

OFFICE OF THE SECRETARY OF STATE

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ARCHIVES DIVISION

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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 839
BUREAU OF LABOR AND INDUSTRIES

FILED

07/31/2024 10:15 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Amends rules to implement Enrolled Senate Bill 594 (2023) and eliminate erroneous citations.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 09/20/2024 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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NEED FOR THE RULE(S)

These rule amendments are necessary to fully implement Enrolled Senate Bill 594 (2023) and to eliminate erroneous citations.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Enrolled Senate Bill 594 (2023) is available here:
<https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/SB594>.

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

Although the Bureau believes that the underlying statutory changes will have a positive impact on racial equity, it does not anticipate that these rules will impact racial equity in this state. Substantively, these amendments conform to Oregon statutory law, which expressly includes certain projects involving demolition and the removal of hazardous waste within the definition of "public works" found in ORS 279C.800.

FISCAL AND ECONOMIC IMPACT:

The Bureau does not anticipate that these administrative rules will result in a fiscal or economic impact apart from the impacts of the underlying legislation.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

These rules apply to state agencies, units of local government and members of the public who become involved in certain public works projects. The Bureau of Labor Statistics' 2022 census noted 402,928 small businesses in Oregon, 12,651 of which operated in the construction industry and employed fewer than 20 employees. Any expected reporting, recordkeeping and administrative activities and cost required to comply with these rules is a function of the statute. Similarly, any professional services, equipment supplies, labor and increased administrative costs are a function of the statute. The Bureau does not anticipate costs associated with these administrative rules, or a broader economic impact, apart from the underlying legislation

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Small businesses, as well as the public at large, are invited to provide comment on these rules and the Bureau is providing notice of the proposed rules via its website, mailing list and the Oregon bulletin.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

The primary purpose of the rule amendments is to conform administrative rules to Oregon Revised Statutes. The secondary purpose is to eliminate erroneous citations. This invitation for comment from the public at large is likely to efficiently surface commentary relevant to these purposes.

RULES PROPOSED:

839-025-0020, 839-025-0035, 839-025-0037, 839-025-0045, 839-025-0100, 839-025-0230, 839-025-0310, 839-025-0500

AMEND: 839-025-0020

RULE SUMMARY: Amends rule to include reference to public works projects involving demolition or hazardous waste removal.

CHANGES TO RULE:

839-025-0020

Public Works Contracts and Contract Specifications; Required Conditions ¶¶

(1) For purposes of this rule:¶¶

(a) "Construction Manager/General Contractor contract" (or "CM/GC contract") means a contract that typically results in a general contractor/construction manager initially undertaking various pre-construction tasks that may include, but are not limited to: design phase development, constructability reviews, value engineering, scheduling, and cost estimating, and in which a guaranteed maximum price for completion of construction-type work is typically established by amendment of the initial contract, after the pre-construction tasks are complete or substantially complete. "CM/GC" refers to the general contractor/construction manager under this form of contract. Following the design phase, the CM/GC may then act as a General Contractor and begin the subcontracting process. The CM/GC typically coordinates and manages the construction process, provides contractor expertise, and acts as a member of the project team.¶¶

(b) "Construction specifications" include the detailed description of physical characteristics of the improvement, design details, technical descriptions of the method and manner of doing the work, quantities or qualities of any materials required to be furnished, descriptions of dimensions, required units of measurement, composition or manufacturer, and descriptions of any quality, performance, or acceptance requirements.¶¶

(2) Every public works contract must contain the following:¶¶

(a) A condition or clause that, if the contractor fails, neglects, or refuses to make prompt payment of any claim for labor or services furnished to the contractor or a subcontractor by any person, or the assignee of the person, in connection with the public works contract as such claim becomes due, the proper officer or officers of the public agency may pay such claim and charge the amount of the payment against funds due or to become due the contractor by reason of the contract (Reference: ORS 279C.515);¶¶

