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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 731
DEPARTMENT OF TRANSPORTATION

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ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Establishment of the ODOT Small Business Development Program

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 09/21/2024 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)

Rules are needed to implement small business development program, which ORS 184.906 required ODOT to establish.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Governor's Executive Order No. 22-15 and 2018 U.S. Census Data

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

The Oregon Department of Transportation (ODOT) is committed to advancing racial equity in its contracting practices. The Small Business Development Program (SBDP) will further the State's goal of embedding equity by increasing the number of small businesses competing for, and being awarded, state procurements. The SBDP creates a dedicated pathway for qualified small businesses, including minority-owned businesses (MBEs), to compete for and win prime ODOT construction contracts. This will be accomplished by:

- Increasing access to contracting opportunities: The SBDP will provide targeted support and resources to qualified small businesses, helping them navigate the bidding process and compete more effectively.
- Building capacity and experience: Through the program, participating small businesses will gain valuable experience as prime contractors, strengthening their qualifications for future projects.
- Promoting a more diverse contractor pool: Many small businesses are minority-owned. An increase in small business participation in ODOT projects will foster a more equitable and inclusive transportation industry in Oregon.

FISCAL AND ECONOMIC IMPACT:

Initially, since the Small Business Development program will limit the bidding pool, project costs of selected projects may increase. However, in the long run, a broader contractor pool benefits the State by:

- Enhancing competition: More competition leads to potentially lower project costs and improved service delivery.

- Encouraging innovation: A diverse group of contractors brings a wider range of perspectives and expertise to the table.
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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).

(1) Economically Benefited:

- Small Construction Businesses: This is the primary beneficiary. The SBDP aims to increase the number of small businesses, including minority-owned businesses (MBEs), that can compete for and win ODOT construction contracts. This translates to increased revenue and growth opportunities for these businesses.
- Oregon Department of Transportation (ODOT): Beyond the addition of 1 FTE, the SBDP Program Manager, tasked with program implementation and management, ODOT will benefit from increased competition from a broader pool of qualified contractors can lead to potentially lower project costs and potentially improved services for ODOT.
- Oregon Transportation Industry: A more diverse contractor base, fostered by the SBDP's encouragement of MBE participation, can introduce new perspectives and expertise, potentially leading to innovation within the industry.

Potential Economic Impact (Positive or Negative):

- Large Construction Businesses: Increased competition from small businesses due to the SBDP could potentially impact the number of contracts awarded to larger firms.

Minimal Economic Impact:

- General Public: The public is unlikely to see a direct economic impact from the SBDP. However, increased competition in the construction industry could lead to lower overall project costs, which could benefit taxpayers in the long run.

Not Economically Affected:

- State Agencies (besides ODOT): The SBDP is specific to ODOT construction projects and is unlikely to directly affect other state agencies.
- Units of Local Government: Similar to state agencies, unless they collaborate with ODOT on construction projects, the SBDP likely won't have a direct economic impact on local governments.

(2)(a) This rule only affects construction businesses that bid on public improvement projects. It is difficult to estimate this number, however, below are the findings of our research.

According to the Office of Small Business Assistance within the Oregon Secretary of State, in 2023 there were only 3,300 employers in Oregon with more than 100 employees. That's out of about 140,000 employers and about 520,000 registered businesses. This data comes from the Employment Department, which maintains data about employers, but not those businesses operating without employees.

While the Secretary of State tracks business registrations and the Construction Contractors Board (CCB) has records on the number of active licensed firms in Oregon, the CCB allows licensing for businesses not registered with the Secretary of State.

(2)(b) There will be no impact on small businesses that choose not to participate in the SBDP. Those construction firms that choose to participate in the program can expect to do the same reporting, recordkeeping, and administrative activities as any business bidding on and delivering federally funded ODOT projects.

(2)(c) Same as above. No change specific to complying with the rule.

