

House Bill 2769

Sponsored by Representative MCLAIN, Senators DEMBROW, MANNING JR, HANSELL; Representatives DOHERTY, HOLVEY, SOLLMAN, Senators BOQUIST, RILEY

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 as part of screening and selection of consultants in specified circumstances.

Becomes operative on January 1, 2020.

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, 279B.405 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 shall select [*consultants*] **a consultant** to provide architec-
7 tural, engineering, photogrammetric mapping, transportation planning or land surveying services on
8 the basis of the consultant's qualifications for the type of professional service required. A contract-
9 ing agency may solicit or use pricing policies and proposals or other pricing information, including
10 the number of hours proposed for the service required, expenses, hourly rates and overhead, to de-
11 termine consultant compensation only after the contracting agency has selected a [*candidate pursu-*
12 *ant to subsection (2) of this section*] **consultant**.

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

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

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

27 (b) Resources committed to perform the [*work*] **services** and the proportion of the time that the
28 [*candidate's*] **prospective consultant's** staff would spend [*on the project*] **to perform services for**

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 **the contracting agency**, including time for specialized services, within the applicable time limits;

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

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

7 (e) Availability to the project locale;

8 (f) Familiarity with the project locale; and

9 (g) Proposed project management techniques.

10 (4) If the screening and selection procedures a contracting agency **follows under this section**
11 **or** creates under subsection (2) of this section result in the contracting agency's determination that
12 two or more [*candidates*] **prospective consultants** are equally qualified, the contracting agency may
13 **use any process to** select a [*candidate through any process the contracting agency adopts*] **consult-**
14 **ant** that is not based on the [*candidate's*] **prospective consultant's** pricing policies, proposals or
15 other pricing information.

16 (5) **Notwithstanding the requirement in subsection (1) of this section that a contracting**
17 **agency may not solicit or use pricing policies, proposals or other pricing information until**
18 **after the contracting agency has selected a consultant, a local contracting agency may use**
19 **pricing policies, proposals or other pricing information as part of the local contracting**
20 **agency's screening and selection of prospective consultants if the local contracting agency:**

21 (a) **States in solicitation documents for the procurement:**

22 (A) **That the local contracting agency will screen and select prospective consultants as**
23 **provided in this subsection;**

24 (B) **How the local contracting agency will rank proposals from prospective consultants,**
25 **with a specific focus on:**

26 (i) **Which factors the local contracting agency will consider in evaluating proposals, in-**
27 **cluding pricing policies, proposals or other pricing information, if the local contracting**
28 **agency will use pricing policies, proposals or other pricing information in the evaluation; and**

29 (ii) **The relative weight the local contracting agency will give each factor, disclosing at**
30 **a minimum the number of available points for each factor, the percentage each factor com-**
31 **prises in the total evaluation score and any other weighting criteria the local contracting**
32 **agency intends to use;**

33 (C) **An estimate of the cost of professional services the local contracting agency requires**
34 **for the procurement; and**

35 (D) **A scope of work that is sufficiently detailed to enable a prospective consultant to**
36 **prepare a responsive proposal.**

37 (b) **Evaluates each prospective consultant on the basis of the prospective consultant's**
38 **qualifications to perform the professional services the local contracting agency requires for**
39 **the procurement. The local contracting agency may use the criteria set forth in subsection**
40 **(3) of this section to conduct the evaluation.**

41 (c) **Announces the evaluation scores and rank for each prospective consultant after**
42 **completing the evaluation described in paragraph (b) of this subsection. The local contracting**
43 **agency may determine that as many as three of the top-ranked prospective consultants are**
44 **qualified to perform the professional services the local contracting agency requires for the**
45 **procurement and may request a pricing proposal for the scope of work stated in paragraph**

1 (a)(D) of this subsection from each of the top-ranked consultants. The pricing proposal must
 2 consist solely of:

3 (A) A schedule of hourly rates that the prospective consultant will charge for the work
 4 of each individual or each labor classification that will perform the professional services the
 5 local contracting agency requires for the procurement, in the form of an offer that is irrev-
 6 ocable for not less than 90 days after the date of the proposal; and

7 (B) A reasonable estimate of the hours that the prospective consultant will require to
 8 perform the professional services the local contracting agency requires for the procurement,
 9 apportioned according to:

10 (i) Each task that comprises the services;

11 (ii) Each individual or labor classification that will perform each task, together with the
 12 hourly rate that applies to each individual or labor classification; and

13 (iii) Expenses, including travel expenses, that the prospective contractor expects to incur
 14 in connection with providing the services.

