

DRAFT

SUMMARY

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.

Requires contracting agency to estimate prospective contractor's profit in cost analysis. Prohibits contracting agency from considering proceeds of sale of, or costs of replacing, long-term assets in cost analysis.

Becomes operative January 1, 2016.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to analyses required before conducting a procurement for services;
3 creating new provisions; amending ORS 279B.030 and 279B.033; and de-
4 claring an emergency.

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

6 **SECTION 1. Section 2 of this 2015 Act is added to and made a part**
7 **of ORS chapter 279B.**

8 **SECTION 2. (1)(a) An employee of a contracting agency that con-**
9 **ducts a cost analysis under ORS 279B.033 or makes a determination**
10 **under ORS 279B.036, or an exclusive representative, as defined in ORS**
11 **243.650, of the employee's bargaining unit, may seek judicial review of**
12 **the contracting agency's cost analysis or determination if:**

13 **(A) The contracting agency allegedly violated a provision of ORS**
14 **279B.030, 279B.033 or 279B.036;**

15 **(B) The employee or the exclusive representative described the al-**
16 **leged violation in a written notice to the contracting agency not later**

1 than 30 days after the date of the alleged violation;

2 (C) The contracting agency proceeded with a procurement after re-
3 ceiving the notice described in subparagraph (B) of this paragraph; and

4 (D) The employee or exclusive representative exhausted any ad-
5 ministrative remedy the contracting agency provides to address an
6 alleged violation.

7 (b)(A) Except as provided in subparagraph (B) of this paragraph, for
8 the purposes of this section a contracting agency proceeded with a
9 procurement if the contracting agency advertised or solicited the pro-
10 curement in accordance with the provisions of this chapter or other-
11 wise took affirmative steps to seek a contractor to perform services
12 for which the contracting agency would be required to conduct a pro-
13 curement under this chapter.

14 (B) A contracting agency did not, for the purposes of this section,
15 proceed with a procurement if the contracting agency issued a request
16 for information or a request for quotation or otherwise sought to ob-
17 tain needed information in the course of complying with ORS 279B.030,
18 279B.033 or 279B.036.

19 (2)(a) If an employee of a state contracting agency, or an exclusive
20 representative of the employee's bargaining unit, seeks judicial review
21 for a state contracting agency's alleged violation of a provision of ORS
22 279B.030, 279B.033 or 279B.036, the Circuit Court for Marion County or
23 the circuit court for the county in which the principal offices of the
24 state contracting agency are located may review the alleged violation
25 under ORS 183.484. For the purposes of the review, a state contracting
26 agency's decision to advertise or solicit or otherwise proceed with a
27 procurement is an order other than an order in a contested case.

28 (b) If an employee of a local contracting agency, or an exclusive
29 representative of the employee's bargaining unit, seeks judicial review
30 for a local contracting agency's alleged violation of a provision of ORS
31 279B.030, 279B.033 or 279B.036, the circuit court for the county in which

1 the principal offices of the local contracting agency are located may
2 review the alleged violation by means of a writ of review under ORS
3 chapter 34.

4 (3)(a) If an employee of a contracting agency, or the exclusive rep-
5 resentative of the employee's bargaining unit, notifies the contracting
6 agency as provided in subsection (1)(a)(B) of this section and timely
7 seeks review under this section, the contracting agency may not pro-
8 ceed with the procurement that is the subject of the review unless the
9 contracting agency determines that:

10 (A) A compelling governmental interest exists in proceeding with
11 the procurement; or

12 (B) An emergency exists that requires the procurement.

13 (b) A contracting agency that makes a determination to proceed
14 with a procurement under paragraph (a) of this subsection shall set
15 forth in writing the reasons for the determination and provide the
16 reasons to the employee or the exclusive representative immediately.

