may be necessary to work more than eight (8) hours per calendar day which results in more than forty (40) hours worked per week, all public employees not otherwise exempt from or otherwise covered by special provisions under the federal Fair Labor Standards Act and regulations related thereto or other persons so employed shall be compensated in accordance with the federal Fair Labor Standards Act and regulations related thereto.

B. Public employees and public safety professionals may be allowed to work in excess of eight (8) hours per day when such hours are assigned as part of an alternative work schedule. In any case where such work schedule results in an employee working in excess of forty (40) hours per workweek who is not exempt from or covered by special provisions under the overtime provisions of the Fair Labor Standards Act, the employee shall be compensated in accordance with the Fair Labor Standards Act and regulations related thereto. For purposes of this section, "public safety professionals" means sheriffs, deputy sheriffs, correctional officers, and persons in the emergency medical service profession.

### **§ 4. Public Contracts Made on Basis of Eight-Hour Day.**

All contracts hereafter made by or on behalf of the state, or by or on behalf of any county, city, township, or other municipality, with any corporation, person or persons, for the performance of any public work, by or on behalf of the state or any county, city, township, or other municipality, shall be deemed and considered as made upon the basis of eight (8) hours constituting a day's work; and it shall be unlawful for such corporation, person or persons, to require, aid, abet, assist, connive at, or permit any laborer, workman, mechanic, prison guards, janitors in public institutions, or other person to work more than eight hours per calendar day in doing such work, except in cases and upon the conditions provided in the preceding section.

Provided that the provisions of this act in regard to hours worked per calendar day shall not apply to the construction, reconstruction, maintenance, or the production of local materials for: Highways, roads, streets, and all the structures and drainage in connection therewith; sewer systems, waterworks systems, dams and levees, canals, drainage ditches, airport grading, drainage, surfacing, seeding and planting. Provided that the provisions of this act will not

prevent employees from drawing time and half for those hours worked over forty (40) during any calendar week.

**§ 5. Penalty for Violating Two Preceding Sections**

Any officer of the state, or of any county, city, township, or other municipality, or any person acting under or for such officer, or any contractor with the state, or any county, city, township, or other municipality thereof, or other persons violating any of the provisions of the two preceding sections, shall for each offense be fined in any sum not less than Fifty Dollars (\$50.00), nor more than Five Hundred Dollars (\$500.00), or punished by imprisonment of not less than three (3) months not more than six (6) months. Each day such violation continues shall constitute a separate offense.

**§ 6. Public Buildings - Home Products - When to Use**

From and after the passage and approval of this act, in the construction of all public buildings erected for the state; for any county for educational, eleemosynary, penal or other institution of the state, or for any county thereof, where the expense of construction is borne wholly or in part by the state, or county, by appropriation, by the issuance of bonds, or by taxation, preference shall be given to materials mined, quarried, manufactured or procured within the State of Oklahoma, provided that the same can be procured at no greater expense than like material or materials of equal quality from without the state.

**§ 7. Repealed by Laws 1983, c. 304, § 182, eff. July 1, 1983**

**§ 8. Prior Contracts Unaffected**

The provisions of Sections 1 and 2 shall not apply to contracts entered into prior to the approval of this act.

**§ 9. Contract Provision Requiring Employment of Oklahoma Labor and Use of Oklahoma Materials**

The Governor, the Director of Central Services, the Board of Regents for Higher Education, and any agent or agency of the State of Oklahoma who shall be authorized to expend funds for the construction or repair of state institutions provided for pursuant to Section 31 of Article X of the State Constitution, shall include in all contracts for repair or construction a provision requiring employment of Oklahoma labor and the use of Oklahoma materials in doing such construction and repair if such Oklahoma labor and materials are available, and the quality of such labor or materials meet the standards of labor and material available from outside the state and can be procured at a cost no higher than the same quality of labor or material available from outside this state.

**§ 10. Use of Oklahoma Labor and Materials Required When Equal to Competitors**

The Governor, the Director of Central Services, the Oklahoma State Regents for Higher Education, and any agent or agency of the State of Oklahoma who shall be authorized to expend funds for the construction or repair of state institutions provided for pursuant to Section 33 of Article X of the State Constitution, shall include in all contracts for repair or construction a provision requiring employment of Oklahoma labor and the use of Oklahoma materials in doing such construction and repair wherever such Oklahoma labor and materials are available and the quality of such labor or materials meet the standards of labor and material available from outside the state and can be procured at a cost no higher than the same quality of labor or material available from outside this state.

### **§ 11. Public Buildings - Facilities for Handicapped - Additions to Existing Buildings**

A. Unless otherwise provided for by law, all plans and specifications for the erection of public buildings by this state, or any agency or political subdivision thereof, or for any building erected through the use of public funds shall provide facilities for the handicapped. Such facilities shall conform with the codes and standards adopted by the State Fire Marshal and amended by the Division's promulgated rules. Elevators shall be constructed and installed in said public buildings to the extent deemed feasible and financially reasonable by the contracting authority of the state or such political subdivision. Said codes and standards shall be on file in the Construction and Properties Division of the Department of Central Services.

B. After May 24, 1973, any building or facility which would have been subject to the provisions of this section but for the fact that it was constructed prior to May 24, 1973, shall be subject to the requirements of this section if additions are made to such building or facility in any twelve-month period which increase the total floor area of such building or facility by twenty-five percent (25%) or more or if alterations or structural repairs are made to such building or facility in any twelve-month period which affect twenty-five percent (25%) or more of the total floor area of such building or facility.

### **§ 12. Plans and Specifications – Approval**

All plans and specifications for the erection of public buildings subject to Section 11 of this title shall be submitted prior to bidding and awarding of contract to the governing body of the political entity controlling the funds involved. Such plans and specifications shall be checked for compliance with Section 11 of this title, and no construction contract for any public building shall be awarded unless and until said plans and specifications are approved as being in compliance with Section 11 of this title by the appropriate governmental agency. If public buildings are to be financed by state funds, the Construction and Properties Division of the Department of Central Services shall approve said plans and specifications. In the case of public buildings to be financed by county funds or funds controlled by some other political subdivision of the state, the agency whose approval is required shall be the governing body of such subdivision.

### **§13. Definitions**

(a) For the purpose of this act the term "contractor" means an individual, general partnership, limited partnership, joint venture, association, corporation or a combination of any of the foregoing who does or undertakes for compensation the construction of any public works.

(b) The term "public works" for the purpose of this act means the construction, alteration, repair, improvement, moving, wrecking or demolition of any highway, road, railroad, earthwork, building or other structure, project, development or improvement, whether it be in whole or in part.

### **§ 14. Preference to Oklahoma-Domiciled Contractors.**

To the extent permitted by federal laws and regulations, whenever the State of Oklahoma, or any department, agency or institution thereof or any city, town or county shall let for bid any contract to a contractor for any public works, the contractor domiciled outside the boundaries of Oklahoma shall be required, in order to be successful, to submit a bid the same percent less than the lowest bid submitted by a responsible contractor domiciled in Oklahoma as would be required for such an Oklahoma domiciled contractor to succeed over the bidding contractor domiciled outside Oklahoma on a like contract being let in his domiciliary state.

### **§ 15. Exceptions**

This act shall not apply to any contractor who is qualified for bidding purposes with the Oklahoma State Highway Department and submits a successful bid wherein part of or the entire funds are furnished by the United States Government.

**§ 16. Unconstitutional**

This section, derived from Laws 1969, c. 274, § 1; Laws 1970, c. 106, § 1, authorizing a state agency to withhold payment to contractors in default for labor or materials, was held to fail to meet the constitutional standard for procedural due process, in that it afforded contractors neither prior notice nor opportunity to be heard, by *Guy H. James Const. Co. v. State ex rel. Oklahoma Department of Transportation*, Okl., 655 P.2d 553 (1982).

**§ 17. Presumption of Consent to Jurisdiction**

Any contractor doing business in this state shall be presumed to have consented to the jurisdiction of any court of this state where the work is being done and service may be obtained upon any agent or employee of said contractor.

**§ 18. Liability of Contractor After Completion of Contract Work.**

Whenever any public officer shall, under the laws of the State of Oklahoma, enter into a contract for the purpose of constructing any highway or turnpike, the contractor or supplier of materials shall not be liable for damages arising out of torts involving injury to persons or damage to property occurring after completion of such contract work and any applicable maintenance obligation and acceptance thereof by such public officer, if all contractual provisions and specifications imposed by state and federal agencies have been complied with by said contractor or supplier of materials.

Provided, however, that nothing herein contained shall apply to any cause of action on behalf of the contracting public agency.

**§ 19. Multi-year Contract for Painting and Maintenance of Water Storage Tanks and Facilities**

A. A municipality or rural water district may enter into a multi-year contract for painting and other maintenance of water storage tanks and appurtenant facilities if the contract contains a contingency provision whereby the municipality or district is not obligated to make any payment, in any year, in an amount exceeding the income and revenue provided for such year.

B. Notwithstanding the provisions of Section 101, et seq., of Title 61 of the Oklahoma Statutes, a municipality or rural water district contemplating entering into a multi-year contract for painting and other maintenance of water storage tanks and appurtenant facilities may or may not, at its option, require that the work be bid pursuant to the provisions of the Public Competitive Bidding Act of 1974.

**State Building Appropriations - Contracts and Purchases**

**§ 21 through § 48. Repealed by Laws 1974, c. 298, Section 35, operative Aug. 1, 1974**

**§ 51. State Agencies, Boards, etc. - Purchase of American Made Products – Exceptions**

A. All agencies, boards, commissions, offices, institutions, or other governmental bodies of the State of Oklahoma, and all individuals making purchases on behalf of such governmental bodies, shall purchase for such governmental bodies goods and equipment manufactured or produced in the United States of America as determined pursuant to federal and state law, unless:

1. A foreign-made product is substantially cheaper and of equal quality;
2. A foreign-made product is of substantially superior quality to competing American products and is sold at a comparable price; or
3. A reciprocal trade agreement or treaty has been negotiated by the State of Oklahoma or by the United States government on behalf of or including this state with a foreign nation or government for nondiscriminatory governmental procurement practices or policies with such foreign nation or government.

B. The state and any political subdivision of the state may give a two and one-half percent (2 1/2%) differential preference to the cost of goods and equipment manufactured or produced in the United States of America over foreign-made products; provided that such preferences shall not be for goods or equipment of inferior quality to those offered from outside the United States of America. This preference shall not be in addition to any other preference for which such goods or equipment may be eligible pursuant to law.

**§ 52. Repealed by Laws 1980, c. 68, Section 1, emerg. eff April 10, 1980**

## **State Consultants**

### **§ 60. Bid Forms for Capital Improvement Projects – Exceptions**

All state agencies, boards, commissions, offices, institutions, and other governmental bodies of this state, and all individuals representing such entities, except the Department of Transportation, the Oklahoma Turnpike Authority, and CompSource Oklahoma provided CompSource Oklahoma is operating pursuant to a pilot program authorized by Sections 1 and 2 of this act, shall use construction manager, consultant and construction contract forms that the State Construction Administrator of the Construction and Properties Division of the Department of Central Services requires to award and execute contracts for designs to construct, renovate, alter, repair, maintain, or improve real property or fixtures of real property of the state. The Administrator may authorize, in writing, exceptions to the use of construction manager, consultant and construction contract forms for specific projects.

