

# Senate Bill 884

Sponsored by COMMITTEE ON FINANCE AND REVENUE

## 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**.

Authorizes contracting agency to make finding that for public improvement contract for which funding will come from federal government under specific provision of law, public interest requires that contracting agency use alternative contracting method.

Sunsets January 2, 2012.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to procurements made with funds provided under the American Recovery and Reinvestment  
3 Act of 2009; creating new provisions; amending ORS 279C.335; and declaring an emergency.

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

5 **SECTION 1.** ORS 279C.335 is amended to read:

6 279C.335. (1) *[All]* **A** public improvement *[contracts shall]* **contract must be awarded by** *[be*  
7 *based upon]* competitive *[bids]* **bidding**, except for:

8 (a) *[Contracts]* **A contract** made with **a** qualified nonprofit *[agencies]* **agency** providing employ-  
9 ment opportunities for individuals with disabilities under ORS 279.835 to 279.855.

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

11 (c) A public improvement contract with a value of less than \$5,000.

12 (d) A contract not to exceed \$100,000 made under procedures for competitive quotes **described**  
13 in ORS 279C.412 and 279C.414.

14 (e) *[Contracts]* **A contract** for repair, maintenance, improvement or protection of property ob-  
15 tained by the Department of Veterans' Affairs under ORS 407.135 and 407.145 (1).

16 (f) **An** energy savings performance *[contracts]* **contract** entered into in accordance with rules  
17 of procedure adopted under ORS 279A.065.

18 (2) Subject to subsection (4)(b) of this section, the Director of the Oregon Department of Ad-  
19 ministrative Services, a local contract review board or, for contracts described in ORS 279A.050  
20 (3)(b), the Director of Transportation may exempt a public improvement contract or a class of public  
21 improvement contracts from the competitive bidding requirements of subsection (1) of this section  
22 *[upon approval of]* **after approving** the following findings submitted by the contracting agency or,  
23 if a state agency is not the contracting agency, the state agency seeking the exemption:

24 (a) It is unlikely that the exemption will encourage favoritism in *[the]* awarding *[of]* public im-  
25 provement contracts or substantially diminish competition for public improvement contracts.

26 (b) *[The]* Awarding *[of]* public improvement contracts under the exemption will likely result in  
27 substantial cost savings to the contracting agency, to the state agency based upon the justification  
28 and information described in ORS 279C.330 or, if the contracts are for public improvements de-  
29 scribed in ORS 279A.050 (3)(b), to the contracting agency or the public. In making the finding, the  
30 Director of the Oregon Department of Administrative Services, the Director of Transportation or the

**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 local contract review board may consider the type, cost and amount of the contract, the number of  
2 persons available to bid and *[such]* other **appropriate** factors *[as may be deemed appropriate]*.

3 (c) As an alternative to the finding described in paragraph (b) of this subsection[.]:

4 (A) When a contracting agency or state agency seeks an exemption that would allow the use  
5 of an *[alternate]* **alternative** contracting method that the agency has not previously used, the agency  
6 may make a finding that identifies the project as a pilot project for which the agency intends to  
7 determine whether the use of the *[alternate]* **alternative** contracting method actually results in  
8 substantial cost savings to the contracting agency, to the state agency or, if the contract is for a  
9 public improvement described in ORS 279A.050 (3)(b), to the contracting agency or the public. The  
10 agency shall include an analysis and conclusion regarding actual cost savings, if any, in the evalu-  
11 ation required under ORS 279C.355.

12 (B) **When the contracting agency will use moneys provided by the federal government**  
13 **through the American Recovery and Reinvestment Act of 2009 (P.L. 111-5) for specific public**  
14 **improvement contracts, the contracting agency may make a finding that the public interest**  
15 **in expediting solicitations and awards for the public improvement contracts requires using**  
16 **alternative contracting methods. In the finding, the contracting agency shall describe the**  
17 **proposed alternative contracting method and identify the public improvement contract or**  
18 **class of public improvement contracts to which the alternative method will apply.**

19 (3) In making findings to support an exemption for a class of public improvement contracts, the  
20 contracting agency or state agency shall clearly identify the class using the class's defining char-  
21 acteristics. Those characteristics *[shall]* **must** include some combination of project descriptions or  
22 locations, time periods, contract values, methods of procurement or other factors that distinguish the  
23 limited and related class of public improvement contracts from the agency's overall construction  
24 program. **Except for public improvement contracts for which the contracting agency makes**  
25 **a finding as provided in subsection (2)(c)(B) of this section,** the agency may not identify a class  
26 solely by funding source, such as a particular bond fund, or by the method of procurement, but shall  
27 identify the class using characteristics that reasonably relate to the exemption criteria set forth in  
28 subsection (2) of this section.