(b) A condition that no person will be employed for more than 10 hours in any one day, or 40 hours in any one week except in cases of necessity, emergency, or where the public policy absolutely requires it, and in such cases

the person so employed must be paid at least time and one-half the regular rate of pay for all time worked:¶

(A) For all overtime in excess of eight hours a day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or¶

(B) For all overtime in excess of 10 hours a day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and¶

(C) For all work performed on Saturday and on any legal holiday specified in ORS 279C.540 (Reference: ORS 279C.520(1));¶

(c) A condition that an employer must give notice to employees who work on a public works contract in writing, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work (Reference: ORS 279C.520(2)); and¶

(d) A condition that the contractor must promptly, as due, make payment to any person, co-partnership, association or corporation, furnishing medical, surgical and hospital care or other needed care and attention, incident to sickness or injury, to employees of such contractor, of all sums which the contractor agrees to pay for such services and all moneys and sums which the contractor collected or deducted from the wages of the contractor's employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service (Reference: ORS 279C.530).¶

(3) Every public works contract that a public agency awards must contain a condition or clause that requires the contractor to:¶

(a) Have a public works bond filed with the Construction Contractors Board before starting work on the project, unless the contractor is exempt under ORS 279C.836(4), (7), (8) or (9).¶

(b) Require, in every subcontract, that the subcontractor have a public works bond filed with the Construction Contractors Board before starting work on the project, unless the subcontractor is exempt under ORS 279C.836(4), (7), (8) or (9).¶

(4) Every subcontract that a contractor or subcontractor awards in connection with a public works contract between a contractor and a public agency must require any subcontractor to have a public works bond filed with the Construction Contractors Board before starting work on the public works projects, unless the subcontractor is exempt under ORS 279C.836 (4), (7), (8), or (9).¶

(5)(a) Every public works contract and subcontract must provide that each worker the contractor, subcontractor or other person who is a party to the contract uses in performing all or part of the contract, must be paid not less than the applicable prevailing rate of wage for each trade or occupation as defined by the Commissioner of the Bureau of Labor and Industries in the applicable publication entitled Definitions of Covered Occupations for Public Works Contracts in Oregon.¶

(b) If a public works project is subject to both ORS 279C.800 to ORS 279C.870 and to the Davis-Bacon Act (40 U.S.C. 3141 et seq.), every public works contract and subcontract must provide that the worker whom the contractor, subcontractor or other person who is a party to the contract uses in performing all or part of the contract, must be paid not less than the higher of the applicable state prevailing rate of wage for each trade or occupation as defined by the Commissioner of the Bureau of Labor and Industries in the applicable publication entitled Definitions of Covered Occupations for Public Works Contracts in Oregon or federal prevailing rate of wage.¶

(6)(a) The specifications for every public works contract must contain a provision that states the existing state prevailing rate of wage and, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act (40 U.S.C. 3141 et seq.).¶

(b) Except as provided in subsection (d) of this section and sections (8) and (9) of this rule, the existing state prevailing rate of wage and the applicable publication entitled Definitions of Covered Occupations for Public Works Contracts in Oregon are those in effect at the time the initial specifications were first advertised for bid solicitations.¶

(c) If a public agency is required under subsection (a) of this section or section (8) of this rule to include the state and federal prevailing rates of wage in the specifications for a contract for public works, the public agency shall also include in the specifications the requirement that the contractor pay the higher of the applicable state or federal prevailing rate of wage to all workers on the public works project.¶

(d) Pursuant to ORS 279C.838(4) and notwithstanding ORS 279C.830(1), if the contract is subject to both ORS 279C.800 to 279C.870 and the Davis Bacon Act (40 U.S.C. 3141 et seq.), the public agency may provide in the specifications for the contract a single date to be used to establish the "existing state prevailing rate of wage," the applicable publication entitled Definitions of Covered Occupations for Public Works Contracts in Oregon, and the "applicable federal prevailing rate of wage" that is consistent with the federal requirements under 29 CFR 1.6.¶

(e) The specifications for a contract for public works must provide that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work on the project, unless the contractor or subcontractor is exempt under ORS 279C.836(4), (7), (8) or (9).¶