15 (d) Permits a prospective consultant identified as qualified under paragraph (c) of this
 16 subsection to withdraw from consideration for the procurement if the prospective consultant
 17 does not wish to provide a price proposal.

18 (e) Completes the evaluation and selects a consultant from among the top-ranked pro-
 19 spective consultants that have not withdrawn as provided under paragraph (d) of this sub-
 20 section, giving not more than 15 percent of the weight in the evaluation to each prospective
 21 consultant's price proposal.

22 [(5)] (6) The contracting agency and the *[selected candidate]* **consultant that the contracting**
 23 **agency selects** shall mutually discuss and refine the scope of services for the project and shall ne-
 24 gotiate conditions, including but not limited to a compensation level and performance schedule,
 25 *based on* for the scope of services **the contracting agency requires**. The compensation level paid
 26 must be reasonable and fair to the contracting agency as determined solely by the contracting
 27 agency. Authority to negotiate a contract under this section does not supersede any provision of
 28 ORS 279A.140 or 279C.520.

29 [(6)] (7) If the contracting agency and *[the selected candidate]* **a consultant that the contract-**
 30 **ing agency selected** are unable for any reason to negotiate a contract at a compensation level that
 31 is reasonable and fair to the contracting agency, the contracting agency shall, either orally or in
 32 writing, formally terminate negotiations with the selected *[candidate]* **consultant**. The contracting
 33 agency may then negotiate with the next most qualified *[candidate]* **prospective consultant**. The
 34 *[negotiation process]* **contracting agency** may continue in this manner through successive *[candi-*
 35 *dates]* **prospective consultants** until an agreement is reached or the contracting agency terminates
 36 the *[consultant contracting]* **selection** process.

37 (8)(a) A prospective consultant has the following rights to protest a contracting agency's
 38 actions under this section:

39 (A) The prospective consultant may protest the contents of the contracting agency's so-
 40 licitation documents as provided in ORS 279B.405.

41 (B) The prospective consultant may protest the contracting agency's selection of a con-
 42 sultant as provided in ORS 279B.410.

43 (b) For the purposes of a protest under this subsection, a prospective consultant is a
 44 bidder or proposer or a prospective bidder, proposer or offeror, as appropriate for the type
 45 of protest permitted under ORS 279B.405 or 279B.410.

1 [(7)] (9) *[It is the]* A goal of this state **is** to promote a sustainable economy in the rural areas
 2 of *[the]* **this** state. In order to monitor progress toward this goal, a state contracting agency shall
 3 keep a record of the locations in which architectural, engineering, photogrammetric mapping,
 4 transportation planning or land surveying services contracts and related services contracts are
 5 performed throughout *[the]* **this** state, the locations of the selected consultants and the direct ex-
 6 penses *[on]* **of** each contract. This record must include the total number of contracts awarded to
 7 each consultant *[firm]* over a 10-year period. The record of direct expenses must include all per-
 8 sonnel travel expenses as a separate and identifiable expense *[on]* **of** the contract. Upon request, the
 9 state contracting agency shall make these records available to the public.

10 [(8)] (10) Notwithstanding the provisions of subsection (1) of this section, a contracting agency
 11 may directly appoint a consultant if the estimated cost of the architectural, engineering, pho-
 12 togrammetric mapping, transportation planning or land surveying services for the project does not
 13 exceed \$100,000.

14 [(9)] (11) Notwithstanding the provisions of subsections (1) and [(8)] (10) of this section, a con-
 15 tracting agency may directly appoint a consultant for architectural, engineering, photogrammetric
 16 mapping, transportation planning or land surveying services in an emergency.

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

18 279A.157. (1) As used in this section:

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

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

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

31 (B) “Contract template” does not include specifications for a procurement, a scope of work,
 32 pricing information, information that identifies parties to the public contract or similar or related
 33 portions of a public contract that a state contracting agency necessarily develops or must alter as
 34 a means of achieving the results the state contracting agency intends for the procurement.

