

**A-Engrossed
House Bill 4122**

Ordered by the House February 14
Including House Amendments dated February 14

Sponsored by Representatives GREENLICK, NATHANSON, HOLVEY; Representatives BARKER, GALLEGOS, GORSEK, HOYLE, KENY-GUYER, KOTEK, LININGER, SMITH WARNER, VEGA PEDERSON, WILLIAMSON, WITT, Senators MONNES ANDERSON, ROBLAN, ROSENBAUM, STEINER HAYWARD (Presession 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.

[Requires state contracting agency or public corporation that procures goods or services with contract price that exceeds \$1 million or meets other criteria to procure quality management services from qualified contractor.]

Requires state contracting agency or public corporation that implements information technology initiative to obtain, in separate procurement, quality management services from qualified contractor if value of information technology initiative exceeds \$5 million or meets certain other criteria. Provides that state contracting agency or public corporation may not artificially divide or fragment information technology initiative to avoid requirement to procure quality management services.

Requires state contracting agency and public corporation to consult with Director of Oregon Department of Administrative Services and to follow policies and procedures of Oregon Department of Administrative Services to determine extent of quality management services that state contracting agency or public corporation needs for information technology initiative.

Requires quality management services contractor to provide reports to contract administrator and to State Chief Information Officer, Director of Oregon Department of Administrative Services and, as appropriate, to director of state contracting agency or governing body of public corporation.

Provides exemption from requirement that state contracting agency may not accept bid or proposal from contractor that assisted state contracting agency in developing specifications or solicitation documents for bid or proposal for certain quality management services.

Requires bidder or proposer to **submit signed affidavit** to demonstrate to contracting agency that bidder or proposer has *[paid all taxes due to public body and otherwise]* complied with tax laws of this state **or political subdivision of this state.**

Becomes operative July 1, 2014.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to standards of performance in public contracting; creating new provisions; amending ORS
3 279B.040 and 279B.110; and declaring an emergency.

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

5 **SECTION 1. Section 2 of this 2014 Act is added to and made a part of ORS chapter 279B.**

6 **SECTION 2. (1) As used in this section:**

7 (a)(A) **"Information technology initiative" means a procurement or a set of related pro-**
8 **curvements that requires a state contracting agency or a public corporation to seek and ob-**
9 **tain, from an authority other than the state contracting agency or the public corporation,**
10 **initial or additional funding or appropriations, an increase in an expenditure limitation, new**
11 **or expanded authority to issue bonds or certificates of participation or other budgetary au-**
12 **thority in order to purchase, lease, rent or otherwise acquire:**

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 (i) New hardware, software or services for data processing, office automation or tele-
2 communications;

3 (ii) An overhaul, upgrade or replacement of a substantial portion of the hardware or
4 software in an existing data processing, office automation or telecommunications system;
5 or

6 (iii) A substantial expansion of existing data processing, office automation or telecom-
7 munications services.

8 (B) "Information technology initiative" does not include:

9 (i) A procurement for preliminary quality assurance services or quality management
10 services;

11 (ii) A routine update to or purchase of hardware or software within an existing data
12 processing, office automation or telecommunications system;

13 (iii) A renewal of an existing contract for data processing, office automation or tele-
14 communications services under terms and conditions that are substantially the same as in
15 the existing contract; or

16 (iv) A replacement of a component of an existing data processing, office automation or
17 telecommunications system that is not essential for the system to function as designed or
18 that occurs at the end of the component's anticipated life cycle.

19 (b) "Preliminary quality assurance services" means a set of services in which a contrac-
20 tor provides an independent and objective review of a state contracting agency's or a public
21 corporation's plans, specifications, estimates, documentation, available resources and overall
22 purpose for an information technology initiative, including services in which the contractor
23 evaluates a proposed information technology initiative against applicable quality standards
24 and best practices from private industry and other sources.

25 (c)(A) "Public corporation" means a corporation:

26 (i) The operations of which are subject to control by this state or by an agency or
27 instrumentality of this state, or by officers of this state or of an agency or instrumentality
28 of this state;

29 (ii) That is organized, at least in part, to serve a public purpose; and

30 (iii) That receives public funds or other support from an entity described in sub-
31 subparagraph (i) of this subparagraph.

32 (B) "Public corporation" does not include:

33 (i) A person or entity described in ORS 174.108 (3);

34 (ii) A city, county, local service district, school district, education service district, com-
35 munity college district or community college service district or a university with a governing
36 board listed in ORS 352.054; or

37 (iii) An administrative subdivision of an entity described in sub-subparagraph (ii) of this
38 subparagraph.

