

House Bill 2220

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Attorney General Hardy Myers for Department of Justice)

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**.

Prohibits collusion in competitive bidding on public contracts. Requires bidder for public contracts to submit noncollusion certificate with bid or sign noncollusion certificate as part of public contract. Defines noncollusion certificate. Imposes penalties for violation. Punishes by maximum six months' imprisonment, \$2,500 fine, or both.

A BILL FOR AN ACT

1
2 Relating to collusion in bidding on public contracting; creating new provisions; and amending ORS
3 279A.010, 279A.990 and 279C.365.

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

5 **SECTION 1. Section 2 of this 2005 Act is added to and made a part of ORS chapter 279B.**

6 **SECTION 2. (1) As used in this section:**

7 (a) **"Bidder" includes a prospective bidder or a representative or agent of a bidder or**
8 **prospective bidder.**

9 (b) **"Noncollusion certificate" means a written statement made by a bidder under oath**
10 **or affirmation and under penalty of perjury certifying that:**

11 (A) **The bidder has arrived at the specifics of the bid, including price and amounts, inde-**
12 **pendently and without communication or agreement with another bidder, except as disclosed**
13 **in a separately attached statement;**

14 (B) **The bidder is not submitting the bid in the interest of or on behalf of any undisclosed**
15 **person;**

16 (C) **The bidder has not directly or indirectly induced or solicited another bidder, in order**
17 **to benefit a third person, to submit a false or sham bid, to refrain from bidding or to change**
18 **a bid;**

19 (D) **The bidder has not directly or indirectly disclosed the bidder's bid price, a breakdown**
20 **of the price, the contents of the price or information or data related to the price to another**
21 **bidder;**

22 (E) **The bidder has not sought through communication or agreement with a person to fix**
23 **the bid price of the bidder or another bidder, to fix an overhead, profit or cost element of**
24 **the bid price of the bidder or another bidder or to secure any advantage against the con-**
25 **tracting agency or any other person interested in the public contract;**

26 (F) **The bidder has not directly or indirectly expressed an interest or lack of interest in**
27 **the public contract, or paid or offered to pay a fee to a person, to cause a collusive or sham**
28 **bid;**

29 (G) **All statements in the bid are true; and**

30 (H) **The bid is genuine and not collusive or a sham.**

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 **(2) This section applies only to public contracts subject to the competitive bidding re-**
 2 **quirements of this chapter.**

3 **(3) A contracting agency shall require in solicitation documents for a public contract that**
 4 **each bidder submit a signed noncollusion certificate with the bidder's bid. When no solicita-**
 5 **tion documents are used for a public contract, the contracting agency shall require the**
 6 **successful bidder to sign a noncollusion certificate as part of the public contract.**

7 **(4) A bidder on a public contract shall submit a signed noncollusion certificate with the**
 8 **bid or, when appropriate, sign a noncollusion certificate as part of a public contract awarded**
 9 **to the bidder.**

10 **(5) If a bidder fails to submit or sign a noncollusion certificate as required under sub-**
 11 **section (4) of this section, the contracting agency shall reject the bid as nonresponsive and**
 12 **cancel any award of the public contract to the bidder.**

13 **(6) It is unlawful for a person to collude or reach an understanding with another person**
 14 **to impair, prevent or eliminate full and unrestricted competition for a public contract.**

15 **SECTION 3.** ORS 279C.365 is amended to read:

16 279C.365. (1) A contracting agency preparing solicitation documents for a public improvement
 17 contract shall, at a minimum, include:

18 (a) The public improvement project;

19 (b) The office where the specifications for the project may be reviewed;

20 (c) The date that prequalification applications must be filed under ORS 279C.430 and the class
 21 or classes of work for which bidders must be prequalified if prequalification is a requirement;

22 (d) The date and time after which bids will not be received, which must be at least five days
 23 after the date of the last publication of the advertisement;

24 (e) The name and title of the person designated for receipt of bids;

25 (f) The date, time and place that the contracting agency will publicly open the bids;

26 (g) A statement that, if the contract is for a public works subject to ORS 279C.800 to 279C.870
 27 or the Davis-Bacon Act (40 U.S.C. 276a), no bid will be received or considered by the contracting
 28 agency unless the bid contains a statement by the bidder that ORS 279C.840 or 40 U.S.C. 276a will
 29 be complied with;

30 (h) A statement that each bid must identify whether the bidder is a resident bidder, as defined
 31 in ORS 279A.120;

