



Senate Committee on Rules  
Testimony on SB 805  
by Tricia Smith June 24, 2013

In 2009, the legislature passed HB 2867 to require public agencies to conduct a feasibility study and cost/benefit analysis before deciding to contract out work performed by their own employees. Producing a cost/benefit analysis prior to deciding to enter into a contract for services is a National State Auditors Association best practice, and is common in successful businesses and even among individuals who want to assure the best value in the services they purchase. The 2009 legislation, sponsored by Rep. Arnie Roblan, came at the request of OSEA, SEIU, OEA, AFSCME, AEE and public interest groups.

The bill was the result of a history of public agencies contracting out jobs performed by public employees in the name of saving money, that according to several studies, did not in fact save money and often cost the agencies and taxpayers more than it would have cost to perform the service in-house. In addition, studies showed that these more expensive contracts came with dramatic cuts to front line employee compensation, which hurt not just the employees and their families, but also the communities in which they live. These workers spent their paychecks buying local goods and services, and when their income was cut the whole community could feel the pinch.

After the 2009 session, we participated in a work group to help develop DAS administrative rules to implement the legislation, and to make recommendations to the 2010 special session on improvements to the cost analysis statutes. Through that work DAS adopted rules state agencies must follow in situations where they may contract out jobs performed by their employees. Local agencies such as school districts, cities and counties are not required to comply with DAS rules.

The rules DAS adopted include the requirement that the agency consider contractor profit in the cost analysis. The recommendations the work group provided to the 2010 special session included a provision that local governments and school districts also include contractor profit in the cost analysis. The short length of the session prevented the proposal from being considered.

Since passage of the cost analysis requirements in 2009 some local governments and school districts seem to have spent their time trying to circumvent the

cost/benefit analysis requirements in the law, rather than be in compliance with them. This practice puts scarce public dollars at risk to more expensive contracts that cannot be undone in the future.

The main points of objection to HB 2867 in 2009, and SB 805 have been that the process is unnecessary, too complicated and time consuming. As I mentioned, conducting a cost analysis is a basic best practice in these situations according to the National State Auditors Association. I have provided you with a copy of their guidance.

We believe local governments' very objection is grounds for the legislature as stewards of public funds, to strengthen the cost analysis requirements in the law by making the improvements contained in SB 805. That these public agencies object to the requirements in the statutes speak volumes about the need for the legislature to clarify them and allow a workable process to take a faulty analysis to the court.

Provided with my testimony is a recent study by the Labor Education and Research Center at the University of Oregon that clearly shows the way school districts that have skirted the intention and requirements of the cost analysis statutes and contracted out jobs since passage of HB 2867. This study illuminates the reasons for the improvements contained in SB 805.

SB 805 will improve the cost analysis requirements in ORS 279B by:  
Clarifying how government agencies can obtain information needed to conduct a cost analysis through a Request for Information;  
Requiring that the sale of long term assets not be considered, and the profit of the potential contractor be considered; and  
Providing a quicker, less expensive writ of review process when a cost analysis is challenged, and clarifying that impacted employees or their union to bring the challenge to the court.

Currently there are many school district contracts for services that are troubling because of the lack of information regarding whether only appropriate costs are being paid for by districts and the state. When subsequent contracts are found to be more expensive, districts have little power to change the terms since they no longer have the ability to provide the service in-house.

Because there is no turning back once a service has been contracted out, it is important that the rules for doing so provide a process that allows the district and the public to understand the true costs. SB 805 will help assure that outcome.

# Contracting for Services

A National State Auditors Association Best Practices Document



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## Best Practices in Contracting for Services

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### Purpose

The Performance Audit Committee of the National State Auditors Association developed this document as a tool for audit organizations and government agencies to use in identifying and evaluating best practices in contracting for services. Although it was intended to address many of the best practices that could apply in these situations, it should not be considered all-inclusive. Further, the practices listed here may not be applicable in all situations, and other practices may accomplish the same things. However, this document can be extremely helpful as a starting point for both agency managers and auditors in deciding what types of practices are more likely to result in an efficient, effective, and accountable service procurement process.