(7)(a) The provisions described in sections (5) and (6), and sections (8) and (9) if applicable, must be included in all specifications for each contract awarded on the project, regardless of the price of any individual contract, so long as the combined price of all contracts awarded on the project is \$50,000 or more (Reference: ORS 279C.830).¶

(b) A statement incorporating the applicable state prevailing wage rate publication and any amendments thereto into the specifications by reference will satisfy these requirements. Except as provided in subsection (c), such reference must include the title of the applicable wage rates publication or determination and the date of the publication or determination as well as the date of any applicable amendments.¶

(c) When the prevailing wage rates are available electronically or are accessible on the Internet, the rates may be incorporated into the specifications by referring to the electronically accessible or Internet-accessible rates and by providing adequate information about how to access the rates. Such reference must include the title of the applicable wage rates publication or determination and the date of the publication or determination as well as the date of any applicable amendments. The reference requirements of this subsection will be satisfied if such reference includes Uniform Resource Locator (URL) information for a webpage or webpages showing the title of each applicable wage rates publication or determination and the date of each publication or determination as well as the date of any applicable amendments.¶

(8)(a) When a public agency is a party to a CM/GC contract, the CM/GC contract becomes a public works contract either when the contract first constitutes a binding and enforceable obligation on the part of the CM/GC to perform or arrange for the performance of construction, reconstruction, major renovation, demolition, removal of hazardous waste or painting of an improvement that is a public works or when the CM/GC contract enters the construction phase, whichever occurs first.¶

(b) For example, the CM/GC will have a binding and enforceable obligation to perform or arrange for the performance of construction, reconstruction, major renovation, demolition, removal of hazardous waste or painting of an improvement after the public agency and CM/GC commit to the guaranteed maximum price.¶

(c) For purposes of this rule, the CM/GC contract enters the construction phase when the agency first authorizes the performance of early construction, reconstruction, major renovation, demolition, removal of hazardous waste or painting work directly related to the improvement project.¶

(d) The publication entitled Definitions of Covered Occupations for Public Works Contracts in Oregon and the prevailing wage rate in effect at the time the CM/GC contract becomes a public works contract shall apply and the applicable prevailing wage rates must be included with the construction specifications for the CM/GC contract.¶

(9) A public works project described in ORS 279C.800(6)(a)(B), (C), (D), (E) or (F) that is not a CM/GC contract subject to section (8) of this rule, and for which no public agency awards a contract to a contractor for the project, is subject to the publication entitled Definitions of Covered Occupations for Public Works Contracts in Oregon and the existing state prevailing rate of wage or, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act that are in effect at the time a public agency enters into an agreement with a private entity for the project. (Note: The effective date of the applicable federal prevailing rate of wage may be different under federal law.) After that time, the specifications for any contract for the public works shall include the applicable prevailing rate of wage.¶

(10) If a project is a public works of the type described in ORS 279C.800(6)(a)(B), (C), (D), (E) or (F) and no public agency awards a contract to a contractor for the project, a public agency will be deemed to have complied with the provisions of ORS 279C.830 if the public agency requires compliance with the provisions of section (7) of this rule in any agreement entered into by the public agency committing to provide funds for the project, to occupy or use the completed project, ~~or~~ authorizing the construction or installation of a solar radiation device, or authorizing demolition or hazardous waste removal.¶

(11) Public agencies may obtain, without cost, a copy of the existing state prevailing rate of wages for use in preparing the contract specifications by contacting the Prevailing Wage Rate Unit or any office of the bureau.

Statutory/Other Authority: ORS 651.060, ORS 279C.808

Statutes/Other Implemented: ORS 279C.800 - 279C.870

AMEND: 839-025-0035

RULE SUMMARY: Amends rule to include all public works projects defined in ORS 279C.800 and eliminate certain citations to subsections.