### **§ 61. Definitions**

As used in Sections 61 through 65 of this title:

1. "Administrator" means the State Construction Administrator of the Construction and Properties Division of the Department of Central Services;
2. "Chief administrative officer" means an individual responsible for directing the administration of a state agency. The term does not mean one or all of the individuals that make policy for a state agency;
3. "Construction manager" means an individual, firm, corporation, association, partnership, copartnership, or any other legal entity possessing the qualifications to provide services of construction management which include, but are not necessarily limited to, design review, scheduling, cost control, value engineering, constructability evaluation, preparation and coordination of bid packages, and construction administration;
4. "Department" means the Department of Central Services;
5. "Consultant" means an individual or legal entity possessing the qualifications to provide licensed architectural, registered engineering, or registered land surveying services or other individuals or legal entities possessing specialized credentials and qualifications as may be needed to plan or design for any construction or a public work improvement project;
6. "Director" means the Director of the Department of Central Services;

7. "Division" means the Construction and Properties Division of the Department of Central Services;

8. "Project" means plans or designs for a public work improvement, except the transportation facilities under the jurisdiction of the Department of Transportation or the Oklahoma Transportation Authority:

- a. to construct, renovate, alter, repair, maintain, or improve real property or fixtures of real property, and
- b. that does not constitute "construction" as defined by the Public Building Construction and Planning Act; and

9. "State agency" means an agency, office, officer, bureau, board, counsel, court, commission, institution, unit, division, body or house of the executive or judicial branches of state government, whether elected or appointed, excluding only political subdivisions of the state.

## **§ 62. Construction Management and Consultant Services**

A. The Construction and Properties Division of the Department of Central Services shall maintain a file of all persons and entities interested in and capable of performing construction management and consultant services for state agencies. The file shall include registration forms and information submitted by construction managers and consultants pursuant to rules promulgated by the Department of Central Services. Pursuant to rules promulgated by the Department, the Division shall determine whether a construction manager or consultant qualifies for registration and shall notify the construction manager or consultant within twenty (20) days of receipt of a request for registration. Construction managers and consultants shall re-register for each successive calendar year with the Division.

B. The requisitioning state agency shall define the scope of a proposed project. The scope shall identify project components, phases, and timetables and shall include detailed project descriptions. The state agency may request the Division to assist with scope development. The state agency shall send the scope and a requisition for construction management or consultant services, signed by the chief administrative officer, to the Division. The Division shall review the scope and approve it before the state agency issues a solicitation.

C. The state agency shall issue a solicitation to construction managers or consultants capable of providing the services the state agency desires. The solicitation shall, at a minimum, contain:

1. Description and scope of the project;
2. Estimated construction cost or available funds, anticipated starting date, and completion date the state agency desires for the project;
3. Certification of funds available for the construction manager or consultant fee, including federal, state or other participation;
4. Closing date for construction manager or consultant to give notice of interest to the state agency; and
5. Additional data the state agency requires from the construction manager or consultant. The closing date for submission of construction manager or consultant notice of interest for consideration shall be within thirty (30) days of the date of the notice the state agency issues.

D. After the closing date, the State Construction Administrator of the Construction and Properties Division of the Department of Central Services shall provide information from the construction managers' or consultants' files to the state agency. Should there be an inadequate expression of interest in the project, the state agency and Division personnel shall confer to add construction managers or consultants for consideration.

E. The state agency shall review the information the Division provides and shall select no less than three and no more than five construction managers or consultants per contract for interviews. The review shall include consideration of factors from the information the Division supplies including, but not limited to:

1. Professional qualifications for the type of work contemplated;
2. Capacity for completing the project in the specified time period; and
3. Past performance on projects of a similar nature.

F. The Division shall advise the state agency of the methods to be used to conduct an evaluation, interview, selection, contract negotiation, and fee negotiation processes pursuant to rules promulgated by the Department of Central Services Division.

G. 1. Upon completion of contract negotiation with the highest qualified construction manager or consultant, which contract shall include a fair and reasonable fee, the Division shall approve and award the contract.

2. If the Division and the first-choice construction manager or consultant cannot reach an agreement, the negotiations shall terminate and negotiations with the second-choice construction manager or consultant shall commence. If the Division and the second-choice construction manager or consultant cannot reach an agreement, the negotiations shall terminate and negotiations with the third-choice construction manager or consultant shall commence. If the Division and the third-choice construction manager or consultant cannot reach an agreement, then all negotiations shall terminate. Should the Division be unable to negotiate a satisfactory contract with any of the three selected construction managers or consultants, the Division shall select additional construction managers or consultants in order of their competency and qualifications and shall continue negotiations in accordance with the provisions of this section until an agreement is reached.

H. Any plans developed pursuant to the process for selection of a contractor for construction of a facility authorized pursuant to Section 183 of Title 73 of the Oklahoma Statutes shall become the property of the State of Oklahoma as a condition of the award of the final contract for construction of the facility.

I. In the selection of a construction manager or consultant, all political subdivisions of this state shall follow these procedures:

The subdivision shall select a construction manager or consultant based upon the professional qualifications and technical experience of the construction manager or consultant. The subdivision shall negotiate a contract with the highest qualified construction manager or consultant, provided that a fee can be negotiated that is fair and reasonable to both parties. In the event a reasonable fee cannot be negotiated with the selected construction manager or consultant, the subdivision may negotiate with other construction managers or consultants in order of their qualifications.

#### **§ 62.1. Consultant and Construction Contracts to Be in Accordance with Public Building Construction and Planning Act**

Except as provided by Sections 61 and 62 of this title and in addition to other statutory requirements, all construction manager, consultant, and construction contracts shall be in accordance with the provisions of the Public Building Construction and Planning Act.

#### **§ 62.2. Minor Services Contracts**

The Construction and Properties Division of the Department of Central Services may enter into contracts with construction managers and consultants registered with the Division for the purpose of providing minor services to state agencies. The contracts shall provide for services

on an as-needed basis and shall not exceed One Hundred Thousand Dollars (\$100,000.00) per construction manager or consultant during one (1) year. The requisitioning state agency shall reimburse the Division for the fee of the construction manager or consultant that provides the services.

**§ 63. Ownership and Control of Plans, etc.**

All drawings, plans, specifications, reports, and models made by a construction manager or consultant for a state agency shall be the property of this state, and shall be delivered to the Construction and Properties Division of the Department of Central Services. The construction manager or consultant receiving payment for plans paid for in whole or in part with state funds shall file such plans with the Division for inclusion in a library system to be maintained by the Division. Any state agency shall have access for review to any plans or specifications filed with the Division.

**§ 64. Offenses**

Any construction manager or consultant or person doing architectural, surveying or engineering work for the State of Oklahoma, their agents, servants or employees, who shall receive gratuity from any contractor or builder of any public building or works, or solicit, receive or make any political contribution from or to a contractor or builder of any public building or works, or who attempts to interfere with the competitive bidding process of the State of Oklahoma in any manner, is guilty of a misdemeanor, and upon conviction thereof shall be fined not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), and by imprisonment in the county jail for not less than six (6) months nor more than one (1) year. Any contractor or builder of any public building or works, their agents, servants or employees, who shall offer any gratuity or political contribution to any construction manager or consultant doing architectural, surveying or engineering work for the State of Oklahoma, or who attempts to interfere with the competitive bidding process of the State of Oklahoma in any manner, is guilty of a misdemeanor, and upon conviction thereof shall be fined not less than One Hundred Dollars (\$100.00) nor more than Five Hundred Dollars (\$500.00), and by imprisonment in the county jail for not less than six (6) months nor more than one (1) year.

**§ 65. Application of Act - Emergencies**

A. In addition to the conditions prescribed pursuant to subsections C and D of this section, the provisions of Section 62 of this title shall not apply whenever the Construction and Properties Division of the Department of Central Services with concurrence of the chief administrative officer of the public agency affected declares that an emergency exists. The construction manager or consultant shall be selected by the State Construction Administrator of the Construction and Properties Division of the Department of Central Services. The resulting construction manager or consultant contract shall not exceed Fifteen Thousand Dollars (\$15,000.00). The reasons for the emergency shall be recorded in the official records of the Division.

B. Emergency as used in this section shall be limited to conditions resulting from any of the following:

1. A sudden unexpected happening or unforeseen occurrence if it is impossible for the provisions of Section 62 of this title to be observed because of the time factor and if the public health or safety is endangered; and
2. A condition or situation which, if allowed to continue, would lead to economic loss to the state or to further damage of state property.

C. The provisions of Section 62 of this title shall not apply to the process for construction of a correctional facility whenever the State Board of Corrections informs the Division that an emergency condition threatens the security of the state correctional system, including inmate population growth, and the condition requires expeditious treatment for the review, approval and bid process as it relates to construction or expansion of correctional facilities. The Division and the Department of Corrections are authorized to implement an expedited competitive bid process for the contracting of construction managers or consultants and construction of new or expanded correctional facilities that adequately respond to the emergency. The State Board of Corrections shall provide written notification to the Governor, the Speaker of the House of Representatives and to the President Pro Tempore of the Senate of the emergency conditions.

D. The provisions of Section 62 of this title shall not apply to CompSource Oklahoma if CompSource Oklahoma is operating pursuant to a pilot program authorized by Sections 1 and 2 of this act.

## **Public Competitive Bidding Act of 1974**

### **§ 101. Short title**

This act shall be known and may be cited as the "Public Competitive Bidding Act of 1974".

### **§ 102. Definitions**

As used in the Public Competitive Bidding Act of 1974:

1. "Administrator" means the State Construction Administrator of the Construction and Properties Division of the Department of Central Services;
2. "Awarding public agency" means the public agency which solicits and receives sealed bids on a particular public construction contract;
3. "Bidding documents" means the bid notice, instruction to bidders, plans and specifications, bidding form, bidding instructions, general conditions, special conditions and all other written instruments prepared by or on behalf of an awarding public agency for use by prospective bidders on a public construction contract;
4. "Chief administrative officer" means an individual responsible for directing the administration of a public agency. The term does not mean one or all of the individuals that make policy for a public agency;
5. "Public agency" means the State of Oklahoma, and any county, city, town, school district or other political subdivision of the state, any public trust, any public entity specifically created by the statutes of the State of Oklahoma or as a result of statutory authorization therefor, and any department, agency, board, bureau, commission, committee or authority of any of the foregoing public entities;
6. "Public construction contract" or "contract" means any contract, exceeding Fifty Thousand Dollars (\$50,000.00) in amount, awarded by any public agency for the purpose of making any public improvements or constructing any public building or making repairs to or performing maintenance on the same except where the improvements, construction of any building or repairs to the same are improvements or buildings leased to a person or other legal entity exclusively for private and not for public use and no public tax revenues shall be expended on or for the contract unless the public tax revenues used for the project are authorized by a majority of the voters of the applicable public agency voting at an election held for that purpose and the public tax revenues do not exceed twenty-five percent (25%) of the total project cost. The amount of public tax dollars committed to the project will not exceed a

fixed amount established by resolution of the governing body prior to or concurrent with approval of the project;

7. "Public improvement" means any beneficial or valuable change or addition, betterment, enhancement or amelioration of or upon any real property, or interest therein, belonging to a public agency, intended to enhance its value, beauty or utility or to adapt it to new or further purposes. The term does not include the direct purchase of materials, equipment or supplies by a public agency, or any personal property, including property as defined in paragraphs 1 and 4 of subsection B of Section 430.1 of Title 62 of the Oklahoma Statutes; and

8. "Retainage" means the difference between the amount earned by the contractor on a public construction contract, with the work being accepted by the public agency, and the amount paid on said contract by the public agency.

