

CHAPTER 77

AN ACT

HB 4122

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

(iii) A substantial expansion of existing data processing, office automation or telecommunications services.

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

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

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

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

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

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

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

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

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

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

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

(B) "Public corporation" does not include:

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

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

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

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

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

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

(C) Reviews and evaluates the state contracting agency's, the public corporation's or the other contractor's performance regularly as the information technology initiative progresses from start to finish;

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

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

(F) Assists the state contracting agency or the public corporation in testing or otherwise evaluating the hardware, software or services that are developed, provided or obtained as part of an information technology initiative to determine whether the hardware, software or ser-

VICES conform with the quality standards identified in subparagraph (A) of this paragraph;

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

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

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

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

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

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

(4)(a) Notwithstanding any procurement authority that a state contracting agency or a public corporation has that is not subject to the authority of the Director of the Oregon Department of Administrative Services under ORS 279A.050 (2) or (7), the state contracting agency or public corporation is subject to the provisions of subsection (2) of this section and shall consult with and follow the rules, policies and procedures of the State Chief Information Officer and the Oregon Department of Administrative Services in determining the extent of preliminary quality assurance services or quality management services that the state contracting agency or public corporation will require for an information technology initiative.

(b) Notwithstanding the Oregon Health Authority's exemption in ORS 279A.050 (7) from the authority that the Oregon Department of

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

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

(A) The State Chief Information Officer;

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

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

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

(ii) The governing body of the public corporation.

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

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

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

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

(2)(a) If a state contracting agency anticipates that the state contracting agency will or must seek advice or assistance of the type described in subsection (1) of this section from a contractor 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 assist-

ance, and the state contracting agency wishes to accept a bid or proposal from the contractor, the state contracting agency, before 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 section.

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

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

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

(C) Approving the exception:

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

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

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

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

(B) If the director disapproves the state contracting agency's application, the director shall state the director's reasons for the disapproval in a written notice to the state contracting agency and shall indicate whether the disapproval extends only to the state contracting agency's acceptance of 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 stated need for advice or assistance from a contractor.

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

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

(4) This section does not apply to:

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

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

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

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

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

(a) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or has the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.

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

(c) Has a satisfactory record of integrity. The contracting agency in evaluating the bidder's or proposer's record of integrity may consider, among other things, whether the bidder or proposer has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the bidder's or proposer's performance of a contract or subcontract. The contracting agency shall document the bidder's or proposer's record of integrity if the contracting

agency finds under this paragraph that the bidder or proposer is not responsible.

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

(e) **Complied with the tax laws of this state or a political subdivision of this state, including ORS 305.620 and ORS chapters 316, 317 and 318. The bidder or proposer shall demonstrate compliance by submitting a signed affidavit that attests, under penalty of perjury, that the bidder or proposer has complied with the tax laws of this state or a political subdivision of this state.**

[(e)] (f) Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder or proposer fails to promptly supply information concerning responsibility that the contracting agency requests, the contracting agency shall determine the bidder's or proposer's responsibility based on available information or may find that the bidder or proposer is not responsible.

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

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

SECTION 4. Section 1 of this 2014 Act and the amendments to ORS 279B.040 and 279B.110 by sections 2 and 3 of this 2014 Act apply to contracts that a contracting agency or a public corporation advertises or solicits on or after the operative date specified in section 5 (1) of this

2014 Act or, if the state contracting agency or public corporation does not advertise or solicit the contract, to contracts that the state contracting agency or public corporation enters into on or after the operative date specified in section 5 (1) of this 2014 Act.

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

(2) **The Attorney General, the State Chief Information Officer, the Director of the Oregon Department of Administrative Services, the Director of Transportation or a state contracting agency or public corporation 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 State Chief Information Officer, the director, the state contracting agency or the public corporation to exercise the duties, functions and powers conferred on the Attorney General, the State Chief Information Officer, the director, the state contracting agency or the public corporation under section 1 of this 2014 Act and the amendments to ORS 279B.040 and 279B.110 by sections 2 and 3 of this 2014 Act.**

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

Approved by the Governor March 19, 2014

Filed in the office of Secretary of State March 19, 2014

Effective date March 19, 2014