

Senate Bill 294

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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 employee of contracting agency that conducts cost analysis or determines feasibility of procurement, or exclusive representative of employee's bargaining unit, to seek judicial review of cost analysis or determination. Specifies conditions under which review may occur.

Requires contracting agency to take certain steps to obtain information necessary to conduct cost analysis before advertising or soliciting procurement.

Requires contracting agency under certain circumstances to update cost analysis and to reconsider determination of feasibility of agency performing services that are subject to procurement.

Requires contracting agency to consider contractor's profit in cost analysis. Prohibits contracting agency from considering proceeds from selling or costs of replacing long-term assets in cost analysis.

Becomes operative January 1, 2018.

Takes effect on 91st day after adjournment sine die.

A BILL FOR AN ACT

1
2 Relating to analyses required before conducting a procurement for services; creating new provisions;
3 amending ORS 279B.030 and 279B.033; and prescribing an effective date.

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

5 **SECTION 1. Section 2 of this 2017 Act is added to and made a part of ORS chapter 279B.**

6 **SECTION 2. (1)(a) An employee of a contracting agency that conducts a cost analysis**
7 **under ORS 279B.033 or makes a determination under ORS 279B.036, or an exclusive repre-**
8 **sentative, as defined in ORS 243.650, of the employee's bargaining unit, may seek judicial**
9 **review of the contracting agency's cost analysis or determination if:**

10 (A) **The contracting agency allegedly violated a provision of ORS 279B.030, 279B.033 or**
11 **279B.036;**

12 (B) **The employee or the exclusive representative described the alleged violation in a**
13 **written notice to the contracting agency not later than 30 days after the date of the alleged**
14 **violation;**

15 (C) **The contracting agency proceeded with the procurement after receiving the notice**
16 **described in subparagraph (B) of this paragraph; and**

17 (D) **The employee or the exclusive representative exhausted any administrative remedy**
18 **the contracting agency provides to address the alleged violation.**

19 (b)(A) **Except as provided in subparagraph (B) of this paragraph, for the purposes of this**
20 **section, a contracting agency proceeded with a procurement if the contracting agency ad-**
21 **vertised or solicited the procurement in accordance with the provisions of this chapter or**
22 **otherwise took affirmative steps to seek a contractor to perform services for which the**
23 **contracting agency would be required to conduct a procurement in accordance with the**
24 **provisions of this chapter.**

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 (B) A contracting agency did not, for the purposes of this section, proceed with a pro-
2 curement if:

3 (i) The contracting agency issued a request for information or a request for a quotation
4 or otherwise sought to obtain needed information in the course of complying with ORS
5 279B.030, 279B.033 or 279B.036; or

6 (ii) The contracting agency, after advertising or soliciting a procurement, updated a cost
7 analysis or reconsidered a determination in accordance with ORS 279B.030 (1)(c).

8 (2)(a) If an employee of a state contracting agency, or an exclusive representative of the
9 employee's bargaining unit, seeks judicial review for a state contracting agency's alleged vi-
10 olation of a provision of ORS 279B.030, 279B.033 or 279B.036, the Circuit Court for Marion
11 County or the circuit court for the county in which the principal offices of the state con-
12 tracting agency are located may review the alleged violation under ORS 183.484. For the
13 purposes of the review, a state contracting agency's decision to advertise or solicit or oth-
14 erwise proceed with a procurement is an order other than an order in a contested case.

15 (b) If an employee of a local contracting agency, or an exclusive representative of the
16 employee's bargaining unit, seeks judicial review for a local contracting agency's alleged vi-
17 olation of a provision of ORS 279B.030, 279B.033 or 279B.036, the circuit court for the county
18 in which the principal offices of the local contracting agency are located may review the al-
19 leged violation by means of a writ of review under ORS chapter 34.

20 (3)(a) If an employee of the contracting agency, or the exclusive representative of the
21 employee's bargaining unit, notifies the contracting agency as provided in subsection
22 (1)(a)(B) of this section and timely seeks judicial review under this section, the contracting
23 agency may not proceed with the procurement that is the subject of the review unless the
24 contracting agency determines that:

25 (A) A compelling governmental interest exists in proceeding with the procurement; or

26 (B) An emergency exists that requires the procurement.

