



Oregon

Kate Brown, Governor

Oregon Transportation Commission

Office of the Director, MS 11

355 Capitol St NE

Salem, OR 97301-3871

DATE: January 5, 2023

TO: Oregon Transportation Commission

FROM: Kristopher W. Strickler
Director

SUBJECT: **Agenda Item D1** – Pilot Community Workforce Agreement Program Update
Agenda Item D2 – Community Benefit Program Administrative Rule

Requested Action:

Receive a status update on the Pilot Community Workforce Agreement Program. Approve the adoption of 731-005-0900 relating to the establishment of the Community Benefit Program and the designation of Community Benefit Contracts.

Background:

Oregon's transportation and heavy highway construction industry has been experiencing a shortage of workers and ODOT is committed to addressing this shortage in the following ways:

- Supporting the near-term and long-term workforce needs of the industry by providing access to and building the pool of skilled trade workers;
- Maximizing the impact of ODOT's investments for the benefit of the communities in which they are located;
- Encouraging racial and gender equity within the heavy highway workforce pipeline;
- Responding to and implementing Senate Bill 420.

During the 2021 regular legislative session, Senate Bill 420 was passed and provided the authority for public agencies to designate public improvement projects as "community benefit contracts." Senate Bill 420 was later codified into ORS 279C.308. Though the legislation and statute do not stipulate what form a community benefit contract must take, several examples of such contracts include project labor agreements, community workforce agreements, and community benefit agreements.

Oregon Transportation Commission Guidance

On September 26, 2022, the Oregon Transportation Commission gave approval for the agency to pursue a Pilot Community Workforce Agreement Program with the following parameters:

- The Pilot Program would include eight (8) pilot ODOT projects to begin construction no later than calendar year 2024. These projects will be selected by ODOT.
 - There must be at least one project in each of the five ODOT regions.
 - The pilot projects must include at least one project in each of the following project categories bridge preservation, highway modernization, and highway operations.
 - In at least two regions, more than one project will be selected to capture the range of evaluation necessary in the previous bullet.

- The selection of these projects will consider the presence and experiences of, and potential impacts to, historically marginalized communities within the impacted project areas.
- The Pilot Program would include provisions that would include the following:
 - Apprenticeship targets goals;
 - Either local hiring or economically distressed zone hiring targets or goals;
 - Exemptions from trust fund payments for non-union contractors that provide quality health care and retirement benefits to their non-union personnel;
 - Including all potential non-union and open shop contractors working on these projects; and
 - Provisions that further minimize financial impacts to DBE and small firms, in particular.
- Upon launch of the Pilot Program, the agency will report to the OTC at least quarterly and deliver a final report to the OTC by 2025 on specific measures including the following:
 - The number and type (union or non-union) of bidders received for each pilot project (compared to an average baseline of other similar, but non-CWA ODOT projects, within the same period), with findings about whether the presence of the CWA limited the types and quantity of bidders.
 - The original cost estimate of the project and any cost adjustments that occurred during the lifecycle of the project (compared to an average baseline of other similar but non-CWA ODOT projects within the same time period), with findings about whether the CWA contributed to any potential cost increase; and
 - The pilot projects schedule adjustments that occurred during the lifecycle of the project (compared to an average baseline of other similar but non-CWA ODOT projects within the same time period), with findings about whether the CWA contributed to any delay.

Current Status

In October 2022, ODOT, the Oregon State Building Trades and Construction Council, and the Northwest Carpenters Union Oregon/SW Washington reached an agreement on a CWA to implement the ODOT CWA Pilot Program. The agreement incorporates 8 pilot projects across all five ODOT regions however a few of those projects will begin in 2024. The ODOT team is taking steps to make the agreement implementable. The first pilot project will be the Outer Powell project, which is expected to go to bid in early 2023.

On November 15, 2022, ODOT filed notice of proposed rulemaking (attachment 01) with the Secretary of State's Office to implement Oregon Laws 2021, chapter 488, section 2 (codified at ORS 279C.308) of the public contracting code to allow a state contracting agency to designate a public improvement contract as a "community benefit contract" (CBC). The public comment period opened on December 1, 2022 and will close on January 11, 2023 at 5pm. On December 16, ODOT held a virtual public hearing on the proposed rule. Over thirty individuals attended the hearing, with 18 individuals testifying.

