

Senate Bill 1565

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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 Attorney General, Director of Oregon Department of Administrative Services and Director of Transportation to cooperate in adopting rules for electronic procurement system. Specifies minimum contents for rules. Requires state agency to use electronic procurement system in accordance with rules in conducting procurement. Permits contracting agency that is not state agency to use electronic procurement system in conducting procurement.

Requires Oregon Department of Administrative Services to establish pilot program for using reverse auction method for conducting procurement for goods and services. Specifies features that pilot program must have. Requires department to evaluate pilot program and report results of evaluation to Governor and committee of Legislative Assembly related to procurement not later than December 31, 2019.

Requires state contracting agency in evaluating competitive proposal to weight proposed contract price at not less than 30 percent of total weight that state contracting agency gives to all factors in final evaluation of proposals. Provides that director or other head of state contracting agency may waive requirement if director or other head determines that waiver is in best interest of state contracting agency. Requires director or other head to report each waiver to Oregon Department of Administrative Services.

Becomes operative January 1, 2019.

Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT

1
2 Relating to methods of public procurement; creating new provisions; amending ORS 279B.060 and
3 279B.145; and prescribing an effective date.

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

5 **SECTION 1. Section 2 of this 2018 Act is added to and made a part of ORS chapter 279A.**

6 **SECTION 2. (1) The Attorney General, the Director of the Oregon Department of Ad-**
7 **ministrative Services and the Director of Transportation shall cooperate in adopting rules**
8 **for an electronic procurement system. The rules, at a minimum, must designate a particular**
9 **electronic procurement system, specify the purposes for which and the circumstances in**
10 **which state agencies must use the electronic procurement system and, to the extent neces-**
11 **sary, specify procedures for access to and use of the electronic procurement system.**

12 **(2) A state agency shall solicit, receive bids or proposals for, award a public contract in**
13 **connection with and otherwise conduct a procurement under the Public Contracting Code in**
14 **accordance with the rules described in subsection (1) of this section, notwithstanding any**
15 **other method specified in the code for conducting a particular type of procurement.**

16 **(3) A contracting agency that is not a state agency may conduct a procurement under**
17 **the Public Contracting Code in accordance with the rules described in subsection (1) of this**
18 **section.**

19 **SECTION 3. Section 4 of this 2018 Act is added to and made a part of ORS chapter 279B.**

20 **SECTION 4. (1) As used in this section, "reverse auction method" means an electronic**
21 **procurement process in which:**

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 (a) A bidder or proposer for a public contract is not aware that other bidders or
2 proposers are submitting bids or price proposals for the procurement;

3 (b) Each bidder or proposer submits a bid or price proposal electronically by a specified
4 deadline; and

5 (c) Each bid or price proposal competes with all other bids or price proposals to offer the
6 lowest contract price for the procurement.

7 (2) The Oregon Department of Administrative Services shall establish a pilot program to
8 evaluate the utility and effectiveness of a reverse auction method for conducting procure-
9 ments under ORS chapter 279B. The pilot program, at a minimum, must:

10 (a) Use a reverse auction method to conduct at least 10 procurements, each with an an-
11 ticipated contract price of \$150,000 or more; and

12 (b) Require from each contracting agency that participates in the pilot program infor-
13 mation about each procurement for which the contracting agency used the reverse auction
14 method. The information must be sufficient to enable the department to evaluate the results
15 of the pilot program using at least these criteria:

16 (A) The extent and amount of cost savings to the contracting agency, if any, that are
17 attributable to using the reverse auction method;

18 (B) The extent, if any, to which contracting agencies that participate in the pilot program
19 realize other nonmonetary benefits or detriments in the procurement process as a result of
20 using the reverse auction method and the nature of the benefits or detriments; and

21 (C) The reactions of bidders or proposers to the reverse auction method and any iden-
22 tifiable benefits or detriments to bidders or proposers that result from using the reverse
23 auction method.

24 (3) The department, not later than December 31, 2019, shall report in writing to the
25 Governor and to a committee of the Legislative Assembly related to public procurement
26 concerning the nature of the pilot program and the results of the department's evaluation
27 under subsection (2) of this section.

28 **SECTION 5.** ORS 279B.060 is amended to read:

29 279B.060. (1) A contracting agency may solicit and award a public contract for goods or ser-
30 vices, or may award multiple public contracts for goods or services when specified in the request
31 for proposals, by requesting and evaluating competitive sealed proposals.