27 (b) A contracting agency that makes a determination to proceed with a procurement
28 under paragraph (a) of this subsection shall set forth in writing the reasons for the deter-
29 mination and provide the reasons to the employee or the exclusive representative imme-
30 diately.

31 (c) Despite a contracting agency's determination under paragraph (a) of this subsection,
32 the court, after joining as a party to the litigation any prospective contractor interested in
33 the procurement, may stay the procurement on the employee's or the exclusive
34 representative's motion if the court finds that the contracting agency's determination under
35 paragraph (a) of this subsection was not supported by substantial evidence or constituted a
36 manifest abuse of discretion. In granting a stay under this paragraph, the court may require
37 the employee or the exclusive representative to post a bond in an amount sufficient to pro-
38 tect the contracting agency and the public from costs associated with a delay in the pro-
39 curement if the court finds that issuing an injunction may irreparably harm the contracting
40 agency or the contractor and that the employee's or the exclusive representative's likelihood
41 of success on the merits of the case is minimal.

42 (4) Notwithstanding ORS 279B.145 or any other provision of this chapter or ORS chapter
43 279A, a court that conducts a review under this section shall review de novo a contracting
44 agency's cost analysis or determination under ORS 279B.030, 279B.033 or 279B.036.

45 (5) If, after judicial review under this section, the court rules in favor of the employee

1 **or the exclusive representative, the court shall enjoin the contracting agency from proceed-**
 2 **ing with the procurement. The court may not award costs or attorney fees to the prevailing**
 3 **party in the litigation.**

4 **SECTION 3.** ORS 279B.030, as amended by section 1, chapter 16, Oregon Laws 2016, is amended
 5 to read:

6 279B.030. *[(1)]* (1)(a) Except as provided in ORS 279B.036, before conducting a procurement for
 7 services with an estimated contract price that exceeds \$250,000, a contracting agency shall:

8 [(a)] (A) Demonstrate, by means of a written cost analysis in accordance with ORS 279B.033,
 9 that the contracting agency would incur less cost in conducting the procurement than in performing
 10 the services with the contracting agency's own personnel and resources; or

11 [(b)] (B) *[Demonstrate]* **Determine**, in accordance with ORS 279B.036, that performing the ser-
 12 vices with the contracting agency's own personnel and resources is not feasible.

13 **(b) To obtain information necessary to conduct the cost analysis described in paragraph**
 14 **(a)(A) of this subsection or to make the determination described in paragraph (a)(B) of this**
 15 **subsection, a contracting agency, before advertising or otherwise soliciting a procurement,**
 16 **shall issue a request for information or a request for a quotation or shall use another rea-**
 17 **sonably practicable method to obtain needed information.**

18 **(c) If, after advertising or otherwise soliciting a procurement and before awarding a**
 19 **contract, a contracting agency obtains new or additional information from bids or proposals,**
 20 **or from other sources, that would alter or otherwise affect a cost analysis the contracting**
 21 **agency conducted under ORS 279B.033 or a determination the contracting agency made under**
 22 **ORS 279B.036, the contracting agency shall update the cost analysis with the new or addi-**
 23 **tional information or, if necessary, reconsider the agency's determination as to the feasibil-**
 24 **ity of performing with the contracting agency's own personnel or resources the services that**
 25 **are the subject of the procurement. The contracting agency may proceed with the procure-**
 26 **ment only after updating the cost analysis or, if appropriate, reconsidering the determination**
 27 **and only if the procurement continues to meet the applicable requirement set forth in ORS**
 28 **279B.033 (2) or 279B.036 (1).**

29 (2) If a local contracting agency authorizes a department, bureau, office or other subdivision of
 30 the local contracting agency to conduct a procurement on behalf of another department, bureau,
 31 office or subdivision of the local contracting agency, the department, bureau, office or subdivision
 32 on whose behalf the procurement is conducted shall comply with the *[requirement]* **requirements**
 33 set forth in subsection (1) of this section.

