

House Bill 4127

Sponsored by Representatives MCLAIN, BYNUM, Senator BOQUIST, Representative VIAL, Senator STEINER HAYWARD; Representatives ALONSO LEON, GREENLICK, HELM, LIVELY, NOBLE, OLSON, SOLLMAN, WHISNANT, Senators HANSELL, MANNING JR, MONROE, RILEY, TAYLOR (Pre-session filed.)

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**.

Permits contracting agency, in conducting procurement for architectural, engineering, photogrammetric mapping, transportation planning and land surveying services, to consider pricing policies, proposals and other pricing information along with prospective consultant's qualifications in specified circumstances.

Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT

1
2 Relating to a consultant selection process for a public contract for certain services; creating new
3 provisions; amending ORS 279A.157 and 279C.110; and prescribing an effective date.

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

5 **SECTION 1.** ORS 279C.110 is amended to read:

6 279C.110. (1) A contracting agency, **in accordance with either subsection (4) or subsection**
7 **(5) of this section**, shall select [*consultants*] **a consultant** to provide architectural, engineering,
8 photogrammetric mapping, transportation planning or land surveying services on the basis of the
9 consultant's qualifications for the type of professional service required. **Except as provided in**
10 **subsection (5) of this section**, a contracting agency may solicit or use pricing policies and pro-
11 posals or other pricing information, including the number of hours proposed for the service required,
12 expenses, hourly rates and overhead, to determine consultant compensation only after the contract-
13 ing agency has selected a [*candidate pursuant to subsection (2) of this section*] **consultant**.

14 (2) Subject to the requirements of subsection (1) of this section, the procedures that a con-
15 tracting agency creates to screen **prospective consultants** and [*select consultants and to select a*
16 *candidate under this section*] **make a selection** are at the contracting agency's sole discretion. The
17 contracting agency may adjust the procedures to accommodate the contracting agency's scope,
18 schedule or objectives for a particular project if the estimated cost of the architectural, engineering,
19 photogrammetric mapping, transportation planning or land surveying services for the project does
20 not exceed \$250,000.

21 (3) A contracting agency's screening and selection procedures under this section, regardless of
22 the estimated cost of the architectural, engineering, photogrammetric mapping, transportation plan-
23 ning or land surveying services for a project, may include considering each [*candidate's*] **prospec-**
24 **tive consultant's**:

25 (a) Specialized experience, capabilities and technical competence, which the [*candidate*] **pro-**
26 **spective consultant** may demonstrate with the [*candidate's*] **prospective consultant's** proposed
27 approach and methodology to meet the project requirements;

28 (b) Resources committed to perform the [*work*] **services** and the proportion of the time that the

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 [candidate's] **prospective consultant's** staff would spend [on the project] **to provide services to the**
 2 **contracting agency**, including time for specialized services, within the applicable time limits;

3 (c) Record of past performance, including but not limited to price and cost data from previous
 4 projects, quality of work, ability to meet schedules, cost control and contract administration;

5 (d) Ownership status and employment practices regarding disadvantaged business enterprises,
 6 minority-owned businesses, woman-owned businesses, businesses that service-disabled veterans own,
 7 emerging small businesses or historically underutilized businesses;

8 (e) Availability to the project locale;

9 (f) Familiarity with the project locale; and

10 (g) Proposed project management techniques.

11 (4)(a) **After screening prospective consultants in accordance with this section, a con-**
 12 **tracting agency shall select the most qualified prospective consultant to provide the profes-**
 13 **sional services the contracting agency requires. After making a selection, the contracting**
 14 **agency may solicit from the prospective consultant the pricing policies, proposals or other**
 15 **pricing information described in subsection (1) of this section.**

16 (b) If the screening and selection procedures a contracting agency [creates under subsection (2)
 17 of] **follows under** this section result in the contracting agency's determination that two or more
 18 [candidates] **prospective consultants** are equally qualified, the contracting agency may **use any**
 19 **process to** select a [candidate through any process the contracting agency adopts] **consultant** that
 20 is not based on the [candidate's] **prospective consultant's** pricing policies, proposals or other
 21 pricing information[.] **described in subsection (1) of this section.**

22 (5)(a) **Notwithstanding the procedure set forth in subsection (4) of this section, a con-**
 23 **tracting agency may first issue a request for qualifications and, after receiving responsive**
 24 **summaries of qualifications from prospective consultants, may determine that as many as**
 25 **five prospective consultants are qualified to provide the professional services the contracting**
 26 **agency requires. The contracting agency shall notify all prospective consultants that re-**
 27 **sponded to the request for qualifications of the contracting agency's determination.**

