

Enrolled Senate Bill 1047

Sponsored by Senator WAGNER; Representative GRAYBER (at the request of Governor Tina Kotek)

CHAPTER

AN ACT

Relating to equity in public procurements; creating new provisions; amending ORS 279B.065, 279B.070 and 279C.335; and prescribing an effective date.

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

SECTION 1. ORS 279B.065 is amended to read:

279B.065. (1) A contracting agency may award a [*procurement of*] **public contract for** goods or services that does not exceed [*\$10,000*] **a contract price of \$25,000** in any manner the contracting agency deems practical or convenient, including by direct selection or award. A contract awarded under this section may be amended to exceed [*\$10,000*] **\$25,000** only in accordance with rules adopted under ORS 279A.065.

(2) A state contracting agency that awards a public contract with a contract price of \$10,000 or more using a method permitted under this section shall document in the state contracting agency’s procurement file the actions the state contracting agency takes to:

(a) Comply with ORS 200.035; and

(b) Consider for the procurement businesses or enterprises that the Certification Office for Business Inclusion and Diversity certifies under ORS 200.055.

[2] (3) A contracting agency may not artificially divide or fragment a procurement so as to constitute a small procurement under this section.

SECTION 2. ORS 279B.070 is amended to read:

279B.070. (1) A contracting agency may award a [*procurement of*] **public contract for** goods or services that exceeds [*\$10,000*] **a contract price of \$25,000**, but does not exceed [*\$150,000*] **a contract price of \$250,000**, [*in accordance with intermediate procurement procedures*] **as provided in subsection (4) of this section.** A contract awarded under this section may be amended to exceed [*\$150,000*] **\$250,000** only in accordance with rules adopted under ORS 279A.065.

(2) A state contracting agency that awards a public contract with a contract price of \$10,000 or more using a method permitted under this section shall document in the state contracting agency’s procurement file the actions the state contracting agency takes to:

(a) Comply with ORS 200.035; and

(b) Invite to participate in the procurement qualified businesses or enterprises that the Certification Office for Business Inclusion and Diversity certifies under ORS 200.055.

[2] (3) A contracting agency may not artificially divide or fragment a procurement so as to constitute an intermediate procurement under this section.

[3] (4) When conducting an intermediate procurement, a contracting agency shall seek at least three informally solicited competitive price quotes or competitive proposals from prospective contractors. The contracting agency shall keep a written record of the sources of the quotes or pro-

posals received. If three quotes or proposals are not reasonably available, fewer will suffice, but the contracting agency shall make a written record of the effort the contracting agency makes to obtain the quotes or proposals.

[(4)] (5) If a contracting agency awards a **public** contract, the contracting agency shall award the **public** contract to the offeror whose quote or proposal will best serve the interests of the contracting agency, taking into account price as well as considerations including, but not limited to, experience, expertise, product functionality, suitability for a particular purpose and contractor responsibility under ORS 279B.110.

SECTION 3. ORS 279C.335 is amended to read:

279C.335. (1) A contracting agency may award a public improvement contract only in response to competitive bids, except for:

(a) A public improvement contract with a qualified nonprofit agency that provides employment opportunities for individuals with disabilities under ORS 279.835 to 279.855.

(b) A public improvement contract that is exempt under subsection (2) of this section.

(c) A public improvement contract with a value of less than ~~[\$10,000]~~ **\$25,000. A state contracting agency that awards a public improvement contract with a contract price of \$10,000 or more under this paragraph shall document in the state contracting agency's procurement file the actions the state contracting agency takes to:**

(A) Comply with ORS 200.035; and

(B) Invite to participate in the procurement qualified businesses or enterprises that the Certification Office for Business Inclusion and Diversity certifies under ORS 200.055.

(d) A public improvement contract with a contract price that does not exceed \$100,000 made under procedures for competitive quotes in ORS 279C.412 and 279C.414.

(e) A contract to repair, maintain, improve or protect property the Department of Veterans' Affairs obtains under ORS 407.135 and 407.145 (1).

(f) An energy savings performance contract that a contracting agency enters into in accordance with rules of procedure adopted under ORS 279A.065.

