

Enrolled
House Bill 2769

Sponsored by Representative MCLAIN, Senators DEMBROW, MANNING JR, HANSELL; Representatives BYNUM, DOHERTY, EVANS, HOLVEY, SOLLMAN, Senators BOQUIST, RILEY

CHAPTER

AN ACT

Relating to a consultant selection process for a public contract for certain services; creating new provisions; amending ORS 279A.157 and 279C.110; and prescribing an effective date.

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

SECTION 1. ORS 279C.110 is amended to read:

279C.110. (1) A contracting agency shall select [*consultants*] **a consultant** to provide architectural, engineering, photogrammetric mapping, transportation planning or land surveying services on the basis of the consultant's qualifications for the type of professional service required. A contracting agency may solicit or use pricing policies and proposals or other pricing information, including the number of hours proposed for the service required, expenses, hourly rates and overhead, to determine consultant compensation only after the contracting agency has selected a [*candidate pursuant to subsection (2) of this section*] **consultant**.

(2) Subject to the requirements of subsection (1) of this section, the procedures that a contracting agency creates to screen **prospective consultants** and [*select consultants and to select a candidate under this section*] **make a selection** are at the contracting agency's sole discretion. The contracting agency may adjust the procedures to accommodate the contracting agency's scope, schedule or objectives for a particular project if the estimated cost of the architectural, engineering, photogrammetric mapping, transportation planning or land surveying services for the project does not exceed \$250,000.

(3) A contracting agency's screening and selection procedures under this section, regardless of the estimated cost of the architectural, engineering, photogrammetric mapping, transportation planning or land surveying services for a project, may include considering each [*candidate's*] **prospective consultant's**:

(a) Specialized experience, capabilities and technical competence, which the [*candidate*] **prospective consultant** may demonstrate with the [*candidate's*] **prospective consultant's** proposed approach and methodology to meet the project requirements;

(b) Resources committed to perform the [*work*] **services** and the proportion of the time that the [*candidate's*] **prospective consultant's** staff would spend [*on the project*] **to perform services for the contracting agency**, including time for specialized services, within the applicable time limits;

(c) Record of past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control and contract administration;

(d) Ownership status and employment practices regarding disadvantaged business enterprises, minority-owned businesses, woman-owned businesses, businesses that service-disabled veterans own, emerging small businesses or historically underutilized businesses;

- (e) Availability to the project locale;
- (f) Familiarity with the project locale; and
- (g) Proposed project management techniques.

(4) If the screening and selection procedures a contracting agency **follows under this section** or creates under subsection (2) of this section result in the contracting agency's determination that two or more *[candidates]* **prospective consultants** are equally qualified, the contracting agency may **use any process** to select a *[candidate through any process the contracting agency adopts]* **consultant** that is not based on the *[candidate's]* **prospective consultant's** pricing policies, proposals or other pricing information.

(5) **Notwithstanding the requirement in subsection (1) of this section that a contracting agency may not solicit or use pricing policies, proposals or other pricing information until after the contracting agency has selected a consultant, a local contracting agency may use pricing policies, proposals or other pricing information as part of the local contracting agency's screening and selection of prospective consultants if the local contracting agency:**

(a) **States in solicitation documents for the procurement:**

(A) **That the local contracting agency will screen and select prospective consultants as provided in this subsection;**

(B) **How the local contracting agency will rank proposals from prospective consultants, with a specific focus on:**

(i) **Which factors the local contracting agency will consider in evaluating proposals, including pricing policies, proposals or other pricing information, if the local contracting agency will use pricing policies, proposals or other pricing information in the evaluation; and**

(ii) **The relative weight the local contracting agency will give each factor, disclosing at a minimum the number of available points for each factor, the percentage each factor comprises in the total evaluation score and any other weighting criteria the local contracting agency intends to use;**

(C) **An estimate of the cost of professional services the local contracting agency requires for the procurement; and**

(D) **A scope of work that is sufficiently detailed to enable a prospective consultant to prepare a responsive proposal.**

(b) **Evaluates each prospective consultant on the basis of the prospective consultant's qualifications to perform the professional services the local contracting agency requires for the procurement. The local contracting agency may use the criteria set forth in subsection (3) of this section to conduct the evaluation.**

(c) **Announces the evaluation scores and rank for each prospective consultant after completing the evaluation described in paragraph (b) of this subsection. The local contracting agency may determine that as many as three of the top-ranked prospective consultants are qualified to perform the professional services the local contracting agency requires for the procurement and may request a pricing proposal for the scope of work stated in paragraph (a)(D) of this subsection from each of the top-ranked consultants. The pricing proposal:**

(A) **Must consist of:**

(i) **A schedule of hourly rates that the prospective consultant will charge for the work of each individual or each labor classification that will perform the professional services the local contracting agency requires for the procurement, in the form of an offer that is irrevocable for not less than 90 days after the date of the proposal; and**

(ii) **A reasonable estimate of hours that the prospective consultant will require to perform the professional services the local contracting agency requires for the procurement; and**

(B) **May include, at the local contracting agency's request, additional pricing information that is limited to:**

(i) **A description of each task that the prospective consultant understands as comprising the professional services;**

(ii) A list of each individual or labor classification that will perform each task, together with the hourly rate that applies to the individual or labor classification; and

(iii) A list of expenses, including travel expenses, that the prospective consultant expects to incur in connection with providing the professional services.