29 (4) In granting exemptions under subsection (2) of this section, the Director of the Oregon De-  
30 partment of Administrative Services, the Director of Transportation or the local contract review  
31 board shall:

32 (a) When appropriate, direct the use of *[alternate]* **alternative** contracting methods that take  
33 account of market realities and modern practices and are consistent with the public policy of en-  
34 couraging competition.

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

40 (5)(a) Before final adoption of the findings required by subsection (2) of this section exempting  
41 a public improvement contract or a class of public improvement contracts from the requirement of  
42 competitive bidding, **except for a finding made under subsection (2)(c)(B) of this section,** a  
43 contracting agency or state agency shall hold a public hearing.

44 (b) Notification of the public hearing shall be published in at least one trade newspaper of  
45 general statewide circulation a minimum of 14 days before the hearing.

1 (c) The notice shall state that the public hearing is for the purpose of taking comments on the  
 2 draft findings for an exemption from the competitive bidding requirement. At the time of the notice,  
 3 copies of the draft findings shall be made available to the public. At the option of the contracting  
 4 agency or state agency, the notice may describe the process by which the findings are finally  
 5 adopted and may indicate the opportunity for *[any]* further public comment.

6 (d) At the public hearing, the contracting agency or state agency shall offer an opportunity for  
 7 any interested party to appear and present comment.

8 (e) If a contracting agency or state agency *[is required to]* **must** act promptly *[due to]* **because**  
 9 **of** circumstances beyond the agency's control that do not constitute an emergency, **the agency may**  
 10 **publish** notification of the public hearing *[may be published]* simultaneously with the agency's so-  
 11 licitation of contractors for the alternative public contracting method, as long as responses to the  
 12 solicitation are due at least five days after the meeting and approval of the findings.

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

19 (7) A public improvement contract awarded under the competitive bidding requirement of sub-  
 20 section (1) of this section may be amended only in accordance with rules adopted under ORS  
 21 279A.065.

22 (8) Public improvement contracts excepted from competitive bid requirements under subsection  
 23 (1)(a), (c), (d), (e) or (f) of this section are not subject to the exemption requirements of subsection  
 24 (2) of this section.

25 **SECTION 2.** ORS 279C.335, as amended by section 1 of this 2009 Act, is amended to read:

26 279C.335. (1) A public improvement contract must be awarded by competitive bidding, except for:

27 (a) A contract made with a qualified nonprofit agency providing employment opportunities for  
 28 individuals with disabilities under ORS 279.835 to 279.855.

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

30 (c) A public improvement contract with a value of less than \$5,000.

31 (d) A contract not to exceed \$100,000 made under procedures for competitive quotes described  
 32 in ORS 279C.412 and 279C.414.

33 (e) A contract for repair, maintenance, improvement or protection of property obtained by the  
 34 Department of Veterans' Affairs under ORS 407.135 and 407.145 (1).

35 (f) An energy savings performance contract entered into in accordance with rules of procedure  
 36 adopted under ORS 279A.065.

37 (2) Subject to subsection (4)(b) of this section, the Director of the Oregon Department of Ad-  
 38 ministrative Services, a local contract review board or, for contracts described in ORS 279A.050  
 39 (3)(b), the Director of Transportation may exempt a public improvement contract or a class of public  
 40 improvement contracts from the competitive bidding requirements of subsection (1) of this section  
 41 after approving the following findings submitted by the contracting agency or, if a state agency is  
 42 not the contracting agency, the state agency seeking the exemption:

43 (a) It is unlikely that the exemption will encourage favoritism in awarding public improvement  
 44 contracts or substantially diminish competition for public improvement contracts.

45 (b) Awarding public improvement contracts under the exemption will likely result in substantial

1 cost savings to the contracting agency, to the state agency based upon the justification and infor-  
2 mation described in ORS 279C.330 or, if the contracts are for public improvements described in ORS  
3 279A.050 (3)(b), to the contracting agency or the public. In making the finding, the Director of the  
4 Oregon Department of Administrative Services, the Director of Transportation or the local contract  
5 review board may consider the type, cost and amount of the contract, the number of persons avail-  
6 able to bid and other appropriate factors.

