

House Bill 2867 from the 2009 Legislative Session

Brought by SEIU and a coalition of public employee unions and union supporters, HB 2867 was designed to address “transparency” and “accountability” in the government contracting process. The bill was originally introduced in tandem with another “transparency in contracting” bill, HB 2037. HB 2037 required that agencies greatly increase the amount of reporting regarding their contractors, including posting on a website the wages and benefits of contractors, subcontractors, names of individuals, terms of the contract, etc. The bill would have affected all contracts over \$50,000 and collecting information not already available. Because of the large cost associated with this bill, both for the state and local governments, this bill died. Certain aspects of the bill applying only to the state survived as part of HB 2500.

HB 2867 did end up passing late in the session after being heavily amended. Many of the most burdensome requirements were either eliminated or minimized throughout the process but the bill still has the potential to pose challenge to local government agencies. The biggest challenge is the requirement that a contracting agency must do perform a cost analysis comparing the costs of performing the work in-house vs. the cost of contracting out the service for procurements for services with an estimated contract exceeding \$250,000.

This is what the bill says, looking at the most important sections:

Sec 2:

States that a contracting agency must conduct a written cost analysis before conducting a procurement for services to show the agency would incur less cost contracting out than in performing the services with the agency’s own personnel and resources, or in the alternative, demonstrate that using the agency’s own personnel is not feasible. However, the bill does not apply to:

- 1) Procurements under \$250,000 (bill as introduced was \$25,000)
- 2) Personal Services contracts, as designated by local contracting agencies
- 3) Public Improvement contracts, as designated in ORS Chapter 279C
- 4) Cities under 15,000
- 5) Counties under 30,000
- 6) Special districts
- 7) Port of Portland
- 8) Procurements for “Client Services” (see handout for list)

Sec. 3:

If the cost analysis shows that the sole reason the cost of contracting out is less costly based on the wages and benefits paid to the contractor, then the agency cannot conduct the procurement. However, even if it determined the cost would be less to provide the service in-house or the sole reason for contracting out is based on wages and benefits, the agency may conduct the procurement anyway if the agency shows it lacks the personnel and resources to perform the service in the amount of time necessary. If so, the agency needs to:

- 1) Keep a record of the cost analysis and findings
- 2) Provide a copy quarterly to the local contract review board
- 3) The cost analysis is a public record

Sec. 4:

An agency may proceed with the procurement without conducting the cost analysis if the agency determines in writing that using in-house personnel is not feasible. The agency must show that:

- 1) The agency lacks the specialized capabilities, experience or technical expertise necessary to do the work with the agency's employees; or
- 2) Special circumstances require contracting out. This list includes, but is not limited to:
 - a) Terms under which the agency receives a grant requires contracting out
 - b) State or federal law requires contracting out
 - c) The procurement is for services incidental to a contract for purchasing or leasing real equipment or personal property, including service and maintenance agreements for leased and/or rented equipment
 - d) Agency cannot accomplish legal, administrative or policy goals with contracting out
 - e) Procurement is under the emergency provisions of ORS 279B.080
 - f) Procurement need is temporary, urgent and/or occasional, and would cause undue delay without contracting out
 - g) Services needed would be completed within 6 months after the date the contract is executed.

Sec. 5:

Addresses the competitive bidding process outlined in ORS 279B.055. Most of the changes are minor, however, the agency must now state in the description of the procurement that, unless the agency specifies otherwise, the scope of work requires the contractor to meet the "highest standards prevalent in the industry." Also, the contract is to specify clear consequences for a contractor's failure to perform the scope of work.

Sec. 6:

Basically state's the same language as Sec. 5, applying it to the RFP process defined in ORS 279B.060.

Sec. 7:

Adds language to the responsible bidder guidelines of ORS 279B.110 to require contracting agencies to consider whether the bidder has completed "previous contracts of a similar nature." Also, adds criteria to be considered when determining whether the contractor has demonstrated a record of integrity. Section 9 basically repeats this language, applying it to the ORS 279C.375 public improvement low-bid process.

The most important sections of the bill, Sections 2,3, and 4 become effective January 1, 2010.