

# House Bill 3679

Sponsored by Representative J SMITH; Representatives HUFFMAN, KENNEMER, SCHAUFLEER, SPRENGER, WHISNANT, WITT

## 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**.

Exempts energy savings performance contracts, under certain circumstances, from requirement to use competitive bidding process to award public improvement contracts. Specifies circumstances. Becomes operative 91 days after effective date of Act. Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to energy savings performance contracts; creating new provisions; amending ORS 279C.335;  
3 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:]*

7 **(1) A contracting agency shall use a competitive bidding process as the basis for awarding**  
8 **a public improvement contract, except for:**

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

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

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

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

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

18 (f) **An** energy savings performance [*contracts entered into*] **contract that a contracting agency**  
19 **enters into with an energy service company** in accordance with rules of procedure adopted under  
20 ORS 279A.065 **or after choosing the energy service company from among prequalified energy**  
21 **service companies that appear on a list that the State Department of Energy designates by**  
22 **rule.**

23 (2) Subject to subsection (4)(b) of this section, the Director of the Oregon Department of Ad-  
24 ministrative Services, a local contract review board or, for contracts described in ORS 279A.050  
25 (3)(b), the Director of Transportation may exempt a public improvement contract or a class of public  
26 improvement contracts from the competitive bidding requirements of subsection (1) of this section  
27 [*upon approval of*] **after the director or the local contract review board approves** the following  
28 findings submitted by the contracting agency or, if a state agency is not the contracting agency, the  
29 state agency [*seeking*] **that seeks** the exemption:

30 (a) [*It is unlikely that*] The exemption [*will*] **is unlikely to** encourage favoritism in [*the awarding*

**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 of] **awarding** public improvement contracts or **to** substantially diminish competition for public im-  
 2 provement contracts.

3 (b) [The] Awarding [of] **a** public improvement [contracts] **contract** under the exemption will  
 4 likely result in substantial cost savings to the contracting agency, to the state agency based upon  
 5 the justification and information described in ORS 279C.330 or, if the [contracts are] **contract is** for  
 6 **a** public [improvements] **improvement** described in ORS 279A.050 (3)(b), to the contracting agency  
 7 or the public. In [making] **approving** the finding, the Director of the Oregon Department of Admin-  
 8 istrative Services, the Director of Transportation or the local contract review board may consider  
 9 the type, cost and amount of the contract, the number of persons available to bid and [such] other  
 10 **appropriate** factors [as may be deemed appropriate].

11 (c) As an alternative to the finding described in paragraph (b) of this subsection, [when] **if** a  
 12 contracting agency or state agency seeks an exemption that would allow the **agency to** use [of] an  
 13 [alternate] **alternative** contracting method that the agency has not previously used, the agency may  
 14 make a finding that identifies the project as a pilot project for which the agency intends to deter-  
 15 mine whether the use of the [alternate] **alternative** contracting method actually results in substan-  
 16 tial cost savings to the contracting agency, to the state agency or, if the contract is for a public  
 17 improvement described in ORS 279A.050 (3)(b), to the contracting agency or the public. The agency  
 18 shall include an analysis and conclusion regarding actual cost savings, if any, in the evaluation re-  
 19 quired under ORS 279C.355.

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

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

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

34 (b) Require and approve or disapprove written findings by the contracting agency or state  
 35 agency that support [the] awarding [of] a particular public improvement contract or a class of public  
 36 improvement contracts, without the competitive bidding requirement of subsection (1) of this section.  
 37 The findings must show that the exemption of a contract or class of contracts complies with the  
 38 requirements of subsection (2) of this section.

39 (5)(a) **A contracting agency or state agency shall hold a public hearing** before [final adoption  
 40 of] **finally adopting** the findings required by subsection (2) of this section **and** exempting a public  
 41 improvement contract or a class of public improvement contracts from the requirement of compet-  
 42 itive bidding[, a contracting agency or state agency shall hold a public hearing].

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

45 (c) The notice [shall] **must** state that the public hearing is for the purpose of taking comments

1 on the draft findings for an exemption from the competitive bidding requirement. At the time of the  
 2 notice, copies of the draft findings *[shall]* **must** be made available to the public. At the option of the  
 3 contracting agency or state agency, the notice may describe the process by which the findings are  
 4 finally adopted and may indicate the opportunity for *[any]* further public comment.

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

7 (e) If a contracting agency or state agency *[is required to]* **must** act promptly *[due to]* **because**  
 8 **of** circumstances beyond the agency’s control that do not constitute an emergency, notification of  
 9 the public hearing may be published simultaneously with the agency’s solicitation of contractors for  
 10 the alternative *[public]* contracting method, as long as responses to the solicitation are due at least  
 11 five days after the *[meeting]* **hearing** and approval of the findings.

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

18 (7) A public improvement contract awarded under the competitive bidding requirement of sub-  
 19 section (1) of this section may be amended only in accordance with rules adopted under ORS  
 20 279A.065.

21 (8) A public improvement *[contracts]* **contract that is** excepted from competitive *[bid]* **bidding**  
 22 requirements under subsection (1)(a), (c), (d), (e) or (f) of this section *[are]* **is** not subject to the ex-  
 23 emption requirements of subsection (2) of this section.

24 **SECTION 2. The amendments to ORS 279C.335 by section 1 of this 2011 Act apply to a**  
 25 **contract that a contracting agency enters into on or after the operative date set forth in**  
 26 **section 3 of this 2011 Act.**

27 **SECTION 3. (1) The amendments to ORS 279C.335 by section 1 of this 2011 Act become**  
 28 **operative 91 days after the effective date of this 2011 Act.**

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

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

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