17 (c) Despite the contracting agency's determination under paragraph
18 (a) of this subsection, the court, after joining as a party to the liti-
19 gation any prospective contractor interested in the procurement, may
20 stay the procurement on the employee's or the exclusive
21 representative's motion if the court finds that the contracting
22 agency's determination under paragraph (a) of this subsection was not
23 supported by substantial evidence or constituted a manifest abuse of
24 discretion. In granting a stay under this paragraph, the court may
25 require the employee or the exclusive representative to post a bond in
26 an amount sufficient to protect the contracting agency and the public
27 from costs associated with a delay in the procurement if the court
28 finds that issuing an injunction may irreparably harm the contracting
29 agency or the contractor and that the employee's or the exclusive
30 representative's likelihood of success on the merits of the case is
31 minimal.

1 (4) Notwithstanding ORS 279B.145 or any other provision of this
2 chapter or ORS chapter 279A, a court shall review de novo a con-
3 tracting agency's determination under ORS 279B.030, 279B.033 or
4 279B.036.

5 (5) If a court rules in favor of the employee or the exclusive repre-
6 sentative, the court shall enjoin the contracting agency from pro-
7 ceeding with the procurement. The court may not award costs and
8 attorney fees to the prevailing party in the litigation.

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

10 279B.030. (1) Except as provided in ORS 279B.036, before conducting a
11 procurement for services with an estimated contract price that exceeds
12 \$250,000, a contracting agency shall:

13 (a) Demonstrate, by means of a written cost analysis in accordance with
14 ORS 279B.033, that the contracting agency would incur less cost in con-
15 ducting the procurement than in performing the services with the contract-
16 ing agency's own personnel and resources; or

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

20 (2) If a local contracting agency authorizes a department, bureau, office
21 or other subdivision of the local contracting agency to conduct a procure-
22 ment on behalf of another department, bureau, office or subdivision of the
23 local contracting agency, the department, bureau, office or subdivision on
24 whose behalf the procurement is conducted shall comply with the require-
25 ment set forth in subsection (1) of this section.

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

27 (a) A local contracting agency or a local contract review board for a city
28 that has a population of not more than 15,000 or a county that has a popu-
29 lation of not more than 30,000;

30 (b) A community college that enrolls not more than 1,000 full-time
31 equivalent students, as defined in ORS 341.005;

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

4 (d) The Port of Portland; or

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

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

9 279B.033. (1)(a) In the cost analysis required under ORS 279B.030, a con-
10 tracting agency shall:

11 [(a)] (A) Estimate the contracting agency's cost of performing the ser-
12 vices, including:

13 [(A)] (i) Salary or wage and benefit costs for contracting agency employ-
14 ees who are directly involved in performing the services, including employees
15 who inspect, supervise or monitor the performance of the services.

16 [(B)] (ii) Material costs, including costs for space, energy, transportation,
17 storage, raw and finished materials, equipment and supplies.

18 [(C)] (iii) Costs incurred in planning for, training for, starting up, imple-
19 menting, transporting and delivering the services and costs related to stop-
20 ping and dismantling a project or operation because the contracting agency
21 intends to procure a limited quantity of services or procure the services
22 within a defined or limited period of time.

23 [(D)] (iv) Miscellaneous costs related to performing the services. The
24 contracting agency may not include in the cost analysis the contracting
25 agency's indirect overhead costs for existing salaries or wages and benefits
26 for administrators or for rent, equipment, utilities and materials except to
27 the extent that the costs are attributable solely to performing the services
28 and would not exist unless the contracting agency performs the services.

29 [(b)] (B) Estimate the cost a [*potential*] **prospective** contractor would
30 incur **and the profit the prospective contractor would realize** in per-
31 forming the services, including:

1 [(A)] (i) Average or actual salary or wage and benefit costs for contrac-
2 tors and employees who:

3 [(i)] (I) Work in the industry or business most closely involved in per-
4 forming the services that the contracting agency intends to procure; and

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

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

10 [(C)] (iii) Miscellaneous costs related to performing the services, includ-
11 ing but not limited to reasonably foreseeable fluctuations in the costs for the
12 items identified in this [subsection] **paragraph** over the expected duration
13 of the procurement.