### Planning

Proper planning provides the foundation for contract awarding and monitoring. Planning identifies what services are needed and when, how they should be provided, and what provisions should be in the contract. Planning also helps ensure proper information is collected to effectively structure a request for proposal (RFP). As a public entity, the agency must know the state's bidding and contracting laws, other relevant state laws as well as any procedural guidelines the agency is obligated to follow. Timely planning is crucial in all procurements, but especially in procurements like RFP's that can take a lot of time to execute.

### Decision to Contract

First, the agency needs to determine whether or not to contract for the service. To make this decision the agency should:

1. Analyze its business needs, goals, objectives, and services and determine whether or not the service is necessary.
2. Conduct a cost/benefit analysis and evaluate options, such as whether contracting is more or less expensive than using agency staff.
3. Determine whether state law either prohibits contracting for services or requires the agency to demonstrate its need to contract.

### Performance Requirements

Once the decision to contract has been made, the agency should develop performance requirements that will hold vendors accountable for the delivery of quality services. Performance requirements should:

1. Clearly state the services expected.
2. Clearly define performance standards and measurable outcomes.
3. Identify how vendor performance will be evaluated.
4. Include positive or negative performance incentives.
5. Identify the staff that will be responsible for monitoring vendor performance. Ensure that sufficient staff resources are available to handle vendor/contract management properly.

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6. Clearly define the procedures to be followed if, during the course of performance of a service contract, unanticipated work arises that requires modification to the contract.

### Request for Proposal Process

The decision to employ a Request for Proposal commits an agency to a formal process based on fair and open competition and equal access to information. This decision allows the agency to systematically define the acquisition process and the basis on which the proposals will be assessed. The RFP itself provides a standardized framework for vendor proposals and highlights the business, technical, and legal issues that must be included in the final contract.

The RFP should:

1. Clearly state the performance requirements and the scope of the services that are to be provided.
2. Include a statement of work that flows from the business needs analysis, and should present a logical plan to address the stated needs.
3. Identify constraints, schedules, deadlines, mandatory items, and allowable renewals.
4. Specify required deliverables, reporting obligations, and payment terms.
5. Clearly state pricing requirements and bid submission expectations, including closing time, date, and location. A standard bid price form is helpful to ensure an "apples to apples" cost comparison.
6. Clearly state the evaluation criteria and weighting factors for scoring proposals.
7. Allow sufficient time for vendors to prepare good proposals.
8. Avoid specifications that favor a particular bidder or brand.
9. Specify the qualifications for the company and/or personnel who would be assigned to the project.
10. Identify federal and state requirements that govern the contracting process and the delivery of services.
11. Outline all procurement communication devices to ensure all appropriate bidders or potential bidders have access to the same information, i.e. pre-bid conferences, Q&A's, whom to contact with questions, etc.

### Award Process

Although evaluation methods vary, the contract award process should ensure vendor proposals are responsive to the agency's needs, consistently and objectively evaluated, and contracts are awarded fairly to responsible vendors. Without proper awarding practices, there is little assurance an agency is selecting the most qualified vendor at the best price. Furthermore, contracting decisions may not be defensible if challenged.

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### Award Decision

When making an award decision, the agency should:

1. Have appropriate procedures for handling late or incomplete proposals.
2. Ensure that an adequate number of proposals were received.
3. Use an evaluation committee, comprised of individuals who are trained on how to score and evaluate the proposals and who are free of impairments to independence.
4. Use fixed, clearly defined, and consistent scoring scales to measure the proposal against the criteria specified in the RFP.
5. Carefully check vendor references.
6. Document the award decision and keep supporting materials.
7. Carefully control bids upon receipt to ensure that bids are not opened prematurely to give late bidding vendors confidential pricing information, bids are not accepted after the due date, inferior bids are not given extra opportunity to cure deficiencies, etc.