### **§ 103. Competitive Bidding Required**

A. Unless otherwise provided by law, all public construction contracts exceeding Fifty Thousand Dollars (\$50,000.00) shall be let and awarded to the lowest responsible bidder, by open competitive bidding after solicitation for sealed bids, in accordance with the provisions of the Public Competitive Bidding Act of 1974. No work shall be commenced until a written contract is executed and all required bonds and insurance have been provided by the contractor to the awarding public agency.

B. Except as provided in subsection D of this section, other construction contracts for the purpose of making any public improvements or constructing any public building or making repairs to the same for Fifty Thousand Dollars (\$50,000.00) or less shall be let and awarded to the lowest responsible bidder by receipt of written bids or awarded on the basis of competitive quotes to the lowest responsible qualified contractor. Work may be commenced in accordance with the purchasing policies of the public agency.

C. Except as provided in subsection D of this section, other construction contracts for less than Five Thousand Dollars (\$5,000.00) may be negotiated with a qualified contractor. Work may be commenced in accordance with the purchasing policies of the public agency.

D. The provisions of this subsection shall apply to public construction for minor maintenance or minor repair work to public school district property. Other construction contracts for less than Twenty-five Thousand Dollars (\$25,000.00) may be negotiated with a qualified contractor. Construction contracts equal to or greater than Twenty-five Thousand Dollars (\$25,000.00) but less than Fifty Thousand Dollars (\$50,000.00) shall be let and awarded to the lowest responsible bidder by receipt of written bids. No work shall be commenced on any construction contract until a written contract is executed and proof of insurance has been provided by the contractor to the awarding public agency.

E. The Construction and Properties Division of the Department of Central Services may award contracts using best value competitive proposals. As used in this subsection, "best value" means an optional contract award system which can evaluate and rank submitted competitive performance proposals to identify the proposal with the greatest value to the state. The Department of Central Services, pursuant to the Administrative Procedures Act, shall promulgate rules necessary to implement the provisions of this subsection.

### **§ 103.1. Repealed by Laws 1984, c. 101, § 1, eff. July 1, 1984**

### **§ 103.2. Political Subdivision May Appoint Purchasing Agent**

The governing body of any political subdivision of this state may duly appoint as its agent any individual or individual of a legal entity, with whom the political subdivision has duly entered

into a public contract pursuant to law, to make purchases necessary for carrying out the public contract.

**§ 103.3. Repealed by Laws 2002, HB 2874, c. 294, § 35, eff. November 1, 2002**

**§ 103.4. State Agency and School District Exclusion**

Nothing in the Public Competitive Bidding Act of 1974 shall be construed to prohibit a school district from erecting a building or making improvements on a force account basis. Contracts between a state agency and a school district for the purpose of emergency asbestos abatement shall be exempt from the provisions of the Public Competitive Bidding Act of 1974.

**§ 103.5. Right of Way Clearance Contracts Below \$50,000**

For purposes of the provisions of the Public Competitive Bidding Act of 1974, contracts not exceeding Fifty Thousand Dollars (\$50,000.00) entered into solely for right-of-way clearance by the Transportation Commission and the Oklahoma Transportation Authority for the exclusive purpose of demolition and removal of buildings, foundations, slab floors, stem walls, steps, brush, shrubs, brickbats or stone and all rubbish, scrap iron, fencing, debris, and the installation of new right-of-way fencing, shall not be considered to be public construction contracts and shall not be required to be open for competitive bidding.

**§ 104. Bid Notices**

All proposals to award public construction contracts shall be made equally and uniformly known by the awarding public agency to all prospective bidders and the public in the following manner:

1. Notice thereof shall be given by publication in a newspaper of general circulation and published in the county where the work, or the major part of it, is to be done, such notice by publication to be published in two consecutive weekly issues of said newspaper, with the first publication thereof to be at least twenty (20) days prior to the date set for opening bids; and
2. Notice thereof shall be sent to trade or construction publications for their use and information whenever the estimated cost of the contract exceeds Fifty Thousand Dollars (\$50,000.00); provided however, that this section shall not be construed as requiring the publication of said notice in such trade or construction publication.

**§ 105. Contents of Bid Notices**

All bid notices shall set forth the following information:

1. The character of the proposed public construction contract in sufficient details that all bidders shall know exactly what their obligation will be, either in the bid notice itself or by reference to bidding documents on file in the main office of the awarding public agency; and
2. The name of the officer, agent or employee of the awarding public agency and the office location and address of such person, from whom a complete set of bidding documents regarding such proposed contract may be obtained, together with the amount of the cost deposit required therefor, if any; and
3. The date, time and place of opening of the sealed bids; and
4. The name and office location and address of the office of the awarding public agency to whom the sealed bids should be submitted; and
5. Any additional information regarding such proposed contract deemed by the awarding public agency to be of beneficial interest to prospective bidders or the public.

### **§ 106. Bidding Documents to be on File**

At least one complete set of bidding documents regarding a proposed public construction contract shall be on file in the main office of the awarding public agency at least twenty (20) days prior to the date set for opening bids. The officer, agent or employee of the awarding public agency designated in the bid notice shall have a sufficient number of complete sets of said bidding documents and shall provide a complete set of same to any prospective bidder, upon request; provided, however, that the awarding public agency may require a reasonable deposit for each such set; provided, that such deposit shall not exceed the actual cost of duplicating or printing. The public agency may retain all or part of said deposit if so stated in the notice for bids.

### **§ 107. Requirements of Bids Exceeding Certain Amount**

A. A bidder on a public construction contract exceeding Fifty Thousand Dollars (\$50,000.00) shall accompany the bid with:

1. A certified check, cashier's check or bid bond equal to five percent (5%) of the bid, which shall be deposited with the awarding public agency as a guaranty; or
2. An irrevocable letter of credit containing terms the Construction and Properties Division of the Department of Central Services prescribes, issued by a financial institution insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation for the benefit of the state, on behalf of the awarding public agency, in an amount equal to five percent (5%) of the bid. The awarding public agency shall deposit the irrevocable letter of credit with the Division.

B. The cost of republication of the notice to bidders, actual expenses incurred by reason of the bidder's default and the difference between the low bid of the defaulting bidder and the amount of the bid of the bidder to whom the contract is subsequently awarded, but not to exceed the amount of the certified check, cashier's check, bid bond or irrevocable letter of credit may, at the discretion of the awarding public agency, be forfeited to the awarding public agency in the event the apparently successful bidder fails to execute the contract or fails to provide the required bonds or irrevocable letters of credit and insurance to the awarding public agency.

C. The public agency shall, upon receipt of notice from the awarding public agency, return a certified or cashier's check, bid bond, or irrevocable letter of credit to the successful bidder on execution and delivery of the contract and required bonds or irrevocable letters of credit and insurance. Checks of unsuccessful bidders shall be returned to them in accordance with the terms of the bid solicitation.

D. Nothing contained herein shall be construed so as to prevent the awarding public agency or the courts from exonerating the bidder and other parties to the bid security document from liability upon a timely showing that the bidder committed what the courts have determined under the common law to be an excusable bidding error and for that reason it would not be equitable to enforce the bid security.

### **§ 108. Written Statement Under Oath to Accompany Bid**

Each bidder shall accompany the bid with a written statement under oath disclosing the following information:

1. The nature of any partnership, joint venture or other business relationships then in effect or which existed within one (1) year prior to the date of such statement with the architect, engineer or other party to the project;

2. Any such business relationship then in effect or which existed within one (1) year prior to the date of such statement between any officer or director of the bidding company and any officer or director of the architectural or engineering firm or other party to the project; and

3. The names of all persons having any such business relationships and the positions they hold with their respective companies or firms. If none of the business relationships hereinabove mentioned exist, then a statement to that effect.

### **§ 109. Late Bids**

Any bid received by the awarding public agency or an officer or employee thereof, more than ninety-six (96) hours excluding Saturdays, Sundays and holidays before the time set for the opening of bids, or any bid so received after the time set for opening of bids, shall not be considered by the awarding public agency and shall be returned unopened to the bidder submitting same.

### **§ 110. Opening of Bids**

All bids shall be sealed and opened only at the time and place mentioned in the bidding documents, and read aloud in the presence of an administrative officer of the awarding public agency. Such bid opening shall be open to the public and to all bidders.

### **§ 111. Time for Awarding of Contract**

The awarding of a contract to the lowest responsible bidder or bidders shall be made within thirty (30) days after the opening of bids unless the governing body of the awarding public agency, by formal recorded action and for good cause shown, provides for a reasonable extension of that period, which extension period shall not in any event exceed fifteen (15) days where only state or local funds are involved, or not to exceed ninety (90) days on any award of contract for the construction of a public improvement where funds are utilized which are furnished by an agency of the United States Government. Upon mutual written agreement between the lowest responsible bidder or bidders and the awarding public agency, the Division may extend the contract award period no more than one hundred twenty (120) days from the bid opening date.

### **§ 112. Bids, Contracts, Bonds Open for Public Inspection**

All bids, both successful and unsuccessful, and all contracts and required bonds shall be placed on file and maintained in the main office of the awarding public agency for a period of five (5) years from the date of opening of bids or for a period of three (3) years from the date of completion of the contract, whichever is longer, shall be open to public inspection and shall be matters of public record.

### **§ 113. Execution of Contract - Bond – Insurance**

A. Except as otherwise provided by law, within the period of time, not to exceed sixty (60) days, specified in the bid notice by the awarding public agency, a contract embodying the terms set forth in the bidding documents shall be executed by the awarding public agency and the successful bidder. No bidder shall obtain any property right in a contract awarded under the provisions of the Public Competitive Bidding Act of 1974 until the contract has been fully executed by both the bidder and the awarding public agency.

