

SENATE AMENDMENTS TO SENATE BILL 254

By COMMITTEE ON BUSINESS AND TRANSPORTATION

April 22

1 On page 1 of the printed bill, delete lines 6 through 27 and delete pages 2 through 4.

2 On page 5, delete lines 1 through 7 and insert:

3 **“SECTION 1. Sections 2 and 3 of this 2013 Act are added to and made a part of ORS**
4 **chapter 279C.**

5 **“SECTION 2. As used in this section and ORS 279A.065, 279C.307, 279C.335 and 279C.380**
6 **and section 3 of this 2013 Act:**

7 **“(1) ‘Construction manager/general contractor’ means a person that provides con-**
8 **struction manager/general contractor services to a contracting agency under a public im-**
9 **provement contract.**

10 **“(2)(a) ‘Construction manager/general contractor services’ means construction-related**
11 **services that a contracting agency procures by means of an alternative contracting method**
12 **under ORS 279C.335 and that:**

13 **“(A) Include a construction manager/general contractor’s:**

14 **“(i) Functioning as a member of a project team that includes the contracting agency, the**
15 **architect or engineer that designs the public improvement under a separate contract with**
16 **the contracting agency and other contractors and consultants; and**

17 **“(ii) Reviewing and analyzing a design for a public improvement in order to:**

18 **“(I) Suggest changes in the design that minimize potential errors, delays, unexpected**
19 **costs and other problems during construction;**

20 **“(II) Recommend means by which the contracting agency may achieve the functions of**
21 **the public improvement or a component of the public improvement safely, reliably, efficiently**
22 **and at the lowest overall cost;**

23 **“(III) Improve the value and quality of the public improvement; and**

24 **“(IV) Reduce the time necessary to complete the public improvement; and**

25 **“(B) May include, depending on the specific terms of the public improvement contract**
26 **and on whether the contracting agency proceeds with the public improvement after com-**
27 **pleting a design, developing a scope of work and setting a budget, a construction**
28 **manager/general contractor’s:**

29 **“(i) Devising a schedule for constructing the public improvement;**

30 **“(ii) Estimating construction, materials, labor and other costs for the public improve-**
31 **ment;**

32 **“(iii) Establishing a fixed price, a guaranteed maximum price or other maximum price;**

33 **“(iv) Constructing portions of the public improvement and subcontracting portions to**
34 **other contractors;**

35 **“(v) Coordinating and overseeing the construction process; or**

1 “(vi) Performing other services related to constructing a public improvement in accord-
2 ance with the terms of the public improvement contract.

3 “(b) ‘Construction manager/general contractor services’ does not include services related
4 to constructing a public improvement under the terms of:

5 “(A) A public improvement contract that a contracting agency awards on the basis of a
6 competitive bidding process that does not require an exemption under ORS 279C.335;

7 “(B) A public improvement contract that results from a design-build procurement, as
8 defined in rules the Attorney General or a contracting agency adopts under ORS 279A.065;

9 “(C) An energy savings performance contract;

10 “(D) A public improvement contract for a transportation project that a contracting
11 agency awards on the basis of:

12 “(i) An evaluation of a bidder’s qualifications, the amount of the bid and the amount of
13 time the bidder will take to complete the public improvement; or

14 “(ii) An evaluation of the bidder’s qualifications and past experience with similar public
15 improvements, the amount of the bid and the approach the bidder intends to use to complete
16 the public improvement; or

17 “(E) A public improvement contract that is otherwise exempt from a requirement for
18 competitive bidding under ORS 279C.335 (2).

19 “(3) ‘Guaranteed maximum price’ means the total price at which a construction
20 manager/general contractor agrees to provide construction manager/general contractor ser-
21 vices to a contracting agency in accordance with the terms and conditions and scope of work
22 for a specific public improvement contract and within which are:

23 “(a) All costs the contracting agency agrees to reimburse and all fees the contracting
24 agency agrees to pay for completing the public improvement; and

25 “(b) Any contingent costs, fees or other charges specifically identified in the public im-
26 provement contract.

27 “SECTION 3. (1) A contracting agency that intends to procure construction
28 manager/general contractor services shall procure the construction manager/general con-
29 tractor services in accordance with model rules the Attorney General adopts under ORS
30 279A.065 (3).

