

House Bill 2062

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Governor John A. Kitzhaber for Oregon Department of Administrative Services)

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 public body on behalf of which contracting agency conducts procurement to perform required cost analysis or make required feasibility determination. Provides that contracting agency must determine whether contracting agency has sufficient information to conduct required cost analysis or feasibility determination before conducting procurement to establish price agreement. Allows contracting agency to establish price agreement if contracting agency conducts cost analysis or feasibility determination or if public body that procures services under price agreement will conduct cost analysis or feasibility determination.

Provides that contracting agency shall consider contractor's profit in addition to contractor's costs when performing required cost analysis for procurement.

Permits contracting agency to withhold disclosure of cost analysis, determination and supporting documentation until after contracting agency issues notice of intent to award contract.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to determinations required for procuring services under the Public Contracting Code; cre-
3 ating new provisions; amending ORS 279B.030, 279B.033 and 279B.036; and declaring an emer-
4 gency.

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

6 **SECTION 1.** ORS 279B.030 is amended to read:

7 279B.030. (1) Except as provided in ORS 279B.036, before conducting a procurement for services
8 with an estimated contract price that exceeds \$250,000, a contracting agency shall:

9 (a) Demonstrate, by means of a written cost analysis in accordance with ORS 279B.033, that the
10 contracting agency would incur less cost in conducting the procurement than in performing the
11 services with the contracting agency's own personnel and resources; or

12 (b) Demonstrate, in accordance with ORS 279B.036, that performing the services with the con-
13 tracting agency's own personnel and resources is not feasible.

14 (2)(a) If a local contracting agency authorizes a department, bureau, office or other subdivision
15 of the local contracting agency to conduct a procurement on behalf of another department, bureau,
16 office or subdivision of the local contracting agency, the department, bureau, office or subdivision
17 on [*whose*] behalf **of which** the procurement is conducted shall comply with [*the requirement set forth*
18 *in*] subsection (1) of this section.

19 **(b) If a contracting agency conducts a procurement on behalf of another public body, the**
20 **public body on behalf of which the contracting agency conducts the procurement shall com-**
21 **ply with subsection (1) of this section.**

22 **(3)(a) If a contracting agency conducts a procurement for the purpose of establishing a**
23 **price agreement under which more than one public body may contract for services, the**
24 **contracting agency before conducting the procurement shall determine whether the con-**
25 **tracting agency has adequate information to comply with subsection (1) of this section on**

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 **behalf of all public bodies that might contract for services under the price agreement. After**
 2 **making the determination, the contracting agency may conduct the procurement to establish**
 3 **the price agreement under the following conditions:**

4 (A) **If the contracting agency has adequate information to comply with subsection (1) of**
 5 **this section on behalf of all public bodies that might contract for services under the price**
 6 **agreement, the contracting agency shall comply with subsection (1) of this section before**
 7 **conducting the procurement to establish the price agreement.**

8 (B) **If the contracting agency does not have adequate information to comply with sub-**
 9 **section (1) of this section on behalf of all public bodies that might contract for services under**
 10 **the price agreement, the contracting agency may conduct the procurement to establish the**
 11 **price agreement without complying with subsection (1) of this section. The contracting**
 12 **agency may not contract for services under the price agreement, however, until the con-**
 13 **tracting agency complies with subsection (1) of this section, nor may the public body con-**
 14 **tract for services under the price agreement until the public body complies with subsection**
 15 **(1) of this section.**

16 (b) **A public body that contracts for services subject to a price agreement established in**
 17 **accordance with paragraph (a)(B) of this subsection shall maintain an aggregated record of**
 18 **the services the public body obtained under the price agreement. If the contract price of the**
 19 **services the public body obtained under the price agreement in the aggregate exceeds or, by**
 20 **contracting for additional services, will exceed \$250,000 during the term of the price agree-**
 21 **ment, the public body shall comply with subsection (1) of this section before contracting for**
 22 **additional services under the price agreement.**

23 (4) **A public body may not divide a procurement into more than one contract for the**
 24 **purpose of avoiding compliance with subsection (1) of this section.**

25 [(3)] (5) **Subsection (1) of this section does not apply to:**

26 (a) **A local contracting agency or a local contract review board for a city that has a population**
 27 **of not more than 15,000 or a county that has a population of not more than 30,000;**

28 (b) **A community college that enrolls not more than 1,000 full-time equivalent students, as de-**
 29 **defined in ORS 341.005;**

30 (c) **A special district, as defined in ORS 198.010, a diking district formed under ORS chapter 551**
 31 **and a soil and water conservation district organized under ORS 568.210 to 568.808;**

