

B-Engrossed
House Bill 4122

Ordered by the Senate February 28
Including House Amendments dated February 14 and Senate Amendments
dated February 28

Sponsored by Representatives GREENLICK, NATHANSON, HOLVEY, Senator FERRIOLI; Representatives BARKER, GALLEGOS, GORSEK, HOYLE, KENY-GUYER, KOTEK, LININGER, SMITH WARNER, VEGA PEDERSON, WILLIAMSON, WITT, Senators GIROD, HANSELL, MONNES ANDERSON, ROBLAN, ROSENBAUM, STARR, STEINER HAYWARD, THOMSEN, WINTERS (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 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 **or standards that State Chief Information Officer or Director of Oregon Department of Administrative Services specifies by rule or policy.** 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.

Exempts Secretary of State and State Treasurer from requirement to obtain quality management services, to consult with director or State Chief Information Officer and to provide reports.

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 complied with tax laws of this state or political subdivision of this state.

Becomes operative July 1, 2014.

Declares emergency, effective on passage.

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A BILL FOR AN ACT

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

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

SECTION 1. (1) As used in this section:

(a)(A) "Information technology initiative" means a project to develop or provide, with the state contracting agency's or public corporation's own personnel and resources, or to obtain by means of a procurement or set of related procurements:

(i) New hardware, software or services for data processing, office automation or telecommunications;

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

or

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

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

4 (i) A procurement for preliminary quality assurance services or quality management
5 services;

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

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

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

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

20 (c) "Procurement" has the meaning given that term in ORS 279A.010.

21 (d)(A) "Public corporation" means a corporation:

22 (i) The operations of which are subject to control by this state or by an agency or
23 instrumentality of this state, or by officers of this state or of an agency or instrumentality
24 of this state;

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

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

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

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

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

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

35 (e) "Quality management services" means a set of services in which a contractor pro-
36 vides an independent and objective review and evaluation of a state contracting agency's, a
37 public corporation's or another contractor's performance with respect to an information
38 technology initiative, such as services in which the contractor:

39 (A) Identifies quality standards that apply or should apply to the information technology
40 initiative;

41 (B) Suggests methods and means by which the state contracting agency, the public cor-
42 poration or the other contractor may meet quality standards identified in subparagraph (A)
43 of this paragraph;

44 (C) Reviews and evaluates the state contracting agency's, the public corporation's or the
45 other contractor's performance regularly as the information technology initiative progresses

1 from start to finish;

2 (D) Identifies omissions or gaps in the state contracting agency's, the public
3 corporation's or the other contractor's planning, execution, control, methodology, commu-
4 nication or reporting as the information technology initiative progresses from start to finish;

5 (E) Identifies risks in the state contracting agency's, the public corporation's or the
6 other contractor's plans or approach to designing, developing or implementing the informa-
7 tion technology initiative and suggests methods to reduce, mitigate or eliminate the risks;

8 (F) Assists the state contracting agency or the public corporation in testing or otherwise
9 evaluating the hardware, software or services that are developed, provided or obtained as
10 part of an information technology initiative to determine whether the hardware, software
11 or services conform with the quality standards identified in subparagraph (A) of this para-
12 graph;

13 (G) Advises the state contracting agency or the public corporation as to whether the
14 hardware, software or services that are developed, provided or obtained as part of an infor-
15 mation technology initiative meet the contracting agency's or the public corporation's needs,
16 specifications or expectations and otherwise enable the state contracting agency or the
17 public corporation to achieve the objectives for the information technology initiative; or

18 (H) Identifies unsatisfactory performance and suggests methods the state contracting
19 agency, the public corporation or the other contractor might use to eliminate the causes of
20 unsatisfactory performance.

21 (f) "State contracting agency" has the meaning given that term in ORS 279A.010.

22 (2)(a) A state contracting agency or a public corporation that implements an information
23 technology initiative shall obtain quality management services from a qualified contractor if
24 the value of the information technology initiative exceeds \$5 million or if the information
25 technology initiative meets criteria or standards that the State Chief Information Officer or
26 the Director of the Oregon Department of Administrative Services specifies by rule or policy.

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

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

35 (4)(a) Notwithstanding any procurement authority that a state contracting agency or a
36 public corporation has that is not subject to the authority of the Director of the Oregon
37 Department of Administrative Services under ORS 279A.050 (2) or (7), the state contracting
38 agency or public corporation is subject to the provisions of subsection (2) of this section and
39 shall consult with and follow the rules, policies and procedures of the State Chief Informa-
40 tion Officer and the Oregon Department of Administrative Services in determining the ex-
41 tent of preliminary quality assurance services or quality management services that the state
42 contracting agency or public corporation will require for an information technology initi-
43 ative.

44 (b) Notwithstanding the Oregon Health Authority's exemption in ORS 279A.050 (7) from
45 the authority that the Oregon Department of Administrative Services has over all state

1 **agency information technology procurements, the Oregon Health Authority shall consult**
2 **with and follow the rules, policies and procedures of the State Chief Information Officer and**
3 **the Oregon Department of Administrative Services in determining the extent of preliminary**
4 **quality assurance services or quality management services that the state contracting agency**
5 **or public corporation will require for an information technology initiative.**

6 **(5)(a) If a state contracting agency or a public corporation awards a contract for pre-**
7 **liminary quality assurance services or quality management services, the contract must pro-**
8 **vide that at the same time a contractor provides a preliminary or final report to the contract**
9 **administrator, the contractor shall also provide a copy of the report to:**

10 **(A) The State Chief Information Officer;**

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

12 **(C) As appropriate for the specific information technology initiative, to:**

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

15 **(ii) The governing body of the public corporation.**

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

19 **(6) This section does not apply to the Secretary of State or the State Treasurer.**

20 **SECTION 2.** ORS 279B.040 is amended to read:

21 279B.040. (1) Except as provided in subsection (2) of this section, a state contracting agency that
22 procures personal services for the purpose of advising or assisting the state contracting agency in
23 developing specifications, a scope or statement of work, an invitation to bid, a request for proposals
24 or other solicitation documents and materials related to a procurement may not accept from the
25 contractor, or an affiliate of the contractor, that advised or assisted the state contracting agency
26 a bid or proposal for the goods or services described, specified or identified in the solicitation doc-
27 uments or materials if a reasonable person would believe that, by giving the advice or assistance,
28 the contractor or affiliate would have or would appear to have an advantage in obtaining the public
29 contract that is the subject of the solicitation.