28 (b) **After making a determination under paragraph (a) of this subsection, a contracting**
 29 **agency may request pricing policies, proposals and other pricing information described in**
 30 **subsection (1) of this section from each qualified prospective consultant. The contracting**
 31 **agency, on the basis of each prospective consultant's qualifications and pricing policies,**
 32 **proposals and other pricing information, may select one or more prospective consultants**
 33 **with which to begin negotiations as provided in subsection (6) of this section. If the pro-**
 34 **spective consultant and the contracting agency complete negotiations successfully, the con-**
 35 **tracting agency shall notify all qualified prospective consultants of the contracting agency's**
 36 **intent to award a contract.**

37 [(5)] (6) The contracting agency and [the] selected [candidate] **consultant** shall mutually discuss
 38 and refine the scope of services for the project and shall negotiate conditions, including but not
 39 limited to a compensation level and performance schedule[, based on] **for** the scope of services **the**
 40 **contracting agency requires.** The compensation level paid must be reasonable and fair to the
 41 contracting agency as determined solely by the contracting agency. Authority to negotiate a con-
 42 tract under this section does not supersede any provision of ORS 279A.140 or 279C.520.

43 [(6)] (7) If the contracting agency and [the] selected [candidate] **consultant** are unable for any
 44 reason to negotiate a contract at a compensation level that is reasonable and fair to the contracting
 45 agency, the contracting agency shall, either orally or in writing, formally terminate negotiations

1 with the selected *[candidate]* **consultant**. The contracting agency may then negotiate with the next
 2 most qualified *[candidate]* **prospective consultant**. The *[negotiation process]* **contracting agency**
 3 may continue in this manner through successive *[candidates]* **prospective consultants** until an
 4 agreement is reached or the contracting agency terminates the *[consultant contracting]* **selection**
 5 process.

6 [(7)] (8) *[It is the]* **A** goal of this state **is** to promote a sustainable economy in the rural areas
 7 of *[the]* **this** state. In order to monitor progress toward this goal, a state contracting agency shall
 8 keep a record of the locations in which architectural, engineering, photogrammetric mapping,
 9 transportation planning or land surveying services contracts and related services contracts are
 10 performed throughout *[the]* **this** state, the locations of the selected consultants and the direct ex-
 11 penses *[on]* **of** each contract. This record must include the total number of contracts awarded to
 12 each consultant *[firm]* over a 10-year period. The record of direct expenses must include all per-
 13 sonnel travel expenses as a separate and identifiable expense *[on]* **of** the contract. Upon request, the
 14 state contracting agency shall make these records available to the public.

15 [(8)] (9) Notwithstanding the provisions of subsection (1) of this section, a contracting agency
 16 may directly appoint a consultant if the estimated cost of the architectural, engineering, pho-
 17 togrammetric mapping, transportation planning or land surveying services for the project does not
 18 exceed \$100,000.

19 [(9)] (10) Notwithstanding the provisions of subsections (1) and [(8)] (9) of this section, a con-
 20 tracting agency may directly appoint a consultant for architectural, engineering, photogrammetric
 21 mapping, transportation planning or land surveying services in an emergency.

22 **SECTION 2.** ORS 279A.157 is amended to read:

23 279A.157. (1) As used in this section:

24 (a)(A) "Contract form" means a document with terms and conditions that the Attorney General
 25 and the Oregon Department of Administrative Services develop, approve and make available for
 26 state contracting agencies to use without alteration, except as provided in subparagraph (B) of this
 27 paragraph, as the terms and conditions of a public contract.

28 (B) "Contract form" does not include specifications for a procurement, a scope of work, pricing
 29 information, information that identifies parties to the public contract or similar or related portions
 30 of a public contract that a state contracting agency necessarily develops or must alter, with ap-
 31 proval from the Attorney General or the Oregon Department of Administrative Services, as a means
 32 of achieving the results the state contracting agency intends for the procurement.

33 (b)(A) "Contract template" means a document with terms and conditions that the Attorney
 34 General and the department develop, approve and make available for state contracting agencies to
 35 use, with appropriate alterations, as the basis for the terms and conditions of a public contract.

36 (B) "Contract template" does not include specifications for a procurement, a scope of work,
 37 pricing information, information that identifies parties to the public contract or similar or related
 38 portions of a public contract that a state contracting agency necessarily develops or must alter as
 39 a means of achieving the results the state contracting agency intends for the procurement.

40 (c) "Solicitation template" means a request for information, a request for a quotation, an invi-
 41 tation to bid, a request for proposals or other document for soliciting a procurement under the
 42 Public Contracting Code in which the Attorney General and the department develop, approve and
 43 make available standardized language that a state contracting agency must use, with appropriate
 44 alterations, for a solicitation.

