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

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

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

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

SECTION 2. (1)(a) An employee of a contracting agency that conducts a cost analysis under ORS 279B.033 or makes a determination under ORS 279B.036, or an exclusive representative, as defined in ORS 243.650, of the employee’s bargaining unit, may seek judicial review of the contracting agency’s cost analysis or determination if:

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

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

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

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

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

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

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

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

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

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

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

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

(B) An emergency exists that requires the procurement.

(b) A contracting agency that makes a determination to proceed with a procurement under paragraph (a) of this subsection shall set forth in writing the reasons for the determination and provide the reasons to the employee or the exclusive representative immediately.

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

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

(5) If, after judicial review under this section, the court rules in favor of the employee
or the exclusive representative, the court shall enjoin the contracting agency from proceeding with the procurement. The court may not award costs or attorney fees to the prevailing party in the litigation.

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

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

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

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

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

(c) If, after advertising or otherwise soliciting a procurement and before awarding a contract, a contracting agency obtains new or additional information from bids or proposals, or from other sources, that would alter or otherwise affect a cost analysis the contracting agency conducted under ORS 279B.033 or a determination the contracting agency made under ORS 279B.036, the contracting agency shall update the cost analysis with the new or additional information or, if necessary, reconsider the agency's determination as to the feasibility of performing with the contracting agency's own personnel or resources the services that are the subject of the procurement. The contracting agency may proceed with the procurement only after updating the cost analysis or, if appropriate, reconsidering the determination and only if the procurement continues to meet the applicable requirement set forth in ORS 279B.033 (2) or 279B.036 (1).

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

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

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

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

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

(d) The Port of Portland; or

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

(4)(a)(A) A state contracting agency that conducts a cost analysis in accordance with ORS 279B.033 or makes a determination under ORS 279B.036 in connection with a procurement for ser-
The requirement to provide the materials described in subparagraph (A) of this paragraph to the State Chief Information Officer does not apply to the Secretary of State or the State Treasurer.

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

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

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

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

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

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

[(ii)] (ii) Material costs, including costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies.

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

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

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

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

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

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

[(ii)] (ii) Material costs, including costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies; and

[(iii)] (iii) Miscellaneous costs related to performing the services, including but not limited to reasonably foreseeable fluctuations in the costs for the items identified in this [subsection] subpar-

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(b) In the cost analysis required under ORS 279B.030, a contracting agency may not include proceeds or revenues from selling, or costs incurred for replacing, any of the contracting agency’s long-term assets, including capital assets, vehicles or other durable goods.

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

(b) A contracting agency may proceed with a procurement even if the contracting agency determines that the contracting agency would incur less cost in providing the services with the contracting agency’s own personnel and resources if at the time the contracting agency intends to conduct a procurement, the contracting agency lacks personnel and resources that are necessary to perform the services within the time in which the services are required. If the contracting agency conducts a procurement under the conditions described in this paragraph, the contracting agency shall:

(A) Keep a record of the cost analysis and findings that the contracting agency makes for each procurement that is subject to this section that the contracting agency conducts [under this section], along with the basis for the contracting agency’s decision to proceed with the procurement; and

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

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

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

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

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

(2) The Attorney General, the Director of the Oregon Department of Administrative Services, the Director of Transportation or a contracting agency that adopts rules under
ORS 279A.065 may take any action before the operative date specified in subsection (1) of this section that is necessary to enable the Attorney General, the director or the contracting agency to exercise, on and after the operative date specified in subsection (1) of this section, all of the duties, functions and powers conferred on the Attorney General, the director or the contracting agency by section 2 of this 2017 Act and the amendments to ORS 279B.030 and 279B.033 by sections 3 and 4 of this 2017 Act.

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