

House Bill 3484

Sponsored by Representatives CONGER, WHISNANT, Senator TELFER; Representatives BREWER, ESQUIVEL, GILLIAM, MCLANE, THATCHER, THOMPSON, WEIDNER, WINGARD

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**.

Establishes Council on Efficient Government. Directs council to review whether goods or services provided by state agencies should be privatized, review solicitations for public contracts, issue annual report and create inventory of activities of state agencies to determine whether activities are inherently governmental activities or activities that could be performed by private entity.

Becomes operative January 1, 2012.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to a Council on Efficient Government; and declaring an emergency.

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

4 **SECTION 1. (1) There is established a Council on Efficient Government, consisting of**
5 **seven members appointed as follows:**

6 (a) **The President of the Senate shall appoint two members who represent the private**
7 **sector.**

8 (b) **The Speaker of the House of Representatives shall appoint two members who repre-**
9 **sent the private sector.**

10 (c) **The Governor shall appoint:**

11 (A) **One member who is the chief executive officer or chief administrative officer of a**
12 **state agency; and**

13 (B) **Two members who represent the private sector.**

14 (2) **The term of office of each member is two years, but a member serves at the pleasure**
15 **of the appointing authority. Before the expiration of the term of a member, the appointing**
16 **authority shall appoint a successor. A member is eligible for reappointment. If there is a**
17 **vacancy for any cause, the appointing authority shall make an appointment to become im-**
18 **mediately effective for the unexpired term.**

19 (3) **Members of the council are not entitled to compensation, but may be reimbursed for**
20 **actual and necessary travel and other expenses incurred by them in the performance of their**
21 **official duties in the manner and amounts provided for in ORS 292.495. Claims for expenses**
22 **incurred in performing functions of the council shall be paid out of funds appropriated to the**
23 **council.**

24 **SECTION 2. Notwithstanding the term of office specified by section 1 of this 2011 Act,**
25 **of the members first appointed to the Council on Efficient Government:**

26 (1) **Four shall serve for a term ending December 31, 2013.**

27 (2) **Three shall serve for a term ending December 31, 2014.**

28 **SECTION 3. (1) The Council on Efficient Government shall select one of its members as**

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 chairperson and another as vice chairperson, for such terms and with duties and powers
 2 necessary for the performance of the functions of such offices as the council determines.

3 (2) A majority of the members of the council constitutes a quorum for the transaction
 4 of business.

5 (3) The council shall meet at times and places specified by the call of the chairperson or
 6 of a majority of the voting members of the council.

7 (4) The council may adopt rules necessary for the operation of the council.

8 **SECTION 4.** The Council on Efficient Government may administer oaths, take depositions
 9 and issue subpoenas to compel the attendance of witnesses and the production of documents
 10 or other written information necessary to carry out the provisions of sections 1 to 12 of this
 11 2011 Act. If any person fails to comply with a subpoena issued under this section or refuses
 12 to testify on matters on which the person lawfully may be interrogated, the procedure set
 13 out in ORS 183.440 shall be followed to compel obedience.

14 **SECTION 5.** (1) The Council on Efficient Government may establish such advisory and
 15 technical committees as the council considers necessary to aid and advise the council in the
 16 performance of the council's functions. These committees may be continuing or temporary
 17 committees. The council shall determine the representation, membership, terms and organ-
 18 ization of the committees and shall appoint their members.

19 (2) Members of the committees are not entitled to compensation, but at the discretion
 20 of the council may be reimbursed from funds available to the council for actual and neces-
 21 sary travel and other expenses incurred by them in the performance of their official duties,
 22 in the manner and amounts provided for in ORS 292.495.

23 **SECTION 6.** (1) The Council on Efficient Government shall:

24 (a) Review whether or not a good or service provided by a state agency could be
 25 privatized, for the provision of the same type and quality of good or service at a reduced cost
 26 or better value. The council may hold public hearings as part of the council's evaluation
 27 process and shall report the council's recommendations to the Governor and the Legislative
 28 Assembly.

29 (b) Review a proposed privatization of a good or service at the request of a state agency
 30 or a private entity.

31 (c) Review issues concerning state agency competition with one or more private entities
 32 to determine ways to eliminate any unfair competition with a private entity.

