

Enrolled Senate Bill 491

Sponsored by Senator MONNES ANDERSON, Representative KOMP; Senators BOQUIST, BURDICK, DEMBROW, DEVLIN, EDWARDS, GELSER, HASS, JOHNSON, RILEY, ROSENBAUM, SHIELDS, STEINER HAYWARD, THOMSEN (Presession filed.)

CHAPTER

AN ACT

Relating to requirements in public contracting for compliance with pay equity provisions of state law; creating new provisions; amending ORS 279B.110, 279B.235, 279C.375 and 279C.520; 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) The Oregon Department of Administrative Services shall establish a program to certify that a person that intends to submit a bid or proposal for a public contract understands the prohibition set forth in ORS 652.220 and in other laws or rules that prohibit discrimination in compensation or wage payments. The program must include, but is not limited to, all of these elements:

(a) A curriculum for training prospective bidders and proposers in complying with the prohibition described in this subsection. The curriculum must include hypothetical situations, case studies and other examples that show conduct that would violate the prohibition and other conduct that would constitute correct and best practices.

(b) Criteria for assessing whether prospective bidders and proposers understand the prohibition and can successfully apply best practices to a hypothetical situation that involves discrimination in compensation or wage payments.

(c) Standards for successful completion of the curriculum and assessment that will result in the department issuing the certificate.

(2) The department may conduct the training and assessment for the program described in subsection (1) of this section or may enter into an interagency agreement with the Bureau of Labor and Industries or a contract with a private entity to conduct the training and assessment.

(3) The department may by rule specify a period of time during which a certificate the department issues under this section is valid and may adopt other rules that are necessary to implement the provisions of this section.

SECTION 3. ORS 279B.110, as amended by section 3, chapter 77, Oregon Laws 2014, is amended to read:

279B.110. (1) As part of a contracting agency's evaluation of a bid or proposal, the contracting agency shall determine whether the bidder or proposer is responsible in accordance with the standards of responsibility set forth in subsection (2) of this section. If the contracting agency de-

termines that a bidder or proposer is not responsible, the contracting agency shall provide the bidder or proposer with written notice of the contracting agency's determination.

(2) In order for a contracting agency to determine that a bidder or proposer is responsible, the bidder or proposer must demonstrate to the contracting agency that the bidder or proposer:

(a) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or has the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.

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

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

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

(e) Complied with the tax laws of this state or a political subdivision of this state, including ORS 305.620 and ORS chapters 316, 317 and 318. The bidder or proposer shall demonstrate compliance by submitting a signed affidavit that [*attests, under penalty of perjury,*] **declares** that the bidder or proposer has complied with the tax laws of this state or a political subdivision of this state.

(f) Possesses an unexpired certificate that the Oregon Department of Administrative Services issued under section 2 of this 2015 Act, if the bidder or proposer employs 50 or more full-time workers and submitted a bid or proposal for a procurement with an estimated contract price that exceeds \$500,000 in response to an advertisement or solicitation from a state contracting agency.

[(f)] (g) Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder or proposer fails to promptly supply information concerning responsibility that the contracting agency requests, the contracting agency shall determine the bidder's or proposer's responsibility based on available information or may find that the bidder or proposer is not responsible.

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

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

SECTION 4. ORS 279B.235 is amended to read:

279B.235. (1) Except as provided in subsections (3) to (6) of this section, every public contract subject to this chapter must [*contain a condition that a person may not be employed*] **provide that:**

(a) A contractor may not employ an employee for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency or when the public policy absolutely requires [*it*] **otherwise**, and in such cases, except in cases of contracts for personal services designated under ORS 279A.055, the [*employee shall be paid*] **contractor shall pay the employee** at least time and a half pay **for:**

[(a)(A) For] **(A)(i)** All overtime in excess of eight hours in any one day or 40 hours in any one week [*when*] **if** the work week is five consecutive days, Monday through Friday; or

[*(B) For*] (ii) All overtime in excess of 10 hours in any one day or 40 hours in any one week [*when*] if the work week is four consecutive days, Monday through Friday; and

[*(b) For*] (B) All work [*performed*] **the employee performs** on Saturday and on any legal holiday specified in ORS 279B.020.