32 (2) ~~The~~ A request for proposals must:

33 (a) Specify a time and date by which sealed proposals must be received, and a place at which
34 the proposals must be submitted. The contracting agency, in the contracting agency's sole dis-
35 cretion, may receive proposals by electronic means or may direct or permit proposers to submit
36 proposals by electronic means.

37 (b) Specify the name and title of the person designated to receive proposals and the person the
38 contracting agency designates as the contact person for the procurement, if different.

39 (c) Describe the procurement. In the description, the contracting agency shall identify the scope
40 of work included within the procurement, outline the contractor's anticipated duties and set expec-
41 tations for the contractor's performance. Unless the contractor is providing architectural, engi-
42 neering, photogrammetric mapping, transportation planning or land surveying services or related
43 services, as defined in ORS 279C.100, or unless the contracting agency for good cause specifies
44 otherwise, the scope of work shall require the contractor to meet the highest standards prevalent
45 in the industry or business most closely involved in providing the appropriate goods or services.

1 (d) Specify a time, date and place for prequalification applications, if any, to be filed and the
2 classes of work, if any, for which proposers must be prequalified in accordance with ORS 279B.120.

3 (e) State that the contracting agency may cancel the procurement or reject any or all proposals
4 in accordance with ORS 279B.100.

5 (f) State that “Contractors shall use recyclable products to the maximum extent economically
6 feasible in the performance of the contract work set forth in this document.” if a state contracting
7 agency issues the request for proposals.

8 (g) Require the contractor or subcontractor to possess an asbestos abatement license, if required
9 under ORS 468A.710.

10 (h) Include all contractual terms and conditions applicable to the procurement. The contract
11 terms and conditions shall specify clear consequences for a contractor’s failure to perform the scope
12 of work identified in the request for proposals or the contractor’s failure to meet established per-
13 formance standards. The consequences may include, but are not limited to:

14 (A) Reducing or withholding payment;

15 (B) Requiring the contractor to perform, at the contractor’s expense, additional work necessary
16 to perform the identified scope of work or meet the established performance standards; or

17 (C) Declaring a default, terminating the public contract and seeking damages and other relief
18 available under the terms of the public contract or other applicable law.

19 (3) The request for proposals also may:

20 (a) Identify contractual terms or conditions that the contracting agency reserves, in the request
21 for proposals, for negotiation with proposers;

22 (b) Request that proposers propose contractual terms and conditions that relate to subject mat-
23 ter reasonably identified in the request for proposals;

24 (c) Contain or incorporate the form and content of the contract that the contracting agency will
25 accept, or suggest contract terms and conditions that nevertheless may be the subject of negoti-
26 ations with proposers;

27 (d) Announce the method the contracting agency will use to select the contractor, which may
28 include, but is not limited to, negotiating with the highest ranked proposer, competitive negotiations,
29 a multiple-tiered competition that is designed to identify a class of proposers that fall within a
30 competitive range or to otherwise eliminate from consideration a class of lower ranked proposers
31 or a combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065; and

32 (e) Describe the manner in which the contracting agency will evaluate proposals, identifying the
33 relative importance of price and other factors the contracting agency will use to evaluate and rate
34 the proposals in the first tier of competition. If the contracting agency uses more than one tier of
35 competitive evaluation, the request for proposals must describe the process the contracting agency
36 will use to evaluate proposals in the subsequent tiers. **If a state contracting agency conducts the
37 procurement, the description under this paragraph must state that the state contracting
38 agency in the evaluation shall weight the contract price that a prospective contractor pro-
39 poses at not less than 30 percent of the total weight that the state contracting agency gives
40 to all factors in the state contracting agency’s final evaluation of a proposal.**

41 (4)(a) The contracting agency may require proposal security in any form the contracting agency
42 deems prudent. Proposal security [*shall*] **must** serve the same function with respect to requests for
43 proposals as bid security serves with respect to invitations to bid under ORS 279B.055.

44 (b) The contracting agency shall return the proposal security to all proposers upon the exe-
45 cution of the contract.

1 (c) The contracting agency shall retain the proposal security if a proposer who is awarded a
2 contract fails to promptly and properly execute the contract. For purposes of this paragraph, prompt
3 and proper execution of the contract includes all action by a proposer that is necessary to form a
4 contract in accordance with the request for proposals, including posting performance security and
5 submitting proof of insurance [*when*] **if** the request for proposals requires the submission. If contract
6 negotiations or competitive negotiations are conducted, the failure, prior to award, of a contracting
7 agency and a proposer to reach agreement does not constitute grounds for retaining proposal secu-
8 rity.