30 (2)(a) If a state contracting agency anticipates that the state contracting agency will or must
31 seek advice or assistance of the type described in subsection (1) of this section from a contractor
32 that is also engaged in providing goods or services that will be described or identified in the solici-
33 tation documents and materials that result from the advice or assistance, and the state contracting
34 agency wishes to accept a bid or proposal from the contractor, the state contracting agency, before
35 awarding a contract for the advice or assistance, shall apply to the Director of the Oregon Depart-
36 ment of Administrative Services for an exception to the prohibition set forth in subsection (1) of this
37 section.

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

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

43 (B) Accepting a bid or proposal from the contractor that gives the advice or assistance is the
44 only practicable way in which the state contracting agency can conduct the procurement success-
45 fully; and

1 (C) Approving the exception:

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

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

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

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

12 (B) If the director disapproves the state contracting agency's application, the director shall state
13 the director's reasons for the disapproval in a written notice to the state contracting agency and
14 shall indicate whether the disapproval extends only to the state contracting agency's acceptance of
15 a bid or proposal from a contractor that gives advice or assistance in preparing solicitation docu-
16 ments and other materials or whether the director also disagrees with the state contracting agency's
17 stated need for advice or assistance from a contractor.

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

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

22 (4) This section does not apply to:

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

24 (b) **A bid or proposal for quality management services, as defined in section 1 of this 2014**
25 **Act, that a state contracting agency receives from a contractor that provided preliminary**
26 **quality assurance services, as defined in section 1 of this 2014 Act, for the same information**
27 **technology initiative that is the subject of the state contracting agency's solicitation for**
28 **quality management services.**

29 **SECTION 3.** ORS 279B.110 is amended to read:

30 279B.110. (1) *[A contracting agency shall prepare a written determination of nonresponsibility for*
31 *a bidder or proposer if the contracting agency determines that the bidder or proposer does not meet the*
32 *standards of responsibility.]* **As part of a contracting agency's evaluation of a bid or proposal,**
33 **the contracting agency shall determine whether the bidder or proposer is responsible in ac-**
34 **cordance with the standards of responsibility set forth in subsection (2) of this section. If the**
35 **contracting agency determines that a bidder or proposer is not responsible, the contracting**
36 **agency shall provide the bidder or proposer with written notice of the contracting agency's**
37 **determination.**

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

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

45 (b) Completed previous contracts of a similar nature with a satisfactory record of performance.

1 For purposes of this paragraph, a satisfactory record of performance means that to the extent that
2 the costs associated with and time available to perform a previous contract remained within the
3 bidder's or proposer's control, the bidder or proposer stayed within the time and budget allotted for
4 the procurement and otherwise performed the contract in a satisfactory manner. The contracting
5 agency shall document the bidder's or proposer's record of performance if the contracting agency
6 finds under this paragraph that the bidder or proposer is not responsible.

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

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

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

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

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

25 (3) A contracting agency may refuse to disclose outside of the contracting agency confidential
26 information furnished by a bidder or proposer under this section when the bidder or proposer has
27 clearly identified in writing the information the bidder or proposer seeks to have treated as confi-
28 dential and the contracting agency has authority under ORS 192.410 to 192.505 to withhold the
29 identified information from disclosure.

30 **SECTION 4. Section 1 of this 2014 Act and the amendments to ORS 279B.040 and 279B.110**
31 **by sections 2 and 3 of this 2014 Act apply to contracts that a contracting agency or a public**
32 **corporation advertises or solicits on or after the operative date specified in section 5 (1) of**
33 **this 2014 Act or, if the state contracting agency or public corporation does not advertise or**
34 **solicit the contract, to contracts that the state contracting agency or public corporation**
35 **enters into on or after the operative date specified in section 5 (1) of this 2014 Act.**

36 **SECTION 5. (1) Section 1 of this 2014 Act and the amendments to ORS 279B.040 and**
37 **279B.110 by sections 2 and 3 of this 2014 Act become operative on July 1, 2014.**

38 (2) **The Attorney General, the State Chief Information Officer, the Director of the Oregon**
39 **Department of Administrative Services, the Director of Transportation or a state contract-**
40 **ing agency or public corporation that adopts rules under ORS 279A.065 may take any action**
41 **before the operative date specified in subsection (1) of this section that is necessary to enable**
42 **the Attorney General, the State Chief Information Officer, the director, the state contract-**
43 **ing agency or the public corporation to exercise the duties, functions and powers conferred**
44 **on the Attorney General, the State Chief Information Officer, the director, the state con-**
45 **tracting agency or the public corporation under section 1 of this 2014 Act and the amend-**

1 **ments to ORS 279B.040 and 279B.110 by sections 2 and 3 of this 2014 Act.**

2 **SECTION 6. This 2014 Act being necessary for the immediate preservation of the public**
3 **peace, health and safety, an emergency is declared to exist, and this 2014 Act takes effect**
4 **on its passage.**

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