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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 23, 2018

Representative Susan McLain
900 Court Street NE H477
Salem OR 97301

Re: Effect of mandatory and permissive language in A-engrossed House Bill 4127

Dear Representative McLain:

You asked whether the use in A-engrossed House Bill 4127 of the permissive term "may" in the amendments to ORS 279C.110 by section 1 (5) of the bill allows contracting agencies to ignore qualifications-based selection in choosing a consultant for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services. You also provided the testimony of Jon C. Larson as an example of an argument that using "may" in section 1 (5) has that effect. Our answer to this question is that, contrary to the proffered testimony, using "may" in section 1 (5) of the bill does not allow contracting agencies to ignore or bypass qualifications-based selection.

A-engrossed House Bill 4127 sets up a structure that continues existing law in requiring contracting agencies to select consultants for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services on the basis of the consultants' qualifications, but creates an optional process under which a contracting agency may deem more than one prospective consultant as qualified to perform the services and may ask for pricing information at an earlier stage of the selection process than existing law allows. The proposed changes to the law also permit contracting agencies to negotiate with more than one prospective consultant for needed services, rather than first choosing a single consultant, entering into negotiations with that one consultant and negotiating with other prospective consultants only if negotiations with the one consultant do not conclude successfully.

The key to understanding the bill's continuing requirement for a qualifications-based selection process lies in the amendments to ORS 279C.110 by section 1 (1) of the bill, which state that "[a] contracting agency, in accordance with **either** subsection (4) or subsection (5) of this section, **shall** select a consultant to provide architectural, engineering, photogrammetric mapping, transportation planning or land surveying services **on the basis of the consultant's qualifications** for the professional service required." (Emphasis added).

This language unambiguously requires contracting agencies to select consultants based on the consultants' qualifications. This requirement is in existing law and does not change in HB 4127-A. The bill, however, does create an option under which contracting agencies may choose to continue with a selection *process* that is substantially the same as that in current agency practice—the process set forth in section 1 (4)—or to use an *alternative selection process* set forth in section 1 (5). Existing law also states that contracting agencies may solicit and use

certain pricing information only after selecting a consultant on the basis of the consultant's qualifications, but new language in the bill creates an exception *as to when a contracting agency may solicit and use pricing information in the selection process* should the contracting agency choose the alternative selection process set forth in section 1 (5). This exception does not, however, modify the language that requires that a contracting agency select a consultant based on the consultant's qualifications or otherwise change that requirement.

Section 1 (5) begins by stating that "[n]otwithstanding the **procedure** set forth in subsection (4) of this section, a contracting agency may first issue a request for **qualifications** and, after receiving responsive **summaries of qualifications** from prospective consultants, may determine that as many as three prospective consultants are qualified to provide the professional services the contracting agency requires." (Emphasis added). The use of "notwithstanding" in the bill indicates that, as an exception to the ordinary *procedural* requirements set out under subsection (4), contracting agencies may choose to use an alternative *procedure.* The language indicates, however, that the *requirement* to choose a consultant *on the basis of the consultant's qualifications* has not changed. The language reinforces this idea by stating that the contracting agency may issue a request for *qualifications* and receive *summaries of qualifications* from prospective consultants.

The use of "may" in section 1 (5) does not allow contracting agencies to skirt or evade qualifications-based selection on a whim; rather, the permissive language allows contracting agencies to make specific choices as to *how to conduct a qualifications-based selection procedure.* Those choices include the possibility of selecting as many as three consultants that the contracting agency deems to be qualified to provide the services the contracting agency seeks and, *only after making this selection*, requesting certain pricing information. Under the language of the bill, contracting agencies may also choose during the selection procedure to negotiate with one or all of the qualified consultants the contracting agency selected based on the consultants' qualifications.

Mr. Larson contended in his testimony that the bill's inclusion of permissive language means that "[s]ubsection (5) mandates no process that contracting agencies must follow." Although this is technically true, the implication that section 1 (5) of the bill creates a new situation and Mr. Larson's contention that "contracting agencies are now free to use, almost literally, any basis that they 'may' think of, and those agencies 'may' change their processes at any time or under any circumstance that those agencies 'may' like," misread both existing law and the language of the bill. ORS 279C.110 (2) currently states that "[s]ubject to the requirements of subsection (1) of this section, the procedures that a contracting agency creates to screen and select consultants and to select a candidate under this section **are at the contracting agency's sole discretion**." (Emphasis added). This language in existing law clearly states that a contracting agency may already choose any procedure the contracting agency wishes to follow in conducting a qualifications-based selection, but that the procedure the contracting agency chooses is subject to the requirement in ORS 279C.110 (1) that the selection be based on the consultant's qualifications. The bill makes only nonsubstantive changes to the requirements in section 1 (2) and therefore does not alter the entirely permissive character of the contracting agency's choice of selection procedures. Section 1 (5) of the bill, therefore, does no more than add another set of selection procedures a contracting agency may choose to follow in lieu of the procedures set forth in section 1 (4).

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Very truly yours,

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