

# House Bill 4122

Sponsored by Representatives GREENLICK, NATHANSON, HOLVEY; Representatives BARKER, GALLEGOS, GORSEK, HOYLE, KENY-GUYER, KOTEK, SMITH WARNER, VEGA PEDERSON, WILLIAMSON, WITT, Senators MONNES ANDERSON, ROBLAN, ROSENBAUM, STEINER HAYWARD (Pre-session filed.)

## 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**.

Requires state contracting agency or public corporation that procures goods or services with contract price that exceeds \$1 million or meets other criteria to procure quality management services from qualified contractor. Provides exemption from requirement that state contracting agency may not accept bid or proposal from contractor that assisted state contracting agency in developing specifications or solicitation documents for bid or proposal for certain quality management services.

Requires bidder or proposer to demonstrate to contracting agency that bidder or proposer has paid all taxes due to public body and otherwise complied with tax laws of this state.

Becomes operative July 1, 2014.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to standards of performance in public contracting; creating new provisions; amending ORS  
3 279B.040 and 279B.110; and declaring an emergency.

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

5 **SECTION 1. Section 2 of this 2014 Act is added to and made a part of ORS chapter 279B.**

6 **SECTION 2. (1) As used in this section:**

7 (a) **“Preliminary quality assurance services” means a set of services in which a contrac-**  
8 **tor provides an independent and objective review of a state contracting agency’s or a public**  
9 **corporation’s plans, specifications, estimates, documentation, available resources and overall**  
10 **purpose for a procurement, including services in which the contractor evaluates a proposed**  
11 **procurement against applicable quality standards and best practices from private industry**  
12 **and other sources.**

13 (b)(A) **“Public corporation” means a corporation:**

14 (i) **The operations of which are subject to control by this state or by an agency or**  
15 **instrumentality of this state, or by officers of this state or of an agency or instrumentality**  
16 **of this state;**

17 (ii) **That is organized, at least in part, to serve a public purpose; and**

18 (iii) **That receives public funds or other support from an entity described in sub-**  
19 **subparagraph (i) of this subparagraph.**

20 (B) **“Public corporation” does not include a person or entity described in ORS 174.108 (3).**

21 (c) **“Quality management services” means a set of services in which a contractor pro-**  
22 **vides an independent and objective review and evaluation of another contractor’s perform-**  
23 **ance to determine whether the other contractor satisfies the goals and meets the**  
24 **specifications for a procurement that a state contracting agency or a public corporation sets**  
25 **forth in the state contracting agency’s or public corporation’s solicitation documents, con-**  
26 **tracts, statements of work or related documents and includes, but is not limited to, services**

**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 in which the contractor:

2 (A) Identifies quality standards that apply or should apply to a procurement;

3 (B) Suggests methods and means by which the other contractor may meet quality stan-  
4 dards identified in subparagraph (A) of this paragraph;

5 (C) Reviews and evaluates the other contractor's performance regularly as the other  
6 contractor provides the goods or performs the services that the state contracting agency or  
7 public corporation procured;

8 (D) Identifies omissions or gaps in the other contractor's planning, execution, control,  
9 methodology, communication or reporting as the other contractor provides the goods or  
10 performs the services or prepares to do so;

11 (E) Identifies risks in the other contractor's plans or approach to providing the goods  
12 or performing the services and suggests methods to reduce, mitigate or eliminate the risks;

13 (F) Assists the state contracting agency or the public corporation in testing or otherwise  
14 evaluating the goods or services the other contractor provides for conformance with the  
15 quality standards identified under subparagraph (A) of this paragraph;

16 (G) Advises the state contracting agency or public corporation as to whether the state  
17 contracting agency or public corporation should accept the goods or services as conforming  
18 to the quality standards identified in subparagraph (A) of this paragraph or as otherwise  
19 meeting the state contracting agency's or public corporation's needs, specifications or ex-  
20 pectations; and

21 (H) Identifies unsatisfactory performance and suggests methods the other contractor  
22 might use to eliminate the causes of unsatisfactory performance.

23 (2)(a) A state contracting agency or public corporation that procures goods or services  
24 under this chapter shall, in a separate procurement, obtain quality management services  
25 from a qualified contractor if the contract price for the procurement exceeds \$1 million or  
26 if:

27 (A) The goods or services must operate without failure during the state contracting  
28 agency's or public corporation's normal business hours;

29 (B) The contractor that provides the goods or performs the services will require more  
30 than one year to do so;

31 (C) More than one state contracting agency or public corporation will use the goods or  
32 services or will have responsibility for managing or maintaining the goods or services; or

33 (D) The state contracting agency or public corporation cannot provide sufficient quality  
34 management services for the procurement with the state contracting agency's or public  
35 corporation's own personnel or resources because the procurement is too complex.

36 (b) A state contracting agency or public corporation may, subject to ORS 279B.040, pro-  
37 cure preliminary quality assurance services from a contractor if the procurement meets the  
38 standards set forth in paragraph (a) of this subsection or if the state contracting agency or  
39 public corporation otherwise believes that the preliminary quality assurance services will  
40 enable the contracting agency or public corporation to conduct a successful procurement.

41 (3)(a) If a state contracting agency or public corporation is subject to the authority of  
42 the Director of the Oregon Department of Administrative Services under ORS 279A.050 (2)  
43 or (7), the state contracting agency or public corporation shall consult with the director and  
44 follow the department's policies and procedures to determine the extent of preliminary  
45 quality assurance services or quality management services the state contracting agency or

1 **public corporation will require for the procurement.**

2 **(b) A state contracting agency or public corporation that is not subject to the director's**  
 3 **authority under ORS 279A.050 (2) or (7) may determine the extent of the preliminary quality**  
 4 **assurance services or quality management services that the state contracting agency or**  
 5 **public corporation requires for a procurement, subject to the provisions of subsection (2) of**  
 6 **this section and in accordance with the limits specified for the state contracting agency's**  
 7 **or public corporation's procurement authority under ORS 279A.050 or under a law other than**  
 8 **the Public Contracting Code.**

9 **SECTION 3.** ORS 279B.040 is amended to read:

10 279B.040. (1) Except as provided in subsection (2) of this section, a state contracting agency that  
 11 procures personal services for the purpose of advising or assisting the state contracting agency in  
 12 developing specifications, a scope or statement of work, an invitation to bid, a request for proposals  
 13 or other solicitation documents and materials related to a procurement may not accept from the  
 14 contractor, or an affiliate of the contractor, that advised or assisted the state contracting agency  
 15 a bid or proposal for the goods or services described, specified or identified in the solicitation doc-  
 16 uments or materials if a reasonable person would believe that, by giving the advice or assistance,  
 17 the contractor or affiliate would have or would appear to have an advantage in obtaining the public  
 18 contract that is the subject of the solicitation.

19 (2)(a) If a state contracting agency anticipates that the state contracting agency will or must  
 20 seek advice or assistance of the type described in subsection (1) of this section from a contractor  
 21 that is also engaged in providing goods or services that will be described or identified in the solic-  
 22 itation documents and materials that result from the advice or assistance, and the state contracting  
 23 agency wishes to accept a bid or proposal from the contractor, the state contracting agency, before  
 24 awarding a contract for the advice or assistance, shall apply to the Director of the Oregon Depart-  
 25 ment of Administrative Services for an exception to the prohibition set forth in subsection (1) of this  
 26 section.

27 (b) The state contracting agency in the application for the exception shall include findings and  
 28 justifications, along with sufficient facts to support the findings and justifications, that will enable  
 29 the director to make an independent judgment as to whether:

30 (A) The state contracting agency needs advice or assistance from a contractor to develop the  
 31 solicitation documents and materials described in subsection (1) of this section;

32 (B) Accepting a bid or proposal from the contractor that gives the advice or assistance is the  
 33 only practicable way in which the state contracting agency can conduct the procurement success-  
 34 fully; and

35 (C) Approving the exception:

36 (i) Is unlikely to encourage favoritism in awarding public contracts or to substantially diminish  
 37 competition for public contracts; and

38 (ii)(I) Is reasonably expected to result in substantial cost savings to the state contracting agency  
 39 or the public; or

40 (II) Otherwise substantially promotes the public interest in a manner that could not be  
 41 practicably realized by complying with the prohibition described in subsection (1) of this section.

42 (c)(A) If the director approves the state contracting agency's application, the director shall  
 43 prepare written findings and justifications for the approval. The state contracting agency's findings,  
 44 justifications and facts and the director's findings, justifications and approval are public records that  
 45 are subject to disclosure as provided in ORS 192.410 to 192.505.

1 (B) If the director disapproves the state contracting agency’s application, the director shall state  
 2 the director’s reasons for the disapproval in a written notice to the state contracting agency and  
 3 shall indicate whether the disapproval extends only to the state contracting agency’s acceptance of  
 4 a bid or proposal from a contractor that gives advice or assistance in preparing solicitation docu-  
 5 ments and other materials or whether the director also disagrees with the state contracting agency’s  
 6 stated need for advice or assistance from a contractor.

7 (C) The director’s approval or disapproval is final.

8 (3) As used in this section, “affiliate” means a person that, directly or indirectly through one  
 9 or more intermediaries, controls, is controlled by or is under common control with a contractor  
 10 described in this section.

