

Enrolled House Bill 2716

Sponsored by Representative FREDERICK; Representatives BARKER, GALLEGOS, GORSEK, HOLVEY, KENY-GUYER, KOTEK, MCLAIN, PILUSO, TAYLOR, WILLIAMSON, WITT, Senator MONNES ANDERSON (Presession filed.)

CHAPTER

AN ACT

Relating to compliance requirements for public contracts that involve disadvantaged business enterprises; creating new provisions; amending ORS 200.065 and sections 4 and 5, chapter 148, Oregon Laws 2015 (Enrolled Senate Bill 584); and declaring an emergency.

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

SECTION 1. Section 2 of this 2015 Act is added to and made a part of ORS chapter 279A.

SECTION 2. (1) A contracting agency that under ORS 279A.105 awards a public contract to a responsible bidder, as defined in ORS 200.005, that has made good faith efforts, as described in ORS 200.045 (3), or that awards a public contract in the course of carrying out an affirmative action goal, policy or program under ORS 279A.100 shall:

(a) Provide as a material condition of the public contract that a contractor remain certified as a disadvantaged, minority, women or emerging small business enterprise under ORS 200.055 for the entire term of the public contract, if the contracting agency awarded the public contract, in whole or in part, on the basis of the contractor's certification.

(b) Require a contractor to provide in the contractor's subcontracts that a subcontractor remain certified as a disadvantaged, minority, women or emerging small business enterprise under ORS 200.055 for the entire term of the subcontract, if the contractor awards the subcontract, in whole or in part, on the basis of the subcontractor's certification.

(c) Verify the contractor's or subcontractor's compliance with the requirements set forth in paragraphs (a) and (b) of this subsection.

(d) Verify that a contractor is paying a subcontractor that is certified under ORS 200.055 promptly as provided in ORS 279B.220 or 279C.570, as appropriate.

(2)(a) If a contracting agency determines at any time during the term of a public contract that a contractor to which the contracting agency awarded the public contract on the basis described in subsection (1) of this section, or a subcontractor to which the contractor awarded a subcontract in connection with the public contract on the basis described in subsection (1) of this section, is no longer certified, the contracting agency may:

(A) Terminate the public contract;

(B) Require the contractor to terminate the subcontract; or

(C) Exercise any of the remedies for breach of contract that are reserved in the public contract.

(b) The actions a contracting agency may take under paragraph (a) of this subsection are in addition to and not in lieu of any other action the Oregon Business Development Department may take with respect to the contractor or subcontractor under ORS 200.065.

(c) Paragraph (a) of this subsection does not apply to an emerging small business as defined in ORS 200.005 that, because of growth in the number of full-time equivalent employees or average annual gross receipts that occurs during the term of the public contract, no longer qualifies as a tier one firm or tier two firm, as those terms are defined in ORS 200.005, or for which a certification under ORS 200.055 expires during the term of the public contract.

SECTION 3. ORS 200.065 is amended to read:

200.065. (1) *[It shall be unlawful for any]* A person **may not** fraudulently *[to]* obtain or retain, *[or]* attempt to obtain or retain or *[to]* aid another person **to** fraudulently *[to]* obtain or retain or attempt to obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise.

(2) *[It shall be unlawful knowingly to]* A **person may not knowingly** make a false claim that any person is qualified for certification or is certified under ORS 200.055 for the purpose of *[gaining]* **obtaining a public** contract or subcontract or other benefit.

(3) *[The]* A public contracting agency may withhold payment, may suspend or terminate *[the]* a **public** contract and may impose on any person a civil penalty **that does not** *[to]* exceed 10 percent of the contract or subcontract price or \$5,000, whichever is less, for each violation of subsection (1) or (2) of this section. **If the public contracting agency does not impose a civil penalty on the person under this subsection, the Oregon Business Development Department may independently impose a civil penalty that does not exceed \$5,000 for each violation of subsection (1) or (2) of this section.** The **person shall pay a penalty** *[shall be paid]* **that the department imposes** to the Office for Minority, Women and Emerging Small Business.