9 (5) **A contracting agency shall give** public notice of the request for proposals [*must be given*]
10 in the same manner as provided for public notice of invitations to bid in ORS 279B.055 (4).

11 (6)(a) Notwithstanding ORS 192.311 to 192.478, **a contracting agency may open** proposals [*may*
12 *be opened*] in a manner [*to avoid*] **that avoids** disclosing contents to competing proposers during,
13 when applicable, the process of negotiation, but the contracting agency shall record and make
14 available the identity of all proposers as part of the contracting agency's public records after the
15 proposals are opened. Notwithstanding ORS 192.311 to 192.478, proposals are not required to be open
16 for public inspection until after the notice of intent to award a contract is issued. The fact that
17 proposals are opened at a meeting, as defined in ORS 192.610, does not make the contents of the
18 proposals subject to disclosure, regardless of whether the public body opening the proposals fails to
19 give notice of or provide for an executive session for the purpose of opening proposals.

20 (b) Notwithstanding a requirement to make proposals open to public inspection after the con-
21 tracting agency issues notice of intent to award a contract, a contracting agency may withhold from
22 disclosure to the public materials included in a proposal that are exempt or conditionally exempt
23 from disclosure under ORS 192.345 or 192.355.

24 (c) If a **contracting agency cancels a** request for proposals [*is canceled*] under ORS 279B.100
25 after **receiving or rejecting** proposals [*are received or if a proposal is rejected*], the contracting
26 agency may return a proposal to the proposer that made the proposal. The contracting agency shall
27 keep a list of returned proposals in the file for the solicitation.

28 (7) As provided in the request for proposals or in written addenda issued thereunder, the con-
29 tracting agency, **before or after opening proposals**, may conduct site tours, demonstrations, indi-
30 vidual or group discussions and other informational activities with proposers [*before or after the*
31 *opening of proposals*] for the purpose of clarification to ensure full understanding of, and respon-
32 siveness to, the solicitation requirements or to consider and respond to requests for modifications
33 of the proposal requirements. The contracting agency shall use procedures designed to accord
34 proposers fair and equal treatment with respect to any opportunity for discussion and revision of
35 proposals.

36 (8) For purposes of evaluation, when provided for in the request for proposals, the contracting
37 agency may employ methods of contractor selection that include, but are not limited to:

38 (a) An award or awards based solely on the ranking of proposals;

39 (b) Discussions leading to best and final offers, in which the contracting agency may not disclose
40 private discussions leading to best and final offers;

41 (c) Discussions leading to best and final offers, in which the contracting agency may not disclose
42 information derived from proposals submitted by competing proposers;

43 (d) Serial negotiations, beginning with the highest ranked proposer;

44 (e) Competitive simultaneous negotiations;

45 (f) Multiple-tiered competition designed to identify, at each level, a class of proposers that fall

1 within a competitive range or to otherwise eliminate from consideration a class of lower ranked
2 proposers;

3 (g) A multistep request for proposals requesting the submission of unpriced technical submittals,
4 and then later issuing a request for proposals limited to the proposers whose technical submittals
5 the contracting agency had determined to be qualified under the criteria set forth in the initial re-
6 quest for proposals; or

7 (h) A combination of methods described in this subsection, as authorized or prescribed by rules
8 adopted under ORS 279A.065.

9 **(9)(a) A state contracting agency, in evaluating a proposal under this section, shall**
10 **weight the contract price that a prospective contractor proposes at not less than 30 percent**
11 **of the total weight that the state contracting agency gives to all factors in the state con-**
12 **tracting agency's final evaluation of a proposal. For purposes of this paragraph, a state**
13 **contracting agency's final evaluation of a proposal is the final evaluative step the state con-**
14 **tracting agency undertakes before deciding to issue a notice of intent to award a contract,**
15 **regardless of the specific method of contractor selection that the state contracting agency**
16 **employs under subsection (8) of this section.**

17 **(b) The director or other head of a state contracting agency may waive the weighting**
18 **requirement specified in paragraph (a) of this subsection if the director or other head de-**
19 **termines in writing that a waiver is in the best interest of the state contracting agency. The**
20 **director or other head shall report in writing to the Director of the Oregon Department of**
21 **Administrative Services each instance in which the director or other head waived the re-**
22 **quirement and in the report shall outline the reasons for the waiver.**

23 [(9)] **(10)** Revisions of proposals may be permitted after the submission of proposals and before
24 award for the purpose of obtaining best offers or best and final offers.