33 (d) Recommend privatization of a good or service to a state agency if the proposed
 34 privatization is demonstrated to provide a more efficient manner of providing a good or
 35 service.

36 (e) Employ a standard process for reviewing business case analyses under section 9 of
 37 this 2011 Act.

38 (f) Review and evaluate business case analyses described in section 9 of this 2011 Act.

39 (g) Not later than 30 days before a state agency solicits a public contract of \$10 million
 40 or more, provide to the state agency, the Governor and the Legislative Assembly an advisory
 41 report for the business case analysis reviewed and evaluated by the council as required under
 42 section 9 of this 2011 Act. The report must contain all versions of the business case analysis,
 43 an evaluation of the business case analysis and any relevant recommendations.

44 (h) Recommend and implement standard processes for state agency and council review
 45 and evaluate state agency business case analyses under section 9 of this 2011 Act, including

1 **templates for use by state agencies in submitting business case analyses to the council.**

2 **(i) Recommend standards, processes and guidelines for use by state agencies in develop-**
 3 **ing business case analyses under section 9 of this 2011 Act.**

4 **(j) Incorporate any lessons learned from soliciting public contracts for services and ac-**
 5 **tivities into council standards, procedures and guidelines, as appropriate, and identify and**
 6 **disseminate to state agencies information regarding best practices in contracting efforts.**

7 **(k) Develop guidelines for assisting state employees whose jobs are eliminated as a result**
 8 **of the issuance of public contracts.**

9 **(L) Receive complaints of violation of any provision of sections 1 to 12 of this 2011 Act.**

10 **(m) Transmit complaints received under this section to a state agency alleged to be in**
 11 **violation of any provision of sections 1 to 12 of this 2011 Act.**

12 **(n) Hold public hearings on complaints and determine whether a state agency is in vio-**
 13 **lation of any provision of sections 1 to 12 of this 2011 Act.**

14 **(o) Issue a written report of the council's findings to the complainant within ninety days**
 15 **after receiving a state agency's response.**

16 **(p) Transmit to the Governor and the Legislative Assembly a complete report of each**
 17 **council meeting, including recommendations to correct violations of prohibitions on compe-**
 18 **tition with private entities and findings on necessary exceptions to the prohibitions.**

19 **(q) Solicit petitions of interest for public contracts from private sector service providers**
 20 **as the council considers appropriate. The council may evaluate and review the petitions and**
 21 **may hold public hearings as part of the evaluation process. The council may recommend**
 22 **some or all of the petitions to the Governor for review. A person does not have a cause of**
 23 **action based on the failure of the council to consider a petition of interest or make a rec-**
 24 **ommendation.**

25 **(2) The council shall prepare an annual report on:**

26 **(a) Recommendations on innovative methods of delivering government services that**
 27 **would improve efficiency, effectiveness or competition in the delivery of government ser-**
 28 **vices, including enterprise-wide proposals.**

29 **(b) Public contracting efforts of each state agency, including the number of solicitations,**
 30 **the number of business case analyses considered under section 9 of this 2011 Act, the number**
 31 **and dollar value of public contracts, descriptions of performance results as applicable, any**
 32 **contract violations or project slippages and the status of extensions, renewals and amend-**
 33 **ments of public contracts.**

34 **(c) Information about the council's activities.**

35 **(d) The status of the inventory created under section 7 of this 2011 Act.**

36 **(3) The council shall submit the annual report prescribed by subsection (2) of this section**
 37 **to the Governor and the Legislative Assembly not later than January 15 immediately fol-**
 38 **lowing the calendar year for which the report is made.**

39 **(4) Each state agency shall submit to the council all information, documents and other**
 40 **materials required by the council pursuant to sections 1 to 12 of this 2011 Act.**

41 **(5) At the request of the council and on approval of the Joint Legislative Audit Commit-**
 42 **tee, the Secretary of State shall provide performance audit information and other required**
 43 **information relating to state agency budgets and functions. The Secretary of State may as-**
 44 **sist in the development and review of the inventory created under section 7 of this 2011 Act.**

45 **(6) In addition to filing a copy of recommendations for privatization with administrative**

1 heads of state agencies, the council shall file a copy of its recommendations for privatization
 2 with the Governor and the Legislative Fiscal Office.