(4) The *[Oregon Business Development]* department or an affected public contracting agency shall investigate *[any complaint that a person has violated]* **violations of** subsection (1) or (2) of this section. In investigating *[such a complaint]* a **violation**, the department or *[an]* **the** affected public contracting agency may require any additional information, administer oaths, take depositions and issue subpoenas to compel *[the attendance of]* witnesses **to attend and to produce** *[and the production of]* books, papers, records, memoranda or other information necessary to carry out *[its]* **the department's or the affected contracting agency's** duties. If *[any]* a person fails to comply with any subpoena *[issued]* **the department issues** under this subsection or refuses to testify on any matter on which a person may lawfully be interrogated, the **department shall follow the procedure** provided in ORS 183.440 *[shall be followed]* to compel compliance.

(5) An affected public contracting agency or the department may disqualify any person *[found to have violated]* **that under oath during the course of an investigation admits to violating** subsection (1) or (2) of this section, *[or who admits to such violation under oath during the course of an investigation from bidding or participating in any public contract for a period of time specified by the agency or department, not to exceed three years]* **or that the department or the affected contracting agency finds to have violated subsection (1) or (2) of this section, from submitting a bid or proposal for, or receiving an award of, a public contract for a period of not more than three years.** Any public contracting agency that has notice of the finding of the fraudulent certification may also disqualify the person from bidding on or participating in any public contract.

SECTION 4. Section 2 of this 2015 Act and the amendments to ORS 200.065 by section 3 of this 2015 Act apply to public contracts that a contracting agency advertises or otherwise solicits or, if the contracting agency does not advertise or otherwise solicit the public contract, to public contracts into which the public contracting agency enters on or after the operative date specified in section 5 of this 2015 Act.

SECTION 5. (1) Section 2 of this 2015 Act and the amendments to ORS 200.065 by section 3 of this 2015 Act become operative on January 1, 2016.

(2) The Director of the Oregon Business Development Department, the Director of the Oregon Department of Administrative Services, the Director of Transportation, the Attorney

General and a public contracting agency that adopts rules under ORS 279A.065 may take any action before the operative date specified in subsection (1) of this section that is necessary to enable the director, the Attorney General or the public contracting agency to exercise, on and after the operative date specified in subsection (1) of this section, all of the duties, functions and powers conferred on the director, the Attorney General or the public contracting agency by section 2 of this 2015 Act and the amendments to ORS 200.065 by section 3 of this 2015 Act.

SECTION 6. If Senate Bill 584 becomes law, section 3 of this 2015 Act (amending ORS 200.065) is repealed and ORS 200.065, as amended by section 2, chapter 148, Oregon Laws 2015 (Enrolled Senate Bill 584), is amended to read:

200.065. (1) A person may not fraudulently obtain or retain, attempt to obtain or retain or aid another person to fraudulently obtain or retain or attempt to obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise.

(2) A person may not knowingly make a false claim that any person is qualified for certification or is certified under ORS 200.055 for the purpose of *[gaining]* **obtaining a public** contract or sub-contract or other benefit.

(3) An affected public contracting agency may withhold payment, may suspend or terminate a public contract and may impose on any person a civil penalty **that does not** *[to]* exceed 10 percent of the contract or subcontract price or \$5,000, whichever is less, for each violation of subsection (1) or (2) of this section. **The person shall pay the penalty to the affected public contracting agency. If the affected public contracting agency does not impose a civil penalty on the person under this subsection, the Oregon Business Development Department may independently impose a civil penalty that does not exceed \$5,000 for each violation of subsection (1) or (2) of this section. The person shall pay a penalty that the department imposes to the Office for Minority, Women and Emerging Small Business.**

(4) The *[Oregon Business Development]* department or an affected public contracting agency shall investigate *[any complaint that a person has violated]* **violations of** subsection (1) or (2) of this section. In investigating a *[complaint]* **violation**, the department or *[an]* **the** affected public contracting agency may require any additional information, administer oaths, take depositions and issue subpoenas to compel witnesses to attend and *[to produce]* **compel the production of** books, papers, records, memoranda or other information necessary to carry out the department's or the affected public contracting agency's duties. If a person fails to comply with any subpoena the department or the affected public contracting agency issues under this subsection or refuses to testify on any matter on which a person may lawfully be interrogated, the department or the affected public contracting agency shall follow the procedure provided in ORS 183.440 to compel compliance.

(5) The department or an affected public contracting agency may disqualify any person that under oath during the course of an investigation admits to violating subsection (1) or (2) of this section, or that the department or the affected public contracting agency finds to have violated subsection (1) or (2) of this section, from submitting a bid or proposal for, or receiving an award of, a public contract for a period of not more than three years. Any public contracting agency that has notice of the finding of the fraudulent certification may also disqualify the person from bidding on or participating in any public contract.

