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**NOTICE OF PROPOSED RULEMAKING**  
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 731  
DEPARTMENT OF TRANSPORTATION

**FILED**

09/23/2024 12:32 PM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Construction and maintenance contracting terms and conditions: Environmental Product Declaration for construction materials.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 10/21/2024 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.*

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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: 10/15/2024

TIME: 3:00 PM

OFFICER: Kevin Shearmire

REMOTE HEARING DETAILS

MEETING URL: [Click here to join the meeting](#)

PHONE NUMBER: 1-719-359-4580

CONFERENCE ID: 83525511937

SPECIAL INSTRUCTIONS:

Passcode: 437185

NEED FOR THE RULE(S)

ORS 184.879 (House Bill 4139 (2022)) requires the Oregon Department of Transportation (ODOT) to collect Environmental Product Declarations (EPDs) for its procurement of "covered materials." ODOT proposes to amend one rule and adopt another rule to implement EPDs for specified ODOT contracts.

First, ODOT proposes to amend OAR 731-005-0470 to include the requirement for EPDs in its public contract rules for highway construction contracts and maintenance projects.

Second, ODOT proposes to adopt OAR 731-005-0910 to set out the requirements for EPD submission by contractors. The proposed rule describes "covered materials" as those construction materials listed in ORS 184.879(1)(b)—concrete, asphalt paving mixtures and steel—and does not designate any other construction material as a covered material. The proposed rule describes which of ODOT's construction and maintenance projects will be included in the program and require contractors to submit EPDs. The proposed rule specifies exemptions for which an EPD would not be required,

including the threshold amount of each covered material below which an EPD would not be required. The proposed rule is to assist ODOT in its accounting of its greenhouse gas emissions from its procurement of construction materials on eligible construction and maintenance projects.

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#### DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

HB 4139, which is now codified as ORS 184.879, 184.882 and 184.884.

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

The proposed rules are anticipated to have no effect on racial equity since all materials requiring EPDs used on eligible projects are subject to the same requirements regardless of a supplier's demographics or geographic location(s). To the extent there is any effect on racial equity, it is a result of the statutory requirement for contractors to provide the EPD. HB 4139 also requires ODOT to adopt separate rules for a grant program to offset costs which is anticipated to have a neutral or positive effect on companies required to generate environmental product declarations.

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#### FISCAL AND ECONOMIC IMPACT:

ODOT is required by statute to collect EPDs for certain construction and maintenance projects. Therefore, to the extent there is a fiscal impact on ODOT for the collection of EPDs, it is from the authorizing statutes. However, to the extent ODOT has exercised discretion in selection of covered materials or applicable projects, there is a fiscal impact from this rulemaking. The collection, analysis and storage of these EPDs will be an additional requirement on ODOT's procurement process and will take staff time to execute this rule. Due to this additional administrative effort on ODOT's procurements, there will also be a fiscal impact to contractors and material suppliers on eligible projects. As part of the procurement process for covered materials, contractors will need to supply additional documentation to comply with ODOT's EPD requirement. This task will require additional administrative effort by the contractor to gather the required documentation prior to using the covered material on a contract. There will be a fiscal impact on material suppliers of concrete, asphalt and steel on eligible projects. These companies will need to have spent 3-6 months of time gathering the required data to develop an EPD and pay for a Life-Cycle Assessment Practitioner (LCAP) or an online EPD tool subscription to generate EPDs for the named materials.

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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) ODOT is the only state agency to incur a cost to administer the EPD requirements of the statute. No unit of local government will face a cost as their projects will not have an EPD requirement. Construction Firms who are contractors on eligible projects will be economically impacted by the statute. Material Suppliers of the named covered materials—concrete, asphalt, and steel—will be economically impacted by the statute's requirement to submit EPDs.