3 (7) Subject to section 9 (2) of this 2011 Act, sections 1 to 12 of this 2011 Act do not pre-
 4 clude a state agency from privatizing the provision of a good or service independently of the
 5 council.

6 **SECTION 7.** (1) The Council on Efficient Government shall create an inventory of activ-
 7 ities of state agencies and classify whether each activity is or elements of the activity are:

8 (a) A commercial activity that could be performed in whole or in part by a private entity;
 9 or

10 (b) An inherently governmental activity.

11 (2) The council shall update the inventory created under this section at least every two
 12 years.

13 (3) The council shall make the inventory available to the public through electronic and
 14 other means.

15 (4) State agencies shall cooperate with inventory-related requests made by the council
 16 under this section.

17 **SECTION 8.** The Council on Efficient Government shall create the first inventory re-
 18 quired under section 7 of this 2011 Act not later than June 30, 2012.

19 **SECTION 9.** (1) A proposal by a state agency to solicit a public contract having a
 20 projected cost of more than \$10 million in any fiscal year shall require:

21 (a) An initial business case analysis conducted by the state agency and submitted to the
 22 Council on Efficient Government, the Governor and the Legislative Assembly not later than
 23 60 days before a solicitation is issued. The council shall evaluate the business case analysis
 24 and submit an advisory report to the state agency, the Governor and the Legislative As-
 25 sembly when the advisory report is completed, but at least 30 days before the agency issues
 26 the solicitation; and

27 (b) A final business case analysis conducted by the state agency and submitted after the
 28 conclusion of any negotiations, at least 30 days before execution of a contract, to the council,
 29 the Governor and the Legislative Assembly.

30 (2) A proposal by a state agency to solicit a public contract having a projected cost of
 31 at least \$1 million but not more than \$10 million in any fiscal year shall require:

32 (a) An initial business case analysis conducted by the state agency and submitted to the
 33 council, the Governor and the Legislative Assembly not later than 30 days before a sollicita-
 34 tion is issued; and

35 (b) A final business case analysis conducted by the state agency and submitted after the
 36 conclusion of any negotiations, not later than 30 days before execution of a contract, to the
 37 council, the Governor and the Legislative Assembly.

38 (3) A business case to solicit a public contract having a projected cost of less than \$1
 39 million in any fiscal year shall require a final business case analysis conducted by the state
 40 agency after the conclusion of any negotiations and provided to the council not later than
 41 30 days before execution of a contract.

42 (4) For any proposed public contract, a state agency shall develop a business case that
 43 justifies the proposal to solicit the public contract. The business case is not subject to chal-
 44 lenge or protest. The business case must include:

45 (a) A detailed description of the service or activity for which the contract is proposed.

1 (b) A description and analysis of the state agency’s current performance based on exist-
 2 ing performance measures if the state agency is currently performing the service or activity.

3 (c) The goals desired to be achieved through the proposed contract and the rationale for
 4 the goals.

5 (d) A citation to the existing or proposed legal authority for contracting for the service
 6 or activity.

7 (e) A description of available options for achieving the goals. If state employees are cur-
 8 rently performing the service or activity, at least one option involving maintaining state
 9 provision of the service or activity shall be included.

10 (f) An analysis of the advantages and disadvantages of each option, including, at a mini-
 11 mum, potential performance improvements and risks.

12 (g) A description of the current market for the contractual services that are under con-
 13 sideration for solicitation.

14 (h) A cost-benefit analysis documenting the direct and indirect specific baseline costs,
 15 savings and qualitative and quantitative benefits involved in or resulting from the imple-
 16 mentation of the recommended option or options. The analysis must specify the schedule
 17 that, at a minimum, must be adhered to in order to achieve the estimated savings. All ele-
 18 ments of cost must be clearly identified in the analysis, described in the business case and
 19 supported by applicable records and reports. The administrative head of the state agency
 20 shall attest that based on the data and information underlying the business case and to the
 21 best of the administrative head’s knowledge, all projected costs, savings and benefits are
 22 valid and achievable. For the purposes of this paragraph:

23 (A) “Cost” means the reasonable, relevant and verifiable cost, which may include ele-
 24 ments such as personnel, materials and supplies, services, equipment, capital depreciation,
 25 rent, maintenance and repairs, utilities, insurance, personnel travel, overhead and interim
 26 and final payments.