39 (d) "Quality management services" means a set of services in which a contractor pro-
40 vides an independent and objective review and evaluation of another contractor's perform-
41 ance to determine whether the other contractor satisfies the goals and meets the
42 specifications for an information technology initiative that a state contracting agency or a
43 public corporation sets forth in the state contracting agency's or public corporation's solic-
44 itation documents, contracts, statements of work or related documents and includes, but is
45 not limited to, services in which the contractor:

1 (A) Identifies quality standards that apply or should apply to an information technology
2 initiative;

3 (B) Suggests methods and means by which the other contractor may meet quality stan-
4 dards identified in subparagraph (A) of this paragraph;

5 (C) Reviews and evaluates the other contractor's performance regularly as the other
6 contractor provides the hardware, software or services for an information technology initi-
7 ative;

8 (D) Identifies omissions or gaps in the other contractor's planning, execution, control,
9 methodology, communication or reporting as the other contractor provides or prepares to
10 provide the hardware, software or services for an information technology initiative;

11 (E) Identifies risks in the other contractor's plans or approach to providing the hard-
12 ware, software or services for an information technology initiative and suggests methods to
13 reduce, mitigate or eliminate the risks;

14 (F) Assists the state contracting agency or the public corporation in testing or otherwise
15 evaluating the hardware, software or services the other contractor provides for an informa-
16 tion technology initiative to determine whether the hardware, software or services conform
17 with the quality standards identified under subparagraph (A) of this paragraph;

18 (G) Advises the state contracting agency or public corporation as to whether the state
19 contracting agency or public corporation should accept the hardware, software or services
20 as conforming to the quality standards identified in subparagraph (A) of this paragraph or
21 as otherwise meeting the state contracting agency's or public corporation's needs, specifi-
22 cations or expectations; and

23 (H) Identifies unsatisfactory performance and suggests methods the other contractor
24 might use to eliminate the causes of unsatisfactory performance.

25 (2)(a) A state contracting agency or public corporation that implements an information
26 technology initiative shall, in a separate procurement, obtain quality management services
27 from a qualified contractor if the value of the information technology initiative exceeds \$5
28 million or if the information technology initiative meets any three or more of the following
29 criteria:

30 (A) Any subcontract or the entire contract price for the information technology initiative
31 exceeds \$1 million;

32 (B) The hardware, software or services for the information technology initiative must
33 operate without failure during the state contracting agency's or public corporation's normal
34 business hours;

35 (C) The contractor that provides the hardware, software or services for the information
36 technology initiative will require more than one year to do so;

37 (D) More than one state contracting agency or public corporation will use or have re-
38 sponsibility for managing or maintaining the hardware, software or services acquired in an
39 information technology initiative;

40 (E) The state contracting agency or public corporation cannot provide sufficient quality
41 management services for the information technology initiative with the state contracting
42 agency's or public corporation's own personnel or resources because the information tech-
43 nology initiative is too complex; or

44 (F) The information technology initiative meets other criteria that the State Chief In-
45 formation Officer by rule defines as requiring a state contracting agency or public corpo-

1 ration to procure quality management services.

2 (b) A state contracting agency or public corporation may, subject to ORS 279B.040, pro-
3 cure preliminary quality assurance services from a contractor if the information technology
4 initiative meets the standards set forth in paragraph (a) of this subsection or if the state
5 contracting agency or public corporation otherwise believes that the preliminary quality as-
6 surance services will enable the contracting agency or public corporation to implement an
7 information technology initiative successfully.

8 (3) A state contracting agency or public corporation may not artificially divide or frag-
9 ment an information technology initiative so as to avoid the application of this section.

10 (4)(a) Notwithstanding any procurement authority that a state contracting agency or a
11 public corporation has that is not subject to the authority of the Director of the Oregon
12 Department of Administrative Services under ORS 279A.050 (2) or (7), the state contracting
13 agency or public corporation is subject to the provisions of subsection (2) of this section and
14 shall consult with the director and follow the policies and procedures of the Oregon Depart-
15 ment of Administrative Services to determine the extent of preliminary quality assurance
16 services or quality management services that the state contracting agency or public corpo-
17 ration will require for an information technology initiative.

18 (b) Notwithstanding the Oregon Health Authority's exemption in ORS 279A.050 (7) from
19 the authority that the Oregon Department of Administrative Services has over all state
20 agency information technology contracts, the Oregon Health Authority shall consult with the
21 Director of the Oregon Department of Administrative Services and follow the policies and
22 procedures of the Oregon Department of Administrative Services to determine the extent
23 of preliminary quality assurance services or quality management services that the Oregon
24 Health Authority will require for an information technology initiative.

