

House Bill 3116

Sponsored by COMMITTEE ON HIGHER EDUCATION AND WORKFORCE DEVELOPMENT

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**.

Removes Oregon University System's exemption from Public Contracting Code.

Requires contracting agency to post on Oregon transparency website cost analysis, records, documentation, feasibility determination and other determination related to decision to procure services.

Becomes operative January 1, 2014.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to public contracting; creating new provisions; amending ORS 279A.025, 279B.033, 279B.036
3 and 351.086; and declaring an emergency.

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

5 **SECTION 1.** ORS 279A.025 is amended to read:

6 279A.025. (1) Except as provided in subsections (2) to (4) of this section, the Public Contracting
7 Code applies to all public contracting.

8 (2) The Public Contracting Code does not apply to:

9 (a) Contracts between a contracting agency and:

10 (A) Another contracting agency;

11 (B) The Oregon Health and Science University;

12 (C) The Oregon State Bar;

13 (D) A governmental body of another state;

14 (E) The federal government;

15 (F) An American Indian tribe or an agency of an American Indian tribe;

16 (G) A nation, or a governmental body in a nation, other than the United States; or

17 (H) An intergovernmental entity formed between or among:

18 (i) Governmental bodies of this or another state;

19 (ii) The federal government;

20 (iii) An American Indian tribe or an agency of an American Indian tribe;

21 (iv) A nation other than the United States; or

22 (v) A governmental body in a nation other than the United States;

23 (b) Agreements authorized by ORS chapter 190 or by a statute, charter provision, ordinance or
24 other authority for establishing agreements between or among governmental bodies or agencies or
25 tribal governing bodies or agencies;

26 (c) Insurance and service contracts as provided for under ORS 414.115, 414.125, 414.135 and
27 414.145 for purposes of source selection;

28 (d) Grants;

29 (e) Contracts for professional or expert witnesses or consultants to provide services or testimony

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 relating to existing or potential litigation or legal matters in which a public body is or may become
 2 interested;

3 (f) Acquisitions or disposals of real property or interest in real property;

4 (g) Sole-source expenditures when rates are set by law or ordinance for purposes of source se-
 5 lection;

6 (h) Contracts for *[the procurement or distribution of]* **procuring or distributing** textbooks;

7 (i) Procurements by a contracting agency from an Oregon Corrections Enterprises program;

8 (j) The procurement, transportation or distribution of distilled liquor, as defined in ORS 471.001,
 9 or the appointment of agents under ORS 471.750 by the Oregon Liquor Control Commission;

10 (k) Contracts *[entered into under ORS chapter 180 between]* the Attorney General and private
 11 counsel or special legal assistants **enter into under ORS chapter 180**;

12 (L) Contracts *[for the sale of]* **to sell** timber from lands *[owned or managed by]* the State Board
 13 of Forestry and the State Forestry Department **own or manage**;

14 (m) Contracts **the State Forester or the State Board of Forestry enters into** for forest
 15 protection or forest related activities, as described in ORS 477.406, *by the State Forester or the State*
 16 *Board of Forestry*];

17 (n) Sponsorship agreements *[entered into by]* the State Parks and Recreation Director **enters**
 18 **into** in accordance with ORS 565.080 (4);

19 (o) Contracts *[entered into by]* the Housing and Community Services Department **enters into** in
 20 exercising the department's duties prescribed in ORS chapters 456 and 458, except that the
 21 department's public contracting for goods and services is subject to ORS chapter 279B;

22 (p) Contracts *[entered into by]* the State Treasurer **enters into** in exercising the powers of *[that*
 23 *office]* **the State Treasurer that are** prescribed in ORS chapters 178, 286A, 287A, 289, 293, 294 and
 24 295, including but not limited to investment contracts and agreements, banking services, clearing
 25 house services and collateralization agreements, bond documents, certificates of participation and
 26 other debt repayment agreements, and any associated contracts, agreements and documents, re-
 27 gardless of whether the obligations that the contracts, agreements or documents establish are gen-
 28 eral, special or limited, except that the State Treasurer's public contracting for goods and services
 29 is subject to ORS chapter 279B;

30 (q) Contracts, agreements or other documents entered into, issued or established in connection
 31 with:

32 (A) The issuance of obligations, as defined in ORS 286A.100 and 287A.310, of a public body;

33 (B) The making of program loans and similar extensions or advances of funds, aid or assistance
 34 by a public body to a public or private body for the purpose of carrying out, promoting or sustaining
 35 activities or programs authorized by law; or

36 (C) The investment of funds by a public body as authorized by law, and other financial trans-
 37 actions of a public body that by *[their]* **the character of the transactions** cannot practically be
 38 established under the competitive contractor selection procedures of ORS 279B.050 to 279B.085;

39 (r) Contracts for employee benefit plans as provided in ORS 243.105 (1), 243.125 (4), 243.221,
 40 243.275, 243.291, 243.303 and 243.565;

41 (s) Contracts for employee benefit plans as provided in ORS 243.860 to 243.886; or

42 (t) Any other public contracting of a public body specifically exempted from the code by another
 43 provision of law.