7 (c) As an alternative to the finding described in paragraph (b) of this subsection[.],

8 [(A)] when a contracting agency or state agency seeks an exemption that would allow the use  
9 of an alternative contracting method that the agency has not previously used, the agency may make  
10 a finding that identifies the project as a pilot project for which the agency intends to determine  
11 whether the use of the alternative contracting method actually results in substantial cost savings  
12 to the contracting agency, to the state agency or, if the contract is for a public improvement de-  
13 scribed in ORS 279A.050 (3)(b), to the contracting agency or the public. The agency shall include  
14 an analysis and conclusion regarding actual cost savings, if any, in the evaluation required under  
15 ORS 279C.355.

16 [(B) *When the contracting agency will use moneys provided by the federal government through the*  
17 *American Recovery and Reinvestment Act of 2009 (P.L. 111-5) for specific public improvement contracts,*  
18 *the contracting agency may make a finding that the public interest in expediting solicitations and*  
19 *awards for the public improvement contracts requires using alternative contracting methods. In the*  
20 *finding, the contracting agency shall describe the proposed alternative contracting method and identify*  
21 *the public improvement contract or class of public improvement contracts to which the alternative*  
22 *method will apply.*]

23 (3) In making findings to support an exemption for a class of public improvement contracts, the  
24 contracting agency or state agency shall clearly identify the class using the class's defining char-  
25 acteristics. Those characteristics must include some combination of project descriptions or locations,  
26 time periods, contract values, methods of procurement or other factors that distinguish the limited  
27 and related class of public improvement contracts from the agency's overall construction program.  
28 [*Except for public improvement contracts for which the contracting agency makes a finding as provided*  
29 *in subsection (2)(c)(B) of this section,*] The agency may not identify a class solely by funding source,  
30 such as a particular bond fund, or by the method of procurement, but shall identify the class using  
31 characteristics that reasonably relate to the exemption criteria set forth in subsection (2) of this  
32 section.

33 (4) In granting exemptions under subsection (2) of this section, the Director of the Oregon De-  
34 partment of Administrative Services, the Director of Transportation or the local contract review  
35 board shall:

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

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

44 (5)(a) Before final adoption of the findings required by subsection (2) of this section exempting  
45 a public improvement contract or a class of public improvement contracts from the requirement of

1 competitive bidding, [except for a finding made under subsection (2)(c)(B) of this section,] a contract-  
 2 ing agency or state agency shall hold a public hearing.

3 (b) Notification of the public hearing shall be published in at least one trade newspaper of  
 4 general statewide circulation a minimum of 14 days before the hearing.

5 (c) The notice shall state that the public hearing is for the purpose of taking comments on the  
 6 draft findings for an exemption from the competitive bidding requirement. At the time of the notice,  
 7 copies of the draft findings shall be made available to the public. At the option of the contracting  
 8 agency or state agency, the notice may describe the process by which the findings are finally  
 9 adopted and may indicate the opportunity for further public comment.

10 (d) At the public hearing, the contracting agency or state agency shall offer an opportunity for  
 11 any interested party to appear and present comment.

12 (e) If a contracting agency or state agency must act promptly because of circumstances beyond  
 13 the agency's control that do not constitute an emergency, the agency may publish notification of the  
 14 public hearing simultaneously with the agency's solicitation of contractors for the alternative public  
 15 contracting method, as long as responses to the solicitation are due at least five days after the  
 16 meeting and approval of the findings.

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

23 (7) A public improvement contract awarded under the competitive bidding requirement of sub-  
 24 section (1) of this section may be amended only in accordance with rules adopted under ORS  
 25 279A.065.

26 (8) Public improvement contracts excepted from competitive bid requirements under subsection  
 27 (1)(a), (c), (d), (e) or (f) of this section are not subject to the exemption requirements of subsection  
 28 (2) of this section.

29 **SECTION 3. (1) The amendments to ORS 279C.335 by section 1 of this 2009 Act apply to**  
 30 **public improvement contracts first advertised or otherwise solicited on or after the effective**  
 31 **date of this 2009 Act and before January 2, 2012.**

32 **(2) The amendments to ORS 279C.335 by section 2 of this 2009 Act apply to public im-**  
 33 **provement contracts first advertised or otherwise solicited on or after January 2, 2012.**

34 **SECTION 4. The amendments to ORS 279C.335 by section 2 of this 2009 Act become op-**  
 35 **erative January 2, 2012.**

36 **SECTION 5. 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.**

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