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## PERMANENT ADMINISTRATIVE ORDER

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CHAPTER 839

BUREAU OF LABOR AND INDUSTRIES

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#### RULES:

839-025-0004, 839-025-0010, 839-025-0013, 839-025-0020, 839-025-0230

AMEND: 839-025-0004

NOTICE FILED DATE: 10/31/2023

RULE SUMMARY: Amends rule to add definitions and otherwise implement Enrolled Senate Bill 594 (2023).

#### CHANGES TO RULE:

839-025-0004

Definitions Generally ¶¶

As used in OAR chapter 839, division 25, unless the context requires otherwise:¶¶

(1) "Apprentice" means:¶¶

(a) A person who is individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Office of Apprenticeship (OA), or with any state apprenticeship agency recognized by OA, and who is employed by a registered training agent pursuant to ORS 660.010(10) and is working pursuant to the standards of the apprentice's apprenticeship program; or¶¶

(b) A person in probationary employment as an apprentice in such an apprenticeship program, but who is not individually registered in the program, but who has been certified by the OA or a state apprenticeship agency to be eligible for probationary employment as an apprentice, and who is employed by a registered training agent pursuant to ORS 660.010 (10) and is working pursuant to the standards of the apprentice's apprenticeship program.¶¶

(2) "The Basic Hourly Rate of Pay" or "Hourly Rate" means the rate of hourly wage, excluding fringe benefits, paid to the worker.¶¶

(3) "Bureau" means the Bureau of Labor and Industries.¶¶

(4) "Collective bargaining agreement in effect" means a collective bargaining agreement which is recognized as being binding on all parties by the National Labor Relations Board; which is enforceable within the geographic area in which the public improvement is located; and, the terms of which extend to workers who are working on the public improvement project.¶¶

(5) "Commissioner" means the Commissioner of the Bureau of Labor and Industries, or designee.¶¶

(6) "Construction" means the initial construction of buildings and other structures, or additions thereto, and of highways and roads. "Construction" does not include the transportation of material or supplies to or from the

public works project by employees of a construction contractor or construction subcontractor.¶

(7) "Demolition" includes the dismantling, razing, destroying, wrecking or removal of buildings or other structures or any part thereof, and of highways and roads.¶

(8) "Division" means the Wage and Hour Division of the Bureau of Labor and Industries.¶

(89) "Employ" includes to suffer or permit to work.¶

(910) "Fringe benefits" means the amount of:¶

(a) The rate of contribution irrevocably made on a "regular basis" and "not less often than quarterly," as those terms are defined in OAR 839-025-0043, by a contractor or subcontractor to a trustee or to a third person pursuant to a plan, fund or program; and¶

(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed in writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state or local law to provide any of such benefits. Other bona fide fringe benefits do not include reimbursement to workers for meals, lodging or other travel expenses, nor contributions to industry advancement funds (CIAF for example), drug testing or union dues.¶

(101)(a) "Funds of a public agency" includes any funds of a public agency that are directly or indirectly used, as described below.¶

(A) "Directly used funds of a public agency" means revenue, money, or that which can be valued in money collected for a public agency or derived from a public agency's immediate custody and control, and, except as provided in ORS 279C.810(1)(a)(H) and (J) and subsection (b) of this section, includes but is not limited to any money loaned by a public agency, including the loan of proceeds from the sale of conduit or pass-through revenue bonds for the specific purpose of financing a project, and public property or other assets used as payment for all or part of a project.¶

(B) "Indirectly used funds of a public agency" means, except as provided in subsection (b) of this section, that a public agency ultimately bears the cost of all or part of the project, even if a public agency is not paying for the project directly or completing payment at the time it occurs or shortly thereafter. A public agency does not indirectly use funds of a public agency when it elects not to collect land rent that is due. Examples of when an agency "ultimately bears the cost" of all or part of a project include but are not limited to:¶

(i) Amortizing the costs of construction over the life of a lease and paying these costs with funds of a public agency during the course of the lease;¶

(ii) A public agency subsidizing the costs of construction that would normally be borne by the contractor;¶

(iii) Using insurance proceeds that belong to a public agency to pay for construction. Insurance proceeds represent "money collected for the custody and control of a public agency" and therefore are funds of a public agency, whether the contractor obtains payment directly from the insurance company or the public agency; or¶

(iv) Using or creating a private entity as a conduit for funding a project when the private entity is in fact an alter ego of the public agency.¶

(b) "Funds of a public agency" does not include:¶

(A) Funds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction, reconstruction, major renovation or painting;¶