(b) **The contractor shall comply with the prohibition set forth in ORS 652.220, that compliance is a material element of the contract and that a failure to comply is a breach that entitles the contracting agency to terminate the contract for cause.**

(c) **The contractor may not prohibit any of the contractor's employees from discussing the employee's rate of wage, salary, benefits or other compensation with another employee or another person and may not retaliate against an employee who discusses the employee's rate of wage, salary, benefits or other compensation with another employee or another person.**

(2) [*An employer must*] **A contractor shall** give notice in writing to employees who work on a public contract, either at the time of hire or before [*commencement of*] work **begins** on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the **contractor may require the** employees [*may be required*] to work.

(3) [*In the case of contracts*] **A public contract** for personal services, as described in ORS 279A.055, [*the contract shall contain a provision that the*] **must provide that the contractor shall pay the contractor's employees who work under the public contract** [*employee shall be paid*] at least time and a half for all overtime [*worked*] **the employees work** in excess of 40 hours in any one week, except for [*individuals*] **employees** under a personal services [*contracts*] **public contract** who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(4) [*In the case of*] **A public contract** for services at a county fair, or for [*other events authorized by*] **another event that** a county fair board **authorizes**, [*the contract must contain a provision that*] **must provide that the contractor shall pay** employees [*must be paid*] **who work under the public contract** at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week. [*An employer shall give notice in writing to*] **A contractor shall notify** employees who work [*on such a*] **under the public contract**, either at the time of hire or before [*commencement of*] work **begins** on the **public contract**, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that **the contractor may require the** employees [*may be required*] to work.

(5)(a) Except as provided in subsection (4) of this section, a [*contracts*] **public contract** for services must [*contain a provision that requires that persons employed under the contracts shall receive*] **provide that the contractor shall pay employees** at least time and a half pay for work [*performed*] **the employees perform under the public contract** on the legal holidays specified in a collective bargaining agreement or in ORS 279B.020 (1)(b)(B) to (G) and for all time [*worked*] **the employee works** in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) [*An employer shall give notice in writing to*] **A contractor shall notify in writing** employees who work on a **public contract** for services, either at the time of hire or before [*commencement of*] work **begins** on the **public contract**, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the **contractor may require the** employees [*may be required*] to work.

(6) This section does not apply to public contracts:

(a) With financial institutions as defined in ORS 706.008.

(b) Made pursuant to the authority of the State Forester or the State Board of Forestry under ORS 477.406 for labor performed in the prevention or suppression of fire.

(c) For goods or personal property.

SECTION 5. ORS 279C.375 is amended to read:

279C.375. (1) After a contracting agency has opened bids and determined that the contracting agency will award a public improvement contract, the contracting agency shall award the contract to the lowest responsible bidder.

(2) At least seven days before awarding a public improvement contract, unless the contracting agency determines that seven days is impractical under rules adopted under ORS 279A.065, the contracting agency shall issue to each bidder or post, electronically or otherwise, a notice of the contracting agency's intent to award a contract. This subsection does not apply to a contract to which competitive bidding does not apply under ORS 279C.335 (1)(c) or (d). The notice and the manner in which the notice is posted or issued must conform to rules adopted under ORS 279A.065.

(3) In determining the lowest responsible bidder, a contracting agency shall do all of the following:

(a) Check the list created by the Construction Contractors Board under ORS 701.227 for bidders who are not qualified to hold a public improvement contract.

(b) Determine whether the bidder is responsible. A responsible bidder must demonstrate to the contracting agency that the bidder:

(A) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or has the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.

(B) Holds current licenses that businesses or service professionals operating in this state must hold in order to undertake or perform the work specified in the contract.

(C) Is covered by liability insurance and other insurance in amounts the contracting agency requires in the solicitation documents.