B. Except as otherwise provided by law, within the period of time specified in subsection A of this section, the following shall be provided by the contractor to the awarding public agency for contracts exceeding Fifty Thousand Dollars (\$50,000.00):

1. A bond or irrevocable letter of credit complying with the provisions of Section 1 of this title;
2. A bond in a sum equal to the contract price, with adequate surety, or an irrevocable letter of credit containing terms prescribed by the Construction and Properties Division of the Department of Central Services issued by a financial institution insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation for the benefit of the state, on behalf of the awarding public agency, in a sum equal to the contract price, to ensure the proper and prompt completion of the work in accordance with the provisions of the contract and bidding documents;
3. A bond in a sum equal to the contract price or an irrevocable letter of credit containing terms as prescribed by the Division issued by a financial institution insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation for the benefit of the state, on behalf of the awarding public agency, in a sum equal to the contract price, to protect the awarding public agency against defective workmanship and materials for a period of one (1) year after acceptance of the project; and
4. Public liability and workers' compensation insurance during construction in reasonable amounts. A public agency may require the contractor to name the public agency and its architects or engineers, or both, as an additional assured under the public liability insurance, which requirement, if made, shall be specifically set forth in the bidding documents.

C. A single irrevocable letter of credit may be used to satisfy paragraphs 1, 2 and 3 of subsection B of this section, provided such single irrevocable letter of credit meets all applicable requirements of subsection B of this section.

If the contractor needs additional time in which to obtain the bond required pursuant to subsection B of this section, the contractor may request and the awarding agency may allow the contractor an additional sixty (60) days in which to obtain the bond.

D. 1. After the award of a contract, but prior to its execution, an awarding public agency, upon discovery of an administrative error in the award process that would void an otherwise valid award, may suspend the time of execution of the contract. The agency may rescind the award and readvertise for bids, or may direct correction of the error and award the contract to the lowest responsible bidder, whichever shall be in the best interests of the state.

2. If the awarding public agency has a governing body, the agency shall, at the next regularly scheduled public business meeting of the governing body of the agency, upon the record, present to the governing body that an error has been made in the award process and shall state the nature of the error. The governing body, upon presentation of the facts of the error, may rescind the award and readvertise for bids, or may direct correction of the error and award the contract to the lowest responsible bidder, whichever shall be in the best interests of the state.

E. No public agency shall require for any public construction project, nor shall any general contractor submit a project bid based on acquiring or participating in, any wrap-up, wrap-around, or controlled insurance program. For the purposes of this subsection, "wrap-up, wrap-around, or controlled insurance program" means any insurance program that has the effect of disabling or rendering inapplicable any workers' compensation, commercial general liability, builders' risk, completed operations, or excess liability insurance coverage carried by a subcontractor that is engaged or to be engaged on a public construction project unless this is a cost savings to the public or the need exists for a specialized or complex insurance program and shall not apply to contracts less than Seventy-five Million Dollars (\$75,000,000.00).

F. This act shall not apply to the public construction projects of constitutional agencies which had authorized a wrap-up, wrap-around, or controlled insurance program on or before April 11, 2000.

**§ 113.1. Partial Payment – Retainage**

A. A public construction contract shall provide for partial payment based upon work completed. The contract shall provide that up to five percent (5%) of all partial payments made shall be withheld as retainage.

B. The Department of Transportation or the Oklahoma Turnpike Authority shall not withhold retainage on public construction contracts awarded by the Department or the Authority.

C. The Department of Transportation shall not withhold retainage or require any bond on projects awarded to railroads on the railroad's privately owned or operated rail property.

**§ 113.2. Withdrawal of Retainage - Deposit of Securities**

The contractor may, from time to time, withdraw any part, or the whole, of the amount which has been retained from partial payments to the contractor pursuant to the terms of contract, upon depositing with or delivery to the awarding public agency, or other appropriate public official designated in the contract document: (1) United States Treasury bonds, United States Treasury notes, United States Treasury bills, or (2) general obligation bonds of the State of Oklahoma, or (3) certificates of deposit from a state or national bank having its principal office in the State of Oklahoma. No retained amount shall be withdrawn which would represent an amount in excess of the market value of the securities at the time of deposit or of the par value of such securities, whichever is lower.

At the time of deposit of any securities the same shall be endorsed, if necessary, and shall be accompanied by a conditional assignment to the awarding public agency, or to the other public body designated as "owner" in the contract documents, which will empower the awarding public agency, or other appropriate public official designated to have custody of same, to negotiate same at any time to the extent necessary to cause the contract to be fulfilled. The securities which remain on deposit at the time of completion of any contract and observance by the parties to the contract of any other statutory obligations relative thereto shall be returned to the contractor.

**§ 113.3. Interest – Rate**

When interest is due the contractor, all awarding public agencies, other than school districts, shall pay to the contractor interest at the rate of one and one-half percent (1 1/2%) per month of the final payment due the contractor. When interest is due to the contractor, school districts shall pay to the contractor interest at the rate of three fourths percent (3/4%) per month of the final payment due the contractor. For lump sum contracts the interest shall commence thirty (30) days after the work under the contract has been completed and accepted and all required material certifications and other documentation required by the contract have been furnished the awarding public agency by the contractor, and shall run until the date when the final payment or estimate is tendered to the contractor.

For contracts bid by unit prices the interest shall commence sixty (60) days after the above conditions are satisfied. When contract quantities or the final payment amount is in dispute, the interest-bearing period shall be suspended until the conclusion of arbitration and settlement of the dispute.

**§ 114. Conflict of Interest**

The chief administrative officer and members of the governing body of the awarding public agency authorizing or awarding or supervising the execution of a public construction contract, and their relatives within the third degree of consanguinity or affinity, are forbidden to be interested directly or indirectly through stock ownership, partnership interest or otherwise in any

such contract. Contracts entered into in violation of this section shall be void. Persons willfully violating this section shall be guilty of a felony and shall be subject to removal from office.

**§ 115. Collusion Among Bidders**

Any agreement or collusion among bidders, prospective bidders or material suppliers in restraint of freedom of competition by agreement to bid at a fixed price or to refrain from bidding, or otherwise, shall render the bids of such bidders void. Persons willfully violating this section shall be guilty of a felony. Each bidder shall accompany the bid with a sworn statement that the bidder has not been a party to any such agreement. The form of the statement shall be substantially as provided in Section 85.22 of Title 74 of the Oklahoma Statutes, but modified in wording to refer to the appropriate public agency requesting bids.

**§ 116. Disclosure of Terms of Bids**

A. Any disclosure by an employee of a public agency of the terms of a bid submitted in response to a bid notice issued by a public agency in advance of the time set for opening of all bids so submitted shall be unlawful. It shall also be unlawful for any person to solicit, possess or receive information which is to be contained in a bid notice of a public agency, for use in preparing a bid, in advance of the date on which said bid notice is to be made equally and uniformly known to all prospective bidders and the public, and it shall further be unlawful for any employee of a public agency to withhold or impede the distribution of said information after notice of the bid has been given, unless the solicitation of bids has been withdrawn or the particular information in question has been deleted or replaced through alteration of the bid notice and said withdrawal or alteration has been made equally and uniformly known. Any violation of this subsection shall be a felony and shall render the proceedings void and require solicitation and award anew.

B. The estimate of the actual cost of the project made by the public agency, construction manager or consultant for the agency shall not be considered confidential and shall be available to the public in accordance with the Oklahoma Open Records Act.

**§ 117. Award to Other Than Lowest Bidder**

If an award is made to other than the lowest bidder, the awarding public agency shall accompany its action with a publicized statement setting forth the reason for its action. Such statement shall be placed on file, open to public inspection and be a matter of public record.

**§ 118. Prequalification of Bidders**

A. In order to determine the responsibility of bidders, the awarding public agency may require prospective bidders, general contractors, subcontractors and material suppliers to prequalify as responsible bidders prior to submitting bids on a public construction contract. Prequalification to bid or perform work pursuant to this section does not constitute a license. Except as provided in subsection B of this section, prequalification shall not serve as a substitute for a license otherwise required by law. Notice of any such prequalification requirement shall be made equally and uniformly known by the awarding public agency to all prospective bidders and the public in the same manner as proposals to award public construction contracts as set forth in Section 104 of this title. Financial information including, but not limited to, audited financial statements required by the awarding public agency as part of prequalification shall remain confidential.

B. The Oklahoma Transportation Commission and the Oklahoma Transportation Authority may establish a system for prequalifying prospective bidders on construction and maintenance contracts to be awarded by the Commission or Authority. The Commission and the Authority shall be the sole judge of the qualifications of prospective bidders and shall ascertain, to their

exclusive satisfaction, the qualifications of each prequalified bidder. Any contractor or subcontractor prequalified as of the effective date of this act performing signing, highway lighting, or traffic signal installation or maintenance for the Oklahoma Department of Transportation or the Oklahoma Transportation Authority shall be allowed to continue to bid and perform such work without obtaining any additional license from this state or any political subdivision of this state. However, no contractor or subcontractor may transfer, convey or assign this exemption to any other person or entity.

### **§ 119. Rejection of Bids**

By majority action of the governing board of the awarding public agency or the chief administrating officer of an awarding public agency without a governing board, the awarding public agency shall have the right to reject any or all bids and solicit bidders again as herein provided if, in the opinion of the governing body of the public agency, the best interests of the people of the State of Oklahoma would be best served by so doing.

#### **§ 119.1. Certain Contract to be Negotiated When No Bid is Received**

A. If no timely bid is received after bid notices have been published on any proposed public construction contract which does not exceed Fifty Thousand Dollars (\$50,000.00):

1. The governing body of a county, city, town or school district may direct its employees or agents to negotiate the contract with a prospective contractor; or
2. The state agency as defined in Section 202 of this title, shall request the State Construction Administrator of the Construction and Properties Division to negotiate a contract on its behalf.

B. The amount of a contract which may be awarded by the governing body pursuant to this section shall not exceed Fifty Thousand Dollars (\$50,000.00) and the work to be performed shall be as specified in the initial bidding documents. The contract shall be executed within six (6) months after the date initially set for opening of bids. The contract and contract procedure shall conform to all other applicable provisions of the Public Competitive Bidding Act of 1974.

### **§ 120. Assignment of Contracts**

No public construction contract shall be assignable by the successful bidder without written consent of the governing body of the awarding public agency, evidenced by resolution. In no event shall such a contract be assigned to a bidder who was declared by the awarding public agency not to be a responsible bidder in the consideration of bids received for the particular contract.

### **§ 121. Change Orders or Addenda**

A. Change orders or addenda to public construction contracts of One Million Dollars (\$1,000,000.00) or less shall not exceed a fifteen percent (15%) cumulative increase in the original contract amount.

B. Change orders or addenda to public construction contracts of over One Million Dollars (\$1,000,000.00) shall not exceed the greater of One Hundred Fifty Thousand Dollars (\$150,000.00) or a ten percent (10%) cumulative increase in the original contract amount.

C. Change orders or cumulative change orders which exceed the limits of subsection A or B of this section shall require a readvertising for bids on the incomplete portions of the contract.

D. If the awarding public agency does not have a governing body, the chief administrative officer of the awarding public agency shall approve change orders. The State Construction Administrator of the Construction and Properties Division of the Department of Central Services,

or the administrator's designee, shall sign and execute all contracts and change orders, as they relate to state agencies.

E. If the awarding public agency has a governing body, all change orders shall be formally approved by the governing body of the awarding public agency and the reasons for approval recorded in the permanent records of the governing body. The governing body of a municipality or technology center may delegate approval of change orders up to Forty Thousand Dollars (\$40,000.00) or ten percent (10%) of any contract, whichever is less, to the chief administrative officer of the municipality or technology center or their designee, with any approved change orders reported to the governing body at the next regularly scheduled meeting.

