

Senate Bill 1069

Sponsored by Senator BOQUIST

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 contracting agency to perform analysis to determine whether constructing transportation project with contracting agency's own equipment and personnel will result in least cost to contracting agency. Specifies elements of cost analysis. Requires contracting agency to file analysis with Commissioner of Bureau of Labor and Industries.

Requires commissioner to investigate contracting agency's alleged violation of Act in response to commissioner's complaint or complaint from contractor or trade association that represents contractors. Requires contractor or trade association to pay filing fee of \$250 to submit complaint. Permits commissioner to require contracting agency to negotiate and enter into agreement to comply with requirements of Act if commissioner finds that contracting agency has violated Act within previous five years and to enter final order that sets forth terms of agreement between contracting agency and contractor or trade association.

Permits party to agreement with contracting agency made in accordance with order of commissioner to submit complaint asking commissioner to enforce agreement. Requires commissioner to investigate complaint and, if commissioner finds substantial evidence of violation, to issue order to cease and desist from violation or conduct contested case hearing. Permits commissioner to impose civil penalty of not more than \$5,000 on local contracting agency that commissioner finds has violated Act or breached agreement, or civil penalty of not more than \$20,000 if commissioner finds that violation was willful.

Becomes operative January 1, 2018.

Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT

1
2 Relating to transportation; and prescribing an effective date.

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

4 **SECTION 1. As used in sections 2 and 3 of this 2017 Act:**

5 (1) **"Contracting agency" has the meaning given that term in ORS 279A.010.**

6 (2) **"Local contracting agency" has the meaning given that term in ORS 279A.010.**

7 (3) **"Transportation project" means a project or undertaking that facilitates any mode**
8 **of transportation in this state including, but not limited to:**

9 (a) **A project for highway, transit, rail and aviation capital infrastructure;**

10 (b) **Bicycle and pedestrian paths, bridges and ways; and**

11 (c) **Construction work on, within or directly related to a public road, as defined in ORS**
12 **376.150, that involves transmission or movement of water, sewage or similar utilities within**
13 **the public road's right of way.**

14 **SECTION 2. (1) The policy of the State of Oregon is that contracting agencies shall make**
15 **every effort to construct transportation projects at the least cost to the contracting agency.**

16 (2)(a) **Not less than 30 days before adopting a budget for the subsequent budget period**
17 **or before starting to construct a transportation project, each contracting agency shall pre-**
18 **pare and file with the Commissioner of the Bureau of Labor and Industries a list of every**
19 **transportation project that the contracting agency plans to fund in the budget period, iden-**
20 **tifying each transportation project by name and estimating the total on-site construction**
21 **costs. The list must also state whether the contracting agency intends to perform the con-**

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 **struction through a private contractor.**

2 **(b) If a contracting agency intends to use the contracting agency's personnel, or equip-**
3 **ment owned, leased or rented by the contracting agency, to perform construction work on**
4 **a transportation project that is estimated to cost more than \$200,000, the contracting agency**
5 **shall file with the commissioner not later than 180 days before construction begins on the**
6 **transportation project an analysis that shows that the contracting agency's decision con-**
7 **forms to the policy stated in subsection (1) of this section. The list and the analysis are**
8 **public records and the contracting agency may periodically revise the list or analysis.**

9 **(3) As part of the analysis required under subsection (2)(b) of this section, a contracting**
10 **agency shall:**

11 **(a) Estimate the cost of contracting with a private contractor to construct the trans-**
12 **portation project;**

13 **(b) Estimate the costs the contracting agency would incur in constructing the transpor-**
14 **tation project with the contracting agency's own personnel and equipment owned, leased or**
15 **rented by the contracting agency and include in the estimate:**

16 **(A) The cost of labor, including all benefits the contracting agency pays to or on behalf**
17 **of employees of the contracting agency who will work on the transportation project, workers'**
18 **compensation insurance premiums and the cost of traveling to and from the site of the**
19 **transportation project;**