(2)(a) It is difficult to estimate the number of small businesses affected because any construction firm that successfully completes ODOT's procurement process may be a contractor on an ODOT construction or maintenance project or any material supplier is eligible to provide materials to ODOT if it meets procurement eligibility requirements. From discussions with industry associations there are an estimated ten or more small businesses that will be affected. Construction firms on eligible ODOT projects and material suppliers of the specified covered materials will be subject to this rule.

(b) An ISO 14025 compliant EPD will need to be submitted for the covered material per this rule. If a prime contractor is not the material supplier, the prime contractor will need to acquire an EPD from its construction material supplier. If the prime contractor is also the construction material supplier, the prime contractor must produce an EPD for the covered

material. A prime contractor or material supplier must develop and maintain an EPD for submission on any ODOT construction or maintenance project for which an EPD is required. Once the EPD is developed, the only costs associated with the EPD is for maintaining and updating the EPD and related records, as necessary, for future submissions on ODOT construction and maintenance projects.

(c) From what we have learned, it may be up to \$10,000 of administrative effort (staff time) and additional costs of either a professional services (Life Cycle Assessment Consultant or subscription to an online EPD tool) to initially get the first material supplier's facility ready to generate an EPD. Once this first facility can generate EPDs, the time and effort are reduced dramatically. These costs vary for an initial EPD from approximately \$5,000 to \$50,000 based on the type of covered material.

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

During the formation of the program and rule, ODOT formed a Technical Advisory Committee (TAC) consisting of groups listed in ORS 184.882. Small business representatives are part of the groups taking part on TAC. Groups taking part in the rule making process included the Oregon Chapter of the Associated General Contractors of America (AGC), National Association of Minority Contractors- Oregon (NAMC-Oregon), Oregon Concrete and Aggregate Producers Association (OCAPA) and the Asphalt Pavement Association of Oregon (APAO), United Steelworkers District 12 and Local Iron Workers 29.

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WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

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RULES PROPOSED:

731-005-0470, 731-005-0910

AMEND: 731-005-0470

RULE SUMMARY: Includes the requirements for Environmental Product Declarations in ODOT's public contract rules.

CHANGES TO RULE:

731-005-0470

Solicitation Documents ¶

The Solicitation Documents shall include the following:¶

(1) General Information:¶

(a) Notice of any pre-Bid conference as follows:¶

(A) The time, date and location of any pre-Bid conference;¶

(B) Whether attendance at the conference will be mandatory or voluntary; and¶

(C) That statements made by ODOT's representatives at the conference are not binding upon ODOT unless confirmed by Written Addendum.¶

(b) The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors must be prequalified if prequalification is a requirement;¶

(c) The name and title of the authorized Agency person designated for receipt of Offers and contact person (if different);¶

(d) Instructions and information concerning submission requirements including the address of the office to which Bids must be delivered and any other special information, e.g., whether Bids may be submitted by Electronic Data Interchange or Electronic Procurement (See OAR 731-005-0500, 731-005-0505 and 731-005-0510 for required provisions for Electronic Data Interchange or Electronic Procurement);¶

(e) The time, date and place of Opening;¶

(f) The time and date of Closing after which ODOT will not accept Bids, which time shall be not less than 5 Days after the date of the last publication of the advertisement. The interval between the date of issuance of the Solicitation document and a Closing should not be less than 14 Days for an ITB unless ODOT finds a shorter interval is in the public's interest. If ODOT is issuing an ITB that may result in a Contract for a Public Improvement with a value in excess of \$75,000, ODOT shall not designate a time of Closing that falls when ODOT is closed to the public or after 12:00 p.m. on Friday; for timing issues relating to Addenda see OAR 731-005-0580(3);¶

