

House Bill 2955

Sponsored by Representative GORSEK

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**.

Permits employee of contracting agency that conducts cost analysis or determines feasibility of procurement to seek judicial review of cost analysis or determination. Specifies conditions under which review may occur.

Requires contracting agency to issue request for information or request for quotation to obtain information necessary to conduct cost analysis or make determination before advertising or otherwise soliciting procurement.

Requires contracting agency to consider contractor's profit in cost analysis. Prohibits contracting agency from considering proceeds of sale or costs of replacing long-term assets in cost analysis.

Becomes operative 91 days after effective date of Act.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to contracting agencies' decisions concerning procurements for services; creating new
3 provisions; amending ORS 279B.030 and 279B.033; and declaring an emergency.

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

5 **SECTION 1. Section 2 of this 2013 Act is added to and made a part of ORS chapter 279B.**

6 **SECTION 2. (1)(a) An employee of a contracting agency that conducts a cost analysis**
7 **under ORS 279B.033 or makes a determination under ORS 279B.036, or an exclusive repre-**
8 **sentative, as defined in ORS 243.650, of the employee's bargaining unit, may seek judicial**
9 **review of the contracting agency's cost analysis or determination if:**

10 (A) **The contracting agency allegedly violated a provision of ORS 279B.030, 279B.033 or**
11 **279B.036;**

12 (B) **The employee or the exclusive representative described the alleged violation in a**
13 **written notice to the contracting agency not later than 30 days after the date of the alleged**
14 **violation;**

15 (C) **The contracting agency proceeded with a procurement after receiving the notice de-**
16 **scribed in subparagraph (B) of this subsection; and**

17 (D) **The employee or the exclusive representative exhausted any administrative remedy**
18 **the contracting agency provides to address the alleged violation.**

19 (b) **For the purposes of this section, a contracting agency proceeded with a procurement**
20 **if the contracting agency advertised or solicited the procurement in accordance with the**
21 **provisions of this chapter or otherwise took affirmative steps to seek a contractor to per-**
22 **form services for which the contracting agency must conduct a procurement under this**
23 **chapter. A contracting agency did not, for the purposes of this section, proceed with a pro-**
24 **urement if the contracting agency issued a request for information or request for a quota-**
25 **tion or otherwise sought to obtain needed data in the course of complying with the provisions**
26 **of ORS 279B.030, 279B.033 or 279B.036.**

27 (2)(a) **If an employee of a state contracting agency, or an exclusive representative of the**

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 employee's bargaining unit, seeks judicial review for an alleged violation of a provision of
 2 ORS 279B.030, 279B.033 or 279B.036, the Circuit Court for Marion County or the circuit court
 3 for the county in which the principal offices of the contracting agency are located may re-
 4 view the alleged violation under ORS 183.484. For the purposes of the review, a state con-
 5 tracting agency's decision to advertise or solicit or otherwise proceed with a procurement
 6 is an order other than an order in a contested case.

7 (b) If an employee of a local contracting agency, or an exclusive representative of the
 8 employee's bargaining unit, seeks judicial review for an alleged violation of a provision of
 9 ORS 279B.030, 279B.033 or 279B.036, the circuit court for the county in which the contracting
 10 agency's principal offices are located may review the alleged violation by means of a writ of
 11 review under ORS chapter 34.

12 (3)(a) If an employee of the contracting agency, or the exclusive representative of the
 13 employee's bargaining unit, notifies the contracting agency as provided in subsection
 14 (1)(a)(B) of this section and timely seeks review under this section, the contracting agency
 15 may not proceed with the procurement that is the subject of the review unless the con-
 16 tracting agency determines that:

17 (A) A compelling governmental interest exists in proceeding with the procurement; or

18 (B) An emergency exists that requires the procurement.

19 (b) A contracting agency that makes a determination under paragraph (a) of this sub-
 20 section shall set forth in writing the reasons for the determination and provide the reasons
 21 to the employee or the exclusive representative immediately.

22 (c) Despite the contracting agency's determination under paragraph (a) of this sub-
 23 section, the court, after joining as a party to the litigation any prospective contractor in-
 24 terested in the procurement, may stay the procurement at the employee's or exclusive
 25 representative's motion if the court finds that the contracting agency's determination under
 26 paragraph (a) of this subsection was not supported by substantial evidence or constituted a
 27 manifest abuse of discretion. In granting a stay under this paragraph, the court may require
 28 the employee or the exclusive representative to post a bond in an amount sufficient to pro-
 29 tect the contracting agency and the public from costs associated with a delay in the pro-
 30 curement if the court finds that issuing an injunction may irreparably harm the contracting
 31 agency or the contractor and that the employee's or exclusive representative's likelihood of
 32 success on the merits of the case is minimal.