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

40 (2)(a) Except as provided in paragraph (c) of this subsection, a state contracting agency shall
 41 use a solicitation template in advertising and soliciting all procurements under the Public Con-
 42 tracting Code and, as provided in paragraph (b) of this subsection, shall use a contract form or a
 43 contract template, as appropriate, as the basis for all public contracts into which the state con-
 44 tracting agency enters. A state contracting agency, in accordance with the Public Contracting Code,
 45 may negotiate the terms and conditions set forth in a contract form or contract template but may

1 not vary the terms and conditions without the advice of the Attorney General or legal counsel that
2 the Attorney General approves if the state contracting agency anticipates that the contract form
3 or contract template will be the basis for a public contract with a contract price that exceeds
4 \$150,000.

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

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

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

24 (B) The nature of the procurement is unique and the public contract requires specific terms and
25 conditions to accommodate the unique nature of the procurement or the state contracting agency,
26 in accordance with provisions in the solicitation documents for the procurement, negotiated terms
27 and conditions for the public contract that differ from the terms and conditions in a contract form
28 or contract template;

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

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

35 (d) This subsection does not apply to a procurement that a state contracting agency conducts
36 under ORS 279B.065, 279B.080 or 279C.110 [(9)] (11).

37 (3) Notwithstanding provisions of this section that require a state contracting agency to use a
38 solicitation template, contract form or contract template that the Attorney General and the depart-
39 ment develop, the office of the Secretary of State and the office of the State Treasurer shall use
40 standardized forms and templates that each office develops for each office's own use in conducting
41 procurements or entering into public contracts. The Secretary of State and the State Treasurer may
42 elect to use solicitation templates, contract forms or contract templates that the Attorney General
43 and the department develop.

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

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

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

4 **SECTION 3.** ORS 279B.405 is amended to read:

5 279B.405. (1) As used in this section:

6 (a) “Brand name” means a brand name specification as defined in ORS 279B.200.

7 (b) “Legally flawed” means that a solicitation document contains terms or conditions that are
 8 contrary to law.

9 (c) “Unnecessarily restrictive” means that specifications limit competition arbitrarily, without
 10 reasonably promoting the fulfillment of the procurement needs of a contracting agency.

11 (2) A prospective bidder, proposer or offeror for a public contract solicited under ORS 279B.055,
 12 279B.060, [or] 279B.085 **or 279C.110** may file a protest with the contracting agency if the prospective
 13 bidder, proposer or offeror believes that the procurement process is contrary to law or that a so-
 14 licitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand
 15 name. If a prospective bidder, proposer or offeror fails to timely file [*such*] a protest, the prospective
 16 bidder, proposer or offeror may not challenge the **public** contract on **the** grounds [*under*] **set forth**
 17 **in** this subsection in any future legal or administrative proceeding.

18 (3) [*The*] **A** contracting agency, [*pursuant to*] **in accordance with** rules adopted under ORS
 19 279A.065, shall notify prospective bidders, proposers or offerors of the time and manner in which a
 20 protest under this section may be filed and considered. Before seeking judicial review, a prospective
 21 bidder, proposer or offeror must file a protest with the contracting agency and exhaust all available
 22 administrative remedies.

23 (4) [*The*] **A** contracting agency shall consider [*the*] **a** protest if the protest is timely filed and
 24 contains the following:

25 (a) Sufficient information to identify the solicitation that is the subject of the protest;

26 (b) The grounds that demonstrate how the procurement process is contrary to law or how the
 27 solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand
 28 name;

29 (c) Evidence or supporting documentation that supports the grounds on which the protest is
 30 based; and

31 (d) The relief sought.

32 (5) If the protest meets the requirements of subsection (4) of this section, the contracting agency
 33 shall consider the protest and issue a decision in writing. Otherwise, the contracting agency shall
 34 promptly notify the prospective bidder, proposer or offeror that the protest is untimely or that the
 35 protest failed to meet the requirements of subsection (4) of this section and [*give*] **shall specify** the
 36 reasons for the failure.

37 (6) The contracting agency shall issue a decision on the protest in accordance with rules
 38 adopted under ORS 279A.065 no fewer than three business days before bids, proposals or offers are
 39 due, unless **the contracting agency determines in writing** [*a written determination is made by the*
 40 *agency*] that circumstances exist that justify a shorter time limit.

