

House Bill 2458

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of House Interim Committee on Rules)

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**.

Permits employee of contracting agency that allegedly violates provisions of Public Contracting Code or labor organization that is certified as exclusive representative of employee's bargaining unit to seek judicial review of alleged violation under certain conditions.

A BILL FOR AN ACT

1
2 Relating to judicial review for violations of the Public Contracting Code; creating new provisions;
3 and amending ORS 279B.420.

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

5 **SECTION 1.** ORS 279B.420 is amended to read:

6 279B.420. (1) If a contracting agency allegedly violates a provision of ORS chapter 279A and a
7 judicial remedy is not otherwise available under ORS chapter 279A, 279B or 279C, the alleged vio-
8 lation is subject to judicial review only as provided in this section.

9 (2) If a contracting agency allegedly violates a provision of this chapter, except a provision of
10 ORS 279B.030, 279B.033, 279B.036, 279B.270, 279B.275, 279B.280 or 279B.400 to 279B.425, and a ju-
11 dicial remedy is not otherwise provided in this chapter or ORS chapter 279A, the alleged violation
12 is subject to judicial review only as provided in this section.

13 (3)(a) A person may seek judicial review under this section for a violation described in sub-
14 section (1) or (2) of this section only if:

15 [(a)] (A) A **contracting agency has awarded or is about to award** a public contract [*is about*
16 *to be awarded or has been awarded*];

17 [(b)] (B) The alleged violation of a provision of this chapter or ORS chapter 279A, except a
18 provision of ORS 279B.030, 279B.033, [*or*] 279B.036, [*or*] 279B.270, 279B.275, 279B.280 [*and*] **or**
19 279B.400 to 279B.425, occurred in the procurement process for the public contract and the alleged
20 violation resulted in or will result in [*an unlawful award of a contract or an unlawful failure to*
21 *award the*] **a contracting agency's unlawfully awarding a contract or unlawfully failing to**
22 **award a** contract;

23 [(c)] (C) The alleged violation deprived the person of the award of the contract or deprived the
24 person of the opportunity to compete for the award of the contract;

25 [(d)] (D) The person was qualified to receive the award of the contract under ORS 279B.110;

26 [(e)] (E) The person gave written notice that described the alleged violation to the contracting
27 agency not later than 10 days after the date on which the alleged violation occurred [*and*] **or**, re-
28 gardless of when the alleged violation occurred, not later than 10 days after the date [*of execution*
29 *of*] **on which the contracting agency executed** the contract;

30 [(f)] (F) The person has exhausted all administrative remedies the contracting agency provides;

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 and

2 [(g)(A)] (G)(i) The alleged violation is a violation of a provision of ORS chapter 279A and no
 3 other section of ORS chapter 279A, 279B or 279C provides judicial review; or

4 [(B)] (ii) The alleged violation is a violation of a provision of this chapter, except a provision
 5 of ORS 279B.030, 279B.033, 279B.036, 279B.270, 279B.275, 279B.280 or 279B.400 to 279B.425, and no
 6 other section of this chapter or ORS chapter 279A provides judicial review.

7 **(b)(A) Notwithstanding the provisions of paragraph (a) of this subsection and the excep-**
 8 **tion set forth in subsection (2) of this section, an employee of a contracting agency that**
 9 **allegedly violated ORS 279B.030, 279B.033 or 279B.036, or a labor organization that is certified**
 10 **as the exclusive representative for the employee’s bargaining unit, may seek judicial review**
 11 **under this section solely for the alleged violation of ORS 279B.030, 279B.033 or 279B.036.**

12 **(B) The employee or labor organization may seek judicial review under subparagraph (A)**
 13 **of this paragraph only if:**

14 **(i) The contracting agency has awarded or issued a notice of intent to award a public**
 15 **contract;**

16 **(ii) An alleged violation of ORS 279B.030, 279B.033 or 279B.036 occurred in the procure-**
 17 **ment process for the public contract and resulted in or will result in the contracting**
 18 **agency’s unlawfully awarding the public contract;**