20 **(B) The cost of equipment, including costs associated with leasing, renting or acquiring**
21 **and owning the equipment, costs for transporting the equipment to and from the site of the**
22 **transportation project, costs for depreciation and costs for insuring, operating, storing, re-**
23 **pairing and maintaining the equipment;**

24 **(C) The costs of administration and overhead the contracting agency will incur, including**
25 **insurance, shop and office costs that are allocable to the transportation project;**

26 **(D) The cost of tools and materials;**

27 **(E) The costs associated with any contracts into which the contracting agency must en-**
28 **ter;**

29 **(F) The commercially reasonable value of quality control testing if the contracting**
30 **agency would require quality control testing of a private contractor that constructed the**
31 **transportation project; and**

32 **(G) Any other necessary and related costs that the contracting agency will incur to**
33 **construct the transportation project with the contracting agency's own personnel and**
34 **equipment owned, leased or rented by the contracting agency; and**

35 **(c) Compare the cost the contracting agency estimates under paragraph (a) of this sub-**
36 **section with the cost the contracting agency estimates under paragraph (b) of this sub-**
37 **section.**

38 **(4) Before a contracting agency constructs a transportation project with the contracting**
39 **agency's own personnel and equipment owned, leased or rented by the contracting agency,**
40 **the contracting agency shall:**

41 **(a) Prepare plans, specifications and estimates of the unit cost of each classification of**
42 **construction work that are sufficient to control the performance of the construction work**
43 **and ensure satisfactory construction quality, if the estimated cost of the transportation**
44 **project exceeds \$200,000.**

45 **(b) Prepare and preserve a full, true and accurate account of the actual costs of per-**

1 forming the work, including all categories of costs described in subsection (3)(b) of this sec-
2 tion. The final account of the costs is a public record.

3 (5) Subsections (2) to (4) of this section do not apply to a contracting agency if the con-
4 tracting agency did not receive a responsive bid or proposal for constructing the transpor-
5 tation project from a responsible bidder or proposer after soliciting bids or proposals for
6 constructing the transportation project, if the solicitation:

7 (a) Occurred within one year before the date on which construction began; and

8 (b) Allowed a commercially reasonable time in which to perform the construction.

9 (6)(a) Except as provided in paragraph (b) of this subsection, the following are transpor-
10 tation projects that are subject to the listing and analysis requirements set forth in sub-
11 sections (2) to (4) of this section:

12 (A) Resurfacing highways at an estimated cost that exceeds \$125,000; and

13 (B) Resurfacing roads or streets with more than 1,000 tons of asphalt pavement or at a
14 depth of two or more inches in any location in an asphalt pavement lift and at an estimated
15 cost that exceeds \$125,000.

16 (b) A transportation project does not include maintenance patching, chip seals or other
17 seals placed as a maintenance treatment on highways, roads or streets.

18 (7) Maintenance resurfacing for any single road, highway or street may exceed \$125,000
19 and not be a transportation project if the cost of resurfacing any one location on the road,
20 highway or street does not exceed \$125,000 and if the contracting agency does not artificially
21 separate the resurfacing into smaller sections in order to avoid the application of this sec-
22 tion.

23 (8) A contracting agency shall prepare and preserve a full, true and accurate account of
24 the actual costs of performing road or street resurfacing if the actual costs exceed \$150,000
25 or if the contracting agency estimates that the actual costs will exceed \$150,000.

26 (9) A contracting agency may not acquire, purchase or assume an ownership interest,
27 including but not limited to a leasehold interest, in any asphalt or asphalt pavement plant
28 or production facility.

29 **SECTION 3.** (1)(a) The Commissioner of the Bureau of Labor and Industries, a contrac-
30 tor, or a trade association of contractors acting on behalf of a member of the trade associ-
31 ation, may allege in a complaint to the commissioner that a contracting agency has violated
32 section 2 of this 2017 Act.