CHANGES TO RULE:

839-025-0035

Payment of Prevailing Rate of Wage ¶¶

(1) Every contractor or subcontractor employing workers on a public works project must pay to such workers no less than the applicable prevailing rate of wage for each trade or occupation, as determined by the commissioner, in which the workers are employed. Additionally, all wages due and owing to the workers shall be paid on the regular payday established and maintained under ORS 652.120.¶¶

(2) When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.), if the state prevailing rate of wage is higher than the federal prevailing rate of wage, the contractor and every subcontractor on the project shall pay no less than the state prevailing rate of wage as determined under ORS 279C.815.¶¶

(3) Every person paid by a contractor or subcontractor in any manner for the person's labor ~~in the construction, reconstruction, major renovation or painting of~~ on a public work is employed and must receive no less than the applicable prevailing rate of wage, regardless of any contractual relationship alleged to exist. Thus, for example, if partners are themselves performing the duties of a worker, the partners must receive no less than the prevailing rate of wage for the hours they are so engaged.¶¶

(4) Persons employed on a public works project and who are spending more than 20% of their time during any workweek in performing duties which are manual or physical in nature as opposed to mental or managerial in nature are workers and must be paid the applicable prevailing rate of wage. Mental or managerial duties include, but are not limited to, administrative, executive, professional, supervisory or clerical duties.¶¶

(5) Persons employed on a public works project for the manufacture or furnishing of materials, articles, supplies or equipment (whether or not a public agency acquires title to such materials, articles, supplies or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) are not workers required to be paid the applicable prevailing rate of wage unless the employment of such persons is performed in connection with and at the site of the public works project.¶¶

(6) Except as provided in ORS 279C.838, persons employed on a public works project who are employed by a commercial supplier of goods or materials must be paid no less than the applicable prevailing rate of wage when the work is performed at the "site of work" as that term is defined in OAR 839-025-0004(25) or when the work is performed in fabrication plants, batch plants, borrow pits, job headquarters, tool yards or other such places that are dedicated exclusively or nearly so to the public works project.¶¶

(7) Except as provided in ORS 279C.838, persons employed on a public works project by the construction contractor or construction subcontractor to transport materials or supplies to or from the public works project are required to be paid the applicable prevailing wage rate for work performed in connection with the transportation of materials or supplies at the "site of work" as that term is defined in OAR 839-025-0004(25).¶¶

(8) Persons employed on a public works project for personal services, as that term is defined in ORS 279C.100(5), as opposed to construction work, are not workers required to be paid the prevailing rate of wage.¶¶

(9) Every apprentice, as defined in OAR 839-025-0004(4), must be paid not less than the appropriate percentage of the applicable journeyman's wage rate and fringe benefits as determined pursuant to ORS 279C.800 to 279C.870. Any worker on a public works project who is not an apprentice as defined in OAR 839-025-0004(4), or who is not employed by a registered training agent pursuant to ORS 660.010(10), or who is not working pursuant to the standards of the apprentice's apprenticeship program, must be paid not less than the applicable prevailing rate of wage for the classification of work actually performed. In addition, if the total number of apprentices employed exceeds the ratio permitted in the applicable standards, all apprentices so employed must be paid not less than the applicable journeyman's prevailing wage rate for work actually performed.¶¶

(10) Every trainee, as defined in OAR 839-025-0004(29), must be paid not less than the appropriate percentage of the applicable journeyman's wage rate and fringe benefits determined pursuant to ORS 279C.800 to 279C.870. Any worker on a public works project who is not a trainee as defined in OAR 839-025-0004(29), or who is not employed by a registered training agent pursuant to ORS 660.010(10), or who is not working pursuant to the standards of the trainee's program, must be paid not less than the applicable prevailing rate of wage for the classification of work actually performed. In addition, if the total number of trainees employed exceeds the ratio permitted in the applicable standards, all trainees so employed must be paid not less than the applicable journeyman's prevailing wage rate for work actually performed.

Statutory/Other Authority: ORS 651.060(4), ORS 279C.808

Statutes/Other Implemented: ORS 279C.800-279C.870

AMEND: 839-025-0037

RULE SUMMARY: Amends rule to eliminate erroneous citation.

