

House Bill 3159

Sponsored by Representatives CLEM, ESQUIVEL; Representatives BOONE, D EDWARDS, WITT

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Requires proposer submitting proposal for public contract for services to submit personnel deployment disclosure. Specifies contents of personnel deployment disclosure.

Requires contracting agency to state in request for proposals that proposer must submit personnel deployment disclosure and that contracting agency will apply preferences in awarding contract in part on basis of information in personnel deployment disclosure.

Requires contracting agency to apply certain preferences in awarding contract.

Requires contracting agency to reject proposal submitted without personnel deployment disclosure unless contracting agency makes certain findings.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to preferences in public contracting; creating new provisions; amending ORS 279B.060,
3 279B.100 and 279B.145; and declaring an emergency.

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

5 **SECTION 1. (1) As used in this section, "locally" means in the county in which the work**
6 **described in a request for proposals will be performed or in an adjacent county.**

7 **(2) A proposer that submits a proposal under ORS 279B.060 shall submit with the proposal**
8 **a personnel deployment disclosure. The personnel deployment disclosure shall state:**

9 **(a) The number of workers the proposer and the proposer's first-tier subcontractors plan**
10 **to deploy to perform work described in the request for proposals;**

11 **(b) The minimum number of workers the proposer and the proposer's first-tier subcon-**
12 **tractors will employ locally and in Oregon; and**

13 **(c) Whether the proposer is headquartered locally or owned by a resident of the county**
14 **in which the work described in the request for proposals will be performed, or of an adjacent**
15 **county.**

16 **(3) The proposer shall certify by signature and oath that the proposer has prepared, read**
17 **and verified the accuracy of the personnel deployment disclosure and that to the best of the**
18 **proposer's knowledge the information in the personnel deployment disclosure is true.**

19 **SECTION 2. ORS 279B.060 is amended to read:**

20 279B.060. (1) A contracting agency may solicit and award a public contract for goods or ser-
21 vices, or may award multiple public contracts for goods or services when specified in the request
22 for proposals, by requesting and evaluating competitive sealed proposals.

23 (2) The request for proposals must *[include]*:

24 (a) **Specify** a time and date by which sealed proposals must be received, and a place at which
25 the proposals must be submitted, *[and may, in the sole discretion of]* **provided that** the contracting
26 agency, **at the contracting agency's sole discretion, may** direct or permit the submission and
27 receipt of proposals by electronic means;

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 (b) **Give** the name and title of the person designated [*for receipt of*] **to receive** proposals and the
 2 person [*designated by the contracting agency*] **the contracting agency designates** as the contact
 3 person for the procurement, if different;

4 (c) [A] **Describe the** procurement [*description*];

5 (d) **Specify** a time, date and place [*that*] **for** prequalification applications, if any, [*must*] **to be**
 6 filed and the classes of work, if any, for which proposers must be prequalified in accordance with
 7 ORS 279B.120;

8 (e) [A *statement*] **State** that the contracting agency may cancel the procurement or reject any
 9 or all proposals in accordance with ORS 279B.100;

10 (f) [A *statement*] **State** that “Contractors shall use recyclable products to the maximum extent
 11 economically feasible in the performance of the contract work set forth in this document.” if the
 12 request for proposals is issued by a state contracting agency;

13 (g) [A *statement that requires the*] **Require a** contractor or subcontractor to possess an asbestos
 14 abatement license, if required under ORS 468A.710; [*and*]

15 (h) **Require the proposer to submit the personnel deployment disclosure described in**
 16 **section 1 of this 2009 Act and state that the contracting agency in awarding the contract that**
 17 **is the subject of the request for proposals will apply preferences in part on the basis of in-**
 18 **formation provided in the personnel deployment disclosure; and**

19 [*h*] (i) **Include** all contractual terms and conditions applicable to the procurement.

20 (3) The request for proposals also may:

21 [(A)] (a) Identify [*those*] contractual terms or conditions **that** the contracting agency reserves,
 22 in the request for proposals, for negotiation with proposers;

23 [(B)] (b) Request that proposers propose contractual terms and conditions that relate to subject
 24 matter reasonably identified in the request for proposals;

25 [(C)] (c) Contain or incorporate the form and content of the contract that the contracting
 26 agency will accept, or suggested contract terms and conditions that nevertheless may be the subject
 27 of negotiations with proposers;

28 [(D)] (d) Announce the method [*of contractor selection that*] **the contracting agency will use**
 29 **to select the contractor, which** may include, but is not limited to, [*negotiation*] **negotiating** with
 30 the highest ranked proposer, competitive negotiations, a multiple-tiered competition designed to
 31 identify a class of proposers that fall within a competitive range or to otherwise eliminate from
 32 consideration a class of lower ranked proposers, or [*any*] a combination of methods, as authorized
 33 or prescribed by rules adopted under ORS 279A.065; and