(d) Permits a prospective consultant identified as qualified under paragraph (c) of this subsection to withdraw from consideration for the procurement if the prospective consultant does not wish to provide a price proposal.

(e) Completes the evaluation and selects a consultant from among the top-ranked prospective consultants that have not withdrawn as provided under paragraph (d) of this subsection, giving not more than 15 percent of the weight in the evaluation to each prospective consultant's price proposal.

[5] *The contracting agency and the selected candidate shall mutually discuss and refine the scope of services for the project and shall negotiate conditions, including but not limited to compensation level and performance schedule, based on the scope of services. The compensation level paid must be reasonable and fair to the contracting agency as determined solely by the contracting agency. Authority to negotiate a contract under this section does not supersede any provision of ORS 279A.140 or 279C.520.*

(6) The contracting agency and the consultant that the contracting agency selects shall mutually discuss, refine and finalize the scope of, the rates and number of hours applicable to, and the maximum compensation level for the professional services and shall negotiate conditions including, but not limited to, a performance schedule for the project. The contracting agency may not pay a compensation level that exceeds a level that the contracting agency alone determines is fair and reasonable to the contracting agency. Authority to negotiate a contract under this section does not supersede any provision of ORS 279A.140 or 279C.520.

[6] (7) If the contracting agency and *[the selected candidate]* a consultant that the contracting agency selected are unable for any reason to negotiate a contract at a compensation level that is reasonable and fair to the contracting agency, the contracting agency shall, either orally or in writing, formally terminate negotiations with the selected *[candidate]* consultant. The contracting agency may then negotiate with the next most qualified *[candidate]* prospective consultant. The *[negotiation process]* contracting agency may continue in this manner through successive *[candidates]* prospective consultants until an agreement is reached or the contracting agency terminates the *[consultant contracting]* selection process.

(8) A prospective consultant has a right to protest the contents of a contracting agency's solicitation documents and the contracting agency's selection of a consultant in accordance with:

(a) Protest procedures in model rules the Attorney General adopts under ORS 279A.065; or

(b) Protest procedures the contracting agency must set forth in rules that the contracting agency adopts, if the contracting agency adopts rules under ORS 279A.065 (6).

[7] (9) *[It is the]* A goal of this state is to promote a sustainable economy in the rural areas of *[the]* this state. In order to monitor progress toward this goal, a state contracting agency shall keep a record of the locations in which architectural, engineering, photogrammetric mapping, transportation planning or land surveying services contracts and related services contracts are performed throughout *[the]* this state, the locations of the selected consultants and the direct expenses *[on]* of each contract. This record must include the total number of contracts awarded to each consultant *[firm]* over a 10-year period. The record of direct expenses must include all personnel travel expenses as a separate and identifiable expense *[on]* of the contract. Upon request, the state contracting agency shall make these records available to the public.

[8] (10) Notwithstanding the provisions of subsection (1) of this section, a contracting agency may directly appoint a consultant if the estimated cost of the architectural, engineering, pho-

togrammetric mapping, transportation planning or land surveying services for the project does not exceed \$100,000.

[(9)] (11) Notwithstanding the provisions of subsections (1) and [(8)] (10) of this section, a contracting agency may directly appoint a consultant for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services in an emergency.

SECTION 2. ORS 279A.157 is amended to read:

279A.157. (1) As used in this section:

(a)(A) "Contract form" means a document with terms and conditions that the Attorney General and the Oregon Department of Administrative Services develop, approve and make available for state contracting agencies to use without alteration, except as provided in subparagraph (B) of this paragraph, as the terms and conditions of a public contract.

(B) "Contract form" does not include specifications for a procurement, a scope of work, pricing information, information that identifies parties to the public contract or similar or related portions of a public contract that a state contracting agency necessarily develops or must alter, with approval from the Attorney General or the Oregon Department of Administrative Services, as a means of achieving the results the state contracting agency intends for the procurement.

(b)(A) "Contract template" means a document with terms and conditions that the Attorney General and the department develop, approve and make available for state contracting agencies to use, with appropriate alterations, as the basis for the terms and conditions of a public contract.

(B) "Contract template" does not include specifications for a procurement, a scope of work, pricing information, information that identifies parties to the public contract or similar or related portions of a public contract that a state contracting agency necessarily develops or must alter as a means of achieving the results the state contracting agency intends for the procurement.

(c) "Solicitation template" means a request for information, a request for a quotation, an invitation to bid, a request for proposals or other document for soliciting a procurement under the Public Contracting Code in which the Attorney General and the department develop, approve and make available standardized language that a state contracting agency must use, with appropriate alterations, for a solicitation.