34 (3) Subsection (1) of this section does not apply to:

35 (a) A local contracting agency or a local contract review board for a city that has a population
 36 of not more than 15,000 or a county that has a population of not more than 30,000;

37 (b) A community college that enrolls not more than 1,000 full-time equivalent students, as de-
 38 fined in ORS 341.005;

39 (c) A special district, as defined in ORS 198.010, a diking district formed under ORS chapter 551
 40 and a soil and water conservation district organized under ORS 568.210 to 568.808;

41 (d) The Port of Portland; or

42 (e) Procurements for client services, the definition and scope of which the Oregon Department
 43 of Administrative Services specifies by rule.

44 (4)(a)(A) A state contracting agency that conducts a cost analysis in accordance with ORS
 45 279B.033 or makes a determination under ORS 279B.036 in connection with a procurement for ser-

1 vices related to information technology, as defined in ORS 291.045, shall provide the State Chief
 2 Information Officer and the Legislative Fiscal Office with copies of the final cost analysis the state
 3 contracting agency prepared under ORS 279B.033 or the final determination the state contracting
 4 agency made under ORS 279B.036.

5 (B) The requirement to provide the materials described in subparagraph (A) of this paragraph
 6 to the State Chief Information Officer does not apply to the Secretary of State or the State Treas-
 7 urer.

8 (b) The Legislative Fiscal Office may provide materials the office receives under paragraph (a)
 9 of this subsection to a committee of the Legislative Assembly or to the Emergency Board in ac-
 10 cordance with policies the office develops.

11 (c) The State Chief Information Officer shall adopt rules and develop policies for incorporating
 12 materials the State Chief Information Officer receives under paragraph (a) of this subsection into
 13 the oversight functions that the State Chief Information Officer exercises under ORS 291.038 and the
 14 planning functions that the State Chief Information Officer exercises under ORS 184.475 and 184.477.

15 **SECTION 4.** ORS 279B.033 is amended to read:

16 279B.033. (1)(a) In the cost analysis required under ORS 279B.030, a contracting agency shall:

17 [(a)] (A) Estimate the contracting agency's cost of performing the services, including:

18 [(A)] (i) Salary or wage and benefit costs for contracting agency employees who are directly
 19 involved in performing the services, including employees who inspect, supervise or monitor the
 20 performance of the services.

21 [(B)] (ii) Material costs, including costs for space, energy, transportation, storage, raw and fin-
 22 ished materials, equipment and supplies.

23 [(C)] (iii) Costs incurred in planning for, training for, starting up, implementing, transporting and
 24 delivering the services and costs related to stopping and dismantling a project or operation because
 25 the contracting agency intends to procure a limited quantity of services or procure the services
 26 within a defined or limited period of time.

27 [(D)] (iv) Miscellaneous costs related to performing the services, **including but not limited to**
 28 **reasonably foreseeable fluctuations in the costs for the items identified in this subparagraph**
 29 **over the expected duration of the procurement.** The contracting agency may not include in the
 30 cost analysis the contracting agency's indirect overhead costs for existing salaries or wages and
 31 benefits for administrators or for rent, equipment, utilities and materials except to the extent that
 32 the costs are attributable solely to performing the services and would not exist unless the con-
 33 tracting agency performs the services.

34 [(b)] (B) Estimate the **profit the potential contractor would realize and the** cost a potential
 35 contractor would incur in performing the services, including:

36 [(A)] (i) Average or actual salary or wage and benefit costs for contractors and employees who:

37 [(i)] (I) Work in the industry or business most closely involved in performing the services that
 38 the contracting agency intends to procure; and

39 [(ii)] (II) Would be necessary and directly involved in performing the services or who would
 40 inspect, supervise or monitor the performance of the services;

41 [(B)] (ii) Material costs, including costs for space, energy, transportation, storage, raw and fin-
 42 ished materials, equipment and supplies; and

43 [(C)] (iii) Miscellaneous costs related to performing the services, including but not limited to
 44 reasonably foreseeable fluctuations in the costs for the items identified in this [subsection] **subpar-**
 45 **agraph** over the expected duration of the procurement.