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

In May 2024, ODOT convened an Advisory Committee to gain input on rule development. The Advisory Committee met twice and included small and mid-size business owners, in addition to industry association representatives. Beyond the Advisory Committee, tribes and other small businesses were invited to serve as advisors and to provide input.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

731-065-0001, 731-065-0010, 731-065-0020, 731-065-0030, 731-065-0040, 731-065-0050, 731-065-0060, 731-065-0070

ADOPT: 731-065-0001

RULE SUMMARY: This rule is to implement and administer the ODOT Small Business Development Program.

CHANGES TO RULE:

731-065-0001

Purpose

As required by ORS 184.906, ODOT has established a small business development program. These rules are to implement and administer this program. They detail eligibility criteria, program duration, disqualification factors, and the process for requesting reconsideration of program disqualification.

Statutory/Other Authority: ORS 184.619

Statutes/Other Implemented: ORS 184.906

ADOPT: 731-065-0010

RULE SUMMARY: Rule defines terms used in ORS 184.906 and these rules.

CHANGES TO RULE:

731-065-0010

Definitions

The following definitions apply to terms used in ORS 184.906 and these rules:¶

- (1) "Active Project" is an SBDP project where a contract has been awarded but not yet reached Second Notification. "Second Notification" is a written acknowledgment by the ODOT Engineer of the end of Contract Time according to Oregon Standard Specification for Construction 00180.50(g).¶
- (2) "Applicant" means a business owner or business representative who completes the application process and attests that their Business meets eligibility requirements for the SBDP.¶
- (3) "Business" means a for-profit construction business.¶
- (4) "COBID" means the Certification Office for Business, Inclusion and Diversity. It is the sole certification authority for Oregon state programs, which include the Minority Business Enterprise (MBE), Women Business Enterprise (WBE), Veteran Business Entity (VBE), and Emerging Small Business (ESB), and certified for the federal Disadvantaged Business Enterprise (DBE) program.¶
- (5) "Expired" means the SBDP participation term of 2 years following program acceptance has been completed and the Business did not renew participation. The Business is no longer eligible for program participation unless it reapplies.¶
- (6) "Misconduct Disqualification" is disqualification of the Business due to specific conduct that includes but is not limited to conduct that is intentionally false or misleading to gain access to the program.¶
- (7) "ODOT" or "Department" means the Oregon Department of Transportation.¶
- (8) "Participation" means the business's ability to participate in the SBDP and compete for public improvement contracts that the Department procures under the SBDP.¶
- (9) "SBA" means the United States Small Business Administration.¶
- (10) "SBDP" means the Oregon Department of Transportation (ODOT) Small Business Development Program.¶
- (11) "Self-Qualification" is a mechanism by which Applicant qualifies for SBDP participation by attesting that it meets required program criteria.¶
- (12) "Termination" means the Business may no longer participate in the program.

Statutory/Other Authority: ORS 184.619

Statutes/Other Implemented: ORS 184.906

ADOPT: 731-065-0020

RULE SUMMARY: Describes methods for qualifying for the ODOT Small Business Development Program beyond those indicated in legislation.

CHANGES TO RULE:

731-065-0020

Qualifying Criteria

(1) A Business may qualify to participate in the SBDP through proof of valid SBA registration, Certification from COBID, or Self-Qualification.

(2) Qualification through valid SBA registration or Certification. A Business may qualify for participation in the SBDP if the Business meets any of the following criteria:

(a) Has registered with the SBA, or a successor agency, as a small disadvantaged business;

(b) Is certified as an emerging small business under ORS 200.055;

(c) Has registered with the SBA, or a successor agency, and is eligible to participate in any SBA small business contracting assistance program; or

(d) Has been certified by COBID as a Minority Business Enterprise (MBE), a Woman Business Enterprise (WBE), a Disadvantaged Business Enterprise (DBE), a Veteran Business Enterprise (VBE), or an Emerging Small Business (ESB).

(3) Self-Qualification. An Applicant may self-qualify their Business for participation in the SBDP if it meets all the following criteria:

(a) The Business is for-profit;

(b) The Business is in the construction industry;

(c) The Business is independently owned and operated;

(d) The Business is not a subsidiary of another business;

(e) The Business is registered with the Secretary of State;

(f) The Business has employed an average of fewer than 500 employees annually, over the past 2 calendar years;

(g) The gross receipts of the Business do not exceed an average of \$45 million annually, over the past 2 calendar years; and

(h) Following completion of the online SBDP application, the Applicant attests that all information provided about the Business is true, accurate, and willingly provided.