31 “(2) A contracting agency shall, in documents the contracting agency uses to procure
32 construction manager/general contractor services:

33 “(a) Describe the criteria the contracting agency will use to evaluate proposals for the
34 construction manager/general contractor services the contracting agency seeks and what
35 weight the contracting agency will give each criterion in the evaluation;

36 “(b) Describe how the contracting agency will use interviews in the contracting agency’s
37 procurement and how the contracting agency will evaluate information the contracting
38 agency obtains from interviews, if the contracting agency uses interviews in the procure-
39 ment;

40 “(c) Describe any other criteria the contracting agency may consider in selecting a con-
41 struction manager/general contractor;

42 “(d) Describe how the contracting agency will combine scoring from the interviews, from
43 evaluating the proposals and from other criteria specified in accordance with paragraph (c)
44 of this subsection to arrive at a proposer’s final score and ranking;

45 “(e) State that any savings the construction manager/general contractor realizes in per-

1 forming the public improvement contract will accrue to the contracting agency, unless the
2 public improvement contract provides otherwise;

3 “(f) Specify terms and conditions that govern how the guaranteed maximum price will
4 be determined and whether the guaranteed maximum price includes or is based on unit
5 pricing or allows for work that is constructed in phases;

6 “(g) State that the contracting agency will not pay any amount that exceeds a fixed price,
7 guaranteed maximum price or other maximum price specified in the public improvement
8 contract unless the amount results from material changes to the scope of work set forth in
9 the public improvement contract;

10 “(h) State that the contracting agency will conduct the procurement in accordance with
11 model rules the Attorney General adopts under ORS 279A.065 (3);

12 “(i) Specify deadlines and time periods for the procurement that allow prospective con-
13 tractors a reasonable opportunity to submit proposals, including but not limited to:

14 “(A) The date and time by which the contracting agency must receive proposals;

15 “(B) The dates on which or the time periods during which the contracting agency will
16 conduct interviews, if the contracting agency will conduct interviews for the procurement;

17 “(C) The date by which the contracting agency plans to indicate an intent to award the
18 public improvement contract; and

19 “(D) The time period during which the contracting agency will meet with proposers that
20 the contracting agency did not select for the public improvement contract, if a proposer re-
21 quests a meeting to discuss the procurement;

22 “(j) State whether the contracting agency will discuss the procurement with prospective
23 bidders or proposers before establishing a competitive range or before awarding a public
24 improvement contract;

25 “(k) Identify any terms and conditions the contracting agency will discuss or negotiate
26 before entering into the public improvement contract;

27 “(L) State whether the contracting agency will allow a proposer to submit a revised
28 proposal and identify the elements of the proposal that the proposer may revise; and

29 “(m) Describe the process, if any, that the contracting agency intends to use to discuss
30 and negotiate terms and conditions for the public improvement contract, accept and evaluate
31 revisions to a proposal and establish a competitive range.

32 “(3) By the earlier of the date on which a contracting agency and a construction
33 manager/general contractor agree on a fixed price, guaranteed maximum price or other
34 maximum price or the date on which the construction manager/general contractor begins
35 to solicit offers for construction services from subcontractors, the public improvement con-
36 tract that the contracting agency negotiates with the construction manager/general con-
37 tractor must:

38 “(a) Describe the methods the construction manager/general contractor will use to
39 qualify and select subcontractors. The methods must be competitive and should provide
40 prospective subcontractors with a reasonable opportunity to participate in the construction
41 manager/general contractor’s qualification and selection process.

42 “(b) Identify the portions of the construction work under the public improvement con-
43 tract for which the construction manager/general contractor may waive the qualification and
44 selection process described in paragraph (a) of this subsection and describe:

45 “(A) How the construction manager/general contractor may determine the portions of

1 the construction work that will not be subject to the qualification and selection process de-
2 scribed in paragraph (a) of this subsection; and

3 “(B) The process the construction manager/general contractor will use to qualify and
4 select prospective subcontractors for the portions of the construction work that are not
5 subject to the qualification and selection process described in paragraph (a) of this sub-
6 section.