F. The governing body of the Oklahoma Tourism and Recreation Department is authorized, upon approval of a majority of all of the members of the Oklahoma Tourism and Recreation Commission, to delegate to the Director of the agency the authority to approve change orders on a construction contract provided that the individual change order does not exceed Twenty-five Thousand Dollars (\$25,000.00) in expenditure and complies with the limits established by this section. The Administrator of the Division shall sign and execute all contracts and change orders.

G. The Transportation Commission may, by rule, authorize the Director of the Department of Transportation to approve change orders in an amount of not to exceed Five Hundred Thousand Dollars (\$500,000.00). Change orders approved by the Director shall be presented to the Transportation Commission during the next regular meeting and the reasons therefor recorded in the permanent records. The Oklahoma Turnpike Authority may authorize the Director of the Authority to approve change orders in an amount not to exceed Two Hundred Fifty Thousand Dollars (\$250,000.00). Change orders approved by the Director of the Authority shall be presented to the Authority during the next regular meeting and the reasons for the orders recorded in permanent records.

H. All change orders for the Department of Transportation or the Authority shall contain a unit price and total for each of the following items:

1. All materials with cost per item;
2. Itemization of all labor with number of hours per operation and cost per hour;
3. Itemization of all equipment with the type of equipment, number of each type, cost per hour for each type, and number of hours of actual operation for each type;
4. Itemization of insurance cost, bond cost, social security, taxes, workers' compensation, employee fringe benefits and overhead cost; and
5. Profit for the contractor.

I. 1. If a construction contract contains unit pricing, and the change order pertains to the unit price, the change order will not be subject to subsection A or B of this section.

2. When the unit price change does not exceed Ten Thousand Dollars (\$10,000.00), the unit price change order computation may be based on an acceptable unit price basis in lieu of cost itemization as required in paragraphs 1, 2, 3, 4 and 5 of subsection H of this section.

J. Alternates or add items bid with the original bid and contained in the awarded contract as options of the awarding public agency shall not be construed as change orders under the provisions of the Public Competitive Bidding Act of 1974.

## **§ 122. Taxpayer Suits to Enjoin Execution of Unlawful Contracts**

Any taxpayer of the State of Oklahoma, or any bona fide unsuccessful bidder on a particular public construction contract, within ten (10) days after any such contract has been executed, is empowered to bring suit in the district court of the county where the work, or the major part of it,

is to be done to enjoin the performance of such contract if entered into in violation of the provisions of this act.

**§ 123. Supervisor's Certification to Accompany Invoices**

A. All statements or invoices submitted to the awarding public agency for work performed shall contain a certification by the supervising architect or engineer, or other supervisory official if no supervisory architect or engineer is employed for the project, that work for which payment is claimed has been performed and that such work conforms to the plans and specifications for the project. No such statement or invoice shall be paid by the awarding public agency without such certification. The execution of a certificate, as herein provided, shall not constitute a defense or in any other manner affect any cause or causes of action which the awarding public agency might otherwise have against the contractor for nonperformance of a public construction contract.

B. If project progressive payments are based on the public agency's estimated quantities of materials provided and work performed, certifications are not required. Payment of progressive estimates shall not constitute a defense or in any manner affect any cause or causes of action which the awarding public agency might have against the contractor for failure to properly perform in accordance with the project contract, plans, specifications, or special provisions. Final estimates shall contain a sworn certification signed by the contractor that the work performed and the material provided conform to the requirements of the contract, plans, specifications, and special provisions.

**§ 124. Inspections**

The awarding public agency shall make provision for the inspection of projects prior to acceptance by the said agency and shall approve claims for payment only after proper inspection has been made as provided in the plans and specifications for said project.

**§ 125. Accounting Procedure**

The Director of State Finance shall prescribe the accounting procedure to be followed to pay costs and payments to contractors on public construction contracts with state agencies. The Director of State Finance is directed to include any procedures necessary to provide accountability for state funds and funds furnished by an agency of the United States Government.

**§ 126. Construction on Force Account Basis**

Nothing in this act shall be construed to prevent a public agency from doing public construction work on a force account basis.

**§ 127. Contracts Made by a Public Trust – Applicability**

This act shall apply to contracts made by a public entity operating pursuant to the Local Industrial Development Act or the Local Development Act except where the public improvements, buildings, or repairs are being made or constructed as a part of an agreement to provide development financing assistance, and where the cost of such public improvements does not exceed twenty-five percent (25%) of the total amount of the estimated public and private investment being made within the related increment district.

**§ 128. Insurance Against Fire and the Elements**

The awarding public agency is authorized to require the contractor to carry builder's risk insurance against damage from fire and the elements during the process of construction to the extent of protecting said public agency's equity in said project until accepted by said agency.

**§ 129. Contracts Exempt.**

A. The Public Competitive Bidding Act of 1974 shall not apply to contracts awarded or contracts for which bids have been solicited on or before August 1, 1974.

B. The Public Competitive Bidding Act of 1974 shall not apply to contracts awarded or contracts for which bids are solicited by CompSource Oklahoma if CompSource Oklahoma is operating pursuant to a pilot program authorized by Sections 1 and 2 of this act.

**§130. Emergencies**

A. The provisions of the Public Competitive Bidding Act of 1974 with reference to notice and bids shall not apply to an emergency if:

1. The governing body of a public agency declares by a two-thirds (2/3) majority vote of all of the members of the governing body that an emergency exists;

2. The Transportation Commission and the Oklahoma Tourism and Recreation Commission, by majority vote of all the members of each Commission, declare that an emergency exists; or

3. The chief administrative officer of a public agency without a governing body declares that an emergency exists.

B. The governing body of a public agency may, upon approval of two-thirds (2/3) majority of all of the members of the governing body, delegate to the chief administrative officer of a public agency the authority to declare an emergency whereby the provisions of the Public Competitive Bidding Act of 1974 with reference to notice and bids shall not apply to contracts less than Thirty-five Thousand Dollars (\$35,000.00) in amount; provided, such authority of the Department of Transportation and the Oklahoma Turnpike Authority shall not extend to any contract exceeding Five Hundred Thousand Dollars (\$500,000.00) in amount.

C. Upon approval of a two-thirds (2/3) majority vote, the Oklahoma Conservation Commission may delegate to the Executive Director the authority to declare an emergency and set a monetary limit for the declaration. The provisions of this subsection may only be used for the purpose of responding to an emergency involving the reclamation of abandoned coal mines or the repair of damaged upstream floodwater retarding structures.

D. An emergency declared by the Board of Corrections pursuant to subsection C of Section 65 of this title shall exempt the Department of Corrections from the limits which would otherwise be imposed pursuant to subsection B of this section for the contracting and construction of new or expanded correctional facilities.

E. The chief administrative officer of a public agency with a governing body shall notify the governing body within ten (10) days of the declaration of an emergency if the governing body did not approve the emergency. The notification shall contain a statement of the reasons for the action, and shall be recorded in the official minutes of the governing body.

F. Emergency as used in this section shall be limited to conditions resulting from a sudden unexpected happening or unforeseen occurrence or condition whereby the public health or safety is endangered.

G. The chief administrative officer of a public agency shall report an emergency within ten (10) days of the emergency declaration and include the official minutes of the governing body of the public agency, if applicable, to the State Construction Administrator of the Department of Central Services who shall compile an annual report detailing all emergencies declared

pursuant to this section during the previous calendar year. The report shall be submitted to the Governor, the President Pro Tempore of the Senate and the Speaker of the House of Representatives.

### **§ 131. Splitting of Contracts**

No contract shall be split into partial contracts for the purpose of avoiding the requirements of this act. All such partial contracts shall be void. Any person who knowingly violates the provisions of this section shall, upon conviction, be guilty of a misdemeanor punishable by imprisonment in the county jail for not more than one (1) year, or by a fine of not more than One Thousand Dollars (\$1,000.00), or by both such fine and imprisonment.

### **§ 132. Repealed by Laws 1983, c. 304, § 182, eff. July 1, 1983**

### **§ 133. Law Governing**

If a statute, charter or general ordinance provides more stringent standards or procedures than those provided by this act, then the statute, charter or general ordinance shall prevail.

### **§134. Insurance or Bond to be Secured From Carrier Licensed in Oklahoma**

Any insurance or bond required by this act shall be secured from an insurance or indemnity carrier licensed to do business in the State of Oklahoma.

### **§ 135. Public Agencies or Officers Not to Exert Influence in Procuring Particular Bond or Insurance**

A. No public agency, nor any officer, agent or employee thereof, nor any person acting or purporting to act on behalf of such public agency or an officer, agent or employee thereof, shall, with respect to any public construction contract require or attempt to require a contractor or any subcontractor to make application to or to procure or obtain from a particular insurance or surety company, agent or broker, any of the bonds or insurance required by this act.

B. Any provisions in a public construction contract or in the bidding documents in conflict herewith are hereby declared to be contrary to the public policy of this state and thereby void.

C. Any person who violates this section shall, upon conviction, be deemed guilty of a misdemeanor.

### **§ 136. Conflicts with Federal Rules and Regulations - Laws Governing**

In the event any provision of this act conflicts with or is inconsistent in any manner with the rules and regulations of any agency of the United States Government, which is providing all or any portion of the funds used to finance any public construction contract, the rules and regulations of said agency of the United States Government shall supersede and take precedence over such portion or portions of this act in conflict or inconsistent therewith, it being the intent of the Legislature to secure all of the benefits available to the people of the State of Oklahoma from federally assisted programs.

### **§ 137. Termination of Contracts on which No Work Has Been Performed**

Any contract which has been bid under the provisions of the Public Competitive Bidding Act, Section 101 et seq. of Title 61 of the Oklahoma Statutes, and on which no work has been performed and no formal claim or litigation has been pending within the last twenty-four (24) months shall be terminated by the public agency which awarded the contract. After termination, the public agency shall determine the amount of any final payment due to the contractor and shall make such payment to the contractor at the contractor's last-known address, or if the

public agency is unable to locate the contractor, the amount due shall be held in a separate account by the State Treasurer in the name of the contractor. Termination of the contract and payment to the contractor or deposit of the funds due to the contractor as determined by the public agency shall release the public agency from any further liability to the contractor or surety company. Any such funds held by the State Treasurer for the contractor which are not claimed by the contractor within thirty-six (36) months from the date of deposit with the State Treasurer shall be deposited in the General Revenue Fund and the state shall have no further liability on the project to the contractor or surety company.

**§ 138. Noncollusion Affidavit Attached To Bid Submitted To School District, County Or Municipality**

Any competitive bid submitted pursuant to the Public Competitive Bidding Act of 1974 to a school district, county or municipality for furnishing of goods or services shall be accompanied by the sworn noncollusion statement contained in Section 85.22 of this title, modified in wording to refer to the school district, county or municipality instead of the state.

**Lighting Energy Conservation Act [REPEALED]**

**§ § 151 to 157 Repealed by Laws 2011, Senate Bill 100, c. 34, § 1, eff. November 1, 2011**

## Public Building Construction And Planning Act

### § 201. Short Title

Sections 202 through 209 of this title shall be known and may be cited as the "Public Building Construction and Planning Act".