(B) Building and development permit fees paid or waived by the public agency;¶

(C) Tax credits or tax abatements;¶

(D) Land that a public agency sells to a private entity at fair market value;¶

(E) The difference between:¶

(i) The value of land that a public agency sells to a private entity as determined at the time of the sale after taking into account any plan, requirement, covenant, condition, restriction or other limitation, exclusive of zoning or land use regulations, that the public agency imposes on the development or use of the land; and¶

(ii) The fair market value of the land if the land is not subject to the limitations described in subparagraph (i) of this paragraph;¶

(F) Staff resources of the public agency used to manage a project or to provide a principal source of supervision, coordination or oversight of a project;¶

(G) Staff resources of the public agency used to design or inspect one or more components of a project;¶

(H) Moneys derived from the sale of bonds that are loaned by a state agency to a private entity, unless the moneys will be used for a public improvement;¶

(I) Value added to land as a consequence of a public agency's site preparation, demolition of real property or remediation or removal of environmental contamination, except for value added in excess of the expenses the

public agency incurred in the site preparation, demolition or remediation or removal when the land is sold for use in a project otherwise subject to ORS 279C.800 to 279C.870; or¶

(J) Bonds, or loans from the proceeds of bonds, issued in accordance with ORS Chapter 289 or 441.525 to 441.595, unless the bonds or loans will be used for a public improvement.¶

(142) "Hazardous waste" has the meaning given in OAR 340-100-0010.¶

(13) "Highest rate of wage among collective bargaining agreements" is the highest rate of wage when combining the hourly rate plus the fringe benefits.¶

(124) "Housing" has the meaning given that term in ORS 456.055.¶

(135) "Labor organization" means any organization certified as such by the National Labor Relations Board.¶

(146) "Major renovation" means the remodeling or alteration of buildings and other structures within the framework of an existing building or structure and the alteration of existing highways and roads, the contract price of which exceeds \$50,000.¶

(157) "Nonprofit organization," as used in section (9)(b)(A) of this rule, means an organization or group of organizations described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.¶

(168) "Normal business hours" means the hours during which the office of the contractor or subcontractor is normally open for business. In the absence of evidence to the contrary, the Division will consider the hours between 8:00 a.m. and 5:00 p.m., excluding the hours between 12:00 noon and 1:00 p.m., on weekdays as normal business hours.¶

(179) "Overtime" means all hours worked:¶

(a) On Saturdays;¶

(b) On the following legal holidays:¶

(A) Each Sunday;¶

(B) New Year's Day on January 1;¶

(C) Memorial Day on the last Monday in May;¶

(D) Independence Day on July 4;¶

(E) Labor Day on the first Monday in September;¶

(F) Thanksgiving Day on the fourth Thursday in November;¶

(G) Christmas Day on December 25.¶

(c) Over 40 hours in a week; and either¶

(d) Over eight (8) hours in a day; or¶

(e) Over 10 hours in a day provided:¶

(A) The employer has established a work schedule of four consecutive days (Monday through Thursday or Tuesday through Friday) pursuant to OAR 839-025-0034; and¶

(B) The employer operates in accordance with this established work schedule.¶

(1820) "Overtime rate" means the basic hourly rate of pay multiplied by one and one-half.¶

(219) "Overtime wages" means the overtime hours worked multiplied by the overtime rate.¶

(202) "Person" includes a public or private corporation, a partnership, a sole proprietorship, a limited liability company, a government or governmental instrumentality.¶

(213) "Prevailing wage rate claim" means a claim for wages filed by a worker with the Division.¶

(224) "Public agency" means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any instrumentality thereof organized and existing under law or charter.¶

(235)(a) "Public work," "public works" or "public works project" includes but is not limited to:¶

(A) Roads, highways, buildings, structures and improvements of all types, ~~the for which a public agency contracts or carries on construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency, demolition, removal of hazardous waste or painting to serve the public interest;~~¶

(B) A project for the construction, reconstruction, major renovation or painting, painting, demolishing, removing hazardous waste from, or performing a major renovation of a road, highway, building, structure or improvement of any type that uses \$750,000 or more of funds of a public agency; ~~or~~¶

(C) A project for the construction of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency; ~~or~~¶

(D) A device, structure, or mechanism, or a combination of devices, structures, or mechanisms that:¶

(i) Uses solar radiation as a source for generating heat, cooling, or electrical energy; and¶

(ii) Is constructed or installed, with or without using funds of a public agency, on land, premises, structures, or buildings that a public agency owns, regardless of the total project cost; ~~or~~¶

(E) A project for the construction, reconstruction, ~~major painting, demolition, renovation or painting of~~ hazardous waste from, or major renovation of, a road, highway, building, structure, or improvement of any type

that occurs, with or without using funds of a public agency, on real property that a public university listed in ORS 352.002 owns;¶