### Contract Provisions

Contracts for the purchase of services must be formal, written documents. Contracts should (1) protect the interests of the agency, (2) identify the responsibilities of the parties to the contract, (3) define what is to be delivered, and (4) document the mutual agreement, the substance, and parameters of what was agreed upon. Specifically, the contract should:

1. Clearly state and define the scope of work, contract terms, allowable renewals, and procedures for any changes.
2. Provide for specific measurable deliverables and reporting requirements, including due dates.
3. Describe the methods of payment, payment schedules, and escalation factors if applicable.
4. Limit the state's liability for work performed either before or after the contract's scope.
5. Contain performance standards, performance incentives and/or clear penalties and corrective actions for non-performance, with a dispute resolution process. The contract also should include a requirement for a performance bond when appropriate.
6. Contain inspection and audit provisions.
7. Include provisions for contract termination.
8. Include provisions for contract renegotiation and/or price escalations if applicable.
9. Tie payments to the acceptance of deliverables or the final product, if possible.
10. Contain all standard or required clauses as published in the RFP. The contract may also incorporate the RFP itself. Order of precedence should be addressed in case of a discrepancy between the RFP and the body of the contract for example.
11. Contain appropriate signatures, approvals, acknowledgements, or witnesses.

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12. As necessary, allow for legal counsel's review of the legal requirements for forming the contract, which may include a review of the contracting process; legal sufficiency of the contract; the contract terms; etc.

### Monitoring

Contract monitoring is an essential part of the contracting process. Monitoring should ensure that contractors comply with contract terms, performance expectations are achieved, and any problems are identified and resolved. Without a sound monitoring process, the contracting agency does not have adequate assurance it receives what it contracts for.

To properly monitor a contract, the agency should:

1. Assign a contract manager with the authority, resources, and time to monitor the project.
2. Ensure that the contract manager possesses adequate skills and has the necessary training to properly manage the contract.
3. Track budgets and compare invoices and charges to contract terms and conditions.
4. Ensure that deliverables are received on time and document the acceptance or rejection of deliverables.
5. Withhold payments to vendors until deliverables are received.
6. Retain documentation supporting charges against the contract.
7. After contract completion the agency evaluates the contractor's performance on this contract against a set of pre-established, standard criteria and retains this record of contract performance for future use. If agencies do maintain a record of contractor past performance, it has the potential use as an evaluation element under "Award Decision."



# All Costs Considered III:

Further Analysis on the Contracting Out  
of School Support Services  
in Oregon

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February 2013

# Conclusion

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he privatization of school support services has long been a topic of concern for Oregon lawmakers, school officials and the public at large. Evidence that privatization often imposed dramatic costs on local employees without producing the promised savings led legislators in 2009 to adopt a new statute to guard against the most damaging versions of contracting out.

In the first test case under the new law — the decision by the Central Point School District (CPSD) to contract out school busing — it is apparent the 2009 statute has not achieved its goal. The contract between CPSD and First Student Inc., fails the most fundamental test created by ORS 279B.033: to the extent it saves the district money, it only does so by relying on steep wage and benefit cuts for local employees. Whether this failure requires a legislative or a regulatory remedy, it is clear lawmakers' intent has not been realized in the law's application.

Furthermore, a detailed examination of bus privatization contracts points to a series of legally questionable practices, along with a handful of transactions that constitute prima facie violations of contractual agreements. The prevalence of ethically or legally suspect

practices may be the result of loopholes in legislative language or of insufficient oversight by state or local authorities. It is clear, however, that hundreds of thousands of taxpayer dollars — and perhaps millions — are being wasted as a result of insufficient controls in the privatization process. At a time when both state and local officials are facing severe budget challenges, Oregon taxpayers simply cannot afford to allow such waste to go uncorrected.

We hope this report will enable lawmakers, school officials and the public at large to take more effective steps toward guaranteeing quality services for students and to safeguard much-needed tax dollars.

► The contract between the Central Point School District and First Student Inc. fails the most fundamental test created by ORS 279B.033: to the extent it saves the district money, it only does so by relying on steep wage and benefit cuts for local employees.