(D) Qualifies as a carrier-insured employer or a self-insured employer under ORS 656.407 or has elected coverage under ORS 656.128.

(E) Has made the disclosure required under ORS 279C.370.

(F) Completed previous contracts of a similar nature with a satisfactory record of performance. For purposes of this subparagraph, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the bidder's control, the bidder stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. The contracting agency shall document the bidder's record of performance if the contracting agency finds under this subparagraph that the bidder is not responsible.

(G) Has a satisfactory record of integrity. The contracting agency in evaluating the bidder's record of integrity may consider, among other things, whether the bidder has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the bidder's performance of a contract or subcontract. The contracting agency shall document the bidder's record of integrity if the contracting agency finds under this subparagraph that the bidder is not responsible.

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

(I) Possesses an unexpired certificate that the Oregon Department of Administrative Services issued under section 2 of this 2015 Act, if the bidder employs 50 or more full-time workers and submitted a bid for a procurement with an estimated contract price that exceeds \$500,000 in response to an advertisement or solicitation from a state contracting agency.

~~(I)~~ **(J)** Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder fails to promptly supply information concerning responsibility that the contracting agency requests, the contracting agency shall determine the bidder's responsibility based on available information, or may find that the bidder is not responsible.

(c) Document the contracting agency's compliance with the requirements of paragraphs (a) and (b) of this subsection in substantially the following form:

RESPONSIBILITY DETERMINATION FORM

Project Name: _____
Bid Number: _____
Business Entity Name: _____
CCB License Number: _____
Form Submitted By (Contracting Agency): _____

Form Submitted By (Contracting Agency Representative's Name): _____
Title: _____
Date: _____

(The contracting agency must submit this form with attachments, if any, to the Construction Contractors Board within 30 days after the date of contract award.)

The contracting agency has (check all of the following):

- Checked the list created by the Construction Contractors Board under ORS 701.227 for bidders who are not qualified to hold a public improvement contract.
- Determined whether the bidder has met the standards of responsibility. In so doing, the contracting agency has found that the bidder demonstrated that the bidder:
 - Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.
 - Holds current licenses that businesses or service professionals operating in this state must hold in order to undertake or perform the work specified in the contract.
 - Is covered by liability insurance and other insurance in amounts required in the solicitation documents.
 - Qualifies as a carrier-insured employer or a self-insured employer under ORS 656.407 or has elected coverage under ORS 656.128.
 - Has disclosed the bidder's first-tier subcontractors in accordance with ORS 279C.370.
 - Has a satisfactory record of performance.
 - Has a satisfactory record of integrity.
 - Is legally qualified to contract

with the contracting agency.

Possesses a certificate that the Oregon Department of Administrative Services issued under section 2 of this 2015 Act.

Has supplied all necessary information in connection with the inquiry concerning responsibility.

Determined the bidder to be (check one of the following):

Responsible under ORS 279C.375 (3)(a) and (b).

Not responsible under ORS 279C.375 (3)(a) and (b).

(Attach documentation if the contracting agency finds the bidder not to be responsible.)

(d) Submit the form described in paragraph (c) of this subsection, with any attachments, to the Construction Contractors Board within 30 days after the date the contracting agency awards the contract.

(4) The successful bidder shall:

(a) Promptly execute a formal contract; and

(b) Execute and deliver to the contracting agency a performance bond and a payment bond when required under ORS 279C.380.

(5) Based on competitive bids, a contracting agency may award a public improvement contract or may award multiple public improvement contracts when specified in the invitation to bid.

(6) A contracting agency may not exclude a commercial contractor from competing for a public contract on the basis that the license issued by the Construction Contractors Board is endorsed as a level 1 or level 2 license. As used in this section, "commercial contractor" has the meaning given that term in ORS 701.005.