~~(F) Demolition of, or removal of hazardous waste from, a road, highway, building, structure or improvement of any type that uses \$750,000 or more in funds of a public agency, or that occurs on real property that a state agency owns, but that does not involve constructing, reconstructing, renovating or painting a road, highway, building, structure or improvement; or¶~~

~~(G) Pursuant to ORS 352.138(4)(b), a project resulting from an agreement under the terms of which a private entity constructs, reconstructs, renovates or paints an improvement of any type that occurs, with or without using funds of a public agency, on real property owned by a public university listed in ORS 352.002 or by a nonprofit organization or other entity that a public university listed in ORS 352.002 owns or controls exclusively.¶~~

~~(b) "Public works," does not include:¶~~

~~(A) Reconstructing or renovating privately owned property that a public agency leases; or¶~~

~~(B) A private nonprofit entity's renovation of publicly owned real property that is more than 75 years old if:¶~~

~~(i) The real property is leased to the private nonprofit entity for more than 25 years;¶~~

~~(ii) Funds of a public agency used in the renovation do not exceed 15 percent of the total cost of the renovation; and¶~~

~~(iii) Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 1, 2007."public works" or "public works project" does not include reconstructing or renovating privately owned property that a public agency leases.¶~~

~~(246) "Public works contract" or "contract" means any contract, agreement or understanding, written or oral, into which a public agency enters for any public work.¶~~

~~(257) "Reconstruction" means highway and road resurfacing and rebuilding, the restoration of existing highways and roads, and the restoration of buildings and other structures.¶~~

~~(268) "Reconstruction or renovation of privately owned property which is leased by a public agency" includes improvements of all types within the framework or footprint of an existing building or structure.¶~~

~~(279)(a) "Residential construction project" means a public works project for the construction, reconstruction, major renovation or painting of a single family house or apartment building of not more than four (4) stories in height and all incidental items such as site work, parking areas, utilities, streets and sidewalks pursuant to the U.S. Department of Labor's "All Agency Memorandum No. 130" -- "Application Of The Standard of Comparison 'Projects Of a Character Similar' Under the Davis-Bacon and Related Acts" dated March 17, 1978, and "All Agency Memorandum No. 131" "Clarification of All Agency Memorandum No. 130" dated July 14, 1978. (See Appendix 6.)¶~~

~~(b) Notwithstanding the provisions of subsection (a) of this section, where it is determined that a different definition of "residential construction" has been adopted by local ordinance or code, or that the prevailing practice of a particular trade or occupation regarding what is considered "residential construction" differs from the U.S. Department of Labor definition of residential construction, the commissioner may consider such information in determining a project to be a "residential construction project."¶~~

~~(2830) "Site of work" is defined as follows:¶~~

~~(a) The site of work is limited to the physical place or places where the construction, reconstruction, major renovation or painting called for in the contract will remain when work on it has been completed, or the physical place or places where the demolition or hazardous waste removal called for in the contract will be performed, and other adjacent or nearby property used by the contractor or subcontractor infor such constructionwork which can reasonably be said to be included in the site.¶~~

~~(b) Except as provided in subsection (c) of this section, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards and similar facilities, are part of the site of work provided they are dedicated exclusively, or nearly so, to the performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them. Such facilities which are established by a supplier of materials for the project after the opening of bids are deemed to be dedicated exclusively to the performance of the contract or project.¶~~

~~(c) Not included in the site of work are permanent home offices, branch plant establishments, fabrication plants, and tool yards of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, and similar facilities of a commercial supplier or materialman which are established by a supplier of materials for the project before opening of bids and not on the project site, are not included in the site of work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract or project.¶~~

~~(2931) "Special wage determination" means a wage determination made at the request of a public agency and which is applicable only to specific job classes. A special wage determination is issued in those cases where there is~~

no current wage determination applicable to specific job classes and the use of such job classes is contemplated on a public works project.¶

(302) "Staff resources of a public agency" means employees of the public agency who may manage, supervise or oversee a project or employees of the public agency used to design or inspect one or more components of a project, but not persons with whom a public agency contracts to perform such services.¶

(313) "Trade" or "occupation" is defined in accordance with the prevailing practices of the construction industry in Oregon.¶

(324) "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Office of Apprenticeship (OA), as meeting its standards for on-the-job training programs, and which has been so certified by that office, and who is employed by a registered training agent pursuant to ORS 660.010(10) and is working pursuant to the standards of the trainee's program.¶

(335) "Training agent" means an employer that is registered with a local joint committee and the Apprenticeship and Training Division of the Bureau of Labor and Industries.¶

(346) "Wage determination" includes the original decision and any subsequent amendments made by the commissioner in accordance with ORS 279C.815.¶

(357) "Wages" or "Prevailing Wages" means the basic hourly rate of pay and fringe benefits as defined in sections (2) and (9) of this rule.¶

(368) "Worker" means a person employed on a public works project and whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental, professional or managerial. The term "worker" includes apprentices, trainees and any person employed or working on a public works project in a trade or occupation for which the commissioner has determined a prevailing rate of wage. (See OAR 839-025-0035.)

