

# Senate Bill 627

Sponsored by Senator STEINER HAYWARD, Representative JOHNSON; Representatives CONGER, WHISNANT (at the request of Oregon School Boards Association)

## 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**.

Raises threshold for requiring cost analysis for procurement from \$250,000 to \$2 million. Requires contracting agency to include overhead costs in estimation of costs contracting agency would incur in performing services subject to procurement. Removes prohibition on proceeding with procurement if contractor's costs are lower solely because contractor pays employees less. Removes requirement for state contracting agency to prepare request for appropriation to obtain resources necessary to perform service that state contracting agency determines would cost less for state contracting agency to perform but for which state contracting agency lacks necessary personnel and resources.

Becomes operative 91 days after effective date of Act.  
Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to public contracting; creating new provisions; amending ORS 279B.030, 279B.033 and  
3 279B.036; and declaring an emergency.

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

5 **SECTION 1.** ORS 279B.030 is amended to read:

6 279B.030. (1) Except as provided in ORS 279B.036, before conducting a procurement for services  
7 with an estimated contract price that exceeds [*\$250,000*] **\$2 million**, a contracting agency shall:

8 (a) Demonstrate, by means of a written cost analysis in accordance with ORS 279B.033, that the  
9 contracting agency would incur less cost in conducting the procurement than in performing the  
10 services with the contracting agency's own personnel and resources; or

11 (b) Demonstrate, in accordance with ORS 279B.036, that performing the services with the con-  
12 tracting agency's own personnel and resources is not feasible.

13 (2)(a) If a local contracting agency authorizes a department, bureau, office or other subdivision  
14 of the local contracting agency to conduct a procurement on behalf of another department, bureau,  
15 office or subdivision of the local contracting agency, the department, bureau, office or subdivision  
16 on [*whose*] behalf **of which** the procurement is conducted shall comply with [*the requirement set forth*  
17 *in*] subsection (1) of this section.

18 **(b) If a contracting agency conducts a procurement on behalf of another public body, the**  
19 **public body on behalf of which the contracting agency conducts the procurement shall com-**  
20 **ply with subsection (1) of this section.**

21 **(3)(a) If a contracting agency conducts a procurement for the purpose of establishing a**  
22 **price agreement under which more than one public body may contract for services, the**  
23 **contracting agency, before conducting the procurement, shall determine whether the con-**  
24 **tracting agency has adequate information to comply with subsection (1) of this section on**  
25 **behalf of all public bodies that might contract for services under the price agreement. After**  
26 **making the determination, the contracting agency may conduct the procurement to establish**

**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 the price agreement under the following conditions:

2 (A) If the contracting agency has adequate information to comply with subsection (1) of  
 3 this section on behalf of all public bodies that might contract for services under the price  
 4 agreement, the contracting agency shall comply with subsection (1) of this section before  
 5 conducting the procurement to establish the price agreement.

6 (B) If the contracting agency does not have adequate information to comply with sub-  
 7 section (1) of this section on behalf of all public bodies that might contract for services under  
 8 the price agreement, the contracting agency may conduct the procurement to establish the  
 9 price agreement without complying with subsection (1) of this section. The contracting  
 10 agency may not contract for services under the price agreement, however, until the con-  
 11 tracting agency complies with subsection (1) of this section, nor may the public body con-  
 12 tract for services under the price agreement until the public body complies with subsection  
 13 (1) of this section.

14 (b) A public body that contracts for services subject to a price agreement established in  
 15 accordance with paragraph (a)(B) of this subsection shall maintain an aggregated record of  
 16 the services the public body obtains under the price agreement. If the contract price of the  
 17 services the public body obtains under the price agreement in the aggregate exceeds or, if  
 18 the public body procures additional services, will exceed \$2 million during the term of the  
 19 price agreement, the public body shall comply with subsection (1) of this section before en-  
 20 tering into a contract for additional services under the price agreement.

21 (4) A public body may not divide a procurement into more than one contract for the  
 22 purpose of avoiding compliance with subsection (1) of this section.

23 [(3)] (5) Subsection (1) of this section does not apply to:

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

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

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

30 (d) The Port of Portland; or

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

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

34 279B.033. (1) In the cost analysis required under ORS 279B.030, a contracting agency shall:

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

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

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

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

45 (D) Miscellaneous costs related to performing the services. The contracting agency [*may not*]

1 **shall** include in the cost analysis the contracting agency's indirect overhead costs for existing sal-  
2 aries, [or] wages and benefits for administrators [or for] **and** rent, equipment, utilities and materials  
3 [except to the extent that the costs are attributable solely to performing the services and would not exist  
4 unless the contracting agency performs the services].