CHANGES TO RULE:

839-025-0037

Residential Construction Projects; Wage Rates; Rate Determinations ¶¶

(1)(a) For residential construction projects as defined in OAR 839-025-0004(24) and subject to ORS 279C.800 to 279C.870, public agencies shall use federal Davis-Bacon wage rates for residential construction projects unless there is no applicable federal rate for a particular trade or classification on the residential project.¶¶

(b) If the applicable federal Davis-Bacon wage rate determination does not include a rate for a particular trade or classification needed on a specific residential construction project, and the project is subject to ORS 279C.800 to 279C.870 but not the federal Davis-Bacon Act, the public agency is required to request a special wage rate, identifying the specific trade or classification, pursuant to OAR 839-025-0007.¶¶

(c) The commissioner may consider and approve a residential wage determination for a trade or classification issued by any federal agency within twelve months of the date of any request for a special wage rate pursuant to subsection (b) of this section.¶¶

(d) Requests for special wage rate determinations for projects subject to both ORS 279C.800 to 279C.870 and the federal Davis-Bacon Act shall be submitted pursuant to Title 29 CFR, Part 5.5(a)(1)(ii) as amended January 9, 2017.¶¶

(e) Copies of any special federal wage rate determinations requested and subsequent determination(s) issued pursuant to subsection (d) of this section must be provided to the commissioner by the public agency.¶¶

(2) Notwithstanding section (1) of this rule, the commissioner, consistent with statutory authority, may survey and issue residential rates.¶¶

(3) Requests for special wage rates for residential construction projects pursuant to section (1)(b) of this rule must be submitted to the Bureau of Labor and Industries by the public agency no fewer than fifteen (15) business days prior to the date the specifications for the project are first advertised.¶¶

(4) If a public agency fails to request special wage rates for a residential construction project pursuant to section (1)(b) of this rule at least fifteen (15) business days before the date the specifications for the project are first advertised for the project, the Prevailing Wage Rates for Public Contracts published by the Commissioner of the Bureau of Labor and Industries in effect when the specifications are first advertised shall apply to those trades or classifications for which there is no applicable federal residential rate.¶¶

(5) The federal Davis-Bacon wage rates apply to residential construction projects subject to ORS 279C.800 to 279C.870 regardless of whether federal law requires Davis-Bacon rates on the project.¶¶

(6) Notwithstanding any other provision of this rule, unless otherwise exempt, under no circumstances may a rate less than the minimum wage rate required by ORS 653.025 be paid to any worker on a residential construction project subject to ORS 279C.800 to 279C.870.

Statutory/Other Authority: ORS 279C.808, ORS 651.060(4)

Statutes/Other Implemented: ORS 279C.800-279C.870

AMEND: 839-025-0045

RULE SUMMARY: Amends rule to conform to statutory language.

CHANGES TO RULE:

839-025-0045

Youth Apprentices **¶**

Youth apprentices, as defined in ORS 344.745, shall not be employed on public works ~~construction~~ projects (Reference: 344.750(5)).

Statutory/Other Authority: ORS 279, ~~651~~C.808, ORS 651.060

Statutes/Other Implemented: ORS 279.348C.800 - 279.38C.870

AMEND: 839-025-0100

RULE SUMMARY: Amends rule to eliminate erroneous citation.