19 **(iii) The employee or labor organization gave written notice that described the alleged**
 20 **violation to the contracting agency not later than 10 days after the date on which the alleged**
 21 **violation occurred or, regardless of when the alleged violation occurred, not later than 10**
 22 **days after the date on which the contracting agency executed the contract;**

23 **(iv) The employee or labor organization has exhausted all administrative remedies the**
 24 **contracting agency provides; and**

25 **(v) The contracting agency’s alleged violation of ORS 279B.030, 279B.033 or 279B.036 will**
 26 **adversely affect the terms and conditions of employment for the employee or for employees**
 27 **that the labor organization represents.**

28 (4) If a state contracting agency allegedly commits a violation, the Circuit Court for Marion
 29 County or the circuit court for the county in which the principal offices of the state contracting
 30 agency are located may review the alleged violation under ORS 183.484.

31 (5) If a local contracting agency allegedly commits a violation, the circuit court for the county
 32 in which the principal offices of the local contracting agency are located may review the alleged
 33 violation by means of a writ of review under ORS chapter 34.

34 (6) If a person gives the notice required under subsection [(3)(e)] **(3)(a)(E) or (b)(B)(iii)** of this
 35 section and timely seeks judicial review under this section, the contracting agency may not execute
 36 the contract unless the contracting agency determines that a compelling governmental interest ex-
 37 ists in proceeding or that the goods and services are urgently needed. A contracting agency that
 38 makes such a determination shall set forth in writing the reasons for the determination and imme-
 39 diately provide the reasons to the person who filed the challenge. Thereafter, after joining the pro-
 40 spective contractor **or, as appropriate, a person described in subsection (3)(b)(A) of this**
 41 **section**, as a party to the litigation and upon motion by the person who filed the challenge, the
 42 court may nonetheless stay the performance of the contract if the court finds that the contracting
 43 agency’s determination that a compelling governmental interest exists in proceeding with contract
 44 execution, or the contracting agency’s determination that the goods or services were urgently
 45 needed, was not supported by substantial evidence or constituted a manifest abuse of discretion. In

1 granting a stay, the court may require the person who sought the stay to post a bond in an amount
 2 sufficient to protect the contracting agency and the public from costs associated with a delay in
 3 contract performance.

4 (7) In a review, the circuit court shall give due deference to any factual contracting decision the
 5 contracting agency made and may not substitute the court’s judgment for the contracting agency’s
 6 judgment. The court shall review all questions of law de novo. Thereafter:

7 (a) If [*a contract has not been*] **the contracting agency has not executed the contract** and the
 8 court rules in favor of the person that sought judicial review, and if the violation could have af-
 9 fected the award of the contract, the court shall remand the procurement to the contracting agency
 10 for a determination whether to continue with the procurement process in light of the court’s deci-
 11 sion.

12 (b) In addition to the relief provided for in paragraph (a) of this subsection, if [*a contract has*
 13 *been*] **the contracting agency has executed the contract** and the court rules in favor of the person
 14 that sought judicial review, the court shall include in the court’s order a determination whether the
 15 party that signed the contract with the contracting agency is entitled to reimbursement under the
 16 conditions of, and calculated in the same manner as provided in, ORS 279C.470. Notwithstanding
 17 that ORS 279C.470 otherwise applies only to public improvement contracts, under this paragraph the
 18 court shall apply ORS 279C.470 to both public improvement contracts and other public contracts of
 19 contracting agencies.

20 (c) The court may award costs and attorney fees to the prevailing party.

21 **SECTION 2. The amendments to ORS 279B.420 by section 1 of this 2011 Act apply to**
 22 **contracts that a contracting agency first advertises or solicits on or after the effective date**
 23 **of this 2011 Act or, if the contracting agency does not advertise or solicit the contract, to**
 24 **contracts that the contracting agency enters into on or after the effective date of this 2011**
 25 **Act.**

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