34 [(E)] (e) [*Contain a description of*] **Describe** the manner in which **the contracting agency will**
 35 **evaluate** proposals, [*will be evaluated, including*] **identifying** the relative importance of price and
 36 [*any*] other [*evaluation*] factors **the contracting agency will use** [*used*] **to evaluate and** rate the
 37 proposals in the first tier of competition[,]. [*and*] If **the contracting agency uses** more than one tier
 38 of competitive evaluation [*may be used*], **the request for proposals must describe** [*a description*
 39 *of*] the process **the contracting agency will use to evaluate proposals** [*under which the proposals*
 40 *will be evaluated*] in the subsequent tiers.

41 [(3)(a)] (4)(a) The contracting agency may require proposal security in any form [*deemed prudent*
 42 *by*] the contracting agency **deems prudent**. Proposal security shall serve the same function with
 43 respect to requests for proposals as bid security serves with respect to invitations to bid under ORS
 44 279B.055.

45 (b) The contracting agency shall return the proposal security to all proposers upon the exe-

1 cution of the contract.

2 (c) The contracting agency shall retain the proposal security if a proposer who is awarded a
 3 contract fails to promptly and properly execute the contract. For purposes of this paragraph, prompt
 4 and proper execution of the contract includes all action by a proposer that is necessary to [*the for-*
 5 *mation of*] **form** a contract in accordance with the request for proposals, including [*the posting of*]
 6 **posting** performance security and [*the submission of*] **submitting** proof of insurance when required
 7 by the request for proposals. If contract negotiations or competitive negotiations are conducted, the
 8 failure, prior to award, of a contracting agency and a proposer to reach agreement does not con-
 9 stitute grounds for [*the retention of*] **retaining** proposal security.

10 [(4)] (5) Public notice of the request for proposals [*shall*] **must** be given in the same manner as
 11 provided for public notice of invitations to bid in ORS 279B.055 (4).

12 [(5)(a)] (6)(a) Notwithstanding ORS 192.410 to 192.505, proposals may be opened in a manner to
 13 avoid disclosure of contents to competing proposers during, when applicable, the process of negoti-
 14 ation, but the contracting agency shall record and make available the identity of all proposers as
 15 part of the contracting agency’s public records from and after the opening of the proposals.
 16 Notwithstanding ORS 192.410 to 192.505, proposals are not required to be open for public inspection
 17 until after the notice of intent to award a contract is issued. The fact that proposals are opened at
 18 a meeting, as defined in ORS 192.610, does not make [*their*] **the contents of the proposals** subject
 19 to disclosure, regardless of whether the public body opening the proposals fails to give notice of or
 20 provide for an executive session for the purpose of opening proposals.

21 (b) Notwithstanding any requirement to make proposals open to public inspection after the
 22 contracting [*agency’s issuance of*] **agency issues** notice of intent to award a contract, a contracting
 23 agency may withhold from disclosure to the public materials included in a proposal that are exempt
 24 or conditionally exempt from disclosure under ORS 192.501 or 192.502.

25 (c) If a request for proposals is canceled under ORS 279B.100 after proposals are received **or**
 26 **if a proposal is rejected**, the contracting agency may return a proposal to the proposer that made
 27 the proposal. The contracting agency shall keep a list of returned proposals in the file for the so-
 28 licitation.

29 [(6)(a)] (7) As provided in the request for proposals or in written addenda issued thereunder, the
 30 contracting agency may conduct site tours, demonstrations, individual or group discussions and
 31 other informational activities with proposers before or after the opening of proposals for the purpose
 32 of clarification to ensure full understanding of, and responsiveness to, the solicitation requirements
 33 or to consider and respond to requests for modifications of the proposal requirements. The con-
 34 tracting agency shall use procedures designed to accord proposers fair and equal treatment with
 35 respect to any opportunity for discussion and revision of proposals.