33 (4) A court in reviewing a violation alleged under this section shall give due deference to
 34 any factual contracting decision the contracting agency made and may not substitute the
 35 court's judgment for the contracting agency's judgment. The court shall review questions
 36 of law de novo.

37 (5) If the court rules in favor of the employee or the exclusive representative, the court
 38 shall enjoin the contracting agency from proceeding with the procurement and the con-
 39 tracting agency shall cancel the procurement. The court may award costs and attorney fees
 40 to the prevailing party in the litigation.

41 **SECTION 3.** ORS 279B.030 is amended to read:

42 279B.030. (1)(a) Except as provided in ORS 279B.036, before conducting a procurement for ser-
 43 vices with an estimated contract price that exceeds \$250,000, a contracting agency shall:

44 [(a)] (A) Demonstrate, by means of a written cost analysis in accordance with ORS 279B.033,
 45 that the contracting agency would incur less cost in conducting the procurement than in performing

1 the services with the contracting agency’s own personnel and resources; or

2 [(b)] (B) [Demonstrate] **Determine**, in accordance with ORS 279B.036, that performing the ser-
 3 vices with the contracting agency’s own personnel and resources is not feasible.

4 (b) **To obtain pricing and other market data that is necessary to conduct the cost anal-
 5 ysis described in paragraph (a)(A) of this subsection or make the determination described in
 6 paragraph (a)(B) of this subsection, the contracting agency shall issue a request for infor-
 7 mation or a request for a quotation or shall use any other reasonably practicable method to
 8 obtain needed data before advertising or otherwise soliciting the procurement.**

9 (2) If a local contracting agency authorizes a department, bureau, office or other subdivision of
 10 the local contracting agency to conduct a procurement on behalf of another department, bureau,
 11 office or subdivision of the local contracting agency, the department, bureau, office or subdivision
 12 on whose behalf the procurement is conducted shall comply with the requirement set forth in sub-
 13 section (1) of this section.

14 (3) Subsection (1) of this section does not apply to:

15 (a) A local contracting agency or a local contract review board for a city that has a population
 16 of not more than 15,000 or a county that has a population of not more than 30,000;

17 (b) A community college that enrolls not more than 1,000 full-time equivalent students, as de-
 18 fined in ORS 341.005;

19 (c) A special district, as defined in ORS 198.010, a diking district formed under ORS chapter 551
 20 and a soil and water conservation district organized under ORS 568.210 to 568.808;

21 (d) The Port of Portland; or

22 (e) Procurements for client services, [as defined in OAR 125-246-0110] **the definition and scope
 23 of which the Oregon Department of Administrative Services specifies by rule.**

24 **SECTION 4.** ORS 279B.033 is amended to read:

25 279B.033. (1)(a) In the cost analysis required under ORS 279B.030, a contracting agency shall:

26 [(a)] (A) Estimate the contracting agency’s cost of performing the services, including:

27 [(A)] (i) Salary or wage and benefit costs for contracting agency employees who are directly
 28 involved in performing the services, including employees who inspect, supervise or monitor the
 29 performance of the services.

30 [(B)] (ii) Material costs, including costs for space, energy, transportation, storage, raw and fin-
 31 ished materials, equipment and supplies.

32 [(C)] (iii) Costs incurred in planning for, training for, starting up, implementing, transporting and
 33 delivering the services and costs related to stopping and dismantling a project or operation because
 34 the contracting agency intends to procure a limited quantity of services or procure the services
 35 within a defined or limited period of time.

36 [(D)] (iv) Miscellaneous costs related to performing the services. The contracting agency may
 37 not include in the cost analysis the contracting agency’s indirect overhead costs for existing salaries
 38 or wages and benefits for administrators or for rent, equipment, utilities and materials except to the
 39 extent that the costs are attributable solely to performing the services and would not exist unless
 40 the contracting agency performs the services.