7 “(c) Identify the conditions under which the construction manager/general contractor or
8 an affiliate or subsidiary of the construction manager/general contractor may perform or
9 compete with other prospective subcontractors to perform construction work under the
10 public improvement contract and describe the methods the construction manager/general
11 contractor will use to qualify and select an affiliate or subsidiary to perform the construction
12 work.

13 “(d) Describe how the construction manager/general contractor will announce which
14 prospective subcontractors the construction manager/general contractor has selected to
15 perform construction services in connection with the public improvement contract.

16 “(e) Describe the conditions under which the construction manager/general contractor
17 will discuss the qualification and selection process described in paragraph (a) of this sub-
18 section in response to a request from a prospective subcontractor that the construction
19 manager/general contractor did not select for a subcontract.

20 “**SECTION 4.** ORS 279A.065 is amended to read:

21 “279A.065. (1) The Attorney General shall prepare and maintain model rules [*of procedure*] **that**
22 **specify procedures for public contracting under the Public Contracting Code and that are**
23 appropriate for [*use by*] all contracting agencies [*governing public contracting under the Public Con-*
24 *tracting Code and*] **to use. The Attorney General** may devise and publish forms for use
25 [*therewith*] **with the model rules.** The Attorney General shall adopt the model rules in [*the manner*
26 *provided by*] **accordance with** ORS chapter 183. Before adopting or amending a model rule, the
27 Attorney General shall consult with the Director of the Oregon Department of Administrative Ser-
28 vices, the Director of Transportation, representatives of county governments, representatives of city
29 governments, representatives of school boards and other knowledgeable persons.

30 “(2) The Attorney General shall adopt model rules [*appropriate for use by all contracting agencies*
31 *to govern the*] **that specify** procedures [*for entering*] **for all contracting agencies to use to enter**
32 into energy savings performance contracts. Before adopting or amending a rule under this sub-
33 section, the Attorney General shall consult with the Oregon Department of Administrative Services,
34 the State Department of Energy, the Oregon University System, local contracting agencies and other
35 knowledgeable persons. The Attorney General may develop standard contract forms for use with
36 energy savings performance contracts.

37 “(3)(a) **The Attorney General shall adopt model rules that specify procedures for all**
38 **contracting agencies to use to procure construction manager/general contractor services.**
39 **Before adopting or amending a rule under this subsection, the Attorney General shall consult**
40 **with the Director of the Oregon Department of Administrative Services, the Director of**
41 **Transportation, the Director of the Department of Corrections, representatives of county**
42 **governments, representatives of city governments, representatives of contracting agencies**
43 **that procure construction manager/general contractor services, construction contractors**
44 **and subcontractors, architects, engineers and project managers that participate in providing**
45 **construction manager/general contractor services and other knowledgeable persons.**

1 **“(b) Notwithstanding subsection (6) of this section, a contracting agency may not adopt**
2 **the contracting agency’s own rules for procuring construction manager/general contractor**
3 **services.**

4 “[(3)] (4) After each legislative session, the Attorney General shall review all laws [*passed by*]
5 the Legislative Assembly **passed** that affect public contracting to determine if the **Attorney Gen-**
6 **eral should amend or repeal a** model [*rules*] **rule** prepared under this section [*should be modified*
7 *by the adoption of*] **or adopt** a new rule [*or by the amendment or repeal of an existing rule*]. If the
8 Attorney General determines that a modification of the model rules is necessary, the Attorney
9 General shall prepare the modification within such time as to allow the modification to take effect
10 no later than 120 days after the effective date of the legislation that caused the **Attorney General**
11 **to modify the** rule. [*to be modified. However,*] The Attorney General may prepare a modification
12 to take effect 121 or more days after the effective date of the legislation if the Attorney General
13 [*provides notice designating the time period within which the modification will take effect to*], **in a**
14 **notice to** the state agencies and persons listed in subsection (1) of this section, **specifies when the**
15 **modification will take effect.**

16 “[(4)] (5) A contracting agency that has not adopted [*its*] **the contracting agency’s** own rules
17 of procedure in accordance with subsection [(5)] (6) of this section is subject to the model rules
18 [*adopted by*] the Attorney General **adopts** under this section, including all modifications to the
19 model rules that the Attorney General may adopt.