CHANGES TO RULE:

839-025-0100

Exemptions from ORS 279C.800 to 279C.870 ¶¶

(1) All public works are regulated under ORS 279C.800 to 279C.870 except as follows:¶¶

(a) Projects for which the total price does not exceed \$50,000. As used in this section, the price of a project includes, but is not limited to, the value of work performed by every person paid by a contractor or subcontractor in any manner for the person's work on the project, but does not include the value of donated materials or work performed on the project by individuals volunteering to the public agency without pay. If the price of a project exceeds \$50,000 at any time during the project, the project is not exempt from ORS 279C.800 to 279C.870.¶¶

(b) Contracts of a People's Utility District, which are regulated under ORS 261.345.¶¶

(c) Projects for which no funds of a public agency are directly or indirectly used.¶¶

(d) Projects:¶¶

(A) That are privately owned;¶¶

(B) That use funds of a private entity;¶¶

(C) In which less than 25 percent of the square footage of a completed project will be occupied or used by a public agency; and¶¶

(D) For which less than \$750,000 of funds of a public agency are used.¶¶

(E) For purposes of this rule, if none of the square footage of a completed project will be occupied or used by a public agency and no funds of a public agency are used, the provisions of paragraphs (C) and (D) of this subsection will be deemed to have been met.¶¶

(e) Projects for residential construction that are privately owned and that predominantly provide affordable housing. As used in this paragraph:¶¶

(A) "Affordable housing" means housing that serves occupants whose incomes are no greater than 60 percent of the area median income or, if the occupants are owners, whose incomes are no greater than 80 percent of the area median income.¶¶

(B) "Predominantly" means 60 percent or more.¶¶

(C) "Privately owned" includes:¶¶

(i) Affordable housing provided on real property owned by a public agency if the real property and related structures are leased to a private entity for 50 or more years; and¶¶

(ii) Affordable housing owned by a partnership, nonprofit corporation or limited liability company in which a housing authority, as defined in ORS 456.005, is a general partner, director or managing member and the housing authority is not a majority owner in the partnership, nonprofit corporation or limited liability company.¶¶

(2) The provisions of ORS 279C.840 and these rules that regulate payment of the prevailing rate of wage do not apply to:¶¶

(a) Inmates of the Oregon Department of Corrections assigned to:¶¶

(A) A work release program or otherwise working in gainful private employment pursuant to ORS 144.480, relating to prison inmate labor; or¶¶

(B) State Parks and Recreation Department projects to improve, maintain and repair buildings and property at state parks and recreation areas pursuant to ORS 390.195(1).¶¶

(b) Oregon Youth Conservation Corps members.¶¶

(3) Pursuant to ORS 352.138, universities with governing boards are exempt from the following Prevailing Wage Rate statutes: ORS 279C.805; ORS 279C.807; ORS 279C.808; ORS 279C.815; ORS 279C.817; ORS 279C.820; and ORS 279C.829. This exemption, however, does not apply to an agreement under the terms of which a private entity constructs, reconstructs, renovates or paints an improvement on real property owned by a university with a governing board or by a nonprofit organization or other entity that a university with a governing board owns or controls exclusively.¶¶

(4) A public agency is not subject to ORS 279C.800 to 279C.870 if the public agency only provides funds for a public works project that are not "funds of a public agency" as that phrase is defined in OAR 839-025-0004(9), or, if the public agency will use or occupy less than 25% of the square footage of the completed public works project and less than 25% of combined square footage of the completed project will be used or occupied by public agencies.¶¶

(5) Notwithstanding the provisions of sections (1), (2), (3), and (4) of this rule, public works as defined in ORS 279C.800-(6)(a)(D) are not exempt from ORS 279C.800 to 279C.870.¶¶

~~[Publications referenced are available from the agency.]~~

Statutory/Other Authority: ~~ORS 279~~, 651.060, ORS 279C.808

Statutes/Other Implemented: ~~ORS 279.357, 390.195(1), OL Ch. 628 (2001)~~ 390.195

RULE SUMMARY: Amends rule to include all public works projects described in ORS 279C.800.

