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Background Brief on ...

Public Contracting

Overview of the Public Contracting Code

House Bill 2341 (2003) established a Public Contracting Code for public agencies within Oregon and became operational on March 1, 2005. Prior to the measure's enactment, statutes relating to public contracts and purchasing law predominately reflected the strict structure of public improvement contracting for which they were written, and were thus less adaptable to modern and innovative contracting practices. Furthermore, laws were amended in a patchwork fashion over several decades and contained many internal inconsistencies and were difficult to work with. House Bill 2341 rewrote many statutes guiding public contracting to modernize and improve the public contracting processes while preserving traditional construction public contracting.

The Public Contracting Code consists of three Oregon Revised Statutes (**ORS**) chapters: ORS 279A (policy for all contracting activities), ORS 279B (procurements of supplies and services), and ORS 279C (construction and architectural activities, engineering land surveying services and related services).

ORS 279A.015 states the policy of the Code that is "...that a sound and responsive public contracting system should:

1. Simplify, clarify and modernize procurement practices so that they reflect the marketplace and industry standards.
2. Instill public confidence through ethical and fair dealing, honesty and good faith on the part of government officials and those who do business with the government.
3. Promote efficient use of state and local government resources, maximizing the economic investment in public contracting within this state.

4. Clearly identify rules and policies that implement each of the legislatively mandated socioeconomic programs that overlay public contracting and accompany the expenditure of public funds.
5. Allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement. In public procurement, as set out in ORS chapter 279B, meaningful competition may be obtained by evaluation of performance factors and other aspects of service and product quality, as well as pricing, in arriving at best value.
6. Provide a public contracting structure that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competitive bidding as the standard for public improvement contracts unless otherwise exempted.”

The code applies to all public contracts that occur in Oregon. There are exemptions for a number of entities and situations, such as the governmental body of another state or the federal government, an American Indian tribe, the Oregon University System, the Legislative and Judicial branches, certain intergovernmental entities, and contracts between a contracting agency and another contracting agency.

Generally, a contracting agency must award a public contract for goods or services by either competitive sealed bidding or competitive sealed proposals as outlined in the code.

Any procurement of goods or services that is \$5,000 or less may be awarded in any manner deemed practical or convenient by the contracting agency, including by direct selection or award. Procurement of goods or services exceeding \$5,000 but not exceeding \$150,000 may be awarded in accordance with intermediate procurement procedures, in which the agency must seek at least three informally solicited competitