

House Bill 3412

Sponsored by COMMITTEE ON GENERAL GOVERNMENT AND CONSUMER PROTECTION

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**.

Prohibits contracting agency from using alternative contracting method to award public improvement contract in which single contractor provides services as construction manager and general contractor unless value of contract is \$5 million or more.

Requires that findings be specific to contract or class of contract and that contracting agency or state agency publish or make findings available before hearing.

Prohibits contracting agency or state agency from making findings unless certain conditions are met.

Specifies that Act becomes operative on 91st day following effective date.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to exemptions from a competitive bid process for public contracts; creating new provisions;
3 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 public improvement contracts shall be based upon competitive bids except:*] **A**
7 **contracting agency shall use a competitive bid as the basis for awarding a public improve-**
8 **ment contract, except for:**

9 (a) [*Contracts made with*] **A contract with a** qualified nonprofit [*agencies providing*] **agency**
10 **that provides** employment opportunities for individuals with disabilities under ORS 279.835 to
11 279.855.

12 (b) A public improvement contract **that is** exempt under subsection (2) of this section.

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

14 (d) A contract [*not to*] **with a value that does not** exceed \$100,000 made under procedures for
15 competitive quotes in ORS 279C.412 and 279C.414.

16 (e) [*Contracts for*] **A contract to** repair, [*maintenance, improvement or protection of*] **maintain,**
17 **improve or protect** property [*obtained by*] the Department of Veterans' Affairs **obtains** under ORS
18 407.135 and 407.145 (1).

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

21 (2)(a) Subject to subsection (4)(b) of this section, the Director of the Oregon Department of
22 Administrative Services, a local contract review board or, for contracts described in ORS 279A.050
23 (3)(b), the Director of Transportation may exempt a public improvement contract or a class of public
24 improvement contracts from the competitive bidding requirements of subsection (1) of this section
25 **and permit the contracting agency to use an alternative contracting method, as provided in**
26 **this subsection or in rules adopted under ORS 279A.065**, upon approval of the following findings
27 submitted by the contracting agency or, if a state agency is not the contracting agency, the state

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 agency seeking the exemption:

2 [(a)] **(A)** It is unlikely that the exemption will encourage favoritism in [the] awarding [of] public
 3 improvement contracts or substantially diminish competition for public improvement contracts. **Un-**
 4 **less the procurement for which the contracting agency or state agency seeks an exemption**
 5 **is an emergency procurement, the contracting agency or state agency may not make the**
 6 **finding described in this subparagraph unless a minimum of three bidders or proposers have**
 7 **indicated that the bidders or proposers will submit bids or proposals for the procurement or,**
 8 **in the case of a procurement in which a single person will provide construction manager and**
 9 **general contractor services, unless a minimum of three bidders or proposers have indicated**
 10 **that the bidders or proposers will submit bids or proposals for subcontracts.**

11 [(b)] **(B)** [The awarding of] **Awarding a** public improvement [contracts] **contract** under the ex-
 12 emption will likely result in substantial cost savings to the contracting agency, to the state agency
 13 based upon the justification and information described in ORS 279C.330 or, if the [contracts are]
 14 **contract is** for public improvements described in ORS 279A.050 (3)(b), to the contracting agency or
 15 the public. In making the finding, the Director of the Oregon Department of Administrative Services,
 16 the Director of Transportation or the local contract review board may consider the type, cost and
 17 amount of the contract, the number of persons available to bid and such other factors as may be
 18 deemed appropriate.

19 [(c)] **(b)** As an alternative to the finding described in [paragraph (b) of this subsection] **para-**
 20 **graph (a)(B) of this subsection,** [when] **if** a contracting agency or state agency seeks an exemption
 21 that would allow the **agency to** use [of] an [alternate] **alternative** contracting method that the
 22 agency has not previously used, the agency may make a finding that identifies the project as a pilot
 23 project for which the agency intends to determine whether the use of the [alternate] **alternative**
 24 contracting method actually results in substantial cost savings to the contracting agency, to the
 25 state agency or, if the contract is for a public improvement described in ORS 279A.050 (3)(b), to the
 26 contracting agency or the public. The agency shall include an analysis and conclusion regarding
 27 actual cost savings, if any, in the evaluation required under ORS 279C.355.

