

B-Engrossed
Senate Bill 1048

Ordered by the Senate June 5
Including Senate Amendments dated April 6 and June 5

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

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.

Directs Department of Transportation to establish small business development program to assist qualified small businesses in competing for department's public improvement contracts. Specifies requirements for program and how department will determine that business is qualified small business.

Caps aggregated value of public improvement contracts department can award each year in connection with program. Requires department to report annually on implementation of program.

Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT

1
2 Relating to a Department of Transportation small business assistance program; creating new pro-
3 visions; amending ORS 279C.335; and prescribing an effective date.

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

5 **SECTION 1. (1) As used in this section, "qualified small business" means a business that**
6 **meets the verification criteria set forth in subsection (3) of this section.**

7 **(2) The Department of Transportation shall establish a small business development pro-**
8 **gram that aids qualified small businesses to compete for public improvement contracts that**
9 **the department procures. In the program, the department, at a minimum, shall:**

10 **(a) Identify public improvements that are suitable for a qualified small business to**
11 **undertake successfully as a general contractor;**

12 **(b) Provide a directory or repository of resources to assist a qualified small business in**
13 **preparing competitive bids or proposals that meet the specifications set forth in solicitations**
14 **for the department's public improvement contracts;**

15 **(c) State in the department's solicitation materials for public improvement contracts,**
16 **that the department identifies under paragraph (a) of this subsection, that the department**
17 **will receive bids or proposals solely from qualified small businesses;**

18 **(d) Designate department employees who have experience or familiarity with challenges**
19 **that qualified small businesses face in competing for the department's public improvement**
20 **contracts to answer questions, and provide support, assistance and information related to**
21 **preparing and submitting bids or proposals that is lawful and does not contravene the poli-**
22 **cies set forth in ORS 279A.015; and**

23 **(e) Evaluate bids and proposals from, and award public improvement contracts to, quali-**
24 **fied small businesses on the basis of a determination of the best value to the state.**

25 **(3) The department shall determine that a business is a qualified small business if 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 **business:**

2 (a) **Has registered with the United States Small Business Administration, or a successor**
3 **agency, as a small disadvantaged business;**

4 (b) **Is certified as an emerging small business under ORS 200.055; or**

5 (c) **Meets other criteria the department establishes by rule.**

6 (4) **The department each year may enter into public improvement contracts with qualified**
7 **small businesses under the program described in subsection (2) of this section that have an**
8 **aggregated total value of not more than \$25,000,000 annually.**

9 (5) **The department shall establish and convene a committee to advise the department**
10 **concerning the program described in subsection (2) of this section. The committee may ad-**
11 **vice the department concerning which public improvements are suitable under subsection**
12 **(2)(a) of this section, which resources would best enable qualified small businesses to prepare**
13 **competitive bids or proposals, what kinds of support, assistance and information is appro-**
14 **priate under subsection (2)(d) of this section and any other matters related to the program**
15 **described in subsection (2) of this section that the department determines are relevant.**

16 (6) **The department may adopt rules necessary to implement and administer the program**
17 **described in subsection (2) this section.**

18 (7)(a) **No later than December 31 of each year, the department shall report, in the man-**
19 **ner provided in ORS 192.245, to the Legislative Assembly concerning:**

20 (A) **The number of public improvement contracts the department identifies under sub-**
21 **section (2)(a) of this section;**

22 (B) **The number of public improvement contracts the department awards to qualified**
23 **small businesses;**

24 (C) **The number of qualified small businesses to which the department provides assist-**
25 **ance under the program;**

26 (D) **The type and size of the qualified small businesses that participate in the program;**

27 (E) **The aggregated value of public improvement contracts the department awards in**
28 **connection with the program; and**

29 (F) **Such other information about the program that the department deems relevant to**
30 **report.**

31 (b) **The department shall collect and compile data necessary to prepare and submit the**
32 **report described in this subsection.**

33 **SECTION 2.** ORS 279C.335 is amended to read:

34 279C.335. (1) A contracting agency may award a public improvement contract only in response
35 to competitive bids, except for:

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

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

39 (c) A public improvement contract with a value of less than \$10,000.