SECTION 7. If Senate Bill 584 becomes law, section 4 of this 2015 Act is amended to read:

Sec. 4. Section 2 of this 2015 Act and the amendments to ORS 200.065 by section *[3]* **6** of this 2015 Act apply to public contracts that a contracting agency advertises or otherwise solicits or, if the contracting agency does not advertise or otherwise solicit the public contract, to public contracts into which the public contracting agency enters on or after the operative date specified in section 5 of this 2015 Act.

SECTION 8. If Senate Bill 584 becomes law, section 5 of this 2015 Act is amended to read:

Sec. 5. (1) Section 2 of this 2015 Act and the amendments to ORS 200.065 by section *[3]* **6** of this 2015 Act become operative on January 1, 2016.

(2) The Director of the Oregon Business Development Department, the Director of the Oregon Department of Administrative Services, the Director of Transportation, the Attorney General and a public contracting agency that adopts rules under ORS 279A.065 may take any action before the operative date specified in subsection (1) of this section that is necessary to enable the director, the Attorney General or the public contracting agency to exercise, on and after the operative date specified in subsection (1) of this section, all of the duties, functions and powers conferred on the director, the Attorney General or the public contracting agency by section 2 of this 2015 Act and the amendments to ORS 200.065 by section [3] **6** of this 2015 Act.

SECTION 9. If Senate Bill 584 becomes law, section 4, chapter 148, Oregon Laws 2015 (Enrolled Senate Bill 584), is amended to read:

Sec. 4. The amendments to ORS 200.055[, 200.065] and 200.075 by sections 1 [to] **and 3** [of this 2015 Act], **chapter 148, Oregon Laws 2015 (Enrolled Senate Bill 584)**, apply to:

(1) Public contracts that a public contracting agency advertises or solicits or, if the public contracting agency does not advertise or otherwise solicit the public contract, a public contract into which the public contracting agency enters on or after the operative date specified in section 5 [of this 2015 Act], **chapter 148, Oregon Laws 2015 (Enrolled Senate Bill 584)**;

(2) Decisions that the Oregon Business Development Department makes on and after the operative date specified in section 5 [of this 2015 Act], **chapter 148, Oregon Laws 2015 (Enrolled Senate Bill 584)**, to approve, deny, revoke, suspend or refuse to renew a certification as a disadvantaged, minority, women or emerging small business enterprise;

(3) Investigations that the department or a public contracting agency conducts on or after the operative date specified in section 5 [of this 2015 Act], **chapter 148, Oregon Laws 2015 (Enrolled Senate Bill 584)**; and

(4) A public contracting agency's decision on or after the operative date specified in section 5 [of this 2015 Act], **chapter 148, Oregon Laws 2015 (Enrolled Senate Bill 584)**, to suspend a business enterprise's right to submit a bid or proposal for a public contract.

SECTION 10. If Senate Bill 584 becomes law, section 5, chapter 148, Oregon Laws 2015 (Enrolled Senate Bill 584), is amended to read:

Sec. 5. (1) The amendments to ORS 200.055[, 200.065] and 200.075 by sections 1 [to] **and 3** [of this 2015 Act], **chapter 148, Oregon Laws 2015 (Enrolled Senate Bill 584)**, become operative on January 1, 2016.

(2) The Director of the Oregon Business Development Department and a public contracting agency that adopts rules under ORS 279A.065 may take any action before the operative date specified in subsection (1) of this section that is necessary to enable the director or the public contracting agency to exercise, on and after the operative date specified in subsection (1) of this section, all of the duties, functions and powers conferred on the director or the public contracting agency by the amendments to ORS 200.055[, 200.065] and 200.075 by sections 1 [to] **and 3** [of this 2015 Act], **chapter 148, Oregon Laws 2015 (Enrolled Senate Bill 584)**.

SECTION 11. **This 2015 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2015 Act takes effect on its passage.**

Passed by House March 24, 2015

Repassed by House June 1, 2015

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Timothy G. Sekerak, Chief Clerk of House

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Tina Kotek, Speaker of House

Passed by Senate May 28, 2015

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Peter Courtney, President of Senate

Received by Governor:

.....M,....., 2015

Approved:

.....M,....., 2015

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Kate Brown, Governor

Filed in Office of Secretary of State:

.....M,....., 2015

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Jeanne P. Atkins, Secretary of State