45 (2)(a) Except as provided in paragraph (c) of this subsection, a state contracting agency shall

1 use a solicitation template in advertising and soliciting all procurements under the Public Con-
2 tracting Code and, as provided in paragraph (b) of this subsection, shall use a contract form or a
3 contract template, as appropriate, as the basis for all public contracts into which the state con-
4 tracting agency enters. A state contracting agency, in accordance with the Public Contracting Code,
5 may negotiate the terms and conditions set forth in a contract form or contract template but may
6 not vary the terms and conditions without the advice of the Attorney General or legal counsel that
7 the Attorney General approves if the state contracting agency anticipates that the contract form
8 or contract template will be the basis for a public contract with a contract price that exceeds
9 \$150,000.

10 (b) A state contracting agency shall use a contract form or contract template for all price
11 agreements, cooperative procurements or procurements for which the Attorney General or the Di-
12 rector of the Oregon Department of Administrative Services determines that the specifications for
13 goods or services, the terms and conditions, the scope of work or other aspects of a procurement
14 or a class of procurements do not vary significantly among state contracting agencies, or for pro-
15 curements or classes of procurements in which the Attorney General or the director determines that
16 using a contract form or contract template is necessary for the state contracting agency to avoid
17 unreasonable liabilities or other risks or would promote best practices in public contracting. A state
18 contracting agency, in accordance with the Public Contracting Code, may negotiate the terms and
19 conditions set forth in a contract form or contract template but may not vary the terms and condi-
20 tions without the advice of the Attorney General or legal counsel that the Attorney General ap-
21 proves if the state contracting agency anticipates that the contract form or contract template will
22 be the basis for a public contract with a contract price that exceeds \$150,000.

23 (c) A state contracting agency may base a public contract on terms and conditions other than
24 the terms and conditions set forth in a contract form or contract template only if:

25 (A) The state contracting agency receives approval from the Attorney General or, if the state
26 contracting agency is subject to ORS 279A.140, from the Director of the Oregon Department of Ad-
27 ministrative Services, unless the state contracting agency determines that the contract price for the
28 public contract is unlikely to exceed \$150,000;

29 (B) The nature of the procurement is unique and the public contract requires specific terms and
30 conditions to accommodate the unique nature of the procurement or the state contracting agency,
31 in accordance with provisions in the solicitation documents for the procurement, negotiated terms
32 and conditions for the public contract that differ from the terms and conditions in a contract form
33 or contract template;

34 (C) The state contracting agency consults the Attorney General, or legal counsel that the At-
35 torney General approves, to develop appropriate terms and conditions for the public contract and
36 for legal advice during all phases of the procurement for which the Attorney General determines
37 that legal advice is necessary and relevant; and

38 (D) The state contracting agency submits the public contract to the Attorney General for ap-
39 proval for legal sufficiency, if the provisions of ORS 291.047 require the submission.

40 (d) This subsection does not apply to a procurement that a state contracting agency conducts
41 under ORS 279B.065, 279B.080 or 279C.110 [(9)] (10).

42 (3) Notwithstanding provisions of this section that require a state contracting agency to use a
43 solicitation template, contract form or contract template that the Attorney General and the depart-
44 ment develop, the office of the Secretary of State and the office of the State Treasurer shall use
45 standardized forms and templates that each office develops for each office's own use in conducting

1 procurements or entering into public contracts. The Secretary of State and the State Treasurer may
2 elect to use solicitation templates, contract forms or contract templates that the Attorney General
3 and the department develop.

4 (4) The Attorney General and the Director of the Oregon Department of Administrative Services
5 shall cooperate to:

6 (a) Develop and make available solicitation templates, contract forms and contract templates for
7 procurements or classes of procurements that state contracting agencies require; and

8 (b) Adopt rules under ORS 279A.065 to implement the provisions of this section.

9 **SECTION 3. The amendments to ORS 279A.157 and 279C.110 by sections 1 and 2 of this**
10 **2018 Act apply to public contracts that a contracting agency first advertises or otherwise**
11 **solicits or, if the contracting agency does not advertise or otherwise solicit the public con-**
12 **tract, to public contracts into which the contracting agency enters on or after the operative**
13 **date specified in section 4 of this 2018 Act.**

14 **SECTION 4. (1) The amendments to ORS 279A.157 and 279C.110 by sections 1 and 2 of this**
15 **2018 Act become operative on January 1, 2019.**

16 (2) A contracting agency may adopt rules and take any other action before the operative
17 date specified in subsection (1) of this section that is necessary to enable the contracting
18 agency, on and after the operative date specified in subsection (1) of this section, to under-
19 take or exercise all of the duties, functions and powers conferred on the contracting agency
20 by the amendments to ORS 279A.157 and 279C.110 by sections 1 and 2 of this 2018 Act.

21 **SECTION 5. This 2018 Act takes effect on the 91st day after the date on which the 2018**
22 **regular session of the Seventy-ninth Legislative Assembly adjourns sine die.**

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