32 (d) **The Port of Portland; or**

33 (e) **Procurements for client services, [as defined in OAR 125-246-0110] the definition and scope**
 34 **of which the Oregon Department of Administrative Services specifies by rule.**

35 **SECTION 2.** **ORS 279B.033 is amended to read:**

36 **279B.033. (1) In the cost analysis required under ORS 279B.030, a contracting agency shall:**

37 (a) **Estimate the contracting agency's cost of performing the services, including:**

38 (A) **Salary or wage and benefit costs for contracting agency employees who are directly involved**
 39 **in performing the services, including employees who inspect, supervise or monitor the performance**
 40 **of the services.**

41 (B) **Material costs, including costs for space, energy, transportation, storage, raw and finished**
 42 **materials, equipment and supplies.**

43 (C) **Costs incurred in planning for, training for, starting up, implementing, transporting and de-**
 44 **livering the services and costs related to stopping and dismantling a project or operation because**
 45 **the contracting agency intends to procure a limited quantity of services or procure the services**

1 within a defined or limited period of time.

2 (D) Miscellaneous costs related to performing the services. The contracting agency may not
 3 include in the cost analysis the contracting agency's indirect overhead costs for existing salaries
 4 or wages and benefits for administrators or for rent, equipment, utilities and materials except to the
 5 extent that the costs are attributable solely to performing the services and would not exist unless
 6 the contracting agency performs the services.

7 (b) Estimate the **profit a potential contractor would earn and the cost** [*a potential*] **the con-**
 8 **tractor would incur in performing the services**[, *including*]. **The contracting agency shall include**
 9 **in estimating the contractor's costs:**

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

11 (i) Work in the industry or business most closely involved in performing the services that the
 12 contracting agency intends to procure; and

13 (ii) Would be necessary and directly involved in performing the services or who would inspect,
 14 supervise or monitor the performance of the services;

15 (B) Material costs, including costs for space, energy, transportation, storage, raw and finished
 16 materials, equipment and supplies; and

17 (C) Miscellaneous costs related to performing the services, including but not limited to reason-
 18 ably foreseeable fluctuations in the costs for the items identified in this subsection over the expected
 19 duration of the procurement.

20 (2)(a) After comparing the difference between the costs estimated as provided in subsection (1)(a)
 21 of this section with the **sum of the profit and** costs estimated as provided in subsection (1)(b) of
 22 this section, except as provided in paragraph (b) of this subsection, the contracting agency may
 23 proceed with the procurement only if the contracting agency would incur more cost in performing
 24 the services with the contracting agency's own personnel and resources than the contracting agency
 25 would incur in procuring the services from a contractor. The contracting agency may not proceed
 26 with the procurement if the sole reason that the costs estimated in subsection (1)(b) of this section
 27 are lower than the costs estimated in subsection (1)(a) of this section is because the costs estimated
 28 in subsection (1)(b)(A) of this section are lower than the costs estimated in subsection (1)(a)(A) of
 29 this section.

30 (b) A contracting agency may proceed with a procurement even if the contracting agency de-
 31 termines that the contracting agency would incur less cost in providing the services with the con-
 32 tracting agency's own personnel and resources if at the time the contracting agency intends to
 33 conduct a procurement, the contracting agency lacks personnel and resources that are necessary to
 34 perform the services within the time in which the services are required. If the contracting agency
 35 conducts a procurement under the conditions described in this paragraph, the contracting agency
 36 shall:

37 (A) Keep a record of the cost analysis and findings that the contracting agency makes for each
 38 procurement the contracting agency conducts under this section, along with the basis for the con-
 39 tracting agency's decision to proceed with the procurement; and

40 (B) Collect and provide copies of the records described in subparagraph (A) of this paragraph
 41 each calendar quarter to the local contract review board, if the contracting agency is a local con-
 42 tracting agency, or to the Emergency Board, if the contracting agency is a state contracting agency.

43 (c) If the contracting agency is a state contracting agency, in addition to complying with the
 44 provisions of paragraph (b) of this subsection the contracting agency shall prepare a request to the
 45 Governor for an appropriation and any authority that is necessary for the contracting agency to

1 hire personnel and obtain resources necessary to perform the services that the contracting agency
 2 procured under the conditions described in paragraph (b) of this subsection. The request must in-
 3 clude a copy of the records that the contracting agency provided to the Emergency Board under
 4 paragraph (b)(B) of this subsection.

5 **(3)(a) Except as provided in paragraph (b) of this subsection,** a cost analysis, record, doc-
 6 umentation or determination made under this section is a public record.