(g) A public improvement contract with an estimated contract price of \$250,000 or less that a contracting agency awards to an emerging small business certified under ORS 200.055 and funds with moneys from the Emerging Small Business Account established under ORS 200.180. A contracting agency that awards a public contract exempted from competitive bidding under this paragraph shall solicit competitive quotes as provided in ORS 279C.414 before making the award.

(2) Subject to subsection (4)(b) and (c) of this section, the Director of the Oregon Department of Administrative Services, a local contract review board or, for contracts described in ORS 279A.050 (3)(b), the Director of Transportation may exempt a public improvement contract or a class of public improvement contracts from the competitive bidding requirement of subsection (1) of this section after the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board approves the following findings that the contracting agency submits or, if a state agency is not the contracting agency, that the state agency that is seeking the exemption submits:

(a) The exemption is unlikely to encourage favoritism in awarding public improvement contracts or substantially diminish competition for public improvement contracts.

(b) Awarding a public improvement contract under the exemption will likely result in substantial cost savings and other substantial benefits to the contracting agency or the state agency that seeks the exemption or, if the contract is for a public improvement described in ORS 279A.050 (3)(b), to the contracting agency or the public. In approving a finding under this paragraph, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board shall consider the type, cost and amount of the contract and, to the extent applicable to the particular public improvement contract or class of public improvement contracts, the following:

(A) How many persons are available to bid;

(B) The construction budget and the projected operating costs for the completed public improvement;

(C) Public benefits that may result from granting the exemption;

(D) Whether value engineering techniques may decrease the cost of the public improvement;

(E) The cost and availability of specialized expertise that is necessary for the public improvement;

(F) Any likely increases in public safety;

(G) Whether granting the exemption may reduce risks to the contracting agency, the state agency or the public that are related to the public improvement;

(H) Whether granting the exemption will affect the sources of funding for the public improvement;

(I) Whether granting the exemption will better enable the contracting agency to control the impact that market conditions may have on the cost of and time necessary to complete the public improvement;

(J) Whether granting the exemption will better enable the contracting agency to address the size and technical complexity of the public improvement;

(K) Whether the public improvement involves new construction or renovates or remodels an existing structure;

(L) Whether the public improvement will be occupied or unoccupied during construction;

(M) Whether the public improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions; and

(N) Whether the contracting agency or state agency has, or has retained under contract, and will use contracting agency or state agency personnel, consultants and legal counsel that have necessary expertise and substantial experience in alternative contracting methods to assist in developing the alternative contracting method that the contracting agency or state agency will use to award the public improvement contract and to help negotiate, administer and enforce the terms of the public improvement contract.

(c) As an alternative to the finding described in paragraph (b) of this subsection, if a contracting agency or state agency seeks an exemption that would allow the contracting agency or state agency to use an alternative contracting method that the contracting agency or state agency has not previously used, the contracting agency or state agency may make a finding that identifies the project as a pilot project for which the contracting agency or state agency intends to determine whether using the alternative contracting method actually results in substantial cost savings to the contracting agency, to the state agency or, if the contract is for a public improvement described in ORS 279A.050 (3)(b), to the contracting agency or the public. The contracting agency or state agency shall include an analysis and conclusion regarding actual cost savings, if any, in the evaluation required under ORS 279C.355.

(3) In making findings to support an exemption for a class of public improvement contracts, the contracting agency or state agency shall clearly identify the class using the class's defining characteristics. The characteristics must include a combination of project descriptions or locations, time periods, contract values, methods of procurement or other factors that distinguish the limited and related class of public improvement contracts from the agency's overall construction program. The agency may not identify a class solely by funding source, such as a particular bond fund, or by the method of procurement, but shall identify the class using characteristics that reasonably relate to the exemption criteria set forth in subsection (2) of this section.

(4) In granting exemptions under subsection (2) of this section, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board shall:

(a) If appropriate, direct the use of alternative contracting methods that take account of market realities and modern practices and are consistent with the public policy of encouraging competition.

(b) Require and approve or disapprove written findings by the contracting agency or state agency that support awarding a particular public improvement contract or a class of public im-

provement contracts, without the competitive bidding requirement of subsection (1) of this section. The findings must show that the exemption of a contract or class of contracts complies with the requirements of subsection (2) of this section.