33 (b) A complaint under paragraph (a) of this subsection must set forth the acts or omis-
34 sions that constitute the alleged violation. The commissioner, the contractor or the trade
35 association must file the complaint with the commissioner within one year after the con-
36 tractor or trade association discovered or should have known that the violation occurred.

37 (c) A contractor or trade association must submit along with a complaint under para-
38 graph (a) of this subsection a filing fee of \$250. If the commissioner finds substantial evidence
39 of a violation, the commissioner shall refund the filing fee. The commissioner by rule may
40 specify other circumstances in which the commissioner will refund the filing fee.

41 (d) The commissioner shall dismiss a complaint under this subsection if the contractor
42 or trade association brings an action in a court of this state or initiates another proceeding
43 that alleges an act or omission that is the same or substantially similar to an act or omission
44 the contractor or trade association alleged in the complaint.

45 (2)(a) The commissioner shall investigate a violation of section 2 of this 2017 Act that is

1 alleged in a complaint under subsection (1) of this section unless the commissioner reason-
 2 ably concludes that the facts alleged in the complaint do not constitute a violation or that
 3 the complaint is frivolous or was filed to harass the contracting agency or for purposes other
 4 than to enforce the requirements of section 2 of this 2017 Act.

5 (b) In the course of an investigation under this subsection, to the extent reasonably
 6 necessary the commissioner may:

7 (A) Compel attendance from witnesses, receive testimony and examine the witnesses
 8 under oath;

9 (B) Require a contracting agency or an employee of a contracting agency to produce
 10 books, records, files and other documents; and

11 (C) Take any other action the commissioner deems necessary to conduct the investi-
 12 gation.

13 (3)(a) The commissioner must conclude an investigation under subsection (2) of this
 14 section within 60 days after the date of a complaint under subsection (1) of this section and
 15 must either find substantial evidence of a violation of section 2 of this 2017 Act or dismiss
 16 the complaint. If the commissioner finds substantial evidence of a violation, the commis-
 17 sioner shall:

18 (A) Notify the contracting agency in writing that the commissioner has found substantial
 19 evidence of a violation of section 2 of this 2017 Act, describe the nature of the violation and,
 20 if the commissioner has not found substantial evidence of a violation in the five years pre-
 21 ceding the date of the complaint, state that for future violations, the commissioner will fol-
 22 low the procedures set forth in paragraph (b) of this subsection, which may include any
 23 remaining construction on the transportation project that is the subject of the
 24 commissioner's finding.

25 (B) Provide a copy of any notice the commissioner issued under subparagraph (A) of this
 26 paragraph to any contractor or trade association that filed a complaint concerning the vio-
 27 lation under subsection (1) of this section.

28 (b) If the commissioner has previously found substantial evidence of a violation of section
 29 2 of this 2017 Act by the contracting agency for a different act or different acts in the five
 30 years preceding the date of the complaint, the commissioner shall attempt to negotiate an
 31 agreement with the contracting agency that remedies the effects of the violation and pre-
 32 vents future violations.

33 (c) If the contracting agency and the commissioner enter into an agreement within 30
 34 days, the commissioner in an order shall set forth, and direct the contracting agency to
 35 comply with, the terms of the agreement.

36 (d) If negotiations between the contracting agency and the commissioner do not result
 37 in an agreement within 30 days, the commissioner shall end negotiations and initiate a con-
 38 tested case hearing against the contracting agency under ORS chapter 183.

39 (4)(a) If a contracting agency that is a party to an agreement under subsection (3)(c) of
 40 this section breaches the agreement, a contractor or trade association may submit a com-
 41 plaint to the commissioner that seeks enforcement of the agreement. The contractor or
 42 trade association must file the complaint within 180 days after the date the contractor or
 43 trade association discovered or should have known of the breach.