11 (4) This section does not apply to:

12 (a) The Secretary of State or the State Treasurer[.]; or

13 **(b) A bid or proposal for quality management services, as defined in section 2 of this 2014**  
 14 **Act, that a state contracting agency receives from a contractor that provided preliminary**  
 15 **quality assurance services, as defined in section 2 of this 2014 Act, for the same procurement**  
 16 **that is the subject of the state contracting agency’s solicitation for quality management**  
 17 **services.**

18 **SECTION 4.** ORS 279B.110 is amended to read:

19 279B.110. (1) *[A contracting agency shall prepare a written determination of nonresponsibility for*  
 20 *a bidder or proposer if the contracting agency determines that the bidder or proposer does not meet the*  
 21 *standards of responsibility.]* **As part of a contracting agency’s evaluation of a bid or proposal,**  
 22 **the contracting agency shall determine whether the bidder or proposer is responsible in ac-**  
 23 **cordance with the standards of responsibility set forth in subsection (2) of this section.**

24 (2) *[In determining whether a bidder or proposer has met the standards of responsibility, the con-*  
 25 *tracting agency shall consider whether a bidder or proposer:]* **In order for a contracting agency to**  
 26 **determine that a bidder or proposer is responsible, the bidder or proposer must demonstrate**  
 27 **to the contracting agency that the bidder or proposer:**

28 (a) Has available the appropriate financial, material, equipment, facility and personnel resources  
 29 and expertise, or has the ability to obtain the resources and expertise, necessary to meet all con-  
 30 tractual responsibilities.

31 (b) Completed previous contracts of a similar nature with a satisfactory record of performance.  
 32 For purposes of this paragraph, a satisfactory record of performance means that to the extent that  
 33 the costs associated with and time available to perform a previous contract remained within the  
 34 bidder’s or proposer’s control, the bidder or proposer stayed within the time and budget allotted for  
 35 the procurement and otherwise performed the contract in a satisfactory manner. The contracting  
 36 agency shall document the bidder’s or proposer’s record of performance if the contracting agency  
 37 finds under this paragraph that the bidder or proposer is not responsible.

38 (c) Has a satisfactory record of integrity. The contracting agency in evaluating the bidder’s or  
 39 proposer’s record of integrity may consider, among other things, whether the bidder or proposer has  
 40 previous criminal convictions for offenses related to obtaining or attempting to obtain a contract  
 41 or subcontract or in connection with the bidder’s or proposer’s performance of a contract or sub-  
 42 contract. The contracting agency shall document the bidder’s or proposer’s record of integrity if the  
 43 contracting agency finds under this paragraph that the bidder or proposer is not responsible.

44 (d) Is legally qualified to contract with the contracting agency.

45 **(e) Paid all taxes the bidder or proposer owes to a public body, as defined in ORS 174.109,**

1 **and otherwise complied with the tax laws of this state or a political subdivision of this state**  
 2 **including, but not limited to, ORS 305.620, 310.630 to 310.706, 320.005 to 320.150, 403.200 to**  
 3 **403.250 and ORS chapters 118, 314, 316, 317, 318, 321 and 323. The bidder or proposer shall**  
 4 **provide the contracting agency with documentation of the bidder's or proposer's compliance.**

5 [(e)] (f) Supplied all necessary information in connection with the inquiry concerning responsi-  
 6 bility. If a bidder or proposer fails to promptly supply information concerning responsibility that the  
 7 contracting agency requests, the contracting agency shall determine the bidder's or proposer's re-  
 8 sponsibility based on available information or may find that the bidder or proposer is not responsi-  
 9 ble.

10 [(f)] (g) Was not debarred by the contracting agency under ORS 279B.130.

11 (3) A contracting agency may refuse to disclose outside of the contracting agency confidential  
 12 information furnished by a bidder or proposer under this section when the bidder or proposer has  
 13 clearly identified in writing the information the bidder or proposer seeks to have treated as confi-  
 14 dential and the contracting agency has authority under ORS 192.410 to 192.505 to withhold the  
 15 identified information from disclosure.

16 **SECTION 5. Section 2 of this 2014 Act and the amendments to ORS 279B.040 and 279B.110**  
 17 **by sections 3 and 4 of this 2014 Act apply to contracts that a contracting agency advertises**  
 18 **or solicits on or after the operative date specified in section 6 (1) of this 2014 Act, or if the**  
 19 **contracting agency does not advertise or solicit the contract, to contracts that the con-**  
 20 **tracting agency enters into on or after the operative date specified in section 6 (1) of this**  
 21 **2014 Act.**

22 **SECTION 6. (1) Sections 1 and 2 of this 2014 Act and the amendments to ORS 279B.040**  
 23 **and 279B.110 by sections 3 and 4 of this 2014 Act become operative on July 1, 2014.**

24 (2) The Attorney General, the Director of the Oregon Department of Administrative  
 25 Services, the Director of Transportation or a state contracting agency or public corporation  
 26 that adopts rules under ORS 279A.065 may take any action before the operative date specified  
 27 in subsection (1) of this section that is necessary to enable the Attorney General, the direc-  
 28 tor, the state contracting agency or public corporation to exercise the duties, functions and  
 29 powers conferred on the Attorney General, the director, the state contracting agency or the  
 30 public corporation by section 2 of this 2014 Act and the amendments to ORS 279B.040 and  
 31 279B.110 by sections 3 and 4 of this 2014 Act.

32 **SECTION 6. This 2014 Act being necessary for the immediate preservation of the public**  
 33 **peace, health and safety, an emergency is declared to exist, and this 2014 Act takes effect**  
 34 **on its passage.**