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

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

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

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

6 **(h) A public improvement contract that the Department of Transportation awards to a**
7 **qualified small business under the small business development program described in section**
8 **1 of this 2023 Act. The department may choose to award a public improvement contract de-**
9 **scribed in this paragraph competitively or using other selection methods that comply with**
10 **the policies set forth in ORS 279A.015.**

11 (2) Subject to subsection (4)(b) and (c) of this section, the Director of the Oregon Department
12 of Administrative Services, a local contract review board or, for contracts described in ORS
13 279A.050 (3)(b), the Director of Transportation may exempt a public improvement contract or a class
14 of public improvement contracts from the competitive bidding requirement of subsection (1) of this
15 section after the Director of the Oregon Department of Administrative Services, the Director of
16 Transportation or the local contract review board approves the following findings that the con-
17 tracting agency submits or, if a state agency is not the contracting agency, that the state agency
18 that is seeking the exemption submits:

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

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

29 (A) How many persons are available to bid;

30 (B) The construction budget and the projected operating costs for the completed public im-
31 provement;

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

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

34 (E) The cost and availability of specialized expertise that is necessary for the public improve-
35 ment;

36 (F) Any likely increases in public safety;

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

39 (H) Whether granting the exemption will affect the sources of funding for the public improve-
40 ment;

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

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

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

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

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

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

12 (c) As an alternative to the finding described in paragraph (b) of this subsection, if a contracting
13 agency or state agency seeks an exemption that would allow the contracting agency or state agency
14 to use an alternative contracting method that the contracting agency or state agency has not pre-
15 viously used, the contracting agency or state agency may make a finding that identifies the project
16 as a pilot project for which the contracting agency or state agency intends to determine whether
17 using the alternative contracting method actually results in substantial cost savings to the con-
18 tracting agency, to the state agency or, if the contract is for a public improvement described in ORS
19 279A.050 (3)(b), to the contracting agency or the public. The contracting agency or state agency
20 shall include an analysis and conclusion regarding actual cost savings, if any, in the evaluation re-
21 quired under ORS 279C.355.

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

30 (4) In granting exemptions under subsection (2) of this section, the Director of the Oregon De-
31 partment of Administrative Services, the Director of Transportation or the local contract review
32 board shall:

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

35 (b) Require and approve or disapprove written findings by the contracting agency or state
36 agency that support awarding a particular public improvement contract or a class of public im-
37 provement contracts, without the competitive bidding requirement of subsection (1) of this section.
38 The findings must show that the exemption of a contract or class of contracts complies with the
39 requirements of subsection (2) of this section.

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

43 (5)(a) A contracting agency or state agency may hold a public hearing before approving the
44 findings required by subsection (2) of this section and before the Director of the Oregon Department
45 of Administrative Services, the Director of Transportation or the local contract review board grants

1 an exemption from the competitive bidding requirement for a public improvement contract or a class
2 of public improvement contracts.

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

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

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

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

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

23 (7) A public improvement contract awarded under the competitive bidding requirement of sub-
24 section (1) of this section may be amended only in accordance with rules adopted under ORS
25 279A.065.

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

29 **SECTION 3. (1) Section 1 of this 2023 Act and the amendments to ORS 279C.335 by section**
30 **2 of this 2023 Act become operative on January 2, 2024.**

31 **(2) The Department of Transportation may adopt rules and take any other action before**
32 **the operative date specified in subsection (1) of this section that is necessary to enable the**
33 **department, on and after the operative date specified in subsection (1) of this section, to**
34 **undertake and exercise the duties, functions and powers conferred on the department by**
35 **section 1 of this 2023 Act and the amendments to ORS 279C.335 by section 2 of this 2023 Act.**

36 **SECTION 4. This 2023 Act takes effect on the 91st day after the date on which the 2023**
37 **regular session of the Eighty-second Legislative Assembly adjourns sine die.**

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