28 **(c) A contracting agency may not use an alternative contracting method to award a**
 29 **public improvement contract in which a single contractor provides services as a construction**
 30 **manager and general contractor under rules adopted under ORS 279A.065 unless the value**
 31 **of the contract is \$5 million or more.**

32 **(d) The contracting agency or state agency that makes findings under this subsection**
 33 **must make the findings with respect to a specific public improvement contract or specific**
 34 **class of public improvement contracts.**

35 (3) In making findings to support an exemption for a class of public improvement contracts, the
 36 contracting agency or state agency shall clearly identify the class using the class's defining char-
 37 acteristics. [Those] **The** characteristics [shall] **must** include some combination of project de-
 38 scriptions or locations, time periods, contract values, methods of procurement or other factors that
 39 distinguish the limited and related class of public improvement contracts from the agency's overall
 40 construction program. The agency may not identify a class solely by funding source, such as a par-
 41 ticular bond fund, or by the method of procurement, but shall identify the class using characteristics
 42 that reasonably relate to the exemption criteria set forth in subsection (2) of this section.

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

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

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

9 (5)(a) **A contracting agency or state agency shall hold a public hearing** before *[final adoption*
 10 *of]* **finally adopting** the findings required by subsection (2) of this section *[exempting]* **to exempt** a
 11 public improvement contract or a class of public improvement contracts from the requirement of
 12 competitive bidding[, *a contracting agency or state agency shall hold a public hearing*]. **The con-**
 13 **tracting agency or state agency shall publish or otherwise make available to any interested**
 14 **person the findings that the contracting agency or state agency intends to adopt a minimum**
 15 **of seven days before the hearing.**

16 (b) Notification of the public hearing *[shall]* **must** be published in at least one trade newspaper
 17 of general statewide circulation a minimum of 14 days before the hearing.

18 (c) The notice shall state that the public hearing is for the purpose of taking comments on the
 19 draft findings for an exemption from the competitive bidding requirement. At the time of the notice,
 20 copies of the draft findings *[shall]* **must** be made available to the public. At the option of the con-
 21 tracting agency or state agency, the notice may describe the process by which the findings are
 22 finally adopted and may indicate *[the]* **an** opportunity for *[any]* further public comment.

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

25 (e) If a contracting agency or state agency is required to act promptly due to circumstances
 26 beyond the agency's control that do not constitute an emergency, notification of the public hearing
 27 may be published simultaneously with the agency's solicitation of contractors for the alternative
 28 public contracting method, as long as responses to the solicitation are due at least five days after
 29 the meeting and approval of the findings.

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

36 (7) A public improvement contract awarded under the competitive bidding requirement of sub-
 37 section (1) of this section may be amended only in accordance with rules adopted under ORS
 38 279A.065.

39 (8) **A public improvement** *[contracts]* **contract that is** excepted from competitive bid require-
 40 ments under subsection (1)(a), (c), (d), (e) or (f) of this section *[are]* **is** not subject to the exemption
 41 requirements of subsection (2) of this section.

42 **SECTION 2. The amendments to ORS 279C.335 by section 1 of this 2011 Act apply to a**
 43 **contract that a contracting agency first advertises or otherwise solicits on or after the op-**
 44 **erative date set forth in section 3 of this 2011 Act or, if the contracting agency does not**
 45 **advertise or solicit the contract, to a contract that the contracting agency enters into on**

1 or after the operative date set forth in section 3 of this 2011 Act.

2 **SECTION 3.** (1) The amendments to ORS 279C.335 by section 1 of this 2011 Act become
3 operative on the 91st day following the effective date of this 2011 Act.

4 (2) The Director of the Oregon Department of Administrative Services, the Attorney
5 General or a contracting agency that adopts rules under ORS 279A.065 may take any action
6 before the operative date specified in subsection (1) of this section that is necessary to enable
7 the director, the Attorney General or the contracting agency to exercise, on and after the
8 operative date specified in subsection (1) of this section, all of the duties, functions and
9 powers conferred on the director, the Attorney General or the contracting agency by the
10 amendments to ORS 279C.335 by section 1 of this 2011 Act.

11 **SECTION 4.** This 2011 Act being necessary for the immediate preservation of the public
12 peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect
13 on its passage.

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