(4) The Department retains the right to require proof of meeting qualifying criteria at any time.

Statutory/Other Authority: ORS 184.619

Statutes/Other Implemented: ORS 184.906

ADOPT: 731-065-0030

RULE SUMMARY: Describes the program application process, participation term, and renewal process.

CHANGES TO RULE:

731-065-0030

Application Process, Program Participation Term, and Renewal

(1) A Business may submit an application to participate via the SBDP application online through the ODOT website or by delivering a hard copy to 355 Capitol St. NE, MS11, c/o SBDP, Salem, OR 97301.

(2) Upon notification that it has received an application from a Business, the Department will determine whether it meets the qualifying criteria.

(3) If the Business meets the qualifying criteria, the Department will notify the Business that the business has been accepted as an SBDP Participant for a two-year term. The Business will be notified of acceptance in writing, and the two-year participation term will be identified in the acceptance letter.

(4) If the Department determines that the Business does not meet the qualifying criteria, the Department will issue a Notice of Intent to Deny Participation for Failure to Meet Qualifying Criteria by Certified Mail, which will include:

(a) An explanation supporting the reasons for failure to qualify and.

(b) A statement of the Business's ability to request Administrative Reconsideration of program qualification and applicable deadlines.

(c) The Business has 20 calendar days from the date of the Notice of Intent to request Administrative Reconsideration.

(5) If the Department does not receive a request for Administrative Reconsideration within 20 calendar days, the Notice of Intent to Deny Participation for Failure to Meet Qualifying Criteria will become the Department's final determination of program eligibility.

(6) Renewal. The process to renew participation at the end of the term is as follows:

(a) The Department will notify the Business that the two-year participation term is expiring.

(b) Notifications will be provided to the Business 30 calendar days prior to expiration and 7 calendar days prior to expiration. The notifications will be in writing with the first sent by Certified Mail.

(c) The Business may renew program participation for another two-year term upon timely attestation confirming continued eligibility as set out in Section 731-065-0020.

(7) If the Business does not timely attest to its eligibility, then the Business' participation term will expire, and participation is terminated on its expiration date.

Statutory/Other Authority: ORS 184.619

Statutes/Other Implemented: ORS 184.906

ADOPT: 731-065-0040

RULE SUMMARY: Covers what a business should do if they no longer meet qualifying criteria, as well as what ODOT will do.

CHANGES TO RULE:

731-065-0040

Change In Qualifying Criteria

(1) If a Business no longer meets SBDP qualifying criteria, the Business must notify the Department of the change within 30 calendar days. A change in qualifying criteria only impacts future bidding opportunities in the SBDP.

(2) If the Department suspects that a Business no longer meets SBDP qualifying criteria, the Department may request documentation to assess Business eligibility. The Department retains the right to require proof from a Business of qualifying criteria at any time.

Statutory/Other Authority: ORS 184.619

Statutes/Other Implemented: ORS 184.906

ADOPT: 731-065-0050

RULE SUMMARY: ODOT may disqualify and terminate the participation of a Business if it determines that a Business no longer meets the eligibility criteria. This rule covers steps taken when a business is disqualified.

CHANGES TO RULE:

731-065-0050

Disqualification

(1) The Department may disqualify and terminate the participation of a Business if it determines that a Business no longer meets the eligibility criteria set out in section 731-065-0020.

(2) When the Department determines that the Business no longer meets the eligibility requirements, the Department will send by Certified Mail, a Notice of Intent to Disqualify and Terminate Participation. The Notice will include:

(a) The effective date of program disqualification;

(b) An explanation supporting the reasons for disqualification; and

(c) A statement of the Business's ability to request Administrative Reconsideration and applicable deadlines.