CHANGES TO RULE:

839-025-0230

Fees for Contracts with Other Special Circumstances ¶¶

(1) When a public agency enters into an agreement for construction management services or chooses to act as its own general contractor or construction manager in connection with a public works project subject to ORS 279C.800 to 279C.870, the contract price for purposes of determining whether the project is regulated under the law shall be the sum of all contracts associated with the project or, if the actual sums are not known at the time work begins, the contract price shall be the guaranteed maximum amount for the project or the agency's good faith estimate of the contract price of the project if there is no guaranteed maximum amount.¶¶

(2) When a public agency contracts with a contractor to act as the general manager of a public works project, the contract for general manager services is a public works contract for purposes of these rules and a fee is required just as it is for any other public works contract, since the contract would not have been entered into but for the public works project.¶¶

(3) When a public agency acts as its own general contractor and enters into one or several contracts in connection with a public works project subject to ORS 279C.800 to 279C.870, the public agency is required to pay the fee in connection with each contract awarded to each contractor. The fee is required on all contracts, regardless of the contract price of any individual contract, so long as the combined price of all contracts awarded on the project is \$50,000 or more.¶¶

(4) When a project is a public works project pursuant to ORS 279C.800(6)(a)(B) and no public agency awards a contract to a contractor for the project, the public agency or agencies providing public funds for the project shall pay the required fee at the time the public agency or agencies commit(s) to the provision of funds for the project. The amount of the fee shall be based on the total project amount. When the amount of the project is not known by the public agency or agencies providing public funds for the project, the public agency or agencies shall pay the required fee pursuant to the provisions of OAR 839-025-0220.¶¶

(5) When a project is a public works project pursuant to ORS 279C.800(6)(a)(C) and no public agency awards a contract to a contractor for the project, the public agency or agencies that will occupy or use the completed project shall pay the required fee when the agency or agencies enter(s) into an agreement to occupy or use the completed project. The amount of the fee shall be based on the total project amount. When the amount of the project is not known by the public agency or agencies that will occupy or use the completed project, the public agency or agencies shall pay the required fee pursuant to the provisions of OAR 839-025-0220.¶¶

(6) When a project is a public works project pursuant to ORS 279C.800(6)(a)(D) and no public agency awards a contract to a contractor for the project, the public agency that owns the land, premise(s), structure(s), or building(s) on which the solar radiation device will be constructed or installed shall pay the required fee at the time the public agency enters into an agreement authorizing the construction or installation of the solar radiation device. The amount of the fee shall be based on the total project amount. When the amount of the project is not known by the public agency, the public agency shall pay the required fee pursuant to the provisions of OAR 839-025-0220.¶¶

(7) When a project is a public works project pursuant to ORS 279C.800(6)(a)(E) and no public agency awards a contract to a contractor for the project, the public university listed in ORS 352.002 that owns the land, premise(s), structure(s), or building(s) on which the construction, reconstruction, major renovation, demolition, removal of hazardous waste or painting takes place shall pay the required fee at the time the public university enters into an agreement authorizing the construction, reconstruction, major renovation, demolition, removal of hazardous waste or painting. The amount of the fee shall be based on the total project amount. When the amount of the project is not known the public university shall pay the required fee pursuant to the provisions of OAR 839-025-0220.¶¶

(8) If a project is a public works of the type described in ORS 279C.800(6)(a)(F) and no public agency awards a contract to a contractor for the project, the public agency or agencies providing public funds for the project or the public agency that owns the real property on which the demolition or removal of hazardous waste take place shall pay the required fee. The fee shall be paid at the time the public agency or agencies commit(s) to the provision of funds for the project, or at the time the public agency authorizes demolition or hazardous waste removal work to be performed. The amount of the fee shall be based on the total project amount. When the amount of the project is not known, the public agency or agencies shall pay the required fee pursuant to the provisions of OAR 839-025-0220.¶¶

(9) When more than one public agency is required to pay a fee pursuant to this rule, the amount of the fee owed by

each public agency shall, if not otherwise previously agreed upon by the agencies, be pro-rated proportionately based on the amount of public funds provided or space occupied or used by each agency.

Statutory/Other Authority: ORS 651.060, ORS 279C.808

Statutes/Other Implemented: ORS 279C.800 - 279C.870

AMEND: 839-025-0310

RULE SUMMARY: Amends rule to conform to definition of public works in ORS 279C.800.