14 **(b) In the cost analysis required under ORS 279B.030, a contracting**
15 **agency may not include proceeds or revenues from a sale of, or costs**
16 **the contracting agency incurs to replace, any of the contracting**
17 **agency's long-term assets, including capital assets, vehicles and other**
18 **durable goods.**

19 (2)(a) After comparing the difference between the costs estimated as pro-
20 vided in subsection [(1)(a)] (1)(a)(A) of this section with the costs estimated
21 as provided in subsection [(1)(b)] (1)(a)(B) of this section, except as provided
22 in paragraph (b) of this subsection, the contracting agency may proceed with
23 the procurement only if the contracting agency would incur more cost in
24 performing the services with the contracting agency's own personnel and
25 resources than the contracting agency would incur in procuring the services
26 from a contractor. The contracting agency may not proceed with the pro-
27 curement if the [sole] **primary** reason that the costs estimated in subsection
28 [(1)(b)] (1)(a)(B) of this section are lower than the costs estimated in sub-
29 section [(1)(a)] (1)(a)(A) of this section is because the costs estimated in
30 subsection [(1)(b)(A)] (1)(a)(B)(i) of this section are lower than the costs
31 estimated in subsection [(1)(a)(A)] (1)(a)(A)(i) of this section.

1 (b) A contracting agency may proceed with a procurement even if the
2 contracting agency determines that the contracting agency would incur less
3 cost in providing the services with the contracting agency's own personnel
4 and resources if at the time the contracting agency intends to conduct a
5 procurement, the contracting agency lacks personnel and resources that are
6 necessary to perform the services within the time in which the services are
7 required. If the contracting agency conducts a procurement under the con-
8 ditions described in this paragraph, the contracting agency shall:

9 (A) Keep a record of the cost analysis and findings that the contracting
10 agency makes for each procurement the contracting agency conducts under
11 this section, along with the basis for the contracting agency's decision to
12 proceed with the procurement; and

13 (B) Collect and provide copies of the records described in subparagraph
14 (A) of this paragraph each calendar quarter to the local contract review
15 board, if the contracting agency is a local contracting agency, or to the
16 Emergency Board, if the contracting agency is a state contracting agency.

17 (c) If the contracting agency is a state contracting agency, in addition to
18 complying with the provisions of paragraph (b) of this subsection the con-
19 tracting agency shall prepare a request to the Governor for an appropriation
20 and any authority that is necessary for the contracting agency to hire per-
21 sonnel and obtain resources necessary to perform the services that the con-
22 tracting agency procured under the conditions described in paragraph (b) of
23 this subsection. The request must include a copy of the records that the
24 contracting agency provided to the Emergency Board under paragraph (b)(B)
25 of this subsection.

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

28 **SECTION 5. Section 2 of this 2015 Act and the amendments to ORS**
29 **279B.030 and 279B.033 by sections 3 and 4 of this 2015 Act apply to**
30 **procurements that a contracting agency first advertises or otherwise**
31 **solicits or, if the contracting agency does not advertise or solicit the**

1 procurement, to a public contract that the contracting agency enters
2 into on or after the operative date specified in section 6 of this 2015
3 Act.

4 SECTION 6. (1) Section 2 of this 2015 Act and the amendments to
5 ORS 279B.030 and 279B.033 by sections 3 and 4 of this 2015 Act become
6 operative on January 1, 2016.

7 (2) The Attorney General, the Director of the Oregon Department
8 of Administrative Services, the Director of Transportation or a con-
9 tracting agency that adopts rules under ORS 279A.065 may take any
10 action before the operative date specified in subsection (1) of this sec-
11 tion that is necessary to enable the Attorney General, the director or
12 the contracting agency to exercise, on and after the operative date
13 specified in subsection (1) of this section, all of the duties, functions
14 and powers conferred on the Attorney General, the director or the
15 contracting agency under section 2 of this 2015 Act and the amend-
16 ments to ORS 279B.030 and 279B.033 by sections 3 and 4 of this 2015
17 Act.

18 SECTION 7. This 2015 Act being necessary for the immediate pres-
19 ervation of the public peace, health and safety, an emergency is de-
20 clared to exist, and this 2015 Act takes effect on its passage.

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