

# House Bill 3396

Sponsored by Representative CLEM

## 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 proposal for public contract for services to include 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. Section 2 of this 2011 Act is added to and made a part of ORS chapter 279B.**

6 **SECTION 2. (1) As used in this section:**

7 (a) "Locally" means in the county in which the work described in a request for proposals  
8 will be performed or in an adjacent county.

9 (b) "Regionally" means within 750 miles of the location in this state in which the work  
10 described in a request for proposals will be performed.

11 (2) A proposer that submits a proposal under ORS 279B.060 shall submit with the proposal  
12 a personnel deployment disclosure. The personnel deployment disclosure shall specify:

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

15 (b) The minimum number of workers the proposer and the proposer's first-tier subcon-  
16 tractors will employ in each of the following categories:

17 (A) Locally;

18 (B) Within this state;

19 (C) Regionally; and

20 (D) Within the United States; and

21 (c) Whether the proposer is headquartered locally, within this state, regionally or within  
22 the United States and whether the proposer is owned locally, regionally, by a resident of this  
23 state or by a resident of the United States.

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

27 **SECTION 3. ORS 279B.060 is amended to read:**

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

4 (2) The request for proposals must:

5 (a) Specify a time and date by which sealed proposals must be received, and a place at which  
 6 the proposals must be submitted. The contracting agency, in the contracting agency's sole dis-  
 7 cretion, may receive proposals by electronic means or may direct or permit proposers to submit  
 8 proposals by electronic means.

9 (b) Specify the name and title of the person designated to receive proposals and the person the  
 10 contracting agency designates as the contact person for the procurement, if different.

11 (c) Describe the procurement. In the description, the contracting agency shall identify the scope  
 12 of work included within the procurement, outline the contractor's anticipated duties and set expect-  
 13 tations for the contractor's performance. Unless the contractor is providing architectural, engi-  
 14 neering and land surveying services or related services, both as defined in ORS 279C.100, or unless  
 15 the contracting agency for good cause specifies otherwise, the scope of work shall require the con-  
 16 tractor to meet the highest standards prevalent in the industry or business most closely involved in  
 17 providing the appropriate goods or services.

18 (d) Specify a time, date and place for prequalification applications, if any, to be filed and the  
 19 classes of work, if any, for which proposers must be prequalified in accordance with ORS 279B.120.

20 (e) State that the contracting agency may cancel the procurement or reject any or all proposals  
 21 in accordance with ORS 279B.100.

22 (f) State that "Contractors shall use recyclable products to the maximum extent economically  
 23 feasible in the performance of the contract work set forth in this document." if a state contracting  
 24 agency issues the request for proposals.

25 (g) Require the contractor or subcontractor to possess an asbestos abatement license, if required  
 26 under ORS 468A.710.

27 **(h) Require the proposer to submit the personnel deployment disclosure described in**  
 28 **section 2 of this 2011 Act and state that the contracting agency in awarding the contract that**  
 29 **is the subject of the request for proposals will apply preferences in part on the basis of in-**  
 30 **formation provided in the personnel deployment disclosure.**

31 [(h)] (i) Include all contractual terms and conditions applicable to the procurement. The contract  
 32 terms and conditions shall specify clear consequences for a contractor's failure to perform the scope  
 33 of work identified in the request for proposals or the contractor's failure to meet established per-  
 34 formance standards. The consequences may include, but are not limited to:

35 (A) Reducing or withholding payment;

36 (B) Requiring the contractor to perform, at the contractor's expense, additional work necessary  
 37 to perform the identified scope of work or meet the established performance standards; or

38 (C) Declaring a default, terminating the public contract and seeking damages and other relief  
 39 available under the terms of the public contract or other applicable law.

40 (3) The request for proposals also may:

41 (a) Identify contractual terms or conditions that the contracting agency reserves, in the request  
 42 for proposals, for negotiation with proposers;

43 (b) Request that proposers propose contractual terms and conditions that relate to subject mat-  
 44 ter reasonably identified in the request for proposals;

45 (c) Contain or incorporate the form and content of the contract that the contracting agency will

1 accept, or suggest contract terms and conditions that nevertheless may be the subject of negoti-  
 2 ations with proposers;

3 (d) Announce the method the contracting agency will use to select the contractor, which may  
 4 include, but is not limited to, negotiating with the highest ranked proposer, competitive negotiations,  
 5 a multiple-tiered competition that is designed to identify a class of proposers that fall within a  
 6 competitive range or to otherwise eliminate from consideration a class of lower ranked proposers  
 7 or a combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065; and

8 (e) Describe the manner in which the contracting agency will evaluate proposals, identifying the  
 9 relative importance of price and other factors the contracting agency will use to evaluate and rate  
 10 the proposals in the first tier of competition. If the contracting agency uses more than one tier of  
 11 competitive evaluation, the request for proposals must describe the process the contracting agency  
 12 will use to evaluate proposals in the subsequent tiers.

