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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

DOJ 1-2024
CHAPTER 137
DEPARTMENT OF JUSTICE

FILED
01/03/2024 10:46 AM
ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Amends rules governing the Attorney General's review and approval of public contracts.

EFFECTIVE DATE: 01/03/2024 THROUGH 06/30/2024

AGENCY APPROVED DATE: 01/03/2024

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Filed By:
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NEED FOR THE RULE(S):

The temporary rule is needed to address the inadvertent drafting error and to avoid the prejudice discussed below in the Justification of Temporary Filing. The temporary rule will meet the need by making inapplicable the subsection of the rule described in the Justification of Temporary Filing.

JUSTIFICATION OF TEMPORARY FILING:

Prejudice to Public Interest or Parties Concerned
This temporary rule has the effect of deleting Subsection (3) of OAR 137-045-0045. This subsection was included as a new subsection to the existing rule in an October 31, 2023, Notice of Proposed Rulemaking. Based on comments received to that proposed rulemaking and additional internal discussions, the DOJ determined not to include the subsection in the Permanent Rule, but the subsection was inadvertently left in the Permanent Rule filed with the Notice of Permanent Rulemaking. The subsection proposed for deletion would have required a State Agency to submit procurement documents resulting in multiple contract awards if the State Agency anticipated the cumulative amounts of those contracts to exceed dollar thresholds for the Attorney General's review set forth in OAR 137-045-0030, regardless of whether any one such contract would exceed those thresholds. Prior to the inadvertent adoption of this subsection, State Agencies were only (and will remain) required to submit procurement documents if they will result in one or more contracts that will exceed the applicable threshold.
Failure to act promptly will result in prejudice to the affected State Agencies whose contracts are subject to Attorney General review and approval by creating a requirement to submit procurement documents for review and authorization for release that previously had not been subject to that requirement. That new requirement will impose substantial administrative burdens on agencies by requiring them to alter their processes and expected timelines for a class of procurements, causing disruption to internal agency processes and potentially leading to a new source of delay in putting agreements into place that support agency functions and programs. In addition, the new requirement will impose on affected agencies additional legal costs related to processes that were previously not subject to review.
Failure to act promptly will also result in unanticipated increases in workload for DOJ General Counsel attorneys by creating an entire new class of procurement documents subject to review by the Attorney General. That additional workload will require DOJ General Counsel Assistant Attorneys General to perform legal services for work that the

DOJ has determined to present relatively low legal risks, at the expense of and timeliness of other legal work.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

The DOJ relied in part on written comments received by DOJ in response to the DOJ's October 31, 2023, Notice of Proposed Rulemaking amending rules governing the Attorney General's review and approval of public contracts.

AMEND: 137-045-0035

RULE TITLE: Review of Anticipated Public Contracts and Price Agreements

RULE SUMMARY: This rule establishes the requirement that state agencies submit certain procurement documents to the Attorney General prior to their release, the substantive nature of the review of procurement documents prior to their release, and the circumstances under which a reviewing Assistant Attorney General may waive the failure to comply with this rule.

RULE TEXT:

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

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

STATUTORY/OTHER AUTHORITY: ORS 291.047(3)

STATUTES/OTHER IMPLEMENTED: ORS 291.047