The agency is working with the Federal Highway Administration (FHWA) to prepare, submit and gain the required approvals to apply the CWA and designate the eight pilot projects as Community Benefit Contracts. The FHWA review has been initiated with approval expected in early 2023.

Decision:

Approval and adoption of 731-005-0900 (see attachment 02) establishes the Community Benefit Program and authorizes the ODOT Director to designate Community Benefit Contracts.

Attachments:

- Attachment 01: Notice of Proposed Rulemaking filed November 15, 2022
- Attachment 02: OAR 731-005-0900 Community Benefit Program Rule

OFFICE OF THE SECRETARY OF STATE

SHEMIA FAGAN
SECRETARY OF STATE

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DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION

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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 731
DEPARTMENT OF TRANSPORTATION

FILED

11/15/2022 4:16 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Establishing ODOT's Authority to Designate Contracts as Community Benefit Contracts under ORS 279C.308

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/21/2022 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.

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Office of Social Equity
123 NW Flanders Street
Portland, OR 97209

Filed By:
Lauri Kunze
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 12/16/2022

TIME: 1:00 PM - 3:00 PM

OFFICER: Maria Ellis

ADDRESS:

Virtual meeting via Zoom

Portland, OR 97209

SPECIAL INSTRUCTIONS:

Join Zoom Meeting

<https://us02web.zoom.us/j/87460212571?pwd=TDMYmKpGc1ZXUmd4cDZBT0tobDQxZz09>

Meeting ID: 874 6021 2571

Passcode: 343884

One tap mobile

+17193594580,,87460212571#,,,,*343884# US

+12532050468,,87460212571#,,,,*343884# US

NEED FOR THE RULE(S)

Oregon Laws 2021, chapter 488, section 2 (codified at ORS 279C.308), amends the public contracting code to allow a state contracting agency to designate a public improvement contract as a community benefit contract (CBC).

The Oregon Department of Transportation (ODOT), as a state contracting agency, proposes rulemaking to establish authority for the Agency to designate up to 8 public improvement contracts as CBCs consistent with the authority given in ORS 279C.308 and as part of ODOT's Community Benefit Contract Pilot Program. This rule describes the material provisions ODOT may include as additional contract terms and conditions in a CBC. Under the proposed rule, the material provisions are those contained in a community workforce agreement (CWA) that apply to contractors. For

purposes of this rulemaking, the proposed material provisions may include such terms as:

- Respectful worksite provisions;
- Contractor management rights;
- Wages and benefits;
- Scope of work covered by the CWA and this proposed rule;
- Union labor;
- Application of collective bargaining agreements;
- CWA pre-job conference and work plan;
- Safety requirements;
- Payments to union trust funds and exceptions;
- Hours of work;
- Priority worker (economically distressed zip code resident, minority, women) and apprentice hiring goals;
- Use of "core workers," as defined in the CWA;
- Dispatch, referrals and hiring procedures for workers and priority workers;
- Disadvantaged Business Enterprise outreach, mentorship and support;
- Use of veterans' programs;
- Dispute resolution; and
- Labor peace.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

- Oregon Laws 2021, Chapter 488
- Overall feedback from ODOT's Community Workforce Agreement Advisory Group
- Social Equity and Office of Civil Rights background and information available through ODOT.
- Federal Highway Administration (FHWA) 1273
- FHWA 2010 Interim Guidance on the Use Project Labor Agreements
- ODOT – Labor community Workforce Agreement, executed on October 11, 2022

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

The Department is committed to enhancing racial equity and advancing apprenticeship and training opportunities for all workers in the construction trades, including Black, Indigenous, and People of Color (BIPOC) and other minority (generally referred to as "Minority") workers.

The Department will establish goals and aspirational targets to increase hiring and apprenticeship of Minority workers based on regional economic demographics and disadvantaged geographic areas. The use of Economically Distressed Zip Code Priority Hiring, an approved approach by FHWA, will enhance hiring opportunities for Minority workers on CBCs.