41 (7) A decision of a contracting agency on a protest under this section, including a protest of a
 42 special procurement, is subject to judicial review only if the action or writ of review is filed before
 43 the opening of bids, proposals or offers.

44 (8)(a) A decision of a state contracting agency on a protest under this section is reviewable by
 45 the Circuit Court for Marion County or the circuit court for the county in which the principal of-

1 fices of the state contracting agency are located.

2 (b) A decision of a local contracting agency on a protest under this section is reviewable by the
 3 circuit court for the county in which the principal offices of the local contracting agency are lo-
 4 cated.

5 (9) If judicial review of a contracting agency’s decision on a protest under this section is sought,
 6 the contracting agency may not proceed with contract execution unless the contracting agency de-
 7 termines that there is a compelling governmental interest in proceeding or that the goods and ser-
 8 vices are urgently needed. If the contracting agency makes such a determination, the contracting
 9 agency shall set forth the reasons for the determination in writing and immediately provide them
 10 to the prospective bidder, proposer or offeror that filed the protest. Thereafter, after joining the
 11 contractor as a party to the litigation and upon motion from the person filing the protest, the court
 12 may nonetheless stay the performance of the contract if the court finds that the contracting
 13 agency’s determination of the existence of a compelling governmental interest in proceeding with
 14 contract execution, or the contracting agency’s determination that the goods or services were ur-
 15 gently needed, was not supported by substantial evidence or constituted a manifest abuse of dis-
 16 cretion. In granting a stay, the court may require the person seeking the stay to post a bond in an
 17 amount sufficient to protect the contracting agency and the public from costs associated with delay
 18 in contract performance.

19 (10) In *[its review]* **reviewing the contracting agency’s decision**, the court shall give due def-
 20 erence to any factual decision **the contracting agency** made *[by the contracting agency]* and may
 21 not substitute *[its]* **the court’s** judgment for *[that of]* the contracting *[agency]* **agency’s judgment**,
 22 but shall review all questions of law de novo. Thereafter:

23 (a) If a contract has not been executed and the court rules in favor of the party that sought
 24 judicial review, the court shall remand the procurement process to the contracting agency for a
 25 determination of whether and how to continue with the procurement process in light of the court’s
 26 decision.

27 (b) In addition to the relief provided for in paragraph (a) of this subsection, if a contract has
 28 been executed, the court shall include in *[its]* **the court’s** order a determination whether the party
 29 that signed the contract with the contracting agency is entitled to reimbursement under the condi-
 30 tions of, and calculated in the same manner as provided in, ORS 279C.470. Notwithstanding that ORS
 31 279C.470 otherwise applies only to public improvement contracts, under this paragraph the court
 32 shall apply ORS 279C.470 to both public improvement contracts and other public contracts of con-
 33 tracting agencies.

34 (c) The court may award costs and attorney fees to the prevailing party.

35 **SECTION 4. The amendments to ORS 279A.157, 279B.405 and 279C.110 by sections 1 to 3**
 36 **of this 2019 Act apply to procurements that a contracting agency first advertises or other-**
 37 **wise solicits or, if the contracting agency does not advertise or otherwise solicit the pro-**
 38 **urement, to public contracts into which the contracting agency enters on or after the**
 39 **operative date specified in section 5 of this 2019 Act.**

40 **SECTION 5. (1) The amendments to ORS 279A.157, 279B.405 and 279C.110 by sections 1**
 41 **to 3 of this 2019 Act become operative on January 1, 2020.**

42 **(2) A contracting agency may adopt rules and take any other action before the operative**
 43 **date specified in subsection (1) of this section that is necessary to enable the contracting**
 44 **agency, on and after the operative date specified in subsection (1) of this section, to under-**
 45 **take or exercise all of the duties, functions and powers conferred on the contracting agency**

1 by the amendments to ORS 279A.157, 279B.405 and 279C.110 by sections 1 to 3 of this 2019
2 Act.

3 SECTION 6. This 2019 Act takes effect on the 91st day after the date on which the 2019
4 regular session of the Eightieth Legislative Assembly adjourns sine die.

5
