

# JUDICIAL REMEDIES UNDER THE NEW PUBLIC CONTRACTING LEGISLATION

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## I. PERCEIVED PROBLEMS WITH CURRENT ORS CHAPTER 279 JUDICIAL REMEDIES

The changes to Oregon law regarding judicial remedies originated with perceived problems about current law. Those problems are briefly summarized below:

### A. Unclear

1. ORS 279.067 provides for challenges to public contract awards that are contrary to law. It may also be maintained for requiring compliance with applicable law. It does not say it is the exclusive method for judicial challenges. Such an action would permit a full hearing, including witnesses. Attorney fees are available to the prevailing party.
2. ORS 279.019(3) permits challenges to contract exemptions by writ of review process, which permits a 60-day timeline for challenges. The writ of review process is also available for challenge to other local government actions. Such an action is usually on the record submitted to the court and no witnesses are called. Attorney fees are not available to the prevailing party.

Questions: If the contract is awarded within 60 days, which Section of ORS Chapter 279 applies? If a writ of review action is brought to challenge a contract award, can that action be dismissed because it does not comply with ORS 279.067?

### B. Time

1. The 60-day timeline for writ of review challenges to exemptions provided by ORS 279.019(3) was perceived to be too long since a contract could have been awarded and expenses incurred by that time.
2. There is no timeline under ORS 279.067 for bringing a challenge.
3. There was no timeline expressed for challenges to a solicitation's specifications. This meant that bidders could wait until after the contract was awarded to challenge the procurement.

C. Administrative Remedies and Scope of Review

1. There is no requirement in ORS Chapter 279 for exhausting administrative remedies prior to filing any kind of judicial proceeding. Some jurisdictions had required this through rule making.
2. The scope of the review before the court was not limited to challenges raised before the agency. Therefore, protestors could assert positions in court that had not been considered by the local contracting entity or state agency. In Oregon's "trial by ambush" approach to litigation, government did not always have any notice that such issues would be raised.

D. Stay and Bonds

1. Persons protesting a contract award often sought to stay execution of the contract. They feared that award and execution of the contract would then preclude them from any relief.
2. There was no specific reference in ORS Chapter 279 as to whether the court could issue a bond. If the court issued a bond, there was no authority for the proposition that the public, as opposed to the government, should be protected.

**II. CHANGES TO JUDICIAL REMEDIES IN REGARD TO PUBLIC IMPROVEMENTS**

Despite perceived problems with judicial remedies, no changes were made to remedies currently available under Oregon law in regard to the award of contracts for public improvements. Therefore, section 134 of HB 2341 keeps current judicial remedies intact.

This result occurred for several reasons. The primary reason was that the interest groups that met regarding the proposed legislation adopted a "consensus" model for change. If consensus could not be reached, then changes were not made. Consensus on changes to judicial remedies for public improvements could not be achieved among the various competing interest groups, which included state and local governments, subcontractors and contractors.

**III. OVERVIEW OF CHANGES TO JUDICIAL REMEDIES FOR ACQUISITION OF GOODS AND SERVICES (OTHER THAN PERSONAL SERVICES)**

There was less concern regarding changes to judicial remedies in regard to the acquisition of goods and services. Therefore, there were a number of changes to current law regarding protests and remedies in this regard. An overview of those changes, found in sections 83 through 97 of the Act, is as follows:

A. Adoption of Administrative Rules

Section 10 of HB 2341 requires the adoption of administrative rules. Like today, these rules fill the gaps left by the legislation or are mandated by the legislation itself. The Judicial Remedies Sections generally provide that local governments, districts, state agencies and other governmental entities shall adopt rules establishing various aspects of the protest process.

B. Exhaustion of Administrative Remedies

Sections 83-87 of the Act require adversely affected or aggrieved bidders or proposers, or potential bidders if appropriate, to challenge the government's solicitation document and proposed award of the contract at the earliest possible time. This permits the government the opportunity to correct defective solicitation documents or flawed procedures without losing valuable time, and ensures that protestors cannot "lay in the weeds" to challenge the government action long after the fact.