13 (4)(a) The contracting agency may require proposal security in any form the contracting agency  
 14 deems prudent. Proposal security shall serve the same function with respect to requests for pro-  
 15 posals as bid security serves with respect to invitations to bid under ORS 279B.055.

16 (b) The contracting agency shall return the proposal security to all proposers upon the exe-  
 17 cution of the contract.

18 (c) The contracting agency shall retain the proposal security if a proposer who is awarded a  
 19 contract fails to promptly and properly execute the contract. For purposes of this paragraph, prompt  
 20 and proper execution of the contract includes all action by a proposer that is necessary to form a  
 21 contract in accordance with the request for proposals, including posting performance security and  
 22 submitting proof of insurance when the request for proposals requires the submission. If contract  
 23 negotiations or competitive negotiations are conducted, the failure, prior to award, of a contracting  
 24 agency and a proposer to reach agreement does not constitute grounds for retaining proposal secu-  
 25 rity.

26 (5) Public notice of the request for proposals must be given in the same manner as provided for  
 27 public notice of invitations to bid in ORS 279B.055 (4).

28 (6)(a) Notwithstanding ORS 192.410 to 192.505, proposals may be opened in a manner to avoid  
 29 disclosing contents to competing proposers during, when applicable, the process of negotiation, but  
 30 the contracting agency shall record and make available the identity of all proposers as part of the  
 31 contracting agency's public records after the proposals are opened. Notwithstanding ORS 192.410 to  
 32 192.505, proposals are not required to be open for public inspection until after the notice of intent  
 33 to award a contract is issued. The fact that proposals are opened at a meeting, as defined in ORS  
 34 192.610, does not make the contents of the proposals subject to disclosure, regardless of whether the  
 35 public body [*opening*] **that opens** the proposals fails to give notice of or provide for an executive  
 36 session for the purpose of opening proposals.

37 (b) Notwithstanding a requirement to make proposals open to public inspection after the con-  
 38 tracting agency issues notice of intent to award a contract, a contracting agency may withhold from  
 39 disclosure to the public materials included in a proposal that are exempt or conditionally exempt  
 40 from disclosure under ORS 192.501 or 192.502.

41 (c) If a request for proposals is canceled under ORS 279B.100 after proposals are received or if  
 42 a proposal is rejected, the contracting agency may return a proposal to the proposer that made the  
 43 proposal. The contracting agency shall keep a list of returned proposals in the file for the sollicita-  
 44 tion.

45 (7) As provided in the request for proposals or in written addenda [*issued thereunder*] **to the**

1 **request for proposals**, the contracting agency may conduct site tours, demonstrations, individual  
 2 or group discussions and other informational activities with proposers before or after [*the*] opening  
 3 [*of*] proposals [*for the purpose of clarification*] **to clarify and** to ensure full understanding of, and  
 4 responsiveness to, the solicitation requirements or to consider and respond to requests for modifi-  
 5 cations of the proposal requirements. The contracting agency shall use procedures designed to ac-  
 6 cord proposers fair and equal treatment with respect to any opportunity for discussion and revision  
 7 of proposals.

8 (8) For purposes of evaluation, when provided for in the request for proposals, the contracting  
 9 agency may employ methods of contractor selection that include, but are not limited to:

10 (a) An award or awards based solely on the ranking of proposals;

11 (b) Discussions leading to best and final offers, in which the contracting agency may not disclose  
 12 private discussions leading to best and final offers;

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

15 (d) Serial negotiations, beginning with the highest ranked proposer;

16 (e) Competitive simultaneous negotiations;

17 (f) Multiple-tiered competition designed to identify, at each level, a class of proposers that fall  
 18 within a competitive range or to otherwise eliminate from consideration a class of lower ranked  
 19 proposers;

20 (g) A multistep request for proposals [*requesting*] **in which the contracting agency asks**  
 21 **proposers to submit** [*the submission of*] unpriced technical submittals, and then later [*issuing*] **is-**  
 22 **suues a subsequent** request for proposals [*limited*] **only** to the proposers whose technical submittals  
 23 the contracting agency [*had*] determined to be qualified under the criteria set forth in the initial  
 24 request for proposals; or

25 (h) A combination of methods described in this subsection, as authorized or prescribed by rules  
 26 adopted under ORS 279A.065.