### § 202. Definitions

As used in the Public Building Construction and Planning Act:

1. "Administrator" means the State Construction Administrator of the Construction and Properties Division of the Department of Central Services;
2. "Construction" means the process of planning, acquiring, designing, building, equipping, altering, repairing, improving, maintaining, or demolishing any structure or appurtenance thereto including facilities, utilities, or other improvements to any real property but not including highways, bridges, airports, railroads, tunnels, sewers not related to a structure or appurtenance thereto, or dams;
3. "Construction administration" means a series of actions required of the State Construction Administrator, of other state agency employees, or, under a construction administration contract or contract provision, to ensure the full, timely, and proper performance of all phases of a construction project by all contractors, suppliers, and other persons having responsibility for project work and any guarantees or warranties pertaining thereto;
4. "Construction management" means a project delivery method based on an agreement whereby the owner acquires from a construction entity a series of services that include, but are not necessarily limited to, design review, scheduling, cost control, value engineering, constructability evaluation, preparation and coordination of bid packages, and construction administration; "construction management" includes:
  - a. "agency construction management" whereby the construction entity provides services to the owner without taking on financial risks for the execution of the actual construction, and
  - b. "at-risk construction management" whereby the construction entity, after providing agency services during the pre-construction period, takes on the financial obligation to carry out construction under a specified cost agreement;
5. "Consultant" means an individual or legal entity possessing the qualifications to provide licensed architectural, registered engineering, or registered land surveying services or possessing specialized credentials and qualifications as may be needed to plan or design for any construction or public work improvement project;
6. "Design-build" means a project delivery method whereby this state acquires both design and construction services in the same contract from a single legal entity, referred to as the design-builder, without the bid component of the traditional design-bid-build process;
7. "Department" means the Department of Central Services;
8. "Director" means the Director of the Department of Central Services;
9. "Division" means the Construction and Properties Division of the Department of Central Services;
10. "Energy performance index or indices" (EPI) means a number describing the energy requirements at the building boundary of a structure, per square foot of floor space or per cubic foot of occupied volume, as appropriate under defined internal and external ambient conditions

over an entire seasonal cycle. As experience develops on the energy performance achieved with state construction, the indices (EPI) will serve as a measure of structure performance with respect to energy consumption;

11. "Life cycle costs" means the cost of owning, operating, and maintaining the structure over the life of the structure. This may be expressed as an annual cost for each year of the facility's use;

12. "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring or disposing of supplies, services, or construction;

13. "Public improvement" means any beneficial or valuable change or addition, betterment, enhancement or amelioration of or upon any real property, or interest therein, belonging to a public agency, intended to enhance its value, beauty or utility or to adapt it to new or further purposes. The term does not include the direct purchase of materials, provided that the materials are not purchased in increments for an amount of less than Twenty-five Thousand Dollars (\$25,000.00) and used for the purposes of completing a single project, equipment or supplies by a public agency, or any personal property as defined in paragraphs 1 and 4 of subsection B of Section 430.1 of Title 62 of the Oklahoma Statutes;

14. "Shared savings financing" means the financing of energy conservation measures and maintenance services through a private firm which may own any purchased equipment for the duration of a contract. Such contract shall specify that the private firm will be recompensed either out of a negotiated portion of the savings resulting from the conservation measures and maintenance services provided by the private firm or, in the case of a cogeneration project, through the payment of a rate for energy lower than would otherwise have been paid for the same energy from current sources; and

15. "State agency" means an agency, board, commission, counsel, court, office, officer, bureau, institution, unit, division, body, or house of the executive or judicial branches of government of this state, whether elected or appointed, excluding only political subdivisions.

#### **§ 202.1. Design-Build and At-Risk Construction Management Project Delivery Methods - Approval - Exemptions – Rules**

A. The design-build and construction management project delivery methods shall not be used without the written approval of the Director of Central Services, or the Director's designee, when those projects are constructed for a state agency or by an act of the Legislature specifying design-build or at-risk construction management for a project. In all instances where the design-build project or at-risk construction management delivery method is authorized, construction administration shall be performed by the State Construction Administrator, the Administrator's designee or designees, or otherwise by contract or contract provision approved by the Director of Central Services for construction administration by another party.

B. Municipalities, counties, public trusts, or any other political subdivision in this state shall not be required to get approval of any other state agency in order to use design-build construction management or at-risk construction management as a construction management delivery method. However, municipalities, counties, public trusts, and any other political subdivision shall be subject to all other provisions of the Public Building Construction and Planning Act.

C. The design-build and construction management project delivery methods shall not be used for any project unless the project meets the criteria established by the administrative rules promulgated as required by this act. Such methods shall not be used unless there is a need for compressed construction time as required to respond to a natural disaster or other emergency situation affecting public health and safety, or all of the following criteria for designation are met:

1. The project benefits the public;

2. There is a need for cost control; and
  3. The need exists for specialized or complex construction methods due to the unique nature of the project.
- D. The use of design-build and construction management project delivery methods shall not interfere or inhibit the opportunity for subcontractors to openly and freely compete for subcontracts pursuant to the Public Competitive Bidding Act of 1974.
- E. The provisions of subsections A and B of this section shall not apply to projects by contract pursuant to an interagency agreement under Section 581 of Title 74 of the Oklahoma Statutes or to projects a state agency performs solely with the staff of the agency.
- F. The State Construction Administrator shall file an annual report to the legislature summarizing cost information for each construction management project completed the preceding year.
- G. The Department of Central Services shall, pursuant to the Administrative Procedures Act, promulgate rules to effect procedures, processes and design-build/construction management fee guidelines necessary to the fulfillment of its responsibilities under this section.
- H. As used in the Public Building Construction and Planning Act, public trusts shall not include state beneficiary public trusts.

**§ 203. Creation of Construction and Properties Division in Office of Public Affairs - State Construction Administrator**

There is hereby created within the Department of Central Services the Construction and Properties Division. There is hereby created within the Division the position of State Construction Administrator who shall be the chief administrative officer of the Division. The Administrator shall be a registered professional engineer or a licensed architect who shall be appointed by and serve at the pleasure of the Director. The Director shall employ or contract with experts and consultants as are necessary to perform the duties of the Division.

**§ 204. Duties of Construction and Properties Division of the Department of Central Services**

- A. The Construction and Properties Division of the Department of Central Services shall:
1. Maintain a comprehensive master plan for utilization and construction of buildings for state agencies, capital improvements, and utilization of land owned by this state;
  2. Review and approve all construction plans and specifications to ensure compliance with good construction practices and space standards, costs of project, proposed construction timetables, and agency need for the project, except as otherwise provided in subsection B of this section;
  3. Inspect prior to acceptance and final payment all completed projects for which the Division issued bid solicitations to ensure compliance with the plans and specifications of the project;
  4. Provide assistance to state agencies when a state agency desires to hire a consultant or construction manager for a project. Except as provided by subsection B of this section, the Division shall award and execute contracts to consultants and construction managers that provide services to state agencies for construction projects;
  5. Develop and issue solicitations for award of state agency contracts for construction. The Division shall have final approval authority for contracts and contract documents. Neither the Division nor any state agency shall, for performance of work that requires that a contractor be

licensed by this state, issue a solicitation to, or make a contract with, a contractor not licensed by this state;

6. Review inspections performed by consultants and construction managers during construction, primary inspections when consultants or construction managers are not used, and final inspections after completion;

7. Recommend standards, including, but not limited to, building codes, space utilization, material testing, indexes of efficiency, economy, and effectiveness, pursuant to rules the Director promulgates;

8. Monitor construction projects to ensure maximum efficiency in the expenditure of state funds for construction;

9. Report fraud or waste in any construction project by written notification with documentation for the report to the Attorney General. The Attorney General shall take appropriate action to protect the interest of the state; and

10. Prequalify as good and sufficient insurance carriers, bonding companies and surety companies to meet provisions of Sections 1 and 134 of this title. The Director shall promulgate rules to establish criteria to determine whether a carrier or company is good and sufficient. The prequalification requirement and process shall not violate the provisions of Section 135 of this title.

B. When a state agency has a licensed architect or licensed engineer, as a full-time employee, to review construction plans and specifications, the review and approval of all construction plans and specifications required pursuant to paragraph 2 of subsection A of this section shall not apply to:

1. The common schools subject to the jurisdiction of the State Department of Education;
2. The Department of Transportation with respect to highways, bridges and dams;
3. The Oklahoma State System of Higher Education;
4. The Military Department of the State of Oklahoma;
5. The Oklahoma Tourism and Recreation Department; and
6. The Department of Human Services.

#### **§ 205. Access to Records**

Employees of the Department of Central Services designated by the Director of the Department shall have access to state agency records that relate to state construction projects. The Director may authorize review or audit of the records.

**§ 206. Repealed by Laws 1998, HB 2802, c. 364, § 38, emerg. eff. June 8, 1998**

**§ 206.1. Repealed by Laws 1998, HB 2802, c. 364, § 38, emerg. eff. June 8, 1998**

**§ 207. Repealed by Laws 2000, SB 1172, c. 363, § 24, emerg. eff. June 6, 2000**

**§ 207.1. Repealed by Laws 2000, SB 1172, c. 363, § 24, emerg. eff. June 6, 2000**

#### **§ 207.2. Contracts with Private Individuals in Practice or Architecture, Engineering or Land Surveying**

A. Except as provided by subsection B of this section, no state agency shall employ, either temporary or full-time, any person engaged in the practice of architecture, engineering or land surveying for the purpose of planning or performing any construction upon any real property belonging to the agency or to the state, or upon any real property of which this state will assume

possession or ownership by contract, option to purchase agreement, lease, or otherwise. The term "practice of architecture" shall be defined as those activities of an architect as provided for in Section 46.3 of Title 59 of the Oklahoma Statutes. The terms "practice of engineering" or the "practice of land surveying" shall be defined as such terms are defined by Section 475.2 of Title 59 of the Oklahoma Statutes.

B. The provisions of subsection A of this section shall not apply to:

1. The Department of Human Services;
2. The Oklahoma Tourism and Recreation Department;
3. The State Department of Health insofar as the monitoring of permitted health care facility construction for licensing purposes;
4. The Oklahoma Historical Society insofar as the monitoring of historical site preservation and authenticity;
5. The Department of Central Services;
6. The State Department of Education and the public schools subject to its jurisdiction;
7. The Department of Transportation;
8. The Oklahoma State System of Higher Education;
9. The Military Department of the State of Oklahoma;
10. The Oklahoma Municipal Power Authority;
11. The Department of Public Safety gun range; and
12. CompSource Oklahoma if CompSource Oklahoma is operating pursuant to a pilot program authorized by Sections 1 and 2 of this act.