32 (i) A statement that the contracting agency may reject any bid not in compliance with all pre-
 33 scribed public contracting procedures and requirements and may reject for good cause all bids upon
 34 a finding of the agency that it is in the public interest to do so;

35 (j) Information addressing whether a contractor or subcontractor must be licensed under ORS
 36 468A.720; *[and]*

37 (k) A statement that a bid for a public improvement contract may not be received or considered
 38 by the contracting agency unless the bidder is licensed by the Construction Contractors Board or
 39 the State Landscape Contractors Board; **and**

40 **(L) A statement that no bid will be received or considered by the contracting agency**
 41 **unless the bid contains a signed noncollusion certificate, as defined in section 5 of this 2005**
 42 **Act.**

43 (2) All bids made to the contracting agency under ORS 279C.335 or 279C.400 must be:

44 (a) In writing;

45 (b) Filed with the person designated for receipt of bids by the contracting agency; and

1 (c) Opened publicly by the contracting agency immediately after the deadline for submission of
2 bids.

3 (3) After having been opened, the bids must be made available for public inspection.

4 (4) A surety bond, irrevocable letter of credit issued by an insured institution as defined in ORS
5 706.008, cashier's check or certified check of each bidder shall be attached to all bids as bid security
6 unless the contract for which a bid is submitted has been exempted from this requirement under
7 ORS 279C.390. The security may not exceed 10 percent of the amount bid for the contract.

8 **SECTION 4. Section 5 of this 2005 Act is added to and made a part of ORS 279C.360 to**
9 **279C.390.**

10 **SECTION 5. (1) As used in this section:**

11 (a) "Bidder" includes a prospective bidder or a representative or agent of a bidder or
12 prospective bidder.

13 (b) "Noncollusion certificate" means a written statement made by a bidder under oath
14 or affirmation and under penalty of perjury certifying that:

15 (A) The bidder has arrived at the specifics of the bid, including price and amounts, inde-
16 pendently and without communication or agreement with another bidder, except as disclosed
17 in a separately attached statement;

18 (B) The bidder is not submitting the bid in the interest of or on behalf of any undisclosed
19 person;

20 (C) The bidder has not directly or indirectly induced or solicited another bidder, in order
21 to benefit a third person, to submit a false or sham bid, to refrain from bidding or to change
22 a bid;

23 (D) The bidder has not directly or indirectly disclosed the bidder's bid price, a breakdown
24 of the price, the contents of the price or information or data related to the price to another
25 bidder;

26 (E) The bidder has not sought through communication or agreement with a person to fix
27 the bid price of the bidder or another bidder, to fix an overhead, profit or cost element of
28 the bid price of the bidder or another bidder or to secure any advantage against the con-
29 tracting agency or any other person interested in the public improvement contract;

30 (F) The bidder has not directly or indirectly expressed an interest or lack of interest in
31 the public improvement contract, or paid or offered to pay a fee to a person, to cause a
32 collusive or sham bid;

33 (G) All statements in the bid are true; and

34 (H) The bid is genuine and not collusive or a sham.

35 (2) This section applies only to public improvement contracts subject to the competitive
36 bidding requirements of this chapter.

37 (3) A contracting agency shall require in solicitation documents for a public improvement
38 contract that each bidder submit a signed noncollusion certificate with the bidder's bid.
39 When no solicitation documents are used for a public improvement contract, the contracting
40 agency shall require the successful bidder to sign a noncollusion certificate as part of the
41 public improvement contract.

42 (4) A bidder on a public improvement contract shall submit a signed noncollusion certif-
43 icate with the bid or, when appropriate, sign a noncollusion certificate as part of a public
44 improvement contract awarded to the bidder.

45 (5) If a bidder fails to submit or sign a noncollusion certificate as required under sub-

1 **section (4) of this section, the contracting agency shall reject the bid as nonresponsive and**
 2 **cancel any award of the public improvement contract to the bidder.**

3 **(6) It is unlawful for a person to collude or reach an understanding with another person**
 4 **to impair, prevent or eliminate full and unrestricted competition for a public improvement**
 5 **contract.**

6 **SECTION 6.** ORS 279A.990 is amended to read:

7 279A.990. (1) The provisions of ORS 291.990 apply to ORS 279A.140, 279A.280 and 279B.270. Any
 8 violation of ORS 279A.140, 279A.280 or 279B.270 shall be punished as described in ORS 291.990.