27 **(9)(a) In addition to and not in lieu of the preferences described in ORS 279A.120, a con-**  
 28 **tracting agency, based on information the proposer provides in the personnel deployment**  
 29 **disclosure described in section 2 of this 2011 Act, shall apply the following preferences in**  
 30 **evaluating proposals the contracting agency receives under this section:**

31 **(A) A proposer that is headquartered in or is owned by a resident of the county in which**  
 32 **the work described in the request for proposals will be performed, or is headquartered in or**  
 33 **owned by a resident of an adjacent county, shall receive first preference, unless the proposed**  
 34 **contract price is more than 10 percent higher than the contract price of a competing pro-**  
 35 **posal from a proposer that is not headquartered in or owned by a resident of the county in**  
 36 **which the work will be performed, or is not headquartered in or owned by a resident of an**  
 37 **adjacent county.**

38 **(B) A proposer that is headquartered in or is owned by a resident of this state shall re-**  
 39 **ceive second preference, unless the proposed contract price is more than seven percent**  
 40 **higher than the contract price of a competing proposal from a proposer that is not head-**  
 41 **quartered in or owned by a resident of this state.**

42 **(C) A proposer that is headquartered in or is owned by a resident of the United States**  
 43 **shall receive third preference, unless the proposed contract price is more than five percent**  
 44 **higher than the contract price of a competing proposal from a proposer that is not head-**  
 45 **quartered in or owned by a resident of the United States.**

1       **(b) A contracting agency shall apply a preference described in paragraph (a) of this sub-**  
 2 **section to a proposal that the contracting agency determines is otherwise responsive to the**  
 3 **request for proposals. A contracting agency may not award a contract to a proposer on the**  
 4 **basis of a preference described in paragraph (a) of this subsection if the contracting agency**  
 5 **determines that the proposer is not responsible under ORS 279B.110.**

6       [(9)] (10) Revisions of proposals may be permitted after the submission of proposals and before  
 7 award for the purpose of obtaining best offers or best and final offers.

8       [(10)] (11) After [the] opening [of] proposals, a contracting agency may issue or electronically  
 9 post an addendum to the request for proposals that modifies the criteria, rating process and proce-  
 10 dure for any tier of competition before the start of the tier to which the addendum applies. The  
 11 contracting agency shall send an addendum that is issued by a method other than electronic posting  
 12 to all proposers who are eligible to compete under the addendum. The contracting agency shall issue  
 13 or post the addendum at least five days before the start of the subject tier of competition or as the  
 14 contracting agency otherwise determines is adequate to allow eligible proposers to prepare for the  
 15 competition in accordance with rules adopted under ORS 279A.065.

16       [(11)] (12) The cancellation of requests for proposals and the rejection of proposals must be in  
 17 accordance with ORS 279B.100.

18       [(12)] (13) In the request for proposals, the contracting agency shall describe the methods by  
 19 which the agency will make the results of each tier of competitive evaluation available to the  
 20 proposers who competed in the tier. The contracting agency shall include a description of the man-  
 21 ner in which the proposers who are eliminated from further competition may protest or otherwise  
 22 object to the contracting agency's decision.

23       [(13)] (14) The contracting agency shall issue or electronically post the notice of intent to award  
 24 described in ORS 279B.135 to each proposer who was evaluated in the final competitive tier.

25       [(14)] (15) If the contracting agency awards a contract, the contracting agency shall award the  
 26 contract to the responsible proposer whose proposal the contracting agency determines in writing  
 27 is the most advantageous to the contracting agency based on the evaluation process and evaluation  
 28 factors described in the request for proposals, applicable preferences described in **this section and**  
 29 **ORS 279A.120 and 279A.125** and, when applicable, the outcome of any negotiations authorized by the  
 30 request for proposals. **The contracting agency may not use** other factors [*may not be used*] in the  
 31 evaluation. When the request for proposals specifies or authorizes awarding multiple public con-  
 32 tracts, the contracting agency shall award public contracts to the responsible proposers who qualify  
 33 for the award of a contract under the terms of the request for proposals.

34       [(15)] (16) The contracting agency may issue a request for information, a request for interest, a  
 35 request for qualifications or other preliminary documents to obtain information useful in preparing  
 36 a request for proposals.

37       [(16)] (17) Before executing a contract solicited under this section, a contracting agency shall  
 38 obtain the proposer's agreement to perform the scope of work and meet the performance standards  
 39 set forth in the final negotiated scope of work.