27 (B) “Savings” means the difference between the direct and indirect actual annual baseline
 28 costs compared to the projected annual cost for the contracted functions or responsibilities
 29 in any succeeding state fiscal year during the term of the contract.

30 (i) A description of differences among current state agency policies and processes and,
 31 as appropriate, a discussion of options or a plan for standardization, consolidation or revision
 32 of current policies and processes, if any, to reduce the customization of any proposed sol-
 33 ution that would otherwise be required.

34 (j) A description of the specific performance standards that must, at a minimum, be met
 35 to ensure adequate performance.

36 (k) The projected time frame for key events from the beginning of the procurement
 37 process through the expiration of a contract.

38 (L) A plan to ensure compliance with the provisions of ORS 192.410 to 192.505.

39 (m) A specific and feasible contingency plan addressing contractor nonperformance and
 40 a description of the tasks involved in and costs required for implementation of the plan.

41 (n) A transition plan for addressing changes in the number of state agency personnel,
 42 affected business processes, employee transition issues and communication with affected
 43 stakeholders. The transition plan must contain a reemployment and retraining assistance
 44 plan for employees who are not retained by the state agency or employed by the contractor.

45 (o) A plan for ensuring access by persons with disabilities in compliance with applicable

1 state and federal law.

2 (p) A description of legislative and budgetary actions necessary to accomplish the pro-
 3 posed public contract.

4 (5) Each public contract subject to this section shall include the following:

5 (a) A scope-of-work provision that clearly specifies each service or deliverable to be
 6 provided, including a description of each deliverable or activity that is quantifiable, measur-
 7 able and verifiable. This provision must include a clause stating that if a particular service
 8 or deliverable is inadvertently omitted or not clearly specified but is determined to be oper-
 9 ationally necessary and is verified to have been performed by the agency within the 12
 10 months before the execution of the contract, the service or deliverable will be provided by
 11 the contractor through the identified contract amendment process.

12 (b) A service level agreement provision describing all services to be provided under the
 13 terms of the agreement, the state agency’s service requirements and performance objectives,
 14 specific responsibilities of the state agency and the contractor and the process for amending
 15 any portion of the service level agreement. Each service level agreement must contain an
 16 exclusivity clause that allows the state agency to retain the right to perform the service or
 17 activity, directly or with another contractor, if service levels are not being achieved.

18 (c) A provision that identifies all associated costs, specific payment terms and payment
 19 schedules, including provisions governing incentives and financial disincentives and criteria
 20 governing payment.

21 (d) A provision that identifies a clear and specific transition plan that will be imple-
 22 mented in order to complete all required activities needed to transfer the service or activity
 23 from the state agency to the contractor and operate the service or activity successfully.

24 (e) A performance standards provision that identifies all required performance standards,
 25 which must include at a minimum:

26 (A) Detailed and measurable acceptance criteria for each deliverable and service to be
 27 provided to the state agency under the terms of the contract that document the required
 28 performance level.

29 (B) A method for monitoring and reporting progress in achieving specified performance
 30 standards and levels.

31 (C) The sanctions or disincentives that will be imposed for nonperformance by the con-
 32 tractor or state agency.

33 (f) A provision that requires the contractor and any subcontractors to maintain adequate
 34 accounting records that comply with all applicable federal and state laws and generally ac-
 35 cepted accounting principles.

36 (g) A provision that authorizes the state agency to have access to and audit all records
 37 related to the contract and any subcontracts, or any responsibilities or functions under the
 38 contract and any subcontracts, for purposes of legislative oversight and a requirement for
 39 audits by a service organization pursuant to professional auditing standards, if appropriate.

40 (h) A provision that requires the contractor to interview and consider for employment
 41 with the contractor each displaced state employee who is interested in such employment.