44 (3) The Public Contracting Code does not apply to the contracting activities of:

45 (a) The Oregon State Lottery Commission;

1 [(b) *The Oregon University System and member public universities, except as provided in ORS*
2 *351.086;*]

3 [(c)] (b) The legislative department;

4 [(d)] (c) The judicial department;

5 [(e)] (d) Semi-independent state agencies listed in ORS 182.454, except as provided in ORS
6 279.835 to 279.855 and 279A.250 to 279A.290;

7 [(f)] (e) Oregon Corrections Enterprises;

8 [(g)] (f) The Oregon Film and Video Office, except as provided in ORS 279A.100 and 279A.250
9 to 279A.290;

10 [(h)] (g) The Travel Information Council, except as provided in ORS 279A.250 to 279A.290;

11 [(i)] (h) The Oregon 529 College Savings Network and the Oregon 529 College Savings Board;

12 [(j)] (i) The Oregon Innovation Council;

13 [(k)] (j) The Oregon Utility Notification Center; or

14 [(L)] (k) Any other public body [*specifically exempted from the code by*] **that** another provision
15 of law **specifically exempts from the code**.

16 (4) ORS 279A.200 to 279A.225 and 279B.050 to 279B.085 do not apply to contracts made with
17 qualified nonprofit agencies providing employment opportunities for individuals with disabilities un-
18 der ORS 279.835 to 279.855.

19 **SECTION 2.** ORS 279B.033 is amended to read:

20 279B.033. (1) In the cost analysis required under ORS 279B.030, a contracting agency shall:

21 (a) Estimate the contracting agency's cost of performing the services, including:

22 (A) Salary or wage and benefit costs for contracting agency employees who are directly involved
23 in performing the services, including employees who inspect, supervise or monitor the performance
24 of the services.

25 (B) Material costs, including costs for space, energy, transportation, storage, raw and finished
26 materials, equipment and supplies.

27 (C) Costs incurred in planning for, training for, starting up, implementing, transporting and de-
28 livering the services and costs related to stopping and dismantling a project or operation because
29 the contracting agency intends to procure a limited quantity of services or procure the services
30 within a defined or limited period of time.

31 (D) Miscellaneous costs related to performing the services. The contracting agency may not
32 include in the cost analysis the contracting agency's indirect overhead costs for existing salaries
33 or wages and benefits for administrators or for rent, equipment, utilities and materials except to the
34 extent that the costs are attributable solely to performing the services and would not exist unless
35 the contracting agency performs the services.

36 (b) Estimate the cost a potential contractor would incur in performing the services, including:

37 (A) Average or actual salary or wage and benefit costs for contractors and employees who:

38 (i) Work in the industry or business most closely involved in performing the services that the
39 contracting agency intends to procure; and

40 (ii) Would be necessary and directly involved in performing the services or who would inspect,
41 supervise or monitor the performance of the services;

42 (B) Material costs, including costs for space, energy, transportation, storage, raw and finished
43 materials, equipment and supplies; and

44 (C) Miscellaneous costs related to performing the services, including but not limited to reason-
45 ably foreseeable fluctuations in the costs for the items identified in this subsection over the expected

1 duration of the procurement.

2 (2)(a) After comparing the difference between the costs estimated as provided in subsection (1)(a)
 3 of this section with the costs estimated as provided in subsection (1)(b) of this section, except as
 4 provided in paragraph (b) of this subsection, the contracting agency may proceed with the procure-
 5 ment only if the contracting agency would incur more cost in performing the services with the
 6 contracting agency's own personnel and resources than the contracting agency would incur in pro-
 7 curing the services from a contractor. The contracting agency may not proceed with the procure-
 8 ment if the sole reason that the costs estimated in subsection (1)(b) of this section are lower than
 9 the costs estimated in subsection (1)(a) of this section is because the costs estimated in subsection
 10 (1)(b)(A) of this section are lower than the costs estimated in subsection (1)(a)(A) of this section.