**§ 207.3. Repealed by Laws 2000, SB 1172, c. 363, § 24, emerg. eff. June 6, 2000**

**§ 207.4. Repealed by Laws 2006, SB 558, c. 271, § 37, emerg. eff. July 1, 2006**

**§ 208. Awarding of All Consultant and Professional Services Contracts Related to Construction Projects**

A. The Construction and Properties Division of the Department of Central Services shall approve state agency selection of, and award contracts to, construction managers and design consultants pursuant to the provisions of Section 62 of this title.

B. The negotiation of construction manager and design consultant contracts and fees shall be performed by the Division.

C. The Division shall award and administer construction contracts for state agencies pursuant to the provisions of the Public Competitive Bidding Act of 1974.

D. 1. When all bids for a public construction contract exceed an agency's estimate and available funding, the State Construction Administrator may enter into negotiations with the lowest responsible bidder for the purpose of modifying the project scope and reducing the construction cost, provided that:

- a. the unexpected higher construction costs resulted from unforeseen economic conditions or otherwise sudden price volatility in the construction industry,
- b. the project was appropriately planned, and cost estimates were developed using standards of care acceptable to the Division, and
- c. further delay caused by redesigning and rebidding the project would jeopardize the using agency's mission or result in the loss of a planned funding source.

2. To request consideration for negotiations pursuant to this subsection, the using agency, within ten (10) days of the bid opening date, shall make a written request to the Director of the Department of Central Services to enter into negotiations pursuant to paragraph 1 of this subsection. If approved by the Director, the State Construction Administrator shall consult with the using agency, consultant and low bidder on methods to reduce the project scope or other cost-saving measures.

3. If a suitable revised scope and contract amount is agreed upon by the using agency, low bidder and State Construction Administrator, the Division may award the public construction contract to the low bidder.

4. The State Construction Administrator shall negotiate a fair and reasonable fee with the project's consultant, if applicable, to make any necessary revisions to the contract documents. The cost of this additional consulting work shall be paid from the agency's available funds.

5. Approval and final award of the contract for the construction negotiated pursuant to this subsection shall occur no later than one hundred twenty (120) days from the opening bid.

### **§ 208.1. Fees for Providing Architectural, Engineering, and Land Surveying Services**

The Construction and Properties Division of the Department of Central Services may collect a reasonable fee for the purpose of providing or contracting for architectural, engineering, and land surveying services to state agencies and from persons requesting plans and notification of solicitations issued by the Division. The Division may collect a reasonable fee for contract management for a construction project. All fees collected in accordance with the provisions of this section shall be deposited in the "State Construction Revolving Fund" created in Section 208.2 of this title.

### **§ 208.2. Creation of State Construction Revolving Fund**

There is hereby created in the State Treasury a revolving fund for the Construction and Properties Division of the Department of Central Services, to be designated the "State Construction Revolving Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all fees collected by the Division in accordance with the provisions of this section or as otherwise provided by law. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the Division. The fund shall be used to defray Division operating costs and expenses the Department incurs to support Division operations. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

### **§ 208.3. Nothing to Prevent Compliance with Act**

Nothing in the Public Building Construction and Planning Act shall be construed to prevent any state entity exempted from any of the provisions of the Public Building Construction and Planning Act from complying with any provisions of the Public Building Construction and Planning Act.

### **§ 209. Adoption of Rules**

The Director of Central Services shall promulgate rules:

1. For state agencies to perform minor construction projects;
2. Specifying building codes pursuant to the Oklahoma Uniform Building Code Commission Act for construction projects;
3. Permitting state agencies who have the expertise, upon written application to the Construction and Properties Division of the Department of Central Services, to perform any part

of the responsibilities of the Division pursuant to the provisions of the Public Building Construction and Planning Act for a specific project;

4. Specifying procedures and guidelines for the implementation of shared savings financing by state agencies;

5. Specifying energy conservation performance guidelines, for conducting a life cycle cost analysis of alternative architectural and engineering designs and alternative major items of energy-consuming equipment to be retrofitted in existing state-owned or leased structures and for developing energy performance indices to evaluate the efficiency of energy utilization for completing designs in the construction of state-financed and leased structures;

6. The time, manner, authentication, and form of making requisitions to the Division;

7. The form and manner of submission for bids or proposals and the manner of accepting and opening bids or proposals that may include online bids pursuant to the Oklahoma Online Bidding Act;

8. The manner for a state agency to acquire services for construction projects not exceeding the amount for which competitive bids are required pursuant to Section 102 of this title;

9. Conditions under which any of the rules herein authorized may be waived;

10. The form of any document the Director requires;

11. Specifying provisions the Division of a state agency shall follow to adhere to acquisition, contract, contract management and other provisions of this title; and

12. Specifying the process a state agency shall follow to establish the scope of work, schedule and cost estimate for all publicly bid construction projects involving construction or renovation of buildings. This requirement shall not apply to project planning work performed by a state agency which employs an architect pursuant to other provisions of this act.

### **§ 210. Model Contract**

A. Shared savings contracts shall be developed in accordance with a model contract to be developed by the Construction and Properties Division of the Department of Central Services. The model contract shall include:

1. The methodology for calculating baseline energy costs;

2. A procedure for revising these costs should the state institute additional energy conservation features or structure use change;

3. A requirement for a performance bond guaranteeing that the structure will be restored to the original condition in the event of default;

4. A provision for early buy out;

5. A clause specifying who will be responsible for maintaining the equipment; and

6. A provision allowing the disposal of equipment at the end of the contract.

No state agency or department shall substantially alter the provisions described in the model without the permission of the Division.

B. Contracts subject to this section shall be awarded pursuant to the provisions of subsection A of Section 208 of this title.

### **§ 211. Replacement or Supplementing Major Items of Energy-Consuming Equipment**

On and after July 1, 1987, when any state agency or department must replace or supplement major items of energy-consuming equipment in existing state-owned or leased structures or any self-contained unit of any structure with other major items of energy-

consuming equipment, the selection of such items shall be made on the basis of a life cycle cost analysis of alternatives in accordance with rules and regulations promulgated by the Director of the Department of Central Services.

**§ 212. Performance-Based Efficiency Contracts - Qualified Providers**

A. For purposes of this section:

1. "Performance-based efficiency contract" means a contract for the design, development, financing, installation, construction, and service of any improvement, repair, alteration or betterment of any public building or facility; or any equipment, fixture or furnishing to be added to or used in any such building or facility; or any maintenance or operational strategy that is designed and implemented that will reduce utility consumption or lower operating costs, and may include, but is not limited to, one or more of the following:

- a. utility services,
- b. heating, ventilating or air conditioning system modifications or replacements and automated control systems,
- c. replacement or modifications of lighting fixtures,
- d. indoor air quality improvements to increase air quality that conform to the applicable state or local building code requirements when done in conjunction with other cost-saving measures,
- e. any additional building infrastructure improvement, cost saving, life safety or any other improvement that provides long-term operating cost reductions and is in compliance with state and local codes, or
- f. any facility operation and support programs that reduce operating cost; and

2. "Qualified provider" means a person or business experienced or trained in the design, analysis, construction and/or installation of energy conservation and facility management measures. A qualified provider must employ a professional engineer registered in the State of Oklahoma.

B. In addition to any other legally permissible alternatives of entering into contracts, the Department of Central Services Construction and Properties Division may enter into performance-based efficiency contracts on behalf of all state agencies with a qualified provider pursuant to the provisions of this section.

A qualified provider to whom the contract is awarded shall be required to provide to the Division a sufficient bond for its faithful performance of the contract. In addition, the Division may require performance bonds covering the annual amount of guaranteed savings over the contract term. The Department of Central Services may enter into an installment contract, lease purchase agreement or other contractual obligation for the purpose of financing performance-based efficiency projects for a term not to exceed twenty (20) years or the useful life of the project.

The qualified provider must guarantee the contract's cost savings each year during the term of the agreement. The savings must be sufficient to offset the annual costs of the contract. The contract shall provide for reimbursement to the state agency undertaking the project annually for any shortfall of guaranteed savings. Savings must be measured, verified and documented each year of the term and may be utilized to meet the annual debt service.

The contracts authorized by this section shall include procedures for modifying the contract should the Division determine it necessary.

This section shall constitute the sole authority necessary to enter into performance-based efficiency contracts, without regard to compliance with other laws which may specify additional procedural requirements for execution of contracts.

**§ 213. Public building energy and environmental performance program**

A. The purpose of this section is to promote effective energy and environmental standards for the construction, renovation, and maintenance of public buildings in this state which will improve the capacity of the state to design, build, and operate high-performance buildings thus creating new jobs, contributing to economic growth, and increasing energy independence. To accomplish the objectives of this section, the state shall adopt construction standards for public buildings that:

1. Optimize the energy performance of public buildings in the state;
2. Increase the demand for environmentally preferable building materials, finishes, and furnishings;
3. Reduce the dependence of the state on imported sources of energy through buildings that conserve energy and utilize local and renewable energy sources;
4. Protect and restore the natural resources of the state by avoiding development of inappropriate building sites;
5. Reduce the burden on municipal water supply and treatment by reducing potable water consumption;
6. Reduce waste generation and manage waste through recycling and diversion from landfill disposal;
7. Establish life-cycle cost analysis as the appropriate and most efficient analysis to determine the optimal performance level of a building project;
8. Ensure that the systems of each building project are designed, installed, and tested to perform according to the design intent and operational needs of the building through third-party postconstruction review and verification; and
9. Authorize the Department of Central Services to pursue ENERGY STAR designation from the United States Environmental Protection Agency to further demonstrate the energy independence of a public building project.

B. For purposes of this section:

- 1 "High-performance certification program" means a public building design, construction, and renovation standard which meets either the standards of the United States Green Building Council's Leadership in Energy and Environmental Design Rating System (LEED) or the standards of the Green Building Initiative's Green Globes Rating System, and which:
  - a. is quantifiable, measurable, and verifiable as certified by an independent third party,
  - b. reduces the operating costs of public buildings by reducing the consumption of energy, water, and other resources,
  - c. results in the recovery of the increased initial capital costs attributable to compliance with the program over a time period by reducing long-term energy, maintenance, and operating costs,
  - d. improves the indoor environmental quality of public buildings for a healthier work environment,
  - e. encourages the use of products harvested, created, or mined within Oklahoma, regardless of product certification status, and
  - f. protects the environment of Oklahoma;

2. a. "Public building" means a facility that:

- (1) is constructed or renovated in whole or in part with state funds or with funds guaranteed or insured by a state agency and the state funds constitute at least fifty percent (50%) of the project cost,
- (2) contains ten thousand (10,000) or more gross square feet,
- (3) includes a heating, ventilation, or air conditioning system, and
- (4) has not entered the design phase prior to July 1, 2008.

b. A public building shall not include:

- (1) a building constructed or renovated with funds from a public school in the state as defined in Section 1-106 of Title 70 of the Oklahoma Statutes, and
- (2) a building constructed or renovated where the primary purpose of the building project is for the storage of archived documents;

3. "State agency" means any agency, board, commission, counsel, court, office, officer, bureau, institution, unit division, body, or house of the executive or judicial branches of state government, whether elected or appointed. State agency shall include institutions within The Oklahoma State System of Higher Education. State agency shall not mean a public school district or technology center school district; and

4. "Substantial renovation" means any renovation of a public building the cost of which exceeds fifty percent (50%) of the replacement value of the facility.