1 **(b) In the cost analysis required under ORS 279B.030, a contracting agency may not in-**
 2 **clude proceeds or revenues from selling, or costs incurred for replacing, any of the con-**
 3 **tracting agency's long-term assets, including capital assets, vehicles or other durable goods.**

4 (2)(a) After comparing the difference between the costs estimated as provided in subsection
 5 [(1)(a)] **(1)(a)(A)** of this section with the costs estimated as provided in subsection [(1)(b)] **(1)(a)(B)**
 6 of this section, except as provided in paragraph (b) of this subsection, the contracting agency may
 7 proceed with the procurement only if the contracting agency would incur more cost in performing
 8 the services with the contracting agency's own personnel and resources than the contracting agency
 9 would incur in procuring the services from a contractor. The contracting agency may not proceed
 10 with the procurement if the [sole] **primary** reason that the costs estimated in subsection [(1)(b)]
 11 **(1)(a)(B)** of this section are lower than the costs estimated in subsection [(1)(a)] **(1)(a)(A)** of this
 12 section is because the costs estimated in subsection [(1)(b)(A)] **(1)(a)(B)(i)** of this section are lower
 13 than the costs estimated in subsection [(1)(a)(A)] **(1)(a)(A)(i)** of this section.

14 (b) A contracting agency may proceed with a procurement even if the contracting agency de-
 15 termines that the contracting agency would incur less cost in providing the services with the con-
 16 tracting agency's own personnel and resources if at the time the contracting agency intends to
 17 conduct a procurement, the contracting agency lacks personnel and resources that are necessary to
 18 perform the services within the time in which the services are required. If the contracting agency
 19 conducts a procurement under the conditions described in this paragraph, the contracting agency
 20 shall:

21 (A) Keep a record of the cost analysis and findings that the contracting agency makes for each
 22 procurement **that is subject to this section that** the contracting agency conducts [*under this sec-*
 23 *tion*], along with the basis for the contracting agency's decision to proceed with the procurement;
 24 and

25 (B) Collect and provide copies of the records described in subparagraph (A) of this paragraph
 26 each calendar quarter to the local contract review board, if the contracting agency is a local con-
 27 tracting agency, or to the Emergency Board, if the contracting agency is a state contracting agency.

28 (c) If the contracting agency is a state contracting agency, in addition to complying with the
 29 provisions of paragraph (b) of this subsection the contracting agency shall prepare a request to the
 30 Governor for an appropriation and any authority that is necessary for the contracting agency to
 31 hire personnel and obtain resources necessary to perform the services that the contracting agency
 32 procured under the conditions described in paragraph (b) of this subsection. The request must in-
 33 clude a copy of the records that the contracting agency provided to the Emergency Board under
 34 paragraph (b)(B) of this subsection.

35 (3) A cost analysis, record, documentation or determination made under this section is a public
 36 record.

37 **SECTION 5. Section 2 of this 2017 Act and the amendments to ORS 279B.030 and 279B.033**
 38 **by sections 3 and 4 of this 2017 Act apply to procurements that a contracting agency first**
 39 **advertises or otherwise solicits or, if the contracting agency does not advertise or solicit the**
 40 **procurement, to procurements that the contracting agency first conducts on or after the**
 41 **operative date specified in section 6 of this 2017 Act.**

42 **SECTION 6. (1) Section 2 of this 2017 Act and the amendments to ORS 279B.030 and**
 43 **279B.033 by sections 3 and 4 of this 2017 Act become operative on January 1, 2018.**

44 **(2) The Attorney General, the Director of the Oregon Department of Administrative**
 45 **Services, the Director of Transportation or a contracting agency that adopts rules under**

1 **ORS 279A.065 may take any action before the operative date specified in subsection (1) of this**
2 **section that is necessary to enable the Attorney General, the director or the contracting**
3 **agency to exercise, on and after the operative date specified in subsection (1) of this section,**
4 **all of the duties, functions and powers conferred on the Attorney General, the director or**
5 **the contracting agency by section 2 of this 2017 Act and the amendments to ORS 279B.030**
6 **and 279B.033 by sections 3 and 4 of this 2017 Act.**

7 **SECTION 7. This 2017 Act takes effect on the 91st day after the date on which the 2017**
8 **regular session of the Seventy-ninth Legislative Assembly adjourns sine die.**

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