41 [(b)] (B) Estimate the cost a potential contractor would incur **and the profit the potential
 42 contractor would realize** in performing the services, including:

43 [(A)] (i) Average or actual salary or wage and benefit costs for contractors and employees who:

44 [(i)] (I) Work in the industry or business most closely involved in performing the services that
 45 the contracting agency intends to procure; and

1 [(ii)] **(II)** Would be necessary and directly involved in performing the services or who would
 2 inspect, supervise or monitor the performance of the services;

3 [(B)] **(ii)** Material costs, including costs for space, energy, transportation, storage, raw and fin-
 4 ished materials, equipment and supplies; and

5 [(C)] **(iii)** Miscellaneous costs related to performing the services, including but not limited to
 6 reasonably foreseeable fluctuations in the costs for the items identified in this [subsection] **para-**
 7 **graph** over the expected duration of the procurement.

8 **(b) In the cost analysis required under ORS 279B.030, a contracting agency may not in-**
 9 **clude proceeds or revenues from a sale, or costs incurred to replace, any of the contracting**
 10 **agency’s long-term assets, including capital assets, vehicles or other durable goods.**

11 (2)(a) After comparing the difference between the costs estimated as provided in subsection
 12 [(1)(a)] **(1)(a)(A)** of this section with the costs estimated as provided in subsection [(1)(b)] **(1)(a)(B)**
 13 of this section, except as provided in paragraph (b) of this subsection, the contracting agency may
 14 proceed with the procurement only if the contracting agency would incur more cost in performing
 15 the services with the contracting agency’s own personnel and resources than the contracting agency
 16 would incur in procuring the services from a contractor. The contracting agency may not proceed
 17 with the procurement if the [sole] **primary** reason that the costs estimated in subsection [(1)(b)]
 18 **(1)(a)(B)** of this section are lower than the costs estimated in subsection [(1)(a)] **(1)(a)(A)** of this
 19 section is because the costs estimated in subsection [(1)(b)(A)] **(1)(a)(B)(i)** of this section are lower
 20 than the costs estimated in subsection [(1)(a)(A)] **(1)(a)(A)(i)** of this section.

21 (b) A contracting agency may proceed with a procurement even if the contracting agency de-
 22 termines that the contracting agency would incur less cost in providing the services with the con-
 23 tracting agency’s own personnel and resources if at the time the contracting agency intends to
 24 conduct a procurement, the contracting agency lacks personnel and resources that are necessary to
 25 perform the services within the time in which the services are required. If the contracting agency
 26 conducts a procurement under the conditions described in this paragraph, the contracting agency
 27 shall:

28 (A) Keep a record of the cost analysis and findings that the contracting agency makes for each
 29 procurement the contracting agency conducts under this section, along with the basis for the con-
 30 tracting agency’s decision to proceed with the procurement; and

31 (B) Collect and provide copies of the records described in subparagraph (A) of this paragraph
 32 each calendar quarter to the local contract review board, if the contracting agency is a local con-
 33 tracting agency, or to the Emergency Board, if the contracting agency is a state contracting agency.

34 (c) If the contracting agency is a state contracting agency, in addition to complying with the
 35 provisions of paragraph (b) of this subsection the contracting agency shall prepare a request to the
 36 Governor for an appropriation and any authority that is necessary for the contracting agency to
 37 hire personnel and obtain resources necessary to perform the services that the contracting agency
 38 procured under the conditions described in paragraph (b) of this subsection. The request must in-
 39 clude a copy of the records that the contracting agency provided to the Emergency Board under
 40 paragraph (b)(B) of this subsection.

41 (3) A cost analysis, record, documentation or determination made under this section is a public
 42 record.

43 **SECTION 5. (1) Section 2 of this 2013 Act and the amendments to ORS 279B.030 and**
 44 **279B.033 by sections 3 and 4 of this 2013 Act become operative 91 days after the effective date**
 45 **of this 2013 Act.**

1 **(2) The Director of the Oregon Department of Administrative Services, the Director of**
2 **Transportation, the Attorney General or a contracting agency that adopts rules under ORS**
3 **279A.065 may take any action before the operative date specified in subsection (1) of this**
4 **section that is necessary to enable the director, the Attorney General or the contracting**
5 **agency to exercise the duties, functions and powers conferred on the director, the Attorney**
6 **General or the contracting agency by section 2 of this 2013 Act and the amendments to ORS**
7 **279B.030 and 279B.033 by sections 3 and 4 of this 2013 Act.**

8 **SECTION 6.** **Section 2 of this 2013 Act applies to procurements with which a contracting**
9 **agency proceeded on or after the operative date specified in section 5 of this 2013 Act.**

10 **SECTION 7.** **This 2013 Act being necessary for the immediate preservation of the public**
11 **peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect**
12 **on its passage.**