C. Location for Challenges

Challenges to state action will occur in Marion County or in the county where the principle offices of the agency are located. Challenges to local action will occur in the county in which the principal offices of the local government body is located.

D. Scope of Judicial Review

The scope of judicial review gives deference to the factual conclusions of the government.

#### **IV. PROTESTS OF SPECIAL PROCUREMENTS**

"Special Procurements," defined by Section 57 of HB 2341, is the name given to a slightly new way of acquiring goods and services. Current ORS Chapter 279 requires goods and services (other than personal services) to be acquired through competitive bidding. ORS 279.015.

Under current law, the State and local governments can obtain "exemptions" to permit a different acquisition process if they can demonstrate a) substantial cost savings and b) that "[i]t is unlikely that such exemption will encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts." Under Section 57 of HB 2341, however, a special procurement also can be obtained if it would

“substantially promote the public interest in a manner that could not practicably be realized under” other provisions of the new purchasing code.

Like the current “exemption” process, special procurements require approval by the Department of Administrative Services (DAS) for state agencies and a local contract review board for local contracting public agencies. Section 57 (2). Public notice of the request for DAS’s or the Board’s approval is required by publishing the request in a newspaper of general circulation in the areas where the contract is to be performed and in other places as the contracting agency may determine. *Id.* at (4) and Section 51(4)(b). Current law did not explicitly require advance notice, although local agencies that publish their decision body’s agenda in advance of a public meeting often provided notice in any event.

Section 83 of HB 2341 details how protests are made to DAS’s or the local contract review board’s approval to use a special procurement. It contains the following elements:

- A. Requirement to protest in accordance with rules and to exhaust all administrative remedies.
- B. The rules shall provide “a reasonable time and manner for affected persons to protest a contracting agency’s request for approval of a special procurement.” 83(1).
- C. Approval by State
  1. Judicial Review of a class special procurement by State agency constitutes rulemaking and protests are through ORS 183.400.
  2. Judicial Review of a contract-specific special procurement may be challenged as an order in an other than contested case, as provided by ORS 183.484.
  3. Judicial review of a contract-specific approval must be sought before the contract is awarded. “Otherwise, a contract awarded pursuant to the contract-specific special procurement is conclusively presumed valid and may not, in any future judicial or administrative proceeding, be challenged on the ground that the contract was awarded under an invalid special procurement.” *Id.*
  4. Location: Marion County or the county in which the principal offices of the state contract agency are located.
  5. The Circuit Court “shall give” priority on its docket for an expedited review.
- D. Approval by Local Contracting Agency

1. Judicial review of both class and contract-specific special procurements is by way of writ of review.
2. Judicial review must be sought within 10 days after approval is given, notwithstanding the 60-day timeline permitted by ORS 34.030.
3. The circuit court “shall give” priority on its docket for an expedited review.

E. Effect on Contract Execution and Performance

1. Filing stays contract execution, unless there is a written finding by the government, and which is provided to the party seeking judicial relief, demonstrating:
  - a) “compelling governmental interest,”
  - b) goods and services are “urgently needed.”

Hypothetical examples of what may constitute “compelling governmental interests:”

Ex. 1: The local agency has federal funds available, but only if a contract is executed by a particular date; otherwise the funds are lost.

Ex. 2: Delay in the acquisition goods and services could result in the interruption of vital services or possible damage to person or property.

2. Notwithstanding contract execution, the party filing suit may ask the court to stay contract performance after joining the prospective contractor to the lawsuit. The court may stay that performance if it finds the agency’s factual findings are not supported by substantial evidence or constituted a manifest abuse of discretion.

F. Scope of Review

1. Court gives “due deference” to factual findings of agency;
2. Court reviews matters of law de novo
3. If contract performance is stayed, the court may require the party seeking the stay to post a bond to protect both the agency and the public from “costs associated with delay in contract performance.”