CHANGES TO RULE:

839-025-0310

Division of Projects ¶¶

(1)(a) A person or public agency may not divide a public works project into more than one project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.¶¶

(b) When making a determination of whether a person or public agency divided a public works project to avoid compliance with ORS 279C.800 to 279C.870, the commissioner will consider the facts and circumstances in any given situation including, but not limited to, the following matters:¶¶

(A) The physical separation of project structures;¶¶

(B) Whether a single public works project includes several types of improvements or structures;¶¶

(C) The anticipated outcome of the particular improvements or structures the agency plans to fund;¶¶

(D) Whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function;¶¶

(E) Whether the work on the project is performed in one time period or in several phases as components of a larger entity;¶¶

(F) Whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project;¶¶

(G) The manner in which the public agency and the contractors administer and implement the project;¶¶

(H) Other relevant matters as may arise in any particular case.¶¶

(c) If the commissioner determines that a person or public agency has divided a public works project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner will issue a written order compelling compliance with 279C.800 to 279C.870. The order will offer the person or public agency the opportunity to contest the order pursuant to OAR 839-050-0000 through 839-050-0420.¶¶

(2) Regardless of whether the commissioner believes that a person or public agency divided a public works project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner may apply the considerations set forth in subsection (1)(b) of this rule to determine whether to divide a public works project into more than one contract.¶¶

(3) If a project is a public works of the type described in ORS 279C.800(6)(a)(B) or (C), the commissioner shall divide the project, if appropriate, after applying the considerations set forth in section (1)(b) of this rule to separate the parts of the project that include funds of a public agency or that will be occupied or used by a public agency from the parts of the project that do not include funds of a public agency and that will not be occupied or used by a public agency. If the commissioner divides the project, any part of the project that does not include funds of a public agency and that will not be occupied or used by a public agency is not subject to 279C.800 to 279C.870.¶¶

(4) If a project includes parts that are owned by a public agency and parts that are owned by a private entity, the commissioner shall divide the project, if appropriate, after applying the considerations set forth in sections (1)(b) and (2) of this rule to separate the parts of the project that are public works from the parts of the project that are not public works. If the commissioner divides the project, parts of the project that are not public works are not subject to ORS 279C.800 to 279C.870.¶¶

(5) When a private project for the construction, reconstruction, major renovation, demolition, hazardous waste removal or painting of a privately owned road, highway, building, structure or improvement of any type that is already underway becomes a public works project by virtue of the provisions of ORS 279C.800(6)(a)(B) or (C), the provisions of 279C.800 to 279C.870 apply prospectively to the project once any public agency commits to the provision of funds for the project or any public agency enters into an agreement to occupy or use any portion of the completed project. If a public agency delays a commitment to the provision of funds or delays entry into an agreement for occupancy or use for the purpose of avoiding compliance with 279C.800 to 279C.870, the commissioner may determine that the provisions of 279C.800 to 279C.870 shall apply to the entire public works project under section (1) of this rule.

Statutory/Other Authority: ORS 279C.808, ORS 651.060(4)

Statutes/Other Implemented: ORS 279C.800-279C.870, ~~OL Ch. 334 (2017)~~

AMEND: 839-025-0500

RULE SUMMARY: Amends rule to conform to statutory terminology.

CHANGES TO RULE:

839-025-0500

Definitions Related to Civil Penalties for Violations of Prevailing Wage Rates on Public Works Matters II

As used in OAR 839-025-0500 to 839-025-0540, a person acts knowingly when the person has actual knowledge of a thing to be done or omitted or should have known the thing to be done or omitted. A person should have known the thing to be done or omitted if the person has knowledge of facts or circumstances that would place the person on reasonably diligent inquiry. A person acts knowingly if the person has the means to be informed but elects not to do so. For purposes of the rule, the contractor, subcontractor and public agency are presumed to know the circumstances of the public works ~~construction~~ project.

Statutory/Other Authority: ~~ORS 279.651C.808~~, ORS 651.060

Statutes/Other Implemented: ~~ORS 279.348 – 279.38C.800-279C.870~~