(3) The Business has 20 calendar days from the date of the Notice of Intent in which to request Administrative Reconsideration. If the Department does not receive a request for Administrative Reconsideration within 20 calendar days, the Notice of Intent to Disqualify and Terminate Participation will become the Department's final determination of program eligibility.

(4) A disqualified Business may reapply for the SBDP following the procedures set out in section 731-065-0020.

Statutory/Other Authority: ORS 184.619

Statutes/Other Implemented: ORS 184.906

ADOPT: 731-065-0060

RULE SUMMARY: ODOT may disqualify a Business and terminate SBDP participation for a Business due to misconduct. This rule covers reasons for misconduct disqualification and the steps taken by ODOT.

CHANGES TO RULE:

731-065-0060

Misconduct Disqualification

(1) The Department may disqualify a Business and terminate SBDP participation due to misconduct.¶

(2) Reasons for Misconduct Disqualification include, but are not limited to:¶

(a) The Applicant knowingly made a false claim, or misrepresented existing certification status, during the qualifying process.¶

(b) The Business entered into an agreement with another organization to leverage Business qualification in the program.¶

(c) If a Business does not meet eligibility criteria and attempts to participate in the SBDP as a qualified small business on the basis of false, fraudulent, or deceitful statements or representations indicating a serious lack of business integrity or honesty, the Department may terminate program participation.¶

(3) If the Department determines that a Business should be disqualified for misconduct and have its participation terminated, the Department will issue a Notice of Intent to Disqualify for Misconduct and Terminate Participation, by Certified Mail, which will include:¶

(a) The effective date of program disqualification;¶

(b) An explanation supporting the reasons for disqualification; and¶

(c) A statement of the Business's ability to request Administrative Reconsideration and applicable deadlines.¶

(4) The Business has 20 calendar days from the date of the Notice of Intent in which to request Administrative Reconsideration. If the Department does not receive a request for request Administrative Reconsideration within 20 calendar days, the Notice of Intent to Revoke Participation Due to Misconduct and Terminate Participation will become the Department's final determination of eligibility.¶

(5) A Business subject to the Department's final determination of Misconduct Disqualification is not eligible to qualify for future program participation.

Statutory/Other Authority: ORS 184.619

Statutes/Other Implemented: ORS 184.906

ADOPT: 731-065-0070

RULE SUMMARY: If a Business disagrees with being disqualified or terminated from participation in the SBDP, it can request that the Department reconsider its determination through the Administrative Reconsideration Process. If the Business disagrees with the result of the Administrative Reconsideration, it may request a contested case hearing.

CHANGES TO RULE:

731-065-0070

Administrative Reconsideration Process and Final Determination

(1) Following the receipt of any Notice of Intent, a Business can request Administrative Reconsideration.

(2) Any request for Administrative Reconsideration must be in writing and received by the Department within 20 calendar days of the date of the Notice of Intent. This written request must include:

(a) The date; and

(b) A clear statement of the basis for Administrative Reconsideration; and

(c) Any supporting documentation, (including but not limited to updated financials or proof of current certification).

(3) Upon receipt of a request for Administrative Reconsideration, the disqualification or termination will be stayed while the Department reviews the request. The Department will complete this review within 30 business days and will inform the Business of the outcome of Administrative Reconsideration in writing either by rescinding the Notice of Intent or issuing a new Notice of Intent.

(4) If the Department does not rescind the Notice of Intent, the Department will issue, via Certified Mail, a Notice of Intent Following Administrative Reconsideration to Deny Participation for Failure to Meet Qualifying Criteria or Notice of Intent to Disqualify and Terminate Program Participation.

(5) The Business may request a contested case hearing under the provisions of ORS chapter 183 by submitting a written request. A written request for a contested case hearing must include:

(a) The date; and

(b) A clear statement of the basis for requesting a contested case hearing; and

(c) Any supporting documentation, (including but not limited to updated financials or proof of current certification).

(6) If no request is made, the Notice of Intent will become the Department's final determination of program eligibility.

Statutory/Other Authority: ORS 184.619

Statutes/Other Implemented: ORS 184.906, ORS 183