**Loopholes in ORS 279B:  
Problems and Pitfalls in School Bus Contracting**

- **Cost-benefit analyses should include *all* the costs of contracting out, including those paid by the state as well as by the school district.** The state is the silent third party in a deal, and deals can be structured to satisfy the district and the contractor, but at the expense of state taxpayers. For example, when Lake Oswego contracted out its bussing in 2003, its RFP stipulated that contractors had to buy the district's bus fleet for \$1 million. The contractor awarded the bid – then called Laidlaw, now First Student – stated that the fleet was only worth \$650,000. The contractor then agreed to pay the district \$1 million for its fleet, but on condition that the district repay the extra \$350,000 in five yearly payments of \$80,000 per year (with interest, the \$350,000 loan became \$400,000). This was a purely financial transaction – essentially a five-year loan. But the contractor built the \$80,000 annual repayment into its cents-per-mile charges, which were submitted to the state as reimbursable “transportation expenses.” The state, in turn, paid 70% of this cost. Thus, the contractor offered a sweetener to seal the deal, and the District got \$350,000 but only had to repay 30% of that amount. It was a good deal for both parties, but only because the state picked up the tab.
- **Districts are not providing the information legislators intended.** ORS 279B states that analyses must include estimated or actual costs for employee wages and benefits, equipment, supplies, and other material costs. However, First Student refused to provide this information, claiming the components of its per-mile charges is a “trade secret.” The analysis CPSD used to show compliance with the law was explicitly fictitious: instead of actual wage and benefit costs, it simply *assumed* that First Student would offer the same wages and benefits the district had. It also completely omitted the cost of buying new buses. Contractors should be required to provide actual data, including a breakout of their per-mile charge into charges for labor; bus purchase; and other cost items.
- **Incomplete or misleading information leads to contracts being approved that clearly fail to meet the legislature's standard.** When all costs are accounted for, it appears that the district may actually suffer a net loss as a result of privatization. However, it is completely clear that any possible net savings are based entirely on lower wages and benefits, which we estimate were cut by 47%.
- **Contracting out entails a dramatic increase in bus purchases.** School buses are subject to rigorous quarterly inspections, but as long as they're roadworthy, districts can operate 20 year-old buses. Contractors insist on “industry” standards that require most buses be replaced after 12 years. If Central Point maintained in-house transportation, it would have bought 10 new buses over five years; instead, First Student will require it to buy 19 new and 25 used buses, for a total of 44 buses purchased over the five-year

contract. Districts should not be forced to purchase more buses for a contractor than they would for in-house transportation.

- **Public dollars buying private buses.** Districts are paying 100% of the cost of purchasing new buses; but these buses are used by First Student's private commercial charter business in off-school hours – weddings, corporate events, group outings to casinos or the coast, even contracting with the Forest Service to transport firefighters. The wear-and-tear and depreciation on the buses appears to be paid 100% by taxpayers. Indeed, it seems possible that taxpayers are paying the fuel, maintenance and repair costs of First Student's private charter business. If buses are used for private purposes, the district and state should be appropriately reimbursed.
- **District and state may pay for buses twice over.** It appears that Districts are charged 100% of the cost of bus purchases over five years, with these charges rolled into the contractor's per-mile charges. When a bus is fully paid for, the per-mile charge should logically be reduced; but such charges are never reduced. Thus, a new bus that is purchased in the first year of a contract and used for 12 years may be paid for more than twice over by taxpayers. A similar problem occurs – particularly for the state -- if a District buys a used bus from another District that has already paid 100% of the purchase price. If the second District is charged a price for the used bus, it is paying for something that another District has already entirely paid off; and the state, which paid 70% of the costs the first time, will be paying again for something it already helped purchase in full. Contractors should guarantee that the public will never pay more than 100% of asset costs.
- **Cost-benefit analyses should project far enough into the future to capture all relevant costs.** Expense such as bus purchase, and poor contract language such as allowing contractor rates to increase faster than the rate of inflation, compound over time. By contrast, the one-time infusion of cash from selling off a bus fleet shows up only in the first contract. To accurately gauge the tradeoffs of contracting out, cost/benefit analyses of bus privatization should project at least 15 years out.
- **School districts and the state are unable to enforce contract terms.** Taxpayers may be defrauded in ways that school districts cannot, or choose not to, enforce. In Lake Oswego, for instance, First Student has increased its fees at a rate higher than allowed in the contract; over five years, this has cost the District \$230,000. And in both Lake Oswego and Central Point, First Student is operating a private charter operation in violation of its contract, and the District has no records as to whether commercial charters may be using publicly-bought fuel, or how many private miles are being paid for by taxpayers. The state Education department does not have capacity to enforce these contracts. The law – and fraud against taxpayers -- should be enforceable through a private right of action.

## Bus Purchases over 5 years