SECTION 6. ORS 279C.520 is amended to read:

279C.520. (1) Every public contract subject to this chapter must *[contain a condition]* **provide that:**

(a) A contractor may not employ an employee *[person may not be employed]* for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency or when the public policy absolutely requires *[it]* **otherwise**, and in such cases, except in cases of contracts for personal services as defined in ORS 279C.100, the **contractor shall pay the employee** *[shall be paid]* at least time and a half pay **for:**

[(a)(A) For] **(A)(i)** All overtime in excess of eight hours in any one day or 40 hours in any one week *[when]* **if** the work week is five consecutive days, Monday through Friday; or

[(B) For] **(ii)** All overtime in excess of 10 hours in any one day or 40 hours in any one week *[when]* **if** the work week is four consecutive days, Monday through Friday; and

[(b) For] **(B)** All work *[performed]* **the employee performs** on Saturday and on any legal holiday specified in ORS 279C.540.

(b) The contractor shall comply with the prohibition set forth in ORS 652.220, that compliance is a material element of the contract and that a failure to comply is a breach that entitles the contracting agency to terminate the contract for cause.

(c) The contractor may not prohibit any of the contractor's employees from discussing the employee's rate of wage, salary, benefits or other compensation with another employee or another person and may not retaliate against an employee who discusses the employee's

rate of wage, salary, benefits or other compensation with another employee or another person.

(2) *[An employer must]* **A contractor shall** give notice in writing to employees who work on a public contract, either at the time of hire or before *[commencement of]* work **begins** on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the **contractor may require the** employees *[may be required]* to work.

(3) *[In the case of contracts]* **A public contract** for personal services, as defined in ORS 279C.100, *[the contract shall contain a provision that the employee shall be paid]* **must provide that the contractor shall pay the contractor's employees who work under the public contract** at least time and a half for all overtime *[worked]* **the employees work** in excess of 40 hours in any one week, except for *[individuals]* **employees** under a personal services *[contracts]* **public contract** who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(4) *[In the case of]* **A public contract** for services at a county fair, or for *[other events authorized by]* **another event that** a county fair board **authorizes**, *[the contract must contain a provision that]* **must provide that the contractor shall pay** employees *[must be paid]* **who work under the public contract** at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week. *[An employer shall give notice in writing to]* **A contractor shall notify** employees who work *[on such a]* **under the public** contract, either at the time of hire or before *[commencement of]* work **begins** on the **public** contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that **the contractor may require the** employees *[may be required]* to work.

(5)(a) Except as provided in subsection (4) of this section, *[contracts]* **a public contract** for services must *[contain a provision that requires that persons employed under the contracts shall receive]* **provide that the contractor shall pay employees** at least time and a half pay for work *[performed]* **the employees perform under the public contract** on the legal holidays specified in a collective bargaining agreement or in ORS 279C.540 (1)(b)(B) to (G) and for all time *[worked]* **the employees work** in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) *[An employer shall give notice in writing to]* **A contractor shall notify in writing** employees who work on a **public** contract for services, either at the time of hire or before *[commencement of]* work **begins** on the **public** contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the **contractor may require the** employees *[may be required]* to work.

SECTION 7. The amendments to ORS 279B.110, 279B.235, 279C.375 and 279C.520 by sections 3 to 6 of this 2015 Act apply to procurements that a contracting agency advertised or otherwise solicited or, if the contracting agency did not advertise or solicit the procurement, to contracts into which the contracting agency entered on or after the operative date specified in section 8 of this 2015 Act.

SECTION 8. (1) The amendments to ORS 279B.110, 279B.235, 279C.375 and 279C.520 by sections 3 to 6 of this 2015 Act become operative January 1, 2016.

(2) The Director of the Oregon Department of Administrative Services, the Director of Transportation, the Attorney General or a 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 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 contracting agency by the amendments to ORS 279B.110, 279B.235, 279C.375 and 279C.520 by sections 3 to 6 of this 2015 Act.

SECTION 9. 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 Senate April 7, 2015

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Lori L. Brocker, Secretary of Senate

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Peter Courtney, President of Senate

Passed by House June 4, 2015

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Tina Kotek, Speaker of House

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