Apprentices' certification and availability, and other employment data will be used to determine appropriate steps to enhance apprenticeship and training opportunities for Minority workers. The Department will consider information such as characteristics of likely Minority candidates for recruitment into the trades, barriers to recruitment, effectiveness of recruitment strategies, retention, and graduation rates. This rule positively promotes apprenticeship and training programs to support the long-term Minority workforce needs in the construction trades.

Adoption of this rule is expected to improve racial equity in the State and will better align ODOT's strategy on advancing racial equity with other successful efforts in the region (e.g. City of Portland).

FISCAL AND ECONOMIC IMPACT:

The rule authorizes ODOT to designate a public improvement contract as a CBC. Criteria to allow a CBC designation includes, but is not limited to, the following:

- Project must be administered by ODOT and included in the Statewide Transportation Improvement Plan (STIP),
- Designation as a CBC is approved by the Federal Highway Administration (FHWA).

Additional contract terms and conditions utilized in CBCs includes compliance with provisions of a community workforce agreement (CWA) that are applicable to contractors. Data, research, and reports on the cost of using CWAs vary greatly. Some research finds zero cost differentials when CWAs are applied. Other research finds up to a twenty-percent cost increase to deliver projects when applying CWAs. Given conflicting research and data, it is difficult to definitively state whether there will be an increased cost to deliver projects designated as CBCs. If such cost increases were to materialize, it is expected that contractors would pass along those increased costs to ODOT through higher bid prices. However, it is important to note that those public agencies in Oregon that have completed projects using a CWA model have not found any cost implications attributable to the CWA, although experience in Oregon to date is limited.

The Department has secured a 2.00 FTE to implement this effort and monitor projects designated as CBCs. Reporting, training, and onsite support is necessary to determine progress of outreach efforts for developing the future workforce and providing opportunities to improve racial and social equity. These two positions have an estimated biennium cost of roughly half a million dollars.

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) ODOT may see increased bid prices on contracts designated as CBCs. Contractors bidding on CBCs may include additional costs for increased apprenticeship requirements, wage increases related to recruiting and retaining workers to satisfy hiring goals and aspirational targets, additional reporting requirements, and risk related to bidder's lack of experience on CBCs or projects utilizing labor agreements. The potential magnitude of these additional costs is difficult to quantify at this time due to uncertainty of how Oregon contractors will respond to requirements on CBC projects. Strategies to address workforce shortages may increase contract costs in the short term but should result in long-term benefits as the pool of skilled workers increases over time. Potential short-term impacts to contract costs include reduced efficiency resulting from an increase in the ratio of apprentice-level to journey-level workers, availability of workers to satisfy hiring goals, and additional labor and administrative burden.

CBCs will provide greater employment opportunities for workers who live near a project and increased apprenticeship opportunities for residents interested in pursuing work in the construction trades. Other programs in Oregon and the northwest have recognized increased economic opportunities for workers and apprentices resulting from labor agreements on projects. Increased wages and benefits to low-income/previously unemployed residents will lead to a higher standard of living for workers and their families and increased tax revenue for the local area.

ODOT anticipates that contractors and subcontractors competing for and working on CBCs may be economically impacted by the proposed rule. The magnitude of these economic impacts cannot be quantified at this time as impacts are dependent upon specific requirements of CBCs, the administrative infrastructure of each firm, and each firm's prior experience with labor agreements on projects. ODOT expects that any economic impacts to contractors and subcontractors bidding on CBCs will be reflected in increased bid prices.

Some contractors and subcontractors may choose not to compete for projects advertised as CBCs. Reduced competition may result in higher bid prices and higher contract amounts as compared to projects not designated as CBCs.

The Department does not anticipate additional costs to other states agencies and members of the public resulting from this rule as it will only apply to ODOT administered construction projects in the Statewide Transportation Improvement Program.