42 (i) A contingency plan provision that describes the mechanism for continuing the opera-
 43 tion of the service or activity, including transferring the service or activity back to the state
 44 agency or successor contractor, if the contractor fails to perform and comply with the per-
 45 formance standards and levels of the contract and the contract is terminated.

1 (j) A provision that requires the contractor and any subcontractors to comply with public
2 records laws specifically to:

3 (A) Keep and maintain the public records that ordinarily and necessarily would be re-
4 quired by the state agency in order to perform the service or activity.

5 (B) Provide the public with access to the public records on the same terms and conditions
6 by which the state agency would provide the records.

7 (C) Ensure that records that are exempt or records that are confidential and exempt are
8 not disclosed except as authorized by law.

9 (D) Meet all requirements for retaining records and transfer to the state agency, at no
10 cost, all public records in possession of the contractor on termination of the contract and
11 destroy any duplicate public records that are exempt or confidential. All records stored
12 electronically must be provided to the state agency in a format that is compatible with the
13 information technology systems of the state agency.

14 (k) A provision that addresses ownership of intellectual property. This paragraph does
15 not provide the specific authority needed by a state agency to obtain a copyright or trade-
16 mark.

17 (L) If applicable, a provision that allows the state agency to purchase from the contrac-
18 tor, at its depreciated value, assets used by the contractor in the performance of the con-
19 tract. If assets have not depreciated, the state agency shall retain the right to negotiate to
20 purchase at an agreed-upon cost.

21 **SECTION 10.** The Council on Efficient Government, by rule, shall establish an accounting
22 method that:

23 (1) Is similar to generally accepted accounting principles used by a private entity.

24 (2) Allows a state agency to identify the total actual cost of engaging in a commercial
25 activity in a manner similar to how a private entity identifies the total actual cost to the
26 private entity, including the following:

27 (a) Labor expenses, including but not limited to compensation and benefits, costs of
28 training, costs of paying overtime, costs of supervising labor and other personnel expenses.

29 (b) Operating costs, including but not limited to vehicle maintenance and repair, mar-
30 keting, advertising or other sales expenses, office expenses, costs of an accounting operation
31 such as billing, insurance expenses, real estate or equipment costs, debt service costs and a
32 proportionate amount of other overhead or capital expenses, such as vehicle depreciation and
33 depreciation of other fixed assets.

34 (c) Contract management costs.

35 (d) Other costs particular to a person supplying the good or service.

36 (3) Provides a process to estimate the taxes a state agency would pay related to engaging
37 in a commercial activity if the state agency were required to pay federal, state and local
38 taxes to the same extent as a private entity engaging in the commercial activity.

39 **SECTION 11.** (1) In preparing the budget report under ORS 291.201 to 291.222, the Gov-
40 ernor and the Oregon Department of Administrative Services shall:

41 (a) Determine the amount of an appropriation that is no longer needed by an executive
42 branch agency because all or a portion of the agency's provision of a good or service is de-
43 livered under a public contract; and

44 (b) Adjust the Governor's budget recommendations to reflect the amount that is deter-
45 mined under paragraph (a) of this subsection.

1 **(2) This section does not prevent the Governor from making a budget recommendation**
2 **regarding the restoration of a portion of the appropriation to a state agency that is reduced**
3 **under this section.**

4 **SECTION 12. Sections 1 to 12 of this 2011 Act do not apply to contracts in support of the**
5 **planning, development, implementation, operation or maintenance of the road, bridge and**
6 **public transportation construction program of the Department of Transportation.**

7 **SECTION 13. (1) Sections 1 to 12 of this 2011 Act become operative on January 1, 2012.**

8 **(2) The Governor, the President of the Senate, the Speaker of the House of Represen-**
9 **tatives, the Council on Efficient Government and any state agency make take any action**
10 **before the operative date specified in subsection (1) of this section that is necessary for the**
11 **Governor, President, Speaker, council or agency to exercise, on and after the operative date**
12 **specified in subsection (1) of this section, all the duties, functions and powers conferred on**
13 **the Governor, President, Speaker, council or agency by sections 1 to 12 of this 2011 Act.**

14 **SECTION 14. This 2011 Act being necessary for the immediate preservation of the public**
15 **peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect**
16 **on its passage.**

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