25 (5)(a) If a state contracting agency or public corporation awards a contract for quality
26 management services, the contract must provide that at the same time a contractor provides
27 a written report to the contract administrator, the contractor shall also provide a copy of
28 the report to:

29 (A) The State Chief Information Officer;

30 (B) The Director of the Oregon Department of Administrative Services; and

31 (C) As appropriate for the specific information technology procurement, to:

32 (i) The director of the state contracting agency or, if a board or commission sets policy
33 for the state contracting agency, to the board or commission; or

34 (ii) The governing body of the public corporation.

35 (b) The state contracting agency or public corporation shall provide the contractor with
36 names, addresses and other contact information the contractor needs to comply with para-
37 graph (a) of this subsection.

38 **SECTION 3.** ORS 279B.040 is amended to read:

39 279B.040. (1) Except as provided in subsection (2) of this section, a state contracting agency that
40 procures personal services for the purpose of advising or assisting the state contracting agency in
41 developing specifications, a scope or statement of work, an invitation to bid, a request for proposals
42 or other solicitation documents and materials related to a procurement may not accept from the
43 contractor, or an affiliate of the contractor, that advised or assisted the state contracting agency
44 a bid or proposal for the goods or services described, specified or identified in the solicitation doc-
45 uments or materials if a reasonable person would believe that, by giving the advice or assistance,

1 the contractor or affiliate would have or would appear to have an advantage in obtaining the public
2 contract that is the subject of the solicitation.

3 (2)(a) If a state contracting agency anticipates that the state contracting agency will or must
4 seek advice or assistance of the type described in subsection (1) of this section from a contractor
5 that is also engaged in providing goods or services that will be described or identified in the solicitation documents and materials that result from the advice or assistance, and the state contracting
6 agency wishes to accept a bid or proposal from the contractor, the state contracting agency, before
7 awarding a contract for the advice or assistance, shall apply to the Director of the Oregon Department of Administrative Services for an exception to the prohibition set forth in subsection (1) of this
8 section.
9
10

11 (b) The state contracting agency in the application for the exception shall include findings and
12 justifications, along with sufficient facts to support the findings and justifications, that will enable
13 the director to make an independent judgment as to whether:

14 (A) The state contracting agency needs advice or assistance from a contractor to develop the
15 solicitation documents and materials described in subsection (1) of this section;

16 (B) Accepting a bid or proposal from the contractor that gives the advice or assistance is the
17 only practicable way in which the state contracting agency can conduct the procurement successfully; and
18

19 (C) Approving the exception:

20 (i) Is unlikely to encourage favoritism in awarding public contracts or to substantially diminish
21 competition for public contracts; and

22 (ii)(I) Is reasonably expected to result in substantial cost savings to the state contracting agency
23 or the public; or

24 (II) Otherwise substantially promotes the public interest in a manner that could not be
25 practicably realized by complying with the prohibition described in subsection (1) of this section.

26 (c)(A) If the director approves the state contracting agency's application, the director shall
27 prepare written findings and justifications for the approval. The state contracting agency's findings,
28 justifications and facts and the director's findings, justifications and approval are public records that
29 are subject to disclosure as provided in ORS 192.410 to 192.505.

30 (B) If the director disapproves the state contracting agency's application, the director shall state
31 the director's reasons for the disapproval in a written notice to the state contracting agency and
32 shall indicate whether the disapproval extends only to the state contracting agency's acceptance of
33 a bid or proposal from a contractor that gives advice or assistance in preparing solicitation documents and other materials or whether the director also disagrees with the state contracting agency's
34 stated need for advice or assistance from a contractor.
35

36 (C) The director's approval or disapproval is final.

37 (3) As used in this section, "affiliate" means a person that, directly or indirectly through one
38 or more intermediaries, controls, is controlled by or is under common control with a contractor
39 described in this section.

40 (4) This section does not apply to:

41 (a) The Secretary of State or the State Treasurer[.]; or

42 (b) **A bid or proposal for quality management services, as defined in section 2 of this 2014**
43 **Act, that a state contracting agency receives from a contractor that provided preliminary**
44 **quality assurance services, as defined in section 2 of this 2014 Act, for the same information**
45 **technology initiative that is the subject of the state contracting agency's solicitation for**

1 **quality management services.**

2 **SECTION 4.** ORS 279B.110 is amended to read:

3 279B.110. (1) *[A contracting agency shall prepare a written determination of nonresponsibility for*
4 *a bidder or proposer if the contracting agency determines that the bidder or proposer does not meet the*
5 *standards of responsibility.]* **As part of a contracting agency's evaluation of a bid or proposal,**
6 **the contracting agency shall determine whether the bidder or proposer is responsible in ac-**
7 **cordance with the standards of responsibility set forth in subsection (2) of this section. If the**
8 **contracting agency determines that a bidder or proposer is not responsible, the contracting**
9 **agency shall provide the bidder or proposer with written notice of the contracting agency's**
10 **determination.**

11 (2) *[In determining whether a bidder or proposer has met the standards of responsibility, the con-*
12 *tracting agency shall consider whether a bidder or proposer:]* **In order for a contracting agency to**
13 **determine that a bidder or proposer is responsible, the bidder or proposer must demonstrate**
14 **to the contracting agency that the bidder or proposer:**

15 (a) Has available the appropriate financial, material, equipment, facility and personnel resources
16 and expertise, or has the ability to obtain the resources and expertise, necessary to meet all con-
17 tractual responsibilities.

18 (b) Completed previous contracts of a similar nature with a satisfactory record of performance.
19 For purposes of this paragraph, a satisfactory record of performance means that to the extent that
20 the costs associated with and time available to perform a previous contract remained within the
21 bidder's or proposer's control, the bidder or proposer stayed within the time and budget allotted for
22 the procurement and otherwise performed the contract in a satisfactory manner. The contracting
23 agency shall document the bidder's or proposer's record of performance if the contracting agency
24 finds under this paragraph that the bidder or proposer is not responsible.

25 (c) Has a satisfactory record of integrity. The contracting agency in evaluating the bidder's or
26 proposer's record of integrity may consider, among other things, whether the bidder or proposer has
27 previous criminal convictions for offenses related to obtaining or attempting to obtain a contract
28 or subcontract or in connection with the bidder's or proposer's performance of a contract or sub-
29 contract. The contracting agency shall document the bidder's or proposer's record of integrity if the
30 contracting agency finds under this paragraph that the bidder or proposer is not responsible.

31 (d) Is legally qualified to contract with the contracting agency.

32 (e) **Complied with the tax laws of this state or a political subdivision of this state, in-**
33 **cluding ORS 305.620 and ORS chapters 316, 317 and 318. The bidder or proposer shall demon-**
34 **strate compliance by submitting a signed affidavit that attests, under penalty of perjury, that**
35 **the bidder or proposer has complied with the tax laws of this state or a political subdivision**
36 **of this state.**

37 *[(e)]* (f) Supplied all necessary information in connection with the inquiry concerning responsi-
38 bility. If a bidder or proposer fails to promptly supply information concerning responsibility that the
39 contracting agency requests, the contracting agency shall determine the bidder's or proposer's re-
40 sponsibility based on available information or may find that the bidder or proposer is not responsi-
41 ble.

42 *[(f)]* (g) Was not debarred by the contracting agency under ORS 279B.130.

43 (3) A contracting agency may refuse to disclose outside of the contracting agency confidential
44 information furnished by a bidder or proposer under this section when the bidder or proposer has
45 clearly identified in writing the information the bidder or proposer seeks to have treated as confi-

1 denial and the contracting agency has authority under ORS 192.410 to 192.505 to withhold the
2 identified information from disclosure.

3 **SECTION 5.** Section 2 of this 2014 Act and the amendments to ORS 279B.040 and 279B.110
4 by sections 3 and 4 of this 2014 Act apply to contracts that a contracting agency advertises
5 or solicits on or after the operative date specified in section 6 (1) of this 2014 Act, or if the
6 contracting agency does not advertise or solicit the contract, to contracts that the con-
7 tracting agency enters into on or after the operative date specified in section 6 (1) of this
8 2014 Act.

9 **SECTION 6.** (1) Sections 1 and 2 of this 2014 Act and the amendments to ORS 279B.040
10 and 279B.110 by sections 3 and 4 of this 2014 Act become operative on July 1, 2014.

11 (2) The Attorney General, the Director of the Oregon Department of Administrative
12 Services, the Director of Transportation or a state contracting agency or public corporation
13 that adopts rules under ORS 279A.065 may take any action before the operative date specified
14 in subsection (1) of this section that is necessary to enable the Attorney General, the direc-
15 tor, the state contracting agency or public corporation to exercise the duties, functions and
16 powers conferred on the Attorney General, the director, the state contracting agency or the
17 public corporation by section 2 of this 2014 Act and the amendments to ORS 279B.040 and
18 279B.110 by sections 3 and 4 of this 2014 Act.

19 **SECTION 7.** This 2014 Act being necessary for the immediate preservation of the public
20 peace, health and safety, an emergency is declared to exist, and this 2014 Act takes effect
21 on its passage.
22