9 **(2) A bidder who violates section 2 (6) or 5 (6) of this 2005 Act commits a class B**
 10 **misdemeanor.**

11 **(3) In addition to any other penalty provided by law, a contracting agency may assess a**
 12 **civil penalty not to exceed \$10,000, plus treble the amount of damages suffered by the con-**
 13 **tracting agency due to the violation, against a person who negligently, recklessly or know-**
 14 **ingly engages or aids in a violation of section 2 (6) or 5 (6) of this 2005 Act.**

15 [(2)] (4) Any contractor, subcontractor, agent or person in authority or in charge who violates
 16 any provision of ORS 279C.520 or 279C.540 as to hours of labor shall be fined not less than \$50 nor
 17 more than \$1,000 or imprisoned in the county jail for not less than five days nor more than one year,
 18 or both.

19 [(3)] (5) Any contractor or subcontractor subject to ORS 279C.840 who fails to pay the prevailing
 20 rate of wage as required by ORS 279C.840 shall be punished by a fine of not more than \$1,000 or
 21 by imprisonment in the county jail for not more than six months, or both.

22 **SECTION 7.** ORS 279A.010 is amended to read:

23 279A.010. (1) As used in the Public Contracting Code, unless the context or a specifically ap-
 24 plicable definition requires otherwise:

25 (a) "Bidder" means a person that submits a bid in response to an invitation to bid.

26 (b) "Contracting agency" means a public body authorized by law to conduct a procurement.
 27 "Contracting agency" includes, but is not limited to, the Director of the Oregon Department of Ad-
 28 ministrative Services and any person authorized by a contracting agency to conduct a procurement
 29 on the contracting agency's behalf. "Contracting agency" does not include the judicial department
 30 or the legislative department.

31 (c) "Days" means calendar days.

32 (d) "Department" means the Oregon Department of Administrative Services.

33 (e) "Director" means the Director of the Oregon Department of Administrative Services or a
 34 person designated by the director to carry out the authority of the director under the Public Con-
 35 tracting Code.

36 (f) "Emergency" means circumstances that:

37 (A) Could not have been reasonably foreseen;

38 (B) Create a substantial risk of loss, damage or interruption of services or a substantial threat
 39 to property, public health, welfare or safety; and

40 (C) Require prompt execution of a contract to remedy the condition.

41 (g) "Energy savings performance contract" means a public contract between a contracting
 42 agency and a qualified energy service company for the identification, evaluation, recommendation,
 43 design and construction of energy conservation measures, including a design-build contract, that
 44 guarantee energy savings or performance.

45 (h) "Executive department" has the meaning given that term in ORS 174.112.

1 (i)(A) “Grant” means:

2 (i) An agreement under which a contracting agency receives moneys, property or other assist-
 3 ance, including but not limited to federal assistance that is characterized as a grant by federal law
 4 or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other
 5 assets, from a grantor for the purpose of supporting or stimulating a program or activity of the
 6 contracting agency and in which no substantial involvement by the grantor is anticipated in the
 7 program or activity other than involvement associated with monitoring compliance with the grant
 8 conditions; or

9 (ii) An agreement under which a contracting agency provides moneys, property or other assist-
 10 ance, including but not limited to federal assistance that is characterized as a grant by federal law
 11 or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other
 12 assets, to a recipient for the purpose of supporting or stimulating a program or activity of the re-
 13 cipient and in which no substantial involvement by the contracting agency is anticipated in the
 14 program or activity other than involvement associated with monitoring compliance with the grant
 15 conditions.

16 (B) “Grant” does not include a public contract for a public improvement, for public works, as
 17 defined in ORS 279C.800, or for emergency work, minor alterations or ordinary repair or mainte-
 18 nance necessary to preserve a public improvement, when under the public contract a contracting
 19 agency pays, in consideration for contract performance intended to realize or to support the real-
 20 ization of the purposes for which grant funds were provided to the contracting agency, moneys that
 21 the contracting agency has received under a grant.

22 (j) “Industrial oil” means any compressor, turbine or bearing oil, hydraulic oil, metal-working
 23 oil or refrigeration oil.

24 (k) “Judicial department” has the meaning given that term in ORS 174.113.

25 (L) “Legislative department” has the meaning given that term in ORS 174.114.

26 (m) “Local contract review board” means a local contract review board described in ORS
 27 279A.060.