20 “[(5)(a)] (6)(a) A contracting agency may adopt [*its*] **the contracting agency’s** own rules of
21 procedure for public contracts that:

22 “(A) Specifically state that the model rules [*adopted by*] the Attorney General **adopts** under this
23 section do not apply to the contracting agency; and

24 “(B) Prescribe the rules of procedure that the contracting agency will use for public contracts,
25 which may include portions of the model rules [*adopted by*] the Attorney General **adopts.**

26 “(b) A contracting agency that adopts rules under this [*section*] **subsection** shall review the
27 rules each time the Attorney General modifies the model rules under this section to determine
28 whether the contracting agency should modify [*its*] **the contracting agency’s** rules to ensure com-
29 pliance with statutory changes.”.

30 In line 8, delete “4” and insert “5”.

31 In line 16, delete “5” and insert “6”.

32 In line 28, delete “, as defined”.

33 In line 29, delete “in section 2 of this 2013 Act,”.

34 In line 34, delete “6” and insert “7”.

35 On page 6, delete lines 4 through 45 and delete pages 7 and 8.

36 On page 9, delete lines 1 through 9 and insert:

37 “**SECTION 8.** ORS 279C.335 is amended to read:

38 “279C.335. (1) All public improvement contracts shall be based upon competitive bids except:

39 “(a) [*Contracts made*] **A public improvement contract** with a qualified nonprofit [*agencies*
40 *providing*] **agency that provides** employment opportunities for individuals with disabilities under
41 ORS 279.835 to 279.855.

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

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

44 “(d) A **public improvement** contract [*not to*] **with a contract price that does not** exceed
45 \$100,000 made under procedures for competitive quotes in ORS 279C.412 and 279C.414.

1 “(e) [*Contracts for*] **A contract to** repair, [*maintenance, improvement or protection of*] **maintain,**
2 **improve or protect** property [*obtained by*] the Department of Veterans’ Affairs **obtains** under ORS
3 407.135 and 407.145 (1).

4 “(f) **An** energy savings performance [*contracts entered*] **contract that a contracting agency**
5 **enters** into in accordance with rules of procedure adopted under ORS 279A.065.

6 “(2) Subject to subsection (4)(b) **and (c)** of this section, the Director of the Oregon Department
7 of Administrative Services, a local contract review board or, for contracts described in ORS
8 279A.050 (3)(b), the Director of Transportation may exempt a public improvement contract or a class
9 of public improvement contracts from the competitive bidding [*requirements*] **requirement** of sub-
10 section (1) of this section [*upon approval of*] **after the Director of the Oregon Department of**
11 **Administrative Services, the Director of Transportation or the local contract review board**
12 **approves** the following findings [*submitted by*] **that** the contracting agency **submits** or, if a state
13 agency is not the contracting agency, **that** the state agency **that is** seeking the exemption
14 **submits:**

15 “(a) [*It is unlikely that*] The exemption [*will*] **is unlikely to** encourage favoritism in [*the*]
16 awarding [*of*] public improvement contracts or substantially diminish competition for public im-
17 provement contracts.

18 “(b) [*The*] Awarding a [*of*] public improvement [*contracts*] **contract** under the exemption will
19 likely result in substantial cost savings **and other substantial benefits** to the contracting agency
20 **or the state agency that seeks the exemption**[, *to the state agency based upon the justification and*
21 *information described in ORS 279C.330*] or, if the [*contracts are*] **contract is** for a public [*improve-*
22 *ments*] **improvement** described in ORS 279A.050 (3)(b), to the contracting agency or the public. In
23 [*making the*] **approving a finding under this paragraph**, the Director of the Oregon Department
24 of Administrative Services, the Director of Transportation or the local contract review board
25 [*may*] **shall** consider the type, cost and amount of the contract[,] **and, to the extent applicable to**
26 **the particular public improvement contract or class of public improvement contracts, the**
27 **following:**

28 “(A) **How many** [*the number of*] persons **are** available to bid [*and such other factors as may be*
29 *deemed appropriate.*];

30 “(B) **The construction budget and the projected operating costs for the completed public**
31 **improvement;**

32 “(C) **Public benefits that may result from the public improvement contract;**

33 “(D) **Whether value engineering techniques may decrease the cost of the public im-**
34 **provement;**

35 “(E) **The cost and availability of specialized expertise that is necessary for the public**
36 **improvement;**