11 (b) A contracting agency may proceed with a procurement even if the contracting agency de-
 12 termines that the contracting agency would incur less cost in providing the services with the con-
 13 tracting agency's own personnel and resources if at the time the contracting agency intends to
 14 conduct a procurement, the contracting agency lacks personnel and resources that are necessary to
 15 perform the services within the time in which the services are required. If the contracting agency
 16 conducts a procurement under the conditions described in this paragraph, the contracting agency
 17 shall:

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

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

24 (c) If the contracting agency is a state contracting agency, in addition to complying with the
 25 provisions of paragraph (b) of this subsection the contracting agency shall prepare a request to the
 26 Governor for an appropriation and any authority that is necessary for the contracting agency to
 27 hire personnel and obtain resources necessary to perform the services that the contracting agency
 28 procured under the conditions described in paragraph (b) of this subsection. The request must in-
 29 clude a copy of the records that the contracting agency provided to the Emergency Board under
 30 paragraph (b)(B) of this subsection.

31 (3) A cost analysis, record, documentation or determination made under this section is a public
 32 record, **and a contracting agency shall post the contracting agency's cost analyses, records,**
 33 **documentation or determinations each quarter on the Oregon transparency website de-**
 34 **scribed in ORS 184.483.**

35 **SECTION 3.** ORS 279B.036 is amended to read:

36 279B.036. (1) Notwithstanding the provisions of ORS 279B.033 (2)(a), a contracting agency may
 37 proceed with a procurement if the contracting agency reasonably determines in writing that using
 38 the contracting agency's own personnel or resources to perform the services that the contracting
 39 agency intends to procure is not feasible. The contracting agency may make the determination de-
 40 scribed in this subsection without conducting a cost analysis under ORS 279B.033 if the contracting
 41 agency finds that:

42 (a) The contracting agency lacks the specialized capabilities, experience or technical or other
 43 expertise necessary to perform the services. In making the finding, the contracting agency shall
 44 compare the contracting agency's capability, experience or expertise in the field most closely in-
 45 volved in performing the services with a potential contractor's capability, experience or expertise

1 in the same or a similar field.

2 (b) Special circumstances require the contracting agency to procure the services by contract.
 3 Special circumstances may include, but are not limited to, circumstances in which:

4 (A) The terms under which the contracting agency receives a grant or other funds for use in a
 5 procurement require the contracting agency to obtain services through an independent contractor;

6 (B) Other state or federal law requires the contracting agency to procure services through an
 7 independent contractor;

8 (C) The procurement is for services that are incidental to a contract for purchasing or leasing
 9 real or personal property, including service and maintenance agreements for equipment that is
 10 leased or rented;

11 (D) The contracting agency cannot accomplish policy, administrative or legal goals, including
 12 but not limited to avoiding conflicts of interest or ensuring independent or unbiased findings in
 13 cases when using the contracting agency's existing personnel or persons the contracting agency
 14 could hire through a regular or ordinary process would not be suitable;

15 (E) The procurement is for services to which the provisions of ORS 279B.080 apply;

16 (F) The procurement is for services, the need for which is so urgent, temporary or occasional
 17 that attempting to perform the services with the contracting agency's own personnel or resources
 18 would cause a delay that would frustrate the purpose for obtaining the services; or

19 (G) The services that the contracting agency intends to procure will be completed within six
 20 months after the date on which the contract for the services is executed.

21 (2) A finding or determination and supporting documentation for a finding or determination
 22 made under this section is a public record, **and a contracting agency shall post the contracting**
 23 **agency's findings or determinations each quarter on the Oregon transparency website de-**
 24 **scribed in ORS 184.483.**

25 **SECTION 4.** ORS 351.086, as amended by section 48, chapter 104, Oregon Laws 2012, is
 26 amended to read:

27 351.086. (1) Except as otherwise provided in this chapter and ORS chapter 352, the provisions
 28 of ORS chapters 182, 240, 270, 273, 276, 278, [279A, 279B, 279C,] 282, 283, 291 and 292 and ORS
 29 180.060, 180.160, 180.210, 180.220, 180.225 and 180.230 do not apply to the Oregon University System.

30 (2) Notwithstanding subsection (1) of this section, the provisions of ORS 182.100, 182.109,
 31 240.167, 276.073 to 276.090, [279A.065 (2), 279B.055 (3), 279C.380 (1)(a) and (3), 279C.600 to 279C.625,
 32 279C.800, 279C.810, 279C.825, 279C.830, 279C.835, 279C.840, 279C.845, 279C.850, 279C.855, 279C.860,
 33 279C.865, 279C.870,] 283.085 to 283.092, 291.200, 291.201 to 291.222, 291.223, 291.224 (2) and (6),
 34 291.226, 291.272 to 291.278, 291.322 to 291.334, 291.405, 291.407, 291.445, 292.043 and 292.044 apply to
 35 the Oregon University System.