7 **(b)(A) A contracting agency that proceeds with a procurement after conducting an anal-**
 8 **ysis or making a determination under this section may withhold a cost analysis, record,**
 9 **documentation or determination made under this section from disclosure under ORS 192.410**
 10 **to 192.505 until after the contracting agency has issued a notice of intent to award a con-**
 11 **tract.**

12 **(B) Notwithstanding the provisions of subparagraph (A) of this paragraph, the contract-**
 13 **ing agency shall disclose the cost analysis, record, documentation or determination upon**
 14 **request to a public employee collective bargaining unit if the decision to proceed with the**
 15 **procurement will affect the members of the public employee collective bargaining unit. The**
 16 **public employee collective bargaining unit shall keep the cost analysis, record, documenta-**
 17 **tion or determination confidential until after the contracting agency has issued a notice of**
 18 **intent to award the contract.**

19 **SECTION 3.** ORS 279B.036 is amended to read:

20 279B.036. (1) Notwithstanding the provisions of ORS 279B.033 (2)(a), a contracting agency may
 21 proceed with a procurement if the contracting agency reasonably determines in writing that using
 22 the contracting agency's own personnel or resources to perform the services that the contracting
 23 agency intends to procure is not feasible. The contracting agency may make the determination de-
 24 scribed in this subsection without conducting a cost analysis under ORS 279B.033 if the contracting
 25 agency finds that:

26 (a) The contracting agency lacks the specialized capabilities, experience or technical or other
 27 expertise necessary to perform the services. In making the finding, the contracting agency shall
 28 compare the contracting agency's capability, experience or expertise in the field most closely in-
 29 volved in performing the services with a potential contractor's capability, experience or expertise
 30 in the same or a similar field.

31 (b) Special circumstances require the contracting agency to procure the services by contract.
 32 Special circumstances may include, but are not limited to, circumstances in which:

33 (A) The terms under which the contracting agency receives a grant or other funds for use in a
 34 procurement require the contracting agency to obtain services through an independent contractor;

35 (B) Other state or federal law requires the contracting agency to procure services through an
 36 independent contractor;

37 (C) The procurement is for services that are incidental to a contract for purchasing or leasing
 38 real or personal property, including service and maintenance agreements for equipment that is
 39 leased or rented;

40 (D) The contracting agency cannot accomplish policy, administrative or legal goals, including
 41 but not limited to avoiding conflicts of interest or ensuring independent or unbiased findings in
 42 cases when using the contracting agency's existing personnel or persons the contracting agency
 43 could hire through a regular or ordinary process would not be suitable;

44 (E) The procurement is for services to which the provisions of ORS 279B.080 apply, **in which**
 45 **case the contracting agency may make the determination required in subsection (1) of this**

1 **section after entering into a contract in accordance with ORS 279B.080;**

2 (F) The procurement is for services, the need for which is so urgent, temporary or occasional
3 that attempting to perform the services with the contracting agency's own personnel or resources
4 would cause a delay that would frustrate the purpose for obtaining the services; or

5 (G) The services that the contracting agency intends to procure will be completed within six
6 months after the date on which the contract for the services is executed.

7 (2) A finding or determination and supporting documentation for a finding or determination
8 made under this section is a public record.

9 **SECTION 4. The provisions of ORS 279B.030, 279B.033 and 279B.036, as amended by**
10 **sections 1 to 3 of this 2011 Act, do not create a cause of action against a public body and**
11 **may not be asserted in an action against a public body as the basis for a per se negligence**
12 **claim.**

13 **SECTION 5. (1) The amendments to ORS 279B.030, 279B.033 and 279B.036 by sections 1**
14 **to 3 of this 2011 Act become operative on the 91st day after the effective date of this 2011**
15 **Act.**

16 (2) The amendments to ORS 279B.030, 279B.033 and 279B.036 by sections 1 to 3 of this 2011
17 Act apply to procurements that a contracting agency advertises or solicits on or after the
18 operative date specified in subsection (1) of this section.

19 (3) The Attorney General, the Director of the Oregon Department of Administrative
20 Services and a contracting agency that has adopted rules under ORS 279A.065 may adopt
21 rules and take related actions before the operative date specified in subsection (1) of this
22 section that are necessary to enable the Attorney General, the director or the contracting
23 agency to exercise, on and after the operative date specified in subsection (1) of this section,
24 all the duties, functions and powers conferred on the Attorney General, the director or the
25 contracting agency by the amendments to ORS 279B.030, 279B.033 and 279B.036 by sections
26 1 to 3 of this 2011 Act.

27 **SECTION 6. This 2011 Act being necessary for the immediate preservation of the public**
28 **peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect**
29 **on its passage.**

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