37 “(F) **Any likely increases in public safety;**

38 “(G) **Whether granting the exemption may reduce risks to the contracting agency, the**
39 **state agency or the public that are related to the public improvement;**

40 “(H) **Whether granting the exemption will affect the sources of funding for the public**
41 **improvement;**

42 “(I) **Whether granting the exemption will better enable the contracting agency to control**
43 **the impact that market conditions may have on the cost of and time necessary to complete**
44 **the public improvement;**

45 “(J) **Whether granting the exemption will better enable the contracting agency to address**

1 **the size and technical complexity of the public improvement;**

2 **“(K) Whether the public improvement involves new construction or renovates or re-**
3 **models an existing structure;**

4 **“(L) Whether the public improvement will be occupied or unoccupied during construction;**

5 **“(M) Whether the public improvement will require a single phase of construction work**
6 **or multiple phases of construction work to address specific project conditions; and**

7 **“(N) Whether the contracting agency or state agency has, or has retained under con-**
8 **tract, and will use contracting agency or state agency personnel, consultants and legal**
9 **counsel that have necessary expertise and substantial experience in alternative contracting**
10 **methods to assist in developing the alternative contracting method that the contracting**
11 **agency or state agency will use to award the public improvement contract and to help ne-**
12 **gotiate, administer and enforce the terms of the public improvement contract.**

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

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

31 **“(4) In granting exemptions under subsection (2) of this section, the Director of the Oregon**
32 **Department of Administrative Services, the Director of Transportation or the local contract review**
33 **board shall:**

34 **“(a) [When] If appropriate, direct the use of [alternate] alternative contracting methods that**
35 **take account of market realities and modern practices and are consistent with the public policy of**
36 **encouraging competition.**

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

42 **“(c) Require a contracting agency or state agency that procures construction**
43 **manager/general contractor services to conduct the procurement in accordance with model**
44 **rules the Attorney General adopts under ORS 279A.065 (3).**

45 **“(5)(a) A contracting agency or state agency shall hold a public hearing before [final**

1 *adoption of]* **approving** the findings required by subsection (2) of this section [*exempting*] **and before**
2 **the Director of the Oregon Department of Administrative Services, the Director of Trans-**
3 **portation or the local contract review board grants an exemption from the competitive bid-**
4 **ding requirement for** a public improvement contract or a class of public improvement contracts.
5 [*from the requirement of competitive bidding, a contracting agency or state agency shall hold a public*
6 *hearing.*]

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

9 “(c) The notice [*shall*] **must** state that the public hearing is for the purpose of taking comments
10 on the draft findings for an exemption from the competitive bidding requirement. At the time of the
11 notice, copies of the draft findings [*shall*] **must** be made available to the public. At the option of the
12 contracting agency or state agency, the notice may describe the process by which the findings are
13 finally adopted and may indicate the opportunity for [*any*] further public comment.

14 “(d) At the public hearing, the contracting agency or state agency shall offer an opportunity for
15 any interested party to appear and [*present*] comment.

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

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

27 “(7) A public improvement contract awarded under the competitive bidding requirement of sub-
28 section (1) of this section may be amended only in accordance with rules adopted under ORS
29 279A.065.

30 “(8) A public improvement [*contracts*] **contract that is** excepted from **the** competitive [*bid re-*
31 *quirements*] **bidding requirement** under subsection (1)(a), (c), (d), (e) or (f) of this section [*are*] **is**
32 not subject to the exemption requirements of subsection (2) of this section.”.

33 In line 10, delete “8” and insert “9”.

34 In line 30, delete “as defined in”.

35 In line 31, delete the boldfaced material.

36 In line 32, delete the boldfaced material.

37 On page 10, line 8, delete “9” and insert “10” and delete “Section 2” and insert “Sections 2 and
38 3”.

39 In line 9, delete “3 to 8” and insert “4 to 9”.

40 In line 17, delete “section 2” and insert “sections 2 and 3”.

41 In line 18, delete “3 to 8” and insert “4 to 9”.

42 In line 19, delete “10” and insert “11” and delete “Section 2” and insert “Sections 2 and 3”.

43 In line 20, delete “3 to 8” and insert “4 to 9”.

44 In line 22, delete “9” and insert “10”.

45 In line 24, delete “11” and insert “12”.