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

Statutes/Other Implemented: ORS 279C.800-870, ~~OL CH. 104, 2021 - 279C.870~~

AMEND: 839-025-0010

NOTICE FILED DATE: 10/31/2023

RULE SUMMARY: Amends rule to implement Enrolled Senate Bill 594 (2023)

CHANGES TO RULE:

839-025-0010

Payroll and Certified Statement Requirements ¶¶

(1) The form required by ORS 279C.845 is the Payroll and Certified Statement form, WH-38. This form must accurately and completely set out the contractor's or subcontractor's payroll records, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked and the gross wages the worker earned each week during which the contractor or subcontractor employs a worker upon a public works project.¶¶

(2) The contractor or subcontractor may submit the weekly payroll on the WH-38 form or may use a similar form providing such form contains all the elements of the WH-38 form. When submitting the weekly payroll on a form other than WH-38, the contractor or subcontractor must attach the certified statement contained on the WH-38 form to the payroll forms submitted.¶¶

(3) Each Payroll and Certified Statement form must be submitted by the contractor or subcontractor to the public agency by the fifth business day of each month following a month in which workers were employed upon a public works project.¶¶

(4) The Payroll and Certified Statement forms received by the public agency are public records subject to the provisions of ORS 192.410 to 192.505. As such, they must be made available upon request. Pursuant to ORS 279C.845(4), information submitted on certified statements may be used only to ensure compliance with the provisions of ORS 279C.800 through 279C.870.¶¶

(5) If the contractor fails to submit its payroll and certified statement forms to the public agency as required by subsection (3) of this rule, the public agency must retain 25 percent of any amount earned by the contractor until the contractor has submitted the required payroll and certified statements to the public agency.¶¶

(a) The amount to be retained shall be calculated at 25 percent of the unpaid amount earned by the contractor at the time each payroll and certified statement are due. For example, if the contractor fails to submit its payroll and certified statement by the fifth of the month and the contractor earned \$100,000 in the period since its last payroll and certified statement were submitted to the public agency, the public agency must retain 25 percent of \$100,000 (\$25,000), until such time as the required payroll and certified statement are submitted.¶¶

(b) When calculating the amount to be retained, amounts previously retained shall not be included as amounts earned by the contractor.¶¶

(c) Once the required payroll and certified statement have been submitted to the public agency, the public agency must pay the amount retained to the contractor within 14 days.¶¶

(6) If a first-tier subcontractor fails to submit a payroll and certified statement form to the public agency as required by subsection (3) of this rule, the contractor must retain 25 percent of any amount earned by the first-tier subcontractor until the first-tier subcontractor has submitted the required payroll and certified statements to the public agency.¶¶

(a) The amount to be retained shall be calculated at 25 percent of the unpaid amount earned by the first-tier subcontractor at the time each payroll and certified statement are due. For example, if the first-tier subcontractor fails to submit the payroll and certified statement by the fifth of the month and the first-tier subcontractor earned \$100,000 in the period since the last payroll and certified statement were submitted to the public agency, the contractor must retain 25 percent of \$100,000 (\$25,000), until such time as the required payroll and certified statement are submitted.¶¶

(b) When calculating the amount to be retained, amounts previously retained shall not be included as amounts earned by the first-tier subcontractor.¶¶

(c) The contractor must verify that the first-tier subcontractor has filed the required payroll and certified statement(s) with the public agency before the contractor may pay the first-tier subcontractor any amount retained under this section.¶¶

(d) Once the first-tier subcontractor has filed the required payroll and certified statement with the public agency, the contractor must pay the amount retained to the first-tier subcontractor within 14 days.¶¶

(7) Notwithstanding ORS 279C.555 or 279C.570(7), amounts retained pursuant to the provisions of this rule shall be in addition to any other amounts retained.¶¶

(8)(a) If a project is a public works of the type described in ORS 279C.800(6)(a)(B); and no public agency awards a contract to a contractor for the project, the contractors and any subcontractors employing workers upon the

public works project shall submit weekly payrolls as required by ORS 279C.845 and this rule to the public agency or agencies providing funds for the project.¶¶