28 (n) “Local contracting agency” means a local government or special government body authorized
 29 by law to conduct a procurement. “Local contracting agency” includes any person authorized by a
 30 local contracting agency to conduct a procurement on behalf of the local contracting agency.

31 (o) “Local government” has the meaning given that term in ORS 174.116.

32 (p) “Lowest responsible bidder” means the lowest bidder who:

33 (A) Has substantially complied with all prescribed public contracting procedures and require-
 34 ments;

35 (B) Has met the standards of responsibility set forth in ORS 279B.110 or 279C.375;

36 (C) Has not been debarred or disqualified by the contracting agency under ORS 279B.130 or
 37 279C.440; and

38 (D) If the advertised contract is a public improvement contract, is not on the list created by the
 39 Construction Contractors Board under ORS 701.227.

40 (q) “Lubricating oil” means any oil intended for use in an internal combustion crankcase,
 41 transmission, gearbox or differential or an automobile, bus, truck, vessel, plane, train, heavy equip-
 42 ment or machinery powered by an internal combustion engine.

43 (r) “Person” means a natural person capable of being legally bound, a sole proprietorship, a
 44 corporation, a partnership, a limited liability company or partnership, a limited partnership, a for-
 45 profit or nonprofit unincorporated association, a business trust, two or more persons having a joint

1 or common economic interest, any other person with legal capacity to contract or a public body.

2 (s) "Post-consumer waste" means a finished material that would normally be disposed of as solid
3 waste, having completed its life cycle as a consumer item. "Post-consumer waste" does not include
4 manufacturing waste.

5 (t) "Price agreement" means a public contract for the procurement of goods or services at a set
6 price with:

7 (A) No guarantee of a minimum or maximum purchase; or

8 (B) An initial order or minimum purchase combined with a continuing contractor obligation to
9 provide goods or services in which the contracting agency does not guarantee a minimum or maxi-
10 mum additional purchase.

11 (u) "Procurement" means the act of purchasing, leasing, renting or otherwise acquiring goods
12 or services. "Procurement" includes each function and procedure undertaken or required to be
13 undertaken by a contracting agency to enter into a public contract, administer a public contract and
14 obtain the performance of a public contract under the Public Contracting Code.

15 (v) "Proposer" means a person that submits a proposal in response to a request for proposals.

16 (w) "Public body" has the meaning given that term in ORS 174.109.

17 (x) "Public contract" means a sale or other disposal, or a purchase, lease, rental or other ac-
18 quisition, by a contracting agency of personal property, services, including personal services, public
19 improvements, public works, minor alterations, or ordinary repair or maintenance necessary to pre-
20 serve a public improvement. "Public contract" does not include grants.

21 (y) "Public contracting" means procurement activities described in the Public Contracting Code
22 relating to obtaining, modifying or administering public contracts or price agreements.

23 (z) "Public Contracting Code" or "code" means ORS chapters 279A, 279B and 279C.

24 (aa) "Public improvement" means a project for construction, reconstruction or major renovation
25 on real property by or for a contracting agency. "Public improvement" does not include:

26 (A) Projects for which no funds of a contracting agency are directly or indirectly used, except
27 for participation that is incidental or related primarily to project design or inspection; or

28 (B) Emergency work, minor alteration, ordinary repair or maintenance necessary to preserve a
29 public improvement.

30 (bb) "Public improvement contract" means a public contract for a public improvement. "Public
31 improvement contract" does not include a public contract for emergency work, minor alterations,
32 or ordinary repair or maintenance necessary to preserve a public improvement.

33 (cc) "Recycled material" means any material that would otherwise be a useless, unwanted or
34 discarded material except for the fact that the material still has useful physical or chemical prop-
35 erties after serving a specific purpose and can, therefore, be reused or recycled.

36 (dd) "Recycled oil" means used oil that has been prepared for reuse as a petroleum product by
37 refining, rerefining, reclaiming, reprocessing or other means, provided that the preparation or use
38 is operationally safe, environmentally sound and complies with all laws and regulations.

39 (ee) "Recycled paper" means a paper product with not less than:

40 (A) Fifty percent of its fiber weight consisting of secondary waste materials; or

41 (B) Twenty-five percent of its fiber weight consisting of post-consumer waste.

42 (ff) "Recycled PETE" means post-consumer polyethylene terephthalate material.