36 [(b)] (8) For purposes of evaluation, when provided for in the request for proposals, the con-
 37 tracting agency may employ methods of contractor selection that include, but are not limited to:

38 [(A)] (a) An award or awards based solely on the ranking of proposals;

39 [(B)] (b) Discussions leading to best and final offers, in which the contracting agency may not
 40 disclose private discussions leading to best and final offers;

41 [(C)] (c) Discussions leading to best and final offers, in which the contracting agency may not
 42 disclose information derived from proposals submitted by competing proposers;

43 [(D)] (d) Serial negotiations, beginning with the highest ranked proposer;

44 [(E)] (e) Competitive simultaneous negotiations;

45 [(F)] (f) Multiple-tiered competition designed to identify, at each level, a class of proposers that

1 fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked
2 proposers;

3 [(G)] (g) A multistep request for proposals requesting the submission of unpriced technical sub-
4 mittals, and then later issuing a request for proposals limited to the proposers whose technical
5 submittals the contracting agency had determined to be qualified under the criteria set forth in the
6 initial request for proposals; or

7 [(H)] (h) [Any] A combination of methods described in this [paragraph] subsection, as author-
8 ized or prescribed by rules adopted under ORS 279A.065.

9 (9)(a) In addition to and not in lieu of the preferences described in ORS 279A.120, a con-
10 tracting agency, based on information provided in the personnel deployment disclosure de-
11 scribed in section 1 of this 2009 Act, shall apply the following preferences in evaluating
12 proposals received under this section:

13 (A) A proposer that is headquartered in or owned by a resident of the county in which
14 the contract will be performed, or in an adjacent county, shall receive first preference, un-
15 less the proposed contract price is more than 7.5 percent higher than the contract price of
16 a competing proposal submitted by a proposer that is not headquartered in or owned by a
17 resident of the county in which the contract will be performed, or an adjacent county.

18 (B) A proposer that is headquartered in or owned by a resident of this state shall receive
19 second preference, unless the proposed contract price is more than five percent higher than
20 the contract price of a competing proposal submitted by a proposer that is not headquartered
21 in or owned by a resident of this state.

22 (C) A proposer that is headquartered in or owned by a resident of the United States shall
23 receive third preference, unless the proposed contract price is more than 2.5 percent higher
24 than the contract price of a competing proposal submitted by a proposer that is not head-
25 quartered in or owned by a resident of the United States.

26 (b) A contracting agency shall apply a preference described in paragraph (a) of this sub-
27 section to a proposal that the contracting agency determines is otherwise responsive to the
28 request for proposals. A contracting agency may not award a contract to a proposer on the
29 basis of a preference described in paragraph (a) of this subsection if the contracting agency
30 has determined that the proposer is not responsible under ORS 279B.110.

31 [(c)] (10) Revisions of proposals may be permitted after the submission of proposals and before
32 award for the purpose of obtaining best offers or best and final offers.

33 [(d)] (11) After the opening of proposals, a contracting agency may issue or electronically post
34 an addendum to the request for proposals that modifies the criteria, rating process and procedure
35 for any tier of competition before the start of the tier to which the addendum applies. The con-
36 tracting agency shall send an addendum that is issued by a method other than electronic posting to
37 all proposers who are eligible to compete under the addendum. The contracting agency shall issue
38 or post the addendum at least five days before the start of the subject tier of competition or as
39 otherwise determined by the contracting agency to be adequate to allow eligible proposers to pre-
40 pare for the competition in accordance with rules adopted under ORS 279A.065.

41 [(7)] (12) The cancellation of requests for proposals and the rejection of proposals must be in
42 accordance with ORS 279B.100.

43 [(8)] (13) In the request for proposals, the contracting agency shall describe the methods by
44 which the agency will make the results of each tier of competitive evaluation available to the
45 proposers who competed in the tier. The contracting agency shall include a description of the man-

ner in which the proposers who are eliminated from further competition may protest or otherwise object to the contracting agency's decision.

[(9)] (14) The contracting agency shall issue or electronically post the notice of intent to award described in ORS 279B.135 to each proposer who was evaluated in the final competitive tier.

[(10)] (15) If a contract is awarded, the contracting agency shall award the contract to the responsible proposer whose proposal the contracting agency determines in writing *[to be]* is the most advantageous to the contracting agency based on the evaluation process and evaluation factors described in the request for proposals, *[any]* applicable preferences described in ORS 279A.120 and 279A.125 and, when applicable, the outcome of *[any]* negotiations authorized by the request for proposals. Other factors may not be used in the evaluation. When the request for proposals specifies or authorizes the award of multiple public contracts, the contracting agency shall award public contracts to the responsible proposers who qualify for the award of a contract under the terms of the request for proposals.

[(11)] (16) The contracting agency may issue a request for information, a request for interest, a request for qualifications or other preliminary documents to obtain information useful in the preparation of a request for proposals.