(2)(a) Based on the most recent disparity study, ODOT has estimated 724 potential small businesses in the construction, A&E, and related services arenas (50 or fewer employees as defined in ORS 183.310) that could be subject to the rule if they are performing work on a CBC designated construction contract.

(2)(b) ODOT construction contract terms and conditions and FHWA 1273 currently include requirements to track and report ethnicity data to the Office of Civil Rights, through the Monthly Employment Utilization Report (MEUR). Required certified payroll reports for prevailing wage reporting include many of the other data requirements. Training plans are also required to identify certified training agents, programs, and approved apprentices participating in training programs.

Other data elements may be included, but the additional impact anticipated is administrative in nature and minimal as much of the reporting is required and submitted by contractors under existing contract terms. ODOT expects administrative costs to be included in the contractor's bid for a project.

(2)(c) ODOT does not expect significant cost increases for professional services, equipment or supplies to comply with the rule. Any cost increase contractors experience in labor and administration is expected to be passed on to the Department through bid prices.

Technical assistance for small businesses may be needed to assist with compliance to CBC terms and conditions and may be provided through the additional FTE requested by ODOT to support this legislation.

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

Small businesses, and associations representing small businesses, were included in a stakeholder engagement process through the Community Workforce Agreement Advisory Group.

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

While ODOT convened a RAC to review rules in June 2022, their consultation was provided under different assumptions about the type of program that ODOT was establishing. ODOT initially sought rules to establish a broader programmatic CBC program and RAC provided consultation on proposed broader rules. In July, the Oregon Transportation Commission (OTC) determined that they did not want to proceed with a broad CBC program. On September 26, 2022, the OTC approved a limited CBC Pilot Program with more specific parameters for the pilot program. The timing between when the Oregon Transportation Commission approved proceeding with a limited CBC Pilot Program and when the pilot projects are scheduled for letting, did not provide sufficient time to establish a RAC to review updated rules.

NOTE: Additional PDF filed with this filing not included in this document. Please contact Department of Transportation for a copy of this document.

ADOPT: 731-005-0900

RULE SUMMARY: Establishes ODOT's authority to designate contracts as Community Benefit Contracts under ORS 279C.308.

CHANGES TO RULE:

731-005-0900

Community Benefit Contracts

(1) This rule establishes a Community Benefit Pilot Program. ODOT may designate up to a total of 8 public improvement projects as community benefit contracts, as authorized by ORS 279C.308. The projects selected by ODOT must begin construction no later than calendar year 2025 as community benefit projects.

(2) In addition to the material provisions listed in ORS 279C.308(3)(b) and any applicable provisions of the Public Contracting Code, ODOT may include as a material provision of the community benefit contract the requirement that the contractor comply with requirements applicable to contractors set forth in the community workforce agreement entered into between ODOT and labor organizations on October 11, 2022, incorporated herein by reference. A copy of the community workforce is available from ODOT.

(3) Nothing in a community benefit contract shall minimize or impede federal contract obligations regarding the Disadvantaged Business Enterprise (DBE) Program, the Equal Employment Opportunity Program (EEO), the On-the-Job Training Program (OJT), the Tribal Employment Rights Ordinance (TERO), or other federal programs in which ODOT participates.

Statutory/Other Authority: ORS 184.619

Statutes/Other Implemented: ORS 279C.308

Final Rule for Approval by Oregon Transportation Commission

January 2023

OAR 731-005-0900

Community Benefit Program

(1) In addition to the definitions in ORS 279C.308, the following definitions apply to OAR 731-005-0900:

(a) “Community workforce agreement” means an agreement executed by the ODOT Director or the Director’s designee and one or more labor organizations to establish material terms that ODOT may include in a community benefit contract.

(b) “Economically distressed zip code” or “EDZ” means a geographic area identified by a United States Postal Service zip code, and identified by ODOT as having a high concentration of the following factors:

(A) Low-income households;

(B) Unemployed individuals; and

(C) Other related economic factors as determined by ODOT.

(c) “EDZ resident worker” means a worker domiciled in an economically distressed zip code.

(d) “Minority” has the meaning set forth in 41 CFR § 60-4.3 for purposes of implementing Presidential Executive Order 11246, as amended.