40       **SECTION 4.** ORS 279B.100 is amended to read:

41       279B.100. (1) [Any] **A contracting agency may cancel a** solicitation or a procurement de-  
 42 scribed in a solicitation [*may be canceled,*] or **may reject** any or all bids or proposals [*may be re-*  
 43 *jected*] in whole or in part, [*when the cancellation or rejection*] **if the contracting agency**  
 44 **determines that canceling the solicitation or procurement or rejecting the proposal** is in the  
 45 **contracting agency's** best interest [*of the contracting agency as determined by the contracting*

1 agency]. The **contracting agency shall make the** reasons for the cancellation or rejection [*must*  
 2 *be made*] part of the solicitation file. A contracting agency is not liable to [*any*] a bidder or proposer  
 3 for [*any*] a loss or expense caused by or resulting from the cancellation or rejection of a solicitation,  
 4 bid, proposal or award.

5 (2) [*Any*] **A contracting agency may delay or suspend a** solicitation or a procurement de-  
 6 scribed in a solicitation, [*may be delayed or suspended when the delay or suspension*] **if the con-**  
 7 **tracting agency determines that delaying or suspending the solicitation or procurement** is in  
 8 the **contracting agency's** best interest [*of the contracting agency as determined by the contracting*  
 9 *agency*]. The contracting agency shall make the reasons for the delay or suspension part of the so-  
 10 licitation file. A contracting agency is not liable to [*any*] a bidder or proposer for [*any*] a loss or  
 11 expense caused by or resulting from the delay or suspension of a solicitation, bid, proposal or award.

12 (3) **A contracting agency shall reject a proposal if the proposal does not include the per-**  
 13 **sonnel deployment disclosure described in section 2 of this 2011 Act unless the contracting**  
 14 **agency finds in writing that:**

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

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

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

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

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

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

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

33 **SECTION 5.** ORS 279B.145 is amended to read:

34 279B.145. The determinations under ORS 279B.030, 279B.033, 279B.036, 279B.055 (3) and (7),  
 35 279B.060 (4) and [(14)] (15), 279B.075, 279B.080, 279B.085 and 279B.110 are final and conclusive un-  
 36 less they are clearly erroneous, arbitrary, capricious or contrary to law.

37 **SECTION 6.** (1) **The Attorney General, in model rules the Attorney General adopts under**  
 38 **ORS 279A.065, shall prescribe the form and content of the personnel deployment disclosure**  
 39 **described in section 2 of this 2011 Act and shall devise standards, criteria and procedures for**  
 40 **applying the preferences set forth in ORS 279B.060 (9).**

41 (2) **The Oregon Department of Administrative Services or a contracting agency that is**  
 42 **subject to ORS 279A.065, in consultation with the Attorney General, by rule shall prescribe**  
 43 **the form and content of the personnel deployment disclosure described in section 2 of this**  
 44 **2011 Act for the department's or the contracting agency's use and shall devise standards,**  
 45 **criteria and procedures for guiding the department or the contracting agency in applying the**

1 preferences set forth in ORS 279B.060 (9). To the extent practicable, the department and the  
2 contracting agency shall adopt rules that are consistent with the model rules the Attorney  
3 General adopts under subsection (1) of this section.

4 **SECTION 7.** (1) Section 2 of this 2011 Act and the amendments to ORS 279B.060, 279B.100  
5 and 279B.145 by sections 3, 4 and 5 of this 2011 Act become operative January 1, 2012.

6 (2) Before January 1, 2012, the Attorney General, the Oregon Department of Adminis-  
7 trative Services and a contracting agency subject to ORS 279A.065 may adopt rules that are  
8 necessary to enable the Attorney General, the department and the contracting agency to  
9 exercise, on and after January 1, 2012, all the duties, powers and functions conferred on the  
10 Attorney General, the department and the contracting agency by section 2 of this 2011 Act  
11 and the amendments to ORS 279B.060, 279B.100 and 279B.145 by sections 3, 4 and 5 of this  
12 2011 Act.

13 **SECTION 8.** Section 2 of this 2011 Act and the amendments to ORS 279B.060, 279B.100  
14 and 279B.145 by sections 3, 4 and 5 of this 2011 Act apply to contracts first advertised or  
15 otherwise solicited or, if not advertised or solicited, entered into on or after the operative  
16 date specified in section 7 of this 2011 Act.

17 **SECTION 9.** This 2011 Act being necessary for the immediate preservation of the public  
18 peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect  
19 on its passage.  
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