SECTION 3. ORS 279B.100 is amended to read:

279B.100. (1) *[Any]* A solicitation or procurement described in a solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part, *[when]* if the **contracting agency determines that canceling the solicitation or procurement or rejecting the proposal** *[cancellation or rejection]* is in the **contracting agency's** best interest *[of the contracting agency as determined by the contracting agency]*. The reasons for the cancellation or rejection must be made part of the solicitation file. A contracting agency is not liable to *[any]* a bidder or proposer for *[any]* a loss or expense caused by or resulting from the cancellation or rejection of a solicitation, bid, proposal or award.

(2) *[Any]* A solicitation or a procurement described in a solicitation may be delayed or suspended when the **contracting agency determines that delaying or suspending the solicitation or procurement** *[delay or suspension]* is in the **contracting agency's** best interest *[of the contracting agency as determined by the contracting agency]*. The contracting agency shall make the reasons for the delay or suspension part of the solicitation file. A contracting agency is not liable to *[any]* a bidder or proposer for *[any]* a loss or expense caused by or resulting from the delay or suspension of a solicitation, bid, proposal or award.

(3) **A contracting agency shall reject a proposal if the proposal does not include the personnel deployment disclosure described in section 1 of this 2009 Act unless the contracting agency finds in writing that:**

(a) **Requiring a personnel deployment disclosure or evaluating a proposal on the basis of information provided in a personnel deployment disclosure conflicts with or would not be permitted by:**

(A) **Conditions placed on a grant or other source of funding the agency will use for the procurement;**

(B) **Applicable federal law, treaties or regulations; or**

(C) **The needs of the contracting agency because of exceptional circumstances;**

(b) **Services the contracting agency requires cannot reasonably be performed or supplied in this state at all or cannot reasonably be performed or supplied in quantities or within delivery times that the contracting agency requires; or**

1 (c) Services that are the subject of the solicitation or procurement by nature must be
 2 performed within this state.

3 (4) A contracting agency that makes a finding described in subsection (3) of this section
 4 shall report to the Oregon Department of Administrative Services which proposals the con-
 5 tracting agency received and evaluated without a personnel deployment disclosure. The de-
 6 partment shall maintain a list of the proposals exempted from the requirement to submit a
 7 personnel deployment disclosure and shall make the list available for public inspection.

8 **SECTION 4.** ORS 279B.145 is amended to read:

9 279B.145. The determinations under ORS 279B.055 (3) and (7), 279B.060 [(3) and (10)] (4) and
 10 (15), 279B.075, 279B.080, 279B.085 and 279B.110 (1) are final and conclusive unless they are clearly
 11 erroneous, arbitrary, capricious or contrary to law.

12 **SECTION 5.** (1) The Attorney General, in model rules the Attorney General adopts under
 13 ORS 279A.065, shall prescribe the form and content of the personnel deployment disclosure
 14 described in section 1 of this 2009 Act and shall devise standards, criteria and procedures for
 15 applying the preferences set forth in ORS 279B.060 (9).

16 (2) The Oregon Department of Administrative Services or a contracting agency that is
 17 subject to ORS 279A.065, in consultation with the Attorney General, by rule shall prescribe
 18 the form and content of the personnel deployment disclosure described in section 1 of this
 19 2009 Act for the department's or the contracting agency's use and shall devise standards,
 20 criteria and procedures for guiding the department or the contracting agency in applying the
 21 preferences set forth in ORS 279B.060 (9). To the extent practicable, the department and the
 22 contracting agency shall adopt rules that are consonant with the rules the Attorney General
 23 adopts under subsection (1) of this section.

24 **SECTION 6.** (1) Section 1 of this 2009 Act and the amendments to ORS 279B.060, 279B.100
 25 and 279B.145 by sections 2, 3 and 4 of this 2009 Act become operative January 1, 2010.

26 (2) Before January 1, 2010, the Attorney General, the Oregon Department of Adminis-
 27 trative Services and a contracting agency may adopt rules that are necessary to enable the
 28 Attorney General, the department and the contracting agency to exercise, on and after
 29 January 1, 2010, all the duties, powers and functions conferred on the Attorney General, the
 30 department and the contracting agency by section 1 of this 2009 Act and the amendments
 31 to ORS 279B.060, 279B.100 and 279B.145 by sections 2, 3 and 4 of this 2009 Act.

32 **SECTION 7.** Section 1 of this 2009 Act and the amendments to ORS 279B.060, 279B.100
 33 and 279B.145 by sections 2, 3 and 4 of this 2009 Act apply to contracts first advertised or
 34 otherwise solicited or, if not advertised or solicited, entered into on or after the operative
 35 date specified in section 6 of this 2009 Act.

36 **SECTION 8.** This 2009 Act being necessary for the immediate preservation of the public
 37 peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect
 38 on its passage.