(e) “Trade” means a specific trade or occupation for which the Oregon Bureau of Labor and Industries has determined the prevailing wage rate pursuant to ORS 279C.815.

(2) This rule, OAR 731-005-0900, establishes the Community Benefit Program. The ODOT Director or the Director’s designee may designate a public improvement contract as a community benefit contract, in accordance with ORS 279C.308, if:

(a) The project is administered by ODOT and is in the Statewide Transportation Improvement Program;

(b) The proposed community benefit contract is partially or completely funded by the Infrastructure Investment and Jobs Act, Public Law 117-58 (2021);

(c) The proposed community benefit project receives all necessary approvals from the Federal Highway Administration; and

(d) After consideration of factors listed by the Federal Highway Administration for the approval of a community workforce agreement that would be included in a community benefit project, the

ODOT Director or the Director's designee determines the project complies with the factors and any guidance from the Federal Highway Administration.

(3) In furtherance of the Community Benefit Program, the ODOT Director or the Director's designee may enter into community workforce agreements with labor organizations to develop material provisions that ODOT may include in a community benefit contract, including, but not limited to, material provisions that ensure labor peace, set forth protocols for hiring and dispatch of union labor in support of ODOT's goals and targets for apprenticeship and hiring.

(4) In addition to the material provisions listed in ORS 279C.308(3)(b) and any applicable provisions of the Oregon Public Contracting Code, a community benefit contract may include as material provisions of the community benefit contract terms and conditions that require the contractor to:

(a) Meet minimum qualifications for contractor and subcontractor participation in a community benefit contract.

(b) Employ apprentices and trainees from ODOT-approved programs to perform a specified percentage of work hours that workers in apprenticeable occupations perform on the community benefit project.

(c) Provide for payment of wages at or above the prevailing rate of wage in accordance with applicable state or federal laws or in accordance with the applicable trade's collective bargaining agreement, whichever is highest.

(d) Provide employer-paid retirement benefits.

(e) Comply with hiring goals for EDZ resident workers and goals for apprenticeship and training, as established by ODOT for each community benefit contract.

(f) Provide a plan to increase participation of minority and women workers in furtherance of workforce diversity and ODOT's aspirational targets, as described in each community benefit contract, and comply with the provided plan.

(g) Participate in a pre-job conference to discuss requirements for the Community Benefit Program and require the contractor's subcontractors to participate in a pre-job conference.

(h) Meet periodic reporting requirements established for each community benefit contract that may include, but are not limited to, the following information:

(A) The number of apprentices and journey workers and the percentage of total workforce hours worked by apprentices and journey workers;

(B) The number of minority and women workers and the percentage of total workforce hours worked by minorities and women workers;

(C) The number of EDZ resident workers and the percentage of total workforce hours worked by EDZ resident workers;

(D) Safety incidents; and

(E) Any other workforce-related information required by ODOT.

(i) Provide minimum worksite conditions and safety requirements, including:

(A) Respectful worksites;

(B) Drug and alcohol testing, access to personal protective equipment, worker facilities, appropriate bathroom facilities and security measures; and

(C) Training related to worksite conditions and safety requirements.

(j) Execute a letter of assent binding a contractor and all of contractor's subcontractors on the community benefit contract to one or more of the requirements described in a community workforce agreement.

(5) Notwithstanding the contractor's execution of a letter of assent as described in section (4)(j) of this rule, the following terms apply to a community benefit contract:

(a) All disputes between ODOT and contractor are governed by and resolved under the terms of the community benefit contract.

(b) Any conflict or discrepancy between the community workforce agreement and any applicable collective bargaining agreement is governed by and resolved under the terms of the applicable community workforce agreement.

(6) The material provisions of a community benefit contract, including any requirement incorporated into a community benefit contract from a community workforce agreement, must comply with applicable local, state and federal laws, and the requirements for the following federal programs: the Disadvantaged Business Enterprise Program, the Equal Employment Opportunity Program, the On-The-Job Training Program, the Tribal Employment Rights Ordinance, and any other federal programs applicable to the community benefit contract.