- (g) The form and submission of Bids and any information required therein, including Bid security, if any;¶
- (h) The office where the plans and Specifications for the Work or goods may be reviewed;¶
- (i) A statement that each Bidder must identify whether the Bidder is a Resident bidder, as defined in ORS 279A.120;¶
- (j) If the Contract resulting from a Solicitation will be a Contract for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 276a), a statement that no Bid will be received or considered by ODOT unless the Bid contains a statement by the Bid as a part of its Offer that "Contractor agrees to be bound by and will comply with the provisions of ORS 279C.830 or 40 U.S.C. 276a;"¶
- (k) If the Work so requires, a statement that ODOT will not receive or consider a Bid from a Bidder that is not registered with the Construction Contractors Board or is not licensed by the State Landscape Contractors Board as required by ORS 671.530;¶
- (L) Whether a Contractor or a subcontractor under the Contract must be licensed for asbestos abatement by the Department of Environmental Quality under ORS 468A.720;¶
- (m) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110. (See OAR 731-005-0670(3));¶
- (n) How ODOT will notify Bidders of Addenda and how ODOT will make Addenda available. See OAR 731-005-0580.¶
- (o) A statement that the contracting agency may reject a Bid that does not comply with prescribed public contracting procedures and requirements, including the requirement to demonstrate the bidder's responsibility under ORS 279C.375 (3)(b), and that the contracting agency may reject for good cause all bids after finding that doing so is in the public interest;¶
- (p) As applicable, the advertisement must comply the domestic preference (Buy America) requirements set forth in ORS 279C.303; and¶
- (q) If designated a Community Benefit Contract, the advertisement must contain the requirements set forth in ORS 279C.308 and OAR 731-005-0900.¶
- (2) Agency Need. The character of the Work or goods ODOT is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements;¶
- (3) Terms and Conditions. ODOT shall include all Contract terms and conditions, including warranties and bonding requirements, ODOT considers necessary. Without limiting the preceding sentence, ODOT must include all applicable Contract provisions required by ORS 279C.500 through 279C.870 as follows:¶
  - (a) Payment of all Persons furnishing labor or material, contributions to Industrial Accident Fund, liens and withholding taxes (ORS 279C.505);¶
  - (b) If the Contract is for a Public Improvement, a condition that the Contractor shall demonstrate it has established a drug-testing program for its employees;¶
  - (c) If the Contract calls for demolition Work described in ORS 279C.510, a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;¶
  - (d) If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective (ORS 279C.510);¶
  - (e) Payment of claims by public officers (ORS 279C.515);¶
  - (f) Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.515;¶
  - (g) A Person's right to file a complaint with the Construction Contractors Board for all Contracts related to a Public Improvement Contract (ORS 279C.515);¶
  - (h) Hours of labor in compliance with ORS 279C.520 and 279C.540;¶
  - (i) Environmental and natural resources regulations (ORS 279C.525);¶
  - (j) Payment for medical care and providing workers' compensation (ORS 279C.530);¶
  - (k) Maximum hours and overtime (ORS 279C.540);¶
  - (L) Claims for overtime (ORS 279C.545);¶
  - (m) Prevailing wage rates (ORS 279C.800 to 279C.870);¶
  - (n) Retainage (ORS 279C.550 through 279C.570);¶
  - (o) Prompt payment policy (ORS 279C.570);¶
  - (p) Contractor's relations with subcontractors (ORS 279C.580);¶
  - (q) Notice of claim (ORS 279C.605);¶
  - (r) With respect to state Agencies, provisions regarding use of recovered resources and recycled materials and to the extent economically feasible, use of recycled paper and PETE products (ORS 279A.150 and 279A.155);¶
  - (s) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385;¶
  - (t) A Contract provision substantially as follows: "All employers, including Contractor, that employ subject workers who work under this Contract in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor

shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530);¶  
(u) Contractor's certification that all subcontractors performing Work described in ORS 701.005 (i.e., construction Work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board (as applicable) before the subcontractors commence Work under the Contract;¶  
(v) Price escalation and de-escalation Contract Provision relating to steel materials. As used in this paragraph, steel material includes any steel products used for and permanently incorporated in the construction, reconstruction or major renovation of a road or highway. Escalation and de-escalation relate to and shall be applied to the raw steel in the steel materials listed in the Contract Provision.¶  
(w) As applicable, comply with the requirements set forth in ORS 279C.303 regarding domestic preference (Buy America);¶  
(x) For any designated Community Benefit Contracts, the contractual provisions required by ORS 279C.308 and OAR 731-005-0900;¶  
(y) If federal funds are involved, the federal laws, rules and regulations applicable to the fund requirements shall govern in the event they conflict with a provision required by ORS 279A.120 to 279A.155; ¶  
(z) Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of, transfer rights, or delegate duties under the Contract, either in whole or in part, without ODOT's prior Written consent. Unless otherwise agreed by ODOT in Writing, such consent shall not relieve the Contractor of any obligations under the Contract. Any assignee or transferee shall be considered the agent of the Contractor and be bound to abide by all provisions of the Contract. If ODOT consents in Writing to an assignment, sale, disposal or transfer of the Contractor's rights or delegation of Contractor's duties, the Contractor and its surety, if any, shall remain liable to ODOT for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless ODOT otherwise agrees in Writing; ~~and~~¶  
(aa) As applicable, provisions that meet the requirements of ORS 279C.533 for apprenticeship employment, aspirational targets, and outreach, recruitment and retention planning; ~~and~~¶  
(bb) As applicable, comply with the requirements for submission of an Environmental Product Declaration required by ORS 184.879 and OAR 731-005-0910.

Statutory/Other Authority: ORS 184.619, 279A.050, 279A.065

Statutes/Other Implemented: ORS 184.879, 279A.030, 279A.120, 279C.300, 279C.345, 279C.365, 279C.375, 279C.390, 279C.500 - 279C.870, 305.385, 701.005, 701.055

ADOPT: 731-005-0910

RULE SUMMARY: This rule describes ODOT's requirements for Environmental Product Declarations.

CHANGES TO RULE:

731-005-0910

Environmental Product Declarations

(1) This rule describes ODOT's requirements for environmental product declarations for covered materials permanently incorporated into ODOT's construction or maintenance projects for the state's transportation system, in accordance with ORS 184.879. ¶

(2) In addition to the definitions in ORS 184.879, the following definitions apply to section (4) of this rule:¶

(a) "Covered materials" has the meaning set forth in ORS 184.879(1)(b)(A)-(C). ¶

(b) "Permanently incorporated" means any covered material that is required to be affixed to the project at the completion of the contract.¶

(3) A contractor must submit an environmental product declaration for covered materials in accordance with the requirements in the contract for the project.¶

(4) Except as provided in ORS 184.879(3)(a)-(b), a procurement for covered materials for a construction or maintenance project must require an environmental product declaration if:¶

(a) The project includes a highway construction contract, as defined in OAR 731-005-0430(25), administered by ODOT or a maintenance project estimated at or above \$3 million, but does not include a public improvement or maintenance project administered by ODOT on behalf of a local government agency;¶

(b) For a highway construction contract, the Engineer's Estimate has an estimated project cost of \$3 million or more at the date of advertisement;¶

(c) The \$3 million threshold for a highway construction contract or maintenance project does not include additional work added after the advertised date stated in the procurement, such as construction engineering, change orders, indirect or force account items; and¶

(d) The covered materials will be permanently incorporated into the project.¶

(5) If the criteria in section (4) of this rule are met, a contractor must provide an environmental product declaration to ODOT for each covered material permanently incorporated into the project that is equal to or greater than the following thresholds:¶

(a) Ready-Mix Concrete: 50 cubic yards or more.¶

(b) Asphalt Paving Mixtures: 2,500 tons or more.¶

(c) Steel Rebar: 15,000 pounds or more.¶

(d) Structural Steel: 5,000 pounds or more.¶

(6) For a highway construction contract and maintenance project, ODOT will determine specific bid items for covered materials that are subject to the Environmental Product Declaration submittal requirement. The selected bid items and required product declaration requirements will be described in the project procurement.

Statutory/Other Authority: ORS 184.619

Statutes/Other Implemented: ORS 184.879