



TEDESCO  
LAW  
GROUP

LAWYERS FOR ORGANIZED LABOR IN THE PACIFIC NORTHWEST

Oregon Office

3021 N.E. BROADWAY  
PORTLAND, OR 97232  
TELEPHONE: 866.697.6015  
FACSIMILE: 503.210.9847

Alaska Office

500 W. INTERNATIONAL  
AIRPORT RD.  
ANCHORAGE, AK 99518  
TELEPHONE: 866.697.6015  
FACSIMILE: 503.210.9847

MICHAEL J. TEDESCO\*  
miketlaw@miketlaw.com  
SARAH K. DRESCHER, OF COUNSEL\*  
sarah@miketlaw.com  
JULIE A. FALENDER\*  
julie@miketlaw.com  
ANIL S. KARIA, OF COUNSEL\*\*\*  
anil@miketlaw.com  
NICOLE L. MCMILLAN\*  
nicole@miketlaw.com  
KATELYN S. OLDHAM\*\*  
katelyn@miketlaw.com  
DAVID A. SNYDER, OF COUNSEL\*\*  
dsnyder@snyderandhoagllc.com  
LANE TOENSMEIER, OF COUNSEL \*  
lane@snyderandhoagllc.com

\* Admitted in OR  
\*\* Admitted in OR, WA  
\*\*\* Admitted in OR, WA, AK

**Date: June 24, 2013**

**Re: Written Testimony of Sarah Drescher to Members of the Senate  
Committee on Rules**

Dear Chair Rosenbaum and members of the Senate Committee on Rules:

Senate Bill 805, as amended, seeks to clarify the process by which a public employee or labor union may seek judicial review of an agency's violation of the cost analysis and feasibility requirements in Oregon's Public Contracting Code, ORS 279B.030 – 279B.036.

Under current law, public agencies may not contract out (or "privatize") the work of public employees unless they first perform a cost analysis or feasibility determination. By performing a cost analysis, the agency compares its own costs to perform the services in-house versus the contractor's costs to perform the services. If it is cheaper to privatize the services, the agency may do so – unless the reason privatization is cheaper is because the contractor pays its employees lower wages and benefits. If the agency performs a feasibility determination, the agency must demonstrate that performing the services with its own personnel is not feasible. These requirements, added to the Contracting Code in 2009, sought to ensure that privatization resulted in actual cost savings to tax payers and that savings were not achieved solely at the expense of family wage jobs in Oregon.

Under current law, **there is no legal process** in the Contracting Code to resolve an agency's violations of the cost analysis/feasibility determinations. This has proven problematic. The Contracting Code provides a means for bidders/proposers/others to seek judicial review of an agency's violations of other provisions within the Code through a writ of review. (ORS 279B.420(5)). However, that judicial review process carves out an exception for violations of the cost analysis/feasibility determinations, so that violations of the cost analysis/feasibility requirements escape legal review. (ORS

279B.420(2)). As a result, employees and labor unions have struggled with how to remedy violations of the cost analysis/feasibility determinations.

SB 805, as amended, fills this gaping hole in the current law by providing judicial review of violations of the cost analysis/feasibility determinations. As discussed above, a judicial review process is already provided by the Contracting Code as the legal process for resolving violations of other provisions in the Contracting Code. SB 805, as amended, extends that legal process to violations of the cost analysis/feasibility provisions.

The Amendments to SB 805 clarify that in the judicial review process, a circuit court reviews violations of the cost analysis/feasibility provisions de novo, which means the court will review an agency's compliance with the law's requirements anew. If the court finds the agency has not complied with the cost analysis/feasibility requirements, the court shall enjoin the agency from proceeding with the procurement, but neither party can recover costs or attorney fees. This amendment was designed to ensure there is no incentive or disincentive to challenging an agency's compliance.

SB 805 also makes the current law consistent with Oregon's administrative rules for the Department of Administrative Services. Under those rules, agencies must consider a contractor's profit margin when calculating the contractor's costs of performing the services and determining whether the contractor's savings are from reduced wages and benefits. The current law does not mirror the DAS rules, creating confusion amongst agencies. SB 805, as amended, clarifies that an agency must include the contractor's estimated profit when the agency conducts the cost analysis.

The proposed legislation will assist agencies with compliance by clarifying that an agency does not "proceed with a cost analysis" if it issues requests for information or otherwise conducts research necessary to comply with the cost analysis/feasibility determinations. This allows agencies to do the appropriate research and obtain information needed to comply with the cost analysis requirements before proceeding with the procurement process. As amended, SB 805 acknowledges that agencies may receive new or updated information relevant to the cost analysis during the procurement process and instructs agencies to update the cost analysis/feasibility determination if information is discovered that alters those initial determinations.

SB 805, as amended, is important to ensure compliance with the Contracting Code and fulfill the Legislature's goals in creating the cost analysis/feasibility requirements. Without a means to remedy violations, the cost analysis/feasibility requirements are unenforceable. The legislative goals that inspired this law in 2009 – ensuring fiscal responsibility in public contracting and avoiding the unnecessary loss of family wage jobs in Oregon – cannot be achieved without a means for ensuring compliance with the law.