G. Relief

1. Contracts not yet executed

- a) If the court finds in favor of the person filing the challenge and the violation could have affected the award of the contract, then the matter is remanded to the contracting agency to determine whether to continue with the procurement process.
- b) Costs and attorney fees may be awarded;

2. Contracts already executed

The same relief is available as that for contracts that were not yet executed. In addition, the court is to determine whether the contractor is entitled to reimbursement similar to that provided for in Section 136 of the Bill.

**V. PROTESTS REGARDING THE CONTENTS OF SOLICITATION DOCUMENTS: SECTION 84**

A. Basis of Protest

Protests can be lodged against solicitation documents for the following reasons

- 1. The document improperly requires use of a brand name product
- 2. The document is “legally flawed”, which is defined as containing terms and conditions that are “contrary to law;” or
- 3. The document is “unnecessarily restrictive” in regard to how it limits competition.

B. Time for protests will be set by Administrative Rule

C. Administrative remedies must be exhausted

D. Not a back door method to protest a special procurement

E. Required Contents of Protest

- 1. Timely filed
- 2. Identifies solicitation document subject to protest
- 3. States grounds on which protest based

- 4. Provides any necessary evidence to support claim
- 5. States the relief sought
- F. Government Response
  - 1. Notify protestor of defects in protest; or
  - 2. If no defects issue a written response 3 days ahead of the bid, unless special circumstances exist.
- G. Scope of Review

Similar to that described above regarding Special procurements

**VI. PROTEST OF CONTRACT AWARD: SECTION 85**

- A. Government must adopt rules and provide a reasonable time and manner in which to make a protest
- B. Who may protest: Someone eligible to receive the award of the contract
- C. Grounds for Protest
  - 1. All lower bids or higher ranked proposals were nonresponsive;
  - 2. In a Request for Proposal process, the criteria stated in the RFP were not followed when ranking the proposals
  - 3. The Government abused its discretion in rejecting the protestor's bid as nonresponsive
  - 4. The evaluation of any proposal violated the law
- D. Response to Protest: In writing and timely

**VII. JUDICIAL REVIEW OF PROTESTS OF CONTRACT AWARD: SECTION 86**

- A. What is reviewable

What is reviewed is the decision regarding the protest. New matter cannot be raised.

- B. When the complaint must be filed:

1. State Contracts: the complaint must be filed before the Attorney General approves the contract as to form, which happens after the contract is awarded.
  2. Local Contracts: the complaint must be filed before the contract is executed.
- C. Complaint
1. Nature of Complainant's interest
  2. Facts showing how the complainant is adversely affected or aggrieved
- D. Joinder: All parties who might otherwise be entitled to receive the award must be joined.
- E. Judicial Review
1. Judicial review will be like that set out in regard to Special Procurements, in Section 83. There are some differences.
  2. Basis for granting relief:
    - a) Lack of substantial evidence to support the agency decision. This is the same factual standard now used on challenges to state agency procurements. Current law is vague about the factual standard to be employed.
    - b) The decision was outside the discretion delegated to the agency by law;
    - c) The decision is inconsistent with agency rule or practice unless the inconsistency is explained;
    - d) The decision violates constitutional provisions or Oregon statutes.

### **VIII. JUDICIAL REVIEW OF OTHER VIOLATIONS: SECTION 86A.**

Section 85A provides a "catch-all" for any alleged violations during the acquisition of goods and services that might not otherwise be addressed in Sections 83 through 86.

- A. When Review Available: Section 86a(3)
1. If a public contract is about to be awarded or has been awarded.

2. An alleged violation has occurred and “that violation resulted in or will result in the unlawful award of a contract or the unlawful failure to award the contract;”
3. “The alleged violation deprived the person seeking judicial review of the award of the contract” or the opportunity to compete for it;
4. The person seeking relief would have been qualified to receive the award;
5. The person seeking judicial review gave written notice to the agency no more than 10 days after the date on which the violation occurred and in no event more than 10 days after the date of the execution of the contract;
6. Administrative remedies have been exhausted;
7. Judicial review is not otherwise available under HB 2341.

B. Type of review:

1. If state agency, then review as order in other than contested case.
2. If local agency, then writ of review under Chapter 24.

N.B. The 60-day time line is applicable.