(c) Require a contracting agency or state agency that procures construction manager/general contractor services to conduct the procurement in accordance with model rules the Attorney General adopts under ORS 279A.065 (3).

(5)(a) A contracting agency or state agency may hold a public hearing before approving the findings required by subsection (2) of this section and before the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board grants an exemption from the competitive bidding requirement for a public improvement contract or a class of public improvement contracts.

(b) Notification of a proposed exemption under subsection (2) of this section must be published in at least one trade newspaper of general statewide circulation a minimum of 14 days before the date on which the contracting agency intends to take action to approve or disapprove the exemption.

(c) The notice must state that in response to a written request, the contracting agency or state agency will hold a public hearing for the purpose of taking comments on the draft findings for an exemption from the competitive bidding requirement.

(d) If the contracting agency or state agency conducts a public hearing, the contracting agency or state agency shall offer an opportunity for any interested party to appear and comment.

(e) If a contracting agency or state agency must act promptly because of circumstances beyond the agency's control that do not constitute an emergency, notification of the proposed exemption may be published simultaneously with the agency's solicitation of contractors for the alternative public contracting method, as long as responses to the solicitation are due at least five days after the agency intends to take action to approve or disapprove the proposed exemption.

(6) The purpose of an exemption is to exempt one or more public improvement contracts from competitive bidding requirements. The representations in and the accuracy of the findings, including any general description of the resulting public improvement contract, are the bases for approving the findings and granting the exemption. The findings may describe anticipated features of the resulting public improvement contract, but the final parameters of the contract are those characteristics or specifics announced in the solicitation document.

(7) A public improvement contract awarded under the competitive bidding requirement of subsection (1) of this section may be amended only in accordance with rules adopted under ORS 279A.065.

(8) A public improvement contract that is excepted from the competitive bidding requirement under subsection (1)(a), (c), (d), (e), (f) or (g) of this section is not subject to the exemption requirements of subsection (2) of this section.

SECTION 4. The Oregon Department of Administrative Services shall promote and apply a policy of diversity, equity and inclusion in public contracting by engaging in efforts to increase public contracting opportunities for businesses and enterprises that the Certification Office for Business Inclusion and Diversity has certified under ORS 200.055. The department shall undertake the following actions:

(1) Review and evaluate the recommendations of a statewide study of disparities in awarding public contracts;

(2) Develop a plan to implement the priority recommendations set forth in the study described in subsection (1) of this section;

(3) Implement the priority recommendations set forth in the study described in subsection (1) of this section; and

(4) Report to the Governor's Policy Advisor for Economic and Business Equity concerning the department's plan and implementation every six months until the earlier of the date on which the department has fully implemented the priority recommendations or June 30,

2025. The department shall submit the first report not later than 90 days after the completion of the study described in subsection (1) of this section.

SECTION 5. Section 4 of this 2023 Act and the amendments to ORS 279B.065, 279B.070 and 279C.335 by sections 1 to 3 of this 2023 Act apply to procurements that a contracting agency advertises or otherwise solicits or, if the contracting agency does not advertise or otherwise solicit the procurement, to public contracts into which the contracting agency enters on or after the operative date specified in section 6 of this 2023 Act.

SECTION 6. (1) The amendments to ORS 279B.065, 279B.070 and 279C.335 by sections 1 to 3 of this 2023 Act become operative on January 1, 2024.

(2) A contracting agency that adopts rules under ORS 279A.065 or 279A.070 may adopt rules and take any other action before the operative date specified in subsection (1) of this section that is necessary for the contracting agency to undertake and exercise all of the duties, functions and powers conferred on the contracting agency by the amendments to ORS 279B.065, 279B.070 and 279C.335 by sections 1 to 3 of this 2023 Act.

SECTION 7. This 2023 Act takes effect on the 91st day after the date on which the 2023 regular session of the Eighty-second Legislative Assembly adjourns sine die.

Passed by Senate April 10, 2023

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Lori L. Brocker, Secretary of Senate

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Rob Wagner, President of Senate

Passed by House May 16, 2023

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Dan Rayfield, Speaker of House

Received by Governor:

.....M.,....., 2023

Approved:

.....M.,....., 2023

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Tina Kotek, Governor

Filed in Office of Secretary of State:

.....M.,....., 2023

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Secretary of State