43 (gg) "Recycled product" means all materials, goods and supplies, not less than 50 percent of the
44 total weight of which consists of secondary and post-consumer waste with not less than 10 percent
45 of its total weight consisting of post-consumer waste. "Recycled product" includes any product that

1 could have been disposed of as solid waste, having completed its life cycle as a consumer item, but
2 otherwise is refurbished for reuse without substantial alteration of the product’s form.

3 (hh) “Secondary waste materials” means fragments of products or finished products of a manu-
4 facturing process that has converted a virgin resource into a commodity of real economic value.
5 “Secondary waste materials” includes post-consumer waste. “Secondary waste materials” does not
6 include excess virgin resources of the manufacturing process. For paper, “secondary waste
7 materials” does not include fibrous waste generated during the manufacturing process such as fibers
8 recovered from waste water or trimmings of paper machine rolls, mill broke, wood slabs, chips,
9 sawdust or other wood residue from a manufacturing process.

10 (ii) “Special government body” has the meaning given that term in ORS 174.117.

11 (jj) “State agency” means the executive department, except the Secretary of State and the State
12 Treasurer in the performance of the duties of their constitutional offices.

13 (kk) “State contracting agency” means an executive department entity authorized by law to
14 conduct a procurement.

15 (LL) “State government” has the meaning given that term in ORS 174.111.

16 (mm) “Used oil” has the meaning given that term in ORS 459A.555.

17 (nn) “Virgin oil” means oil that has been refined from crude oil and that has not been used or
18 contaminated with impurities.

19 (2) Other definitions appearing in the Public Contracting Code and the sections in which they
20 appear are:

- 21
- 22 (a) “Adequate”ORS 279C.305
- 23 (b) “Administering contracting
24 agency”ORS 279A.200
- 25 (c) “Affirmative action”ORS 279A.100
- 26 (d) “Architect”ORS 279C.100
- 27 (e) “Architectural, engineering
28 and land surveying
29 services”ORS 279C.100
- 30 (f) “Bid documents”ORS 279C.400
- 31 (g) “Bidder”ORS 279B.415 **and**
32**sections 2 and 5**
33**of this 2005 Act**
- 34 (h) “Bids”ORS 279C.400
- 35 (i) “Brand name”ORS 279B.405
- 36 (j) “Brand name or equal
37 specification”ORS 279B.200
- 38 (k) “Brand name
39 specification”ORS 279B.200
- 40 (L) “Class special
41 procurement”ORS 279B.085
- 42 (m) “Consultant”ORS 279C.115
- 43 (n) “Contract-specific
44 special procurement”ORS 279B.085
- 45 (o) “Cooperative

1 procurement”ORS 279A.200

2 (p) “Cooperative procurement

3 group”ORS 279A.200

4 (q) “Donee”ORS 279A.250

5 (r) “Engineer”ORS 279C.100

6 (s) “Established catalog

7 price”ORS 279B.005

8 (t) “Findings”ORS 279C.330

9 (u) “Fire protection

10 equipment”ORS 279A.190

11 (v) “Flagger”ORS 279C.810

12 (w) “Fringe benefits”ORS 279C.800

13 (x) “Funds of a public

14 agency”ORS 279C.810

15 (y) “Good cause”ORS 279C.585

16 (z) “Good faith dispute”ORS 279C.580

17 (aa) “Goods”ORS 279B.115

18 (bb) “Goods and services” or

19 “goods or services”ORS 279B.005

20 (cc) “Interstate cooperative

21 procurement”ORS 279A.200

22 (dd) “Invitation to bid”ORS 279B.005

23and 279C.400

24 (ee) “Joint cooperative

25 procurement”ORS 279A.200

26 (ff) “Labor dispute”ORS 279C.650

27 (gg) “Land surveyor”ORS 279C.100

28 (hh) “Legally flawed”ORS 279B.405

29 (ii) “Locality”ORS 279C.800

30 (jj) **“Noncollusion**

31 **certificate”sections 2 and 5**

32 **.....of this 2005 Act**

33 (kk) “Nonprofit

34 organization”ORS 279C.810

35 (LL) “Nonresident bidder”ORS 279A.120

36 (mm) “Not-for-profit

37 organization”ORS 279A.250

38 (nn) “Original contract”ORS 279A.200

39 (oo) “Permissive cooperative

40 procurement”ORS 279A.200

41 (pp) “Person”ORS 279C.500

42and 279C.815

43 (qq) “Personal services”ORS 279C.100

44 (rr) “Prevailing rate of

45 wage”ORS 279C.800