25 [(10)] **(11)** After [the] opening [of] proposals, a contracting agency may issue or electronically
26 post an addendum to the request for proposals that modifies the criteria, rating process and proce-
27 dure for any tier of competition before the start of the tier to which the addendum applies. The
28 contracting agency shall send an addendum that is issued by a method other than electronic posting
29 to all proposers who are eligible to compete under the addendum. The contracting agency shall issue
30 or post the addendum at least five days before the start of the subject tier of competition or as the
31 contracting agency otherwise determines is adequate to allow eligible proposers to prepare for the
32 competition in accordance with rules adopted under ORS 279A.065.

33 [(11)] **(12)** The cancellation of requests for proposals and the rejection of proposals must be in
34 accordance with ORS 279B.100.

35 [(12)] **(13)** In [the] a request for proposals, [the] a contracting agency shall describe the methods
36 by which the **contracting** agency will make the results of each tier of competitive evaluation
37 available to the proposers who competed in the tier. The contracting agency shall include a de-
38 scription of the manner in which the proposers who are eliminated from further competition may
39 protest or otherwise object to the contracting agency's decision.

40 [(13)] **(14)** [The] A contracting agency shall issue or electronically post the notice of intent to
41 award described in ORS 279B.135 to each proposer who was evaluated in the final competitive tier.

42 [(14)] **(15)** If [the] a contracting agency awards a contract, the contracting agency shall award
43 the contract to the responsible proposer whose proposal the contracting agency determines in
44 writing is the most advantageous to the contracting agency based on the evaluation process and
45 evaluation factors described in **this section and in** the request for proposals, applicable preferences

1 described in ORS 279A.120 and 279A.125 and, when applicable, the outcome of any negotiations au-
 2 thorized by the request for proposals. Other factors may not be used in the evaluation. [*When*] If the
 3 request for proposals specifies or authorizes awarding multiple public contracts, the contracting
 4 agency shall award public contracts to the responsible proposers who qualify for the award of a
 5 contract under the terms of the request for proposals.

6 [~~(15)~~] **(16)** [~~The~~] A contracting agency may issue a request for information, a request for interest,
 7 a request for qualifications or other preliminary documents to obtain information useful in preparing
 8 a request for proposals.

9 [~~(16)~~] **(17)** Before executing a contract solicited under this section, a contracting agency shall
 10 obtain the proposer's agreement to perform the scope of work and meet the performance standards
 11 set forth in the final negotiated scope of work.

12 **SECTION 6.** ORS 279B.145 is amended to read:

13 279B.145. [~~The determinations~~] A **determination** under ORS 279B.030, 279B.033, 279B.036,
 14 279B.055 (3) and (7), 279B.060 (4) and [~~(14)~~] **(15)**, 279B.075, 279B.080, 279B.085 and 279B.110 [~~are~~] **is**
 15 final and conclusive unless [~~they are~~] **the determination is** clearly erroneous, arbitrary, capricious
 16 or contrary to law.

17 **SECTION 7.** Section 2 of this 2018 Act and the amendments to ORS 279B.060 and 279B.145
 18 by sections 5 and 6 of this 2018 Act apply to public contracts that a contracting agency has
 19 advertised or otherwise solicited or, if the contracting agency has not advertised or other-
 20 wise solicited the public contract, to public contracts into which the contracting agency en-
 21 ters on or after the operative date specified in section 8 of this 2018 Act.

22 **SECTION 8.** (1) Sections 2 and 4 of this 2018 Act and the amendments to ORS 279B.060
 23 and 279B.145 by sections 5 and 6 of this 2018 Act become operative on January 1, 2019.

24 (2) The Attorney General, the Director of the Oregon Department of Administrative
 25 Services, the Director of Transportation and a contracting agency that adopts rules under
 26 ORS 279A.065 or 279A.070 may adopt rules and take any other action before the operative
 27 date specified in subsection (1) of this section that is necessary to enable the Attorney
 28 General, the director or the contracting agency, on and after the operative date specified in
 29 subsection (1) of this section, to undertake or exercise all of the duties, functions and powers
 30 conferred on the Attorney General, the director or the contracting agency under section 2
 31 of this 2018 Act and the amendments to ORS 279B.060 and 279B.145 by sections 5 and 6 of this
 32 2018 Act.

33 **SECTION 9.** Section 4 of this 2018 Act is repealed on January 2, 2020.

34 **SECTION 10.** This 2018 Act takes effect on the 91st day after the date on which the 2018
 35 regular session of the Seventy-ninth Legislative Assembly adjourns sine die.