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

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

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

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

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

13 (C) Miscellaneous costs related to performing the services, including but not limited to reason-  
14 ably foreseeable fluctuations in the costs for the items identified in this subsection over the expected  
15 duration of the procurement.

16 (2)(a) After comparing the difference between the costs estimated as provided in subsection (1)(a)  
17 of this section with the costs estimated as provided in subsection (1)(b) of this section, except as  
18 provided in paragraph (b) of this subsection, the contracting agency may proceed with the procure-  
19 ment only if the contracting agency would incur more cost in performing the services with the  
20 contracting agency's own personnel and resources than the contracting agency would incur in pro-  
21 curing the services from a contractor. [The contracting agency may not proceed with the procurement  
22 if the sole reason that the costs estimated in subsection (1)(b) of this section are lower than the costs  
23 estimated in subsection (1)(a) of this section is because the costs estimated in subsection (1)(b)(A) of this  
24 section are lower than the costs estimated in subsection (1)(a)(A) of this section.]

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

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

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

38 [(c) If the contracting agency is a state contracting agency, in addition to complying with the pro-  
39 visions of paragraph (b) of this subsection the contracting agency shall prepare a request to the Gov-  
40 ernor for an appropriation and any authority that is necessary for the contracting agency to hire  
41 personnel and obtain resources necessary to perform the services that the contracting agency procured  
42 under the conditions described in paragraph (b) of this subsection. The request must include a copy  
43 of the records that the contracting agency provided to the Emergency Board under paragraph (b)(B)  
44 of this subsection.]

45 (3)(a) **Except as provided in paragraph (b) of this subsection,** a cost analysis, record, doc-

1umentation or determination made under this section is a public record.

2 **(b) A contracting agency that proceeds with a procurement after conducting an analysis**  
 3 **or making a determination under this section may withhold a cost analysis, record, doc-**  
 4 **umentation or determination the contracting agency makes under this section from disclo-**  
 5 **sure under ORS 192.410 to 192.505 until after the contracting agency issues a notice of intent**  
 6 **to award a contract.**

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

8 279B.036. (1) Notwithstanding the provisions of ORS 279B.033 (2)(a), a contracting agency may  
 9 proceed with a procurement if the contracting agency reasonably determines in writing that using  
 10 the contracting agency's own personnel or resources to perform the services that the contracting  
 11 agency intends to procure is not feasible. The contracting agency may make the determination de-  
 12 scribed in this subsection without conducting a cost analysis under ORS 279B.033 if the contracting  
 13 agency finds that:

14 (a) The contracting agency lacks the specialized capabilities, experience or technical or other  
 15 expertise necessary to perform the services. In making the finding, the contracting agency shall  
 16 compare the contracting agency's capability, experience or expertise in the field most closely in-  
 17 volved in performing the services with a potential contractor's capability, experience or expertise  
 18 in the same or a similar field.

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

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

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

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

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

32 (E) The procurement is for services to which the provisions of ORS 279B.080 apply, **in which**  
 33 **case the contracting agency may make the determination required in subsection (1) of this**  
 34 **section after entering into a contract in accordance with ORS 279B.080;**

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

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

40 (2) A finding or determination and supporting documentation for a finding or determination  
 41 made under this section is a public record.

42 **SECTION 4. The provisions of ORS 279B.030, 279B.033 and 279B.036, as amended by**  
 43 **sections 1 to 3 of this 2013 Act, do not create a cause of action against a public body and**  
 44 **may not be asserted in an action against a public body as the basis for a per se negligence**  
 45 **claim.**

1       **SECTION 5.** (1) The amendments to ORS 279B.030, 279B.033 and 279B.036 by sections 1  
2 to 3 of this 2013 Act become operative on the 91st day after the effective date of this 2013  
3 Act.

4       (2) The amendments to ORS 279B.030, 279B.033 and 279B.036 by sections 1 to 3 of this 2013  
5 Act apply to procurements that a contracting agency advertises or otherwise solicits on or  
6 after the operative date specified in subsection (1) of this section.

7       (3) The Attorney General, the Director of the Oregon Department of Administrative  
8 Services, the Director of Transportation or a contracting agency that adopts rules under  
9 ORS 279A.065 may adopt rules and take related actions before the operative date specified in  
10 subsection (1) of this section that are necessary to enable the Attorney General, the director  
11 or the contracting agency to exercise, on and after the operative date specified in subsection  
12 (1) of this section, all of the duties, functions and powers conferred on the Attorney General,  
13 the director or the contracting agency by the amendments to ORS 279B.030, 279B.033 and  
14 279B.036 by sections 1 to 3 of this 2013 Act.

15       **SECTION 6.** This 2013 Act being necessary for the immediate preservation of the public  
16 peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect  
17 on its passage.

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