(2)(a) Except as provided in paragraph (c) of this subsection, a state contracting agency shall use a solicitation template in advertising and soliciting all procurements under the Public Contracting Code and, as provided in paragraph (b) of this subsection, shall use a contract form or a contract template, as appropriate, as the basis for all public contracts into which the state contracting agency enters. A state contracting agency, in accordance with the Public Contracting Code, may negotiate the terms and conditions set forth in a contract form or contract template but may not vary the terms and conditions without the advice of the Attorney General or legal counsel that the Attorney General approves if the state contracting agency anticipates that the contract form or contract template will be the basis for a public contract with a contract price that exceeds \$150,000.

(b) A state contracting agency shall use a contract form or contract template for all price agreements, cooperative procurements or procurements for which the Attorney General or the Director of the Oregon Department of Administrative Services determines that the specifications for goods or services, the terms and conditions, the scope of work or other aspects of a procurement or a class of procurements do not vary significantly among state contracting agencies, or for procurements or classes of procurements in which the Attorney General or the director determines that using a contract form or contract template is necessary for the state contracting agency to avoid unreasonable liabilities or other risks or would promote best practices in public contracting. A state contracting agency, in accordance with the Public Contracting Code, may negotiate the terms and conditions set forth in a contract form or contract template but may not vary the terms and conditions without the advice of the Attorney General or legal counsel that the Attorney General approves if the state contracting agency anticipates that the contract form or contract template will be the basis for a public contract with a contract price that exceeds \$150,000.

(c) A state contracting agency may base a public contract on terms and conditions other than the terms and conditions set forth in a contract form or contract template only if:

(A) The state contracting agency receives approval from the Attorney General or, if the state contracting agency is subject to ORS 279A.140, from the Director of the Oregon Department of Administrative Services, unless the state contracting agency determines that the contract price for the public contract is unlikely to exceed \$150,000;

(B) The nature of the procurement is unique and the public contract requires specific terms and conditions to accommodate the unique nature of the procurement or the state contracting agency, in accordance with provisions in the solicitation documents for the procurement, negotiated terms and conditions for the public contract that differ from the terms and conditions in a contract form or contract template;

(C) The state contracting agency consults the Attorney General, or legal counsel that the Attorney General approves, to develop appropriate terms and conditions for the public contract and for legal advice during all phases of the procurement for which the Attorney General determines that legal advice is necessary and relevant; and

(D) The state contracting agency submits the public contract to the Attorney General for approval for legal sufficiency, if the provisions of ORS 291.047 require the submission.

(d) This subsection does not apply to a procurement that a state contracting agency conducts under ORS 279B.065, 279B.080 or 279C.110 [(9)] (11).

(3) Notwithstanding provisions of this section that require a state contracting agency to use a solicitation template, contract form or contract template that the Attorney General and the department develop, the office of the Secretary of State and the office of the State Treasurer shall use standardized forms and templates that each office develops for each office's own use in conducting procurements or entering into public contracts. The Secretary of State and the State Treasurer may elect to use solicitation templates, contract forms or contract templates that the Attorney General and the department develop.

(4) The Attorney General and the Director of the Oregon Department of Administrative Services shall cooperate to:

(a) Develop and make available solicitation templates, contract forms and contract templates for procurements or classes of procurements that state contracting agencies require; and

(b) Adopt rules under ORS 279A.065 to implement the provisions of this section.

SECTION 3. The amendments to ORS 279A.157 and 279C.110 by sections 1 and 2 of this 2019 Act apply to procurements that a contracting agency first advertises or otherwise solicits or, if the contracting agency does not advertise or otherwise solicit the procurement, to public contracts into which the contracting agency enters on or after the operative date specified in section 4 of this 2019 Act.

SECTION 4. (1) The amendments to ORS 279A.157 and 279C.110 by sections 1 and 2 of this 2019 Act become operative on January 1, 2020.

(2) A contracting agency may adopt rules and take any other action before the operative date specified in subsection (1) of this section that is necessary to enable the contracting agency, on and after the operative date specified in subsection (1) of this section, to undertake or exercise all of the duties, functions and powers conferred on the contracting agency by the amendments to ORS 279A.157 and 279C.110 by sections 1 and 2 of this 2019 Act.

SECTION 5. This 2019 Act takes effect on the 91st day after the date on which the 2019 regular session of the Eightieth Legislative Assembly adjourns sine die.

Passed by House March 19, 2019

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Timothy G. Sekerak, Chief Clerk of House

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Tina Kotek, Speaker of House

Passed by Senate April 24, 2019

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Peter Courtney, President of Senate

Received by Governor:

.....M,....., 2019

Approved:

.....M,....., 2019

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Kate Brown, Governor

Filed in Office of Secretary of State:

.....M,....., 2019

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Bev Clarno, Secretary of State