

Minority Report

A-Engrossed

Senate Bill 805

Ordered by the Senate July 1
Including Senate Minority Report Amendments dated July 1

Sponsored by nonconcurring members of the Senate Committee on Rules: Senators STARR, FERRIOLI

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.

Permits employee of contracting agency that conducts cost analysis or determines feasibility of procurement, or exclusive representative of employee's bargaining unit, to seek judicial review of cost analysis or determination. Specifies conditions under which review may occur.

Increases threshold estimated procurement contract price for requiring cost analysis to \$2 million.

Requires certain agencies to demonstrate that procurement will advance specified educational goals as part of pre-procurement analysis.

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 January 1, 2014.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to analyses required before conducting a procurement for services; creating new provisions;
3 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 paragraph; and**

17 **(D) The employee or exclusive representative exhausted any administrative remedy the**
18 **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-**

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 form services for which the contracting agency would be required to conduct a procurement
2 under this chapter. A contracting agency did not, for the purposes of this section, proceed
3 with a procurement if the contracting agency issued a request for information or request for
4 a quotation or otherwise sought to obtain needed data in the course of complying with the
5 provisions of ORS 279B.030, 279B.033 or 279B.036.

6 (2)(a) If an employee of a state contracting agency, or an exclusive representative of the
7 employee's bargaining unit, seeks judicial review for a state contracting agency's alleged vi-
8 olation of a provision of ORS 279B.030, 279B.033 or 279B.036, the circuit court for the county
9 in which the principal offices of the state contracting agency are located may review the al-
10 leged violation under ORS 183.484. For the purposes of the review, a state contracting
11 agency's decision to advertise or solicit or otherwise proceed with a procurement is an order
12 other than an order in a contested case.

13 (b) If an employee of a local contracting agency, or an exclusive representative of the
14 employee's bargaining unit, seeks judicial review for a local contracting agency's alleged vi-
15 olation of a provision of ORS 279B.030, 279B.033 or 279B.036, the circuit court for the county
16 in which the principal offices of the local contracting agency are located may review the al-
17 leged violation by means of a writ of review under ORS chapter 34.

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

- 23 (A) A compelling governmental interest exists in proceeding with the procurement; or
- 24 (B) An emergency exists that requires the procurement.

25 (b) A contracting agency that makes a determination to proceed with a procurement
26 under paragraph (a) of this subsection shall set forth in writing the reasons for the deter-
27 mination and provide the reasons to the employee or the exclusive representative imme-
28 diately.

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

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

44 (5) If the court rules in favor of the employee or the exclusive representative, the court
45 shall enjoin the contracting agency from proceeding with the procurement and the con-

1 **tracting agency shall cancel the procurement. The court may award costs and attorney fees**
2 **to the prevailing party in the litigation.**

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

4 279B.030. (1)(a) Except as provided in ORS 279B.036, before *[conducting]* **deciding to conduct**
5 a procurement for services with an estimated contract price that exceeds *[\$250,000]* **\$2 million**, a
6 contracting agency shall:

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

10 *[(b)]* **(B)** Demonstrate, in accordance with ORS 279B.036, that performing the services with the
11 contracting agency's own personnel and resources is not feasible.

12 **(b) In addition to complying with the provisions of paragraph (a) of this subsection, if**
13 **applicable to the contracting agency, the contracting agency shall demonstrate that con-**
14 **ducting the procurement will advance the educational goals identified in ORS 351.009.**

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

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

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

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

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

27 (d) The Port of Portland; or

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

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

31 279B.033. (1) In the cost analysis required under ORS 279B.030, a contracting agency shall:

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

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

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

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

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

1 the contracting agency performs the services.

2 (b) Estimate the cost a potential contractor would incur **and the profit the potential con-**
 3 **tractor would realize** in performing the services, including:

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

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

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

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

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

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

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

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

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

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

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

45 **SECTION 5. Section 2 of this 2013 Act and the amendments to ORS 279B.030 and 279B.033**

1 by sections 3 and 4 of this 2013 Act apply to contracts that a contracting agency first ad-
2 vertises or otherwise solicits or, if the contracting agency does not advertise or solicit the
3 contract, to contracts that the contracting agency first enters into on or after the operative
4 date specified in section 6 of this 2013 Act.

5 **SECTION 6.** (1) Section 2 of this 2013 Act and the amendments to ORS 279B.030 and
6 279B.033 by sections 3 and 4 of this 2013 Act become operative on January 1, 2014.

7 (2) 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 take any action before the operative date specified in subsection (1) of this
10 section that is necessary to enable the Attorney General, the director or the contracting
11 agency to exercise, on and after the operative date specified in subsection (1) of this section,
12 all of the duties, functions and powers conferred on the Attorney General, the director or
13 the contracting agency by section 2 of this 2013 Act and the amendments to ORS 279B.030
14 and 279B.033 by sections 3 and 4 of this 2013 Act.

15 **SECTION 7.** 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.