44 (b) The commissioner shall investigate a complaint that a contractor or trade association
 45 files under paragraph (a) of this subsection as provided in subsection (2) of this section. If

1 the commissioner finds substantial evidence that the contracting agency materially breached
2 the agreement, the commissioner may:

3 (A) Issue an order to cease and desist from the contracting agency's material breach and
4 to perform actions that the commissioner determines will carry out the purposes of section
5 2 of this 2017 Act and remedy the effects of the breach; or

6 (B) Conduct a contested case hearing in accordance with ORS chapter 183.

7 (c) An order to cease and desist that the commissioner issues under paragraph (b)(A) of
8 this subsection may not include an award of attorney fees. The remedy that the commis-
9 sioner orders may include requiring the contracting agency to enter into a contract with a
10 contractor to perform any remaining construction on the transportation project that is the
11 subject of the contracting agency's violation.

12 (d) In addition to the other remedies allowed under this section, the commissioner, a
13 contractor or a trade association may bring a civil action to enforce any agreement entered
14 into under subsection (3)(c) of this section. The court may enjoin a violation of the agree-
15 ment or may require specific performance from a party to the agreement.

16 (5)(a) If the commissioner finds by a preponderance of the evidence in a contested case
17 hearing under subsection (3)(d) of this section that a local contracting agency violated the
18 least cost policy set forth in section 2 of this 2017 Act, or in a contested case hearing under
19 subsection (4)(b)(B) of this section that a local contracting agency materially breached the
20 agreement described in subsection (3)(c) of this section, the commissioner shall issue an or-
21 der to cease and desist from the conduct that constitutes the violation or breach and may
22 impose a civil penalty of not more than \$5,000 for each project or breach or a civil penalty
23 of not more than \$20,000 if the commissioner determines that the local contracting agency
24 willfully engaged in a violation of the least cost policy set forth in section 2 of this 2017 Act
25 or willfully breached an agreement described in subsection (3)(c) of this section.

26 (b) The commissioner shall impose a civil penalty under paragraph (a) of this subsection
27 in accordance with ORS 183.745 and shall apply the proceeds of the civil penalty first to the
28 costs of the commissioner's investigation and any administrative proceedings that result
29 from the investigation. The commissioner shall deposit any remaining proceeds in the State
30 Treasury to the credit of the General Fund.

31 (c) An order to cease and desist that the commissioner issues under paragraph (a) of this
32 subsection must provide that the local contracting agency perform actions that the com-
33 missioner reasonably determines will:

34 (A) Carry out the purposes of section 2 of this 2017 Act, as appropriate; and

35 (B) Eliminate the effects of the violation, which may include having a private contractor
36 perform any remaining construction on the transportation project that is the subject of the
37 violation.

38 (d) In addition to other available remedies for violations of orders of the commissioner,
39 a contractor or trade association may bring a civil action to enforce a cease and desist order
40 issued under paragraph (a) of this subsection through writ of mandamus or specific per-
41 formance.

42 **SECTION 4.** Sections 1 to 3 of this 2017 Act apply to procurements that a contracting
43 agency first advertises or otherwise solicits or, if the contracting agency does not advertise
44 or solicit the procurement, to a contract that a contracting agency enters into on or after
45 the operative date specified in section 5 of this 2017 Act.

1 **SECTION 5.** (1) Sections 1 to 3 of this 2017 Act become operative on January 1, 2018.

2 (2) The Commissioner of the Bureau of Labor and Industries, the Director of Transpor-
3 tation, a contracting agency or a local contracting agency may adopt rules and take any
4 other action before the operative date specified in subsection (1) of this section that is nec-
5 essary to enable the commissioner, the director, the contracting agency or the local con-
6 tracting agency to exercise all of the duties, functions and powers conferred on the
7 commissioner, the director, the contracting agency or the local contracting agency by
8 sections 1 to 3 of this 2017 Act.

9 **SECTION 6.** This 2017 Act takes effect on the 91st day after the date on which the 2017
10 regular session of the Seventy-ninth Legislative Assembly adjourns sine die.

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