C. The Department of Central Services shall adopt and update from time to time a high-performance certification program.

D. A state agency designing, constructing, or controlling the substantial renovation of a public building shall carry out the design, construction, or substantial renovation so as to achieve the highest performance certification attainable as certified by an independent third party pursuant to the high-performance certification program adopted by the Department pursuant to subsection C of this section. For purposes of this subsection, a certification is attainable if the increased initial costs of achieving the certification, including the time value of money, can be recouped from decreased operational costs within five (5) years.

E. If the state agency estimates that the increased initial costs of achieving certification will exceed five percent (5%) of the total cost of the design, construction, or substantial renovation project, the Department of Central Services shall specifically examine the estimate before authorizing the design, construction or substantial renovation.

F. If a public building undergoing substantial renovation cannot achieve a high-performance certification due to either the historical nature of the building or because the increased costs of renovating the public building cannot be recouped from decreased operational costs within five (5) years, an accredited professional shall assert in writing that, as much as possible, the substantial renovation was executed in a manner that is consistent with the standards in the high-performance certification program adopted by the Department of Central Services.

G. Any facility that is designed or newly constructed with state funds with less than five thousand (5,000) gross square feet that except for the size would be a public building subject to the high-performance certification program, any minor renovation of a public building, and any controlled maintenance of a public building shall, as much as possible, be executed in a manner that is consistent with the standards in the high-performance certification program adopted by the Department of Central Services.

H. A public building may be exempted from complying with this section upon a determination by the Department of Central Services that extenuating circumstances exist such as to preclude compliance with the high-performance certification program.

I. The Department of Central Services shall identify and seek to have any public building which has been designed, constructed, or renovated in accordance with the standards of the high-performance certification program designated as an ENERGY STAR building by the United States Environmental Protection Agency.

J. The Department of Central Services shall develop and implement a process to monitor and evaluate the energy and environmental benefits associated with designing, constructing, or renovating a public building in accordance with the standards of the high-performance certification program. The Department shall issue an annual report regarding program guidelines, monitoring and evaluation procedures, and the energy and environmental benefits related to the implementation of the high-performance certification program.

**§ 220. Use of Construction Management by Board of Education of School District**

A. Any political subdivision or board of education of a school district may use construction management as a project delivery method for the building, altering, repairing, improving, maintaining or demolishing any structure or appurtenance thereto, or any other improvement to real property owned by that political subdivision or school district. For purposes of this section "construction management" shall be defined as set forth in Section 202 of this title and shall include both agency construction management and at-risk construction management.

B. A political subdivision or school district shall select a construction manager based on the professional qualifications and technical experience of the construction manager. Selection criteria shall include the experience of the candidate, past performance, and certification of the company or individuals within the company of their knowledge of recognized standards of construction, construction management and project management. Only firms recognized as qualified construction managers by the Construction and Properties Division of the Department of Central Services pursuant to Section 62 of this title, may be considered for selection as a construction manager by a political subdivision or school district.

C. The construction management project delivery method may only be used for public construction contracts when the construction project meets the criteria established by Section 202.1 of this title, except that a political subdivision or school district shall not be required to obtain permission from the Director of Central Services.

D. When bids for a public construction project have been received from general contractors pursuant to the Public Competitive Bidding Act of 1974 and the lowest responsible bid is within the awarding agency's available funding, the awarding agency shall not reject all bids and award the project to a construction manager.

E. Construction management contracts, for both agency construction management and at-risk construction management, entered into by a political subdivision or school district pursuant to this section shall not be considered a public construction contract pursuant to Section 102 of Title 61 of the Oklahoma Statutes and shall not be subject to competitive bidding requirements as set forth in the Public Competitive Bidding Act of 1974.

F. All construction contracts or subcontracts for work to be performed for any political subdivision or school district pursuant to a construction management project delivery method shall be awarded in accordance with the provisions of the Public Competitive Bidding Act of 1974. If a construction manager at-risk wishes to self-perform portions of the construction work to be performed, the construction manager at-risk may self-perform portions of the work provided the construction manager at-risk competitively bids the work under the same terms and conditions as the other bidders and the construction manager at-risk is the lowest responsible bidder for the construction subcontract. No work shall commence until the school district executes a written contract and the contractor and subcontractors submit bonds and proofs of insurance as required by the appropriate contract.

## **Fair Pay for Construction Act**

### **§ 221. Short Title**

This act shall be known and may be cited as the "Fair Pay for Construction Act".

### **§ 222. Definitions**

As used in the Fair Pay for Construction Act:

1. "Construction contract" means a written contract or subcontract awarded by an owner or contracting entity for the purpose of making any public improvements or constructing any public building or making repairs to or performing maintenance on the same;
2. "Material supplier" means any entity that supplies materials, services, or equipment to be used in conjunction with the performance of work on a construction contract;
3. "Prime contractor" means any entity that has a direct contract with an owner to perform work under a construction contract;
4. "Owner" means any state government entity, municipality, township, public trust or an instrumentality of a state government entity, municipality, township or public trust in this state, or any entity designated by the owner to act on the owner's behalf, that requests work to be performed by a contractor under a construction contract;
5. "Proper invoice" means a request for payment or partial payment based on work performed on a construction contract;
6. "Retainage" means the difference between a gross proper invoice amount on a construction contract and the amount paid on said contract;
7. "Subcontractor" means any entity that has a direct contract with a prime contractor to perform a portion of the work under a construction contract; and
8. "Sub-subcontractor" means any entity that has a direct contract with another subcontractor to perform a portion of the work under a construction contract.

### **§ 223. Owner's Duty to Make Progress Payments to Prime Contractor - Payment and Invoice Reductions**

A. On all construction contracts exceeding Twenty-five Thousand Dollars (\$25,000.00) in value an owner shall make progress payments to the prime contractor for work performed and materials properly stored, within thirty (30) calendar days after a proper invoice is submitted to the owner or a representative designated by the owner.

B. An owner or entity designated by the owner, may not reduce a proper invoice of a prime contractor without detailing and forwarding to the prime contractor, within fourteen (14) calendar days of receipt of the proper invoice, the reasons for reduction. The reduction may not be more than an amount that is reasonable to correct the work, as set forth in writing.

C. If a contracting entity has had their proper invoice reduced by another entity all other affected entities having a construction contract with the contracting entity shall be notified within seven (7) calendar days. Except as affected by a prior reduction, a prime contractor or subcontractor may not reduce the proper invoice of another subcontractor, sub-subcontractor, or material supplier without detailing and forwarding to the subcontractor, sub-subcontractor, or material supplier, within seven (7) calendar days of receipt of the proper invoice, the reasons for reduction. A prime contractor, subcontractor, or sub-subcontractor may also reduce a payment of a contracted party from a previous proper invoice. Any such reductions may not be more than an amount that is reasonable to correct the reasons for reduction, as set forth in writing. Any

prime contractor, subcontractor or sub-subcontractor may be exempt from notification if the reduction is less than one percent (1%) of its net proper invoice or is due to mathematical errors.

**§ 224. Payments to Subcontractors, Sub-Subcontractors, and Material Suppliers**

A. If a subcontractor or material supplier has performed in accordance with the provisions of a construction contract, the prime contractor shall make payment to the subcontractor or material supplier no later than ten (10) calendar days after the prime contractor receives its corresponding payment for the work performed.

B. If a sub-subcontractor or material supplier has performed in accordance with the provisions of a construction contract, the sub-subcontractor or material supplier shall be entitled to receive payment no later than seven (7) calendar days after subcontractor receives its corresponding payment for the work performed.

**§ 225. Suspension of Work, Termination of Contract for Late Payment - Notice - Effect on Contract**

A. Any prime contractor that performs work under a construction contract may suspend performance of the work or may terminate a construction contract if the prime contractor is not properly paid within forty-nine (49) calendar days of the date that the corresponding proper invoice is submitted. Written notice must be received by the owner at least seven (7) calendar days before any such intended suspension or termination.

B. A prime contractor or any entity that suspends performance due to the suspension of a prime contractor, is not required to furnish further performance until such entity is paid for the full amount, less retainage, of work performed, material supplied, or services rendered, together with any costs incurred for demobilization, mobilization and other costs attributable to delay of the work resulting from the shutdown and start-up of a project.

C. Any entity that suspends performance of the work or terminates a construction contract for nonpayment under this act shall not be held in breach of the construction contract.

D. If the owner delays in making payments to the prime contractor, any agreed-upon schedule or completion date and their resulting penalties, damages, bonuses, or rewards shall be extended by the same amount of calendar days that payments were late.

E. If a payment to a prime contractor is received later than as specified in this act, that prime contractor shall be entitled to receive interest pursuant to Section 41.4b of Title 62 of the Oklahoma Statutes. If the prime contractor has already paid a subcontractor, then no interest is due and owing to the subcontractor. If interest is paid to a prime contractor as provided herein, then any subsequent timely payment made to a subcontractor shall bear interest at the same rate paid to the prime contractor. If a prime contractor fails to timely pay a subcontractor, such payment to a subcontractor shall bear interest at the rate of one and one-half percent (1 1/2%) per month .

**§ 226. Retainage Provision in Contracts and Subcontracts - Release of Retainage**

A. A construction contract may include a provision for the retainage of a portion of payment due. Such retainage is not to exceed five percent (5%) of the amount of the payment due.

B. A subcontract may include a provision for the retainage of a portion of payment due. Such retainage is not to exceed five percent (5%) of the amount of the payment due.

C. No later than twenty-one (21) calendar days after a certificate of substantial completion is issued for the project or separate usable phase of the project and upon adequate performance of the prime contractor and with approval of any applicable surety, retainage shall be released by the owner to the prime contractor less an amount no greater than one hundred

fifty percent (150%) of the estimated costs to correct any incomplete or defective work as identified, itemized, and attached to the certificate of substantial completion. All remaining funds shall be released as each deficiency is satisfactorily completed. The prime contractor shall release within ten (10) calendar days of receipt, the share of those funds that have been withheld from other entities. All other entities shall release within seven (7) calendar days of receipt, the share of those funds that have been withheld from other entities.

**§ 227. Applicability of Act - Void and Unenforceable Contract Provisions**

- A. 1. This act shall not apply to:
    - a. highway construction,
    - b. railroad construction, or
    - c. turnpike construction.
  2. Except as the following may be a portion of a construction contract as defined in Section 2 of this act, this act shall not apply to:
    - a. roads,
    - b. bridges,
    - c. utilities,
    - d. traffic control,
    - e. drainage construction,
    - f. sanitary sewer construction, or
    - g. waterline construction.
  3. This act shall not apply to any contract relating to a single-, two-, three-, or four-family dwelling.
- B. The following are against the public policy of this state and are void and unenforceable:
1. A provision, covenant, clause or understanding in, collateral to or affecting a construction contract that makes the contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state; and
  2. A provision, covenant, clause or understanding in, collateral to or affecting a construction contract that disallows or alters the rights of any prime contractor, subcontractor, sub-subcontractor, or material supplier to receive and enforce any and all rights under this act.