36 (3) Notwithstanding subsection (1) of this section, ORS 273.413 to 273.456 apply to any structure,
 37 equipment or asset owned by the Oregon University System that is encumbered by a certificate of
 38 participation.

39 (4) Notwithstanding subsection (6) of this section:

40 (a) The provisions of ORS chapters 35, 190, 192, 244 and 297 and ORS 30.260 to 30.460, 184.480,
 41 184.483, 184.486, 184.488, 200.005 to 200.025, 200.045 to 200.090, 200.100 to 200.120, 200.160 to 200.200,
 42 236.605 to 236.640, 243.650 to 243.782, 243.800, 243.820, 243.830, 243.850, 243.910 to 243.945, 307.090
 43 and 307.112 apply to the Oregon University System under the same terms as [they] **the provisions**
 44 apply to other public bodies other than the State of Oregon.

45 (b) The provisions of ORS [chapter] **chapters 279A, 279B, 279C and 286A** and ORS 293.115,

1 293.117, 293.130, 293.169, 293.171, 293.205 to 293.225, 293.250, 293.265 to 293.280, 293.285, 293.295,
 2 293.321, 293.353, 293.375, 293.406, 293.465 to 293.485, 293.490, 293.495, 293.525, 293.701 to 293.820,
 3 293.875, 293.880 and 293.990 apply to the Oregon University System under the same terms as *[they]*
 4 **the provisions** apply to state agencies with moneys *[held by]* the State Treasurer **holds**, to the
 5 Oregon University System Fund established in ORS 351.506 and to any other moneys deposited with
 6 or held by the State Treasurer for the Oregon University System.

7 (5) Notwithstanding subsections (1) and (6) of this section, the Oregon University System and
 8 *[its]* **the agents and employees of the Oregon University System** remain subject to all statutes and
 9 administrative rules of this state that create rights, benefits or protections in favor of military vet-
 10 erans, service members and families of service members to the same extent as an agency of this
 11 state would be subject to such statutes and administrative rules.

12 (6)(a) Except as provided by paragraph (b) of this subsection, the Oregon University System, as
 13 a distinct governmental entity, is not subject to any provision of law enacted after January 1, 2011,
 14 with respect to any governmental entity, that is unique to governmental entities, unless the pro-
 15 vision specifically provides that *[it]* **the provision** applies to the Oregon University System.

16 (b) To the same extent as state agencies that borrow through the State Treasurer or that have
 17 moneys held in the State Treasury, the Oregon University System is subject to any provision of law
 18 enacted after January 1, 2011, that relates to or affects the borrowings of the Oregon University
 19 System through the State Treasurer or the deposit, payment or investment of moneys held in the
 20 Oregon University System Fund or any other moneys held for the Oregon University System in the
 21 State Treasury.

22 (7) In carrying out the duties, functions and powers imposed by law upon the Oregon University
 23 System, the State Board of Higher Education or the Chancellor of the Oregon University System
 24 may contract with any public agency *[for the performance of such]* **to perform** duties, functions and
 25 powers *[as]* **that** the board or chancellor considers appropriate.

26 **SECTION 5. (1) The amendments to ORS 279A.025, 279B.033, 279B.036 and 351.086 by**
 27 **sections 1 to 4 of this 2013 Act become operative on January 1, 2014.**

28 **(2) The Director of the Oregon Department of Administrative Services, the Director of**
 29 **Transportation, the Attorney General, the State Board of Higher Education, the Chancellor**
 30 **of the Oregon University System, a president of an institution within the Oregon University**
 31 **System or a contracting agency that adopts rules under ORS 279A.065 may take any action**
 32 **before the operative date specified in subsection (1) of this section that is necessary to enable**
 33 **the director, the Attorney General, the board, the chancellor, the president or the con-**
 34 **tracting agency to exercise the duties, functions and powers conferred on the director, the**
 35 **Attorney General, the board, the chancellor, the president or the contracting agency by the**
 36 **amendments to ORS 279A.025, 279B.033, 279B.036 and 351.086 by sections 1 to 4 of this 2013**
 37 **Act.**

38 **SECTION 6. The amendments to ORS 279A.025, 279B.033, 279B.036 and 351.086 by sections**
 39 **1 to 4 of this 2013 Act apply to public contracts that a contracting agency advertises or**
 40 **otherwise solicits or, if the contracting agency does not advertise or solicit the contract, to**
 41 **contracts into which the contracting agency enters on or after the operative date specified**
 42 **in section 5 of this 2013 Act.**

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