**Public Contracting Cost analysis for Projects over \$250,000  
Central Point School District No. 6**

| <b>District's Estimate to Perform Services</b>  |                                  | <b>District's Estimate to Contract the Services</b>  |   |
|---|----------------------------------|--|---|
| District Costs to perform the services: ORS § 279B.033(1)(a) and OAR 137-047-0250(5)(b) |                                  | Estimated cost a contractor would incur: ORS § 279B.033(1)(b) and OAR 137-047-0250(5)(c)     |   |
| <b>Salary or wage and benefit costs:</b>  | <u>Based on 2010-2011 budget</u> | <b>Average or actual salary or wage and benefit costs for contractors and employees who:</b> | The district cannot determine contractor's wage and benefit programs until RFP's have been received. We anticipate a contractor to pay a competitive wage relative to the services offered. Contractors have economies of scale for reduced health benefit costs. Due to this lack of information we are using the assumption that the cost will be equal to that of the District.<br><br>\$1,555,735.00                        |
| Drivers salaries-regular  | \$445,189.00                     |  |   |
| Drivers salaries- SPED  | \$105,229.00                     |  |   |
| Substitutes salaries  | \$ 75,000.00                     |  |   |
| Employee benefits   | \$638,352.00                     |  |   |
| Mechanics salaries  | \$ 93,135.00                     |  |   |
| Employee benefits   | \$ 58,519.00                     |  |   |
| Supervisor/office salaries  | \$ 83,983.00                     |  |   |
| Employee benefits   | \$56,328.00                      |  |   |
| <b>Total</b>  | <b>\$1,555,735.00</b>            |  |   |
| <b>Material costs:</b>  | <u>Based on 2010-2011 budget</u> | <b>Material costs</b>  | Contractors buy parts and supplies 5% to 10% less.<br><br>Contractors (depending on size) have management efficiencies and economies of scale for safety programs, maintenance programs, training programs.<br><br>Because we cannot estimate the exact cost of the materials for a contractor until we get actual numbers we are using the assumption that the cost will be equal to that of the District.<br><br>\$519,050.00 |
| Utilities for bus barn  | \$ 22,400.00                     |  |   |
| Office operations(copy machine, supplies, repairs)                                      | \$ 5,250.00                      |  |   |
| Driver supplies, meals testing  | \$ 10,500.00                     |  |   |
| Communication system lease  | \$ 2,400.00                      |  |   |
| Insurance-property and buses  | \$ 55,000.00                     |  |   |
| Contactor fees- non reimbursable travel   | \$ 18,000.00                     |  |   |
| Bus repairs and maintenance   | \$171,000.00                     |  |   |
| Fuel and oil and tires  | \$234,000.00                     |  |   |
| Bus garage dues and fees  | \$ 500.00                        |  |   |
| <b>Total</b>  | <b>\$519,050.00</b>              |  |   |
| <b>costs related to stopping and dismantling a project or operation</b>                 |                                  | <b>Miscellaneous costs</b>   |   |
| <b>Costs incurred in planning for, training for, starting up</b>                        |                                  | <b>Anything Not included in</b>  |   |

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|   |             |  |                |
|---|-------------|--|----------------|
|   |             | <b>the Above: A Contracting Agency may consider other reliable information that bears on the costs a potential Contractor would incur.</b> |                |
| <p><b>Miscellaneous costs :</b><br/>The District Currently has 28 route buses, 3 spare/trip buses, 8 SPED buses and 1 activity bus. 28 of these are over 10 years old with 8 over 20 years old. (see the attached analysis)<br/>The District believes that these buses need to be replaced in order to have a viable fleet. The District has replaced buses in the past using a lease purchase option that spreads the payments over 5 years. Using 2010 rates the cost of replacing all busses would be \$566,254 per year. If we then subtract the depreciation that we would receive through the State School Funds of approx. \$183,400 the net cost to the District would be \$382,854 for 5 years.</p> <p><b>COST OF BUS REPLACEMENT FOR ONE YEAR NET OF DEPRECIATION</b></p> | \$382,854   | <b>Profit Incurred by the Contractor:</b>  |                |
| <p><b>Anything not included in the above:</b><br/>A Contracting Agency may consider other reliable information that bears on the cost to the Contracting Agency of performing the Services.</p>   |             |  |                |
| <b>TOTAL</b>  | \$2,457,639 | <b>TOTAL</b>   | \$2,074,785.00 |

After comparing the difference between the costs estimated for the Contracting Agency to perform the Services and the estimated costs a potential Contractor would incur in performing the Services under section the Contracting Agency may proceed with the Procurement only if the Contracting Agency would incur more cost in performing the Services with the agency's own personnel and resources than it would incur in procuring the

**Public Contracting Cost analysis for Projects over \$250,000  
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Services from a Contractor.

Exception Based on Salaries or Wages and Benefits. If the sole reason that the costs estimated for the Contracting Agency to perform the Services under section (5)(b) exceed the estimated costs a potential Contractor would incur in performing the Services under section (5)(c) is because the average or actual salary or wage and benefit costs for Contractors and their employees estimated under subsection (5)(c)(A) are lower than the salary or wage and benefit costs for employees of the Contracting Agency under subsection (5)(b)(A), then the Contracting Agency may not proceed with the Procurement.

**Conclusion:**

**The District feels that after the above analysis as required by HB2867 that the District could save money by contracting. The administration recommends that the Board of Directors begins the process of asking for proposals from transportation contractors to provide transportation services for Central Point District No. 6 beginning with the 2011-2012 school year.**