(b) When more than one public agency provides funds for a project, the public agencies may designate one agency to receive the contractor's and any subcontractors' payrolls.¶¶

(9)(a) If a project is a public works of the type described in ORS 279C.800(6)(a)(C); and no public agency awards a contract to a contractor for the project, the contractors and any subcontractors employing workers upon the public works project shall submit weekly payrolls as required by ORS 279C.845 and this rule to the public agency or agencies that will occupy or use the completed project.¶¶

(b) When more than one public agency will occupy or use the completed project, the public agencies may designate one agency to receive the contractor's and any subcontractors' payrolls.¶¶

(10) If a project is a public works of the type described in ORS 279C.800(6)(a)(D); and no public agency awards a contract to a contractor for the project, the contractors and any subcontractors employing workers upon the public works project shall submit weekly payrolls as required by ORS 279C.845 and this rule to the public agency that owns the land, premise(s), structure(s) or building(s) on which the solar radiation device(s) will be constructed or installed.¶¶

(11) If a project is a public works of the type described in ORS 279C.800(6)(a)(E); and no public agency awards a contract to a contractor for the project, the contractors and any subcontractors employing workers upon the public works project shall submit weekly payrolls as required by ORS 279C.845 and this rule to the public university listed in ORS 352.002 that owns the real property.¶¶

(12) 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 contractors and any subcontractors employing workers upon the public works project shall submit weekly payrolls as required by ORS 279C.845 and this rule to the public agency or agencies providing funds for the project or to the public agency that owns the real property on which the demolition or removal of hazardous waste takes place.¶¶

[ED. NOTE: Forms and Publications referenced are available from the Wage and Hour Division of the Bureau of Labor and Industries.]

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

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

AMEND: 839-025-0013

NOTICE FILED DATE: 10/31/2023

RULE SUMMARY: Amends rule to implement Enrolled Senate Bill 594 (2023).

CHANGES TO RULE:

839-025-0013

Notice of Public Works Form ¶¶

- (1) The notification form required by ORS 279C.835 is the Notice of Public Works form, WH-81.¶¶
  - (2) Except as provided in sections (4), (5), and (6) of this rule, the public agency must file the Notice of Public Works form, WH-81, with the Prevailing Wage Rate Unit within 30 days after the date a public works contract is awarded.¶¶
  - (3) The Notice of Public Works form, WH-81, must be accompanied by:¶¶
    - (a) payment of the fee required pursuant to ORS 279C.825; and¶¶
    - (b) a copy of the disclosure of first-tier subcontractors submitted to the public agency by the contractor if required pursuant to ORS 279C.370 and if a public agency awards a contract to a contractor for a public works project.¶¶
  - (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 Notice of Public Works form shall be filed by the public agency providing public funds for the project at the time the public agency commits to the provision of funds for the project.¶¶
  - (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 Notice of Public Works form shall be filed by the public agency when the agency enters into an agreement to occupy or use the completed project.¶¶
  - (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 Notice of Public Works form shall be filed by 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 at the time the public agency enters into an agreement authorizing the construction or installation of the solar radiation device.¶¶
  - (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 Notice of Public Works form shall be filed by the public university listed in ORS 352.002 that owns the real property on which the work takes place, at the time the public agency enters into an agreement authorizing the project.¶¶
  - (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 Notice of Public Works form shall be filed by the public agency or agencies providing public funds for the project or by the public agency that owns the real property on which the demolition or removal of hazardous waste takes place. The form shall be filed at the time the public agency commits to the provision of funds for the project or authorizes demolition or hazardous waste removal work to be performed.¶¶
  - (9) Public agencies are not required to file a Notice of Public Works form when the contract awarded is not regulated under the provisions of ORS 279C.800 to 279C.870.¶¶
- [ED. NOTE: Forms and Publications referenced in these rules are available from the Wage and Hour Division of the Bureau of Labor and Industries.]
- Statutory/Other Authority: ORS 651.060(4), ORS 279C.808
- Statutes/Other Implemented: ORS 279C.800- - 279C.870



AMEND: 839-025-0020

NOTICE FILED DATE: 10/31/2023

RULE SUMMARY: Amends rule to implement Enrolled Senate Bill 594 (2023).

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 ~~(E)~~ 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 ~~(E),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.¶

(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~~(4)~~, ORS 279C.808

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

AMEND: 839-025-0230

NOTICE FILED DATE: 10/31/2023

RULE SUMMARY: Amends rule to implement Enrolled Senate Bill 594 (2023).

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 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 ~~section (4) or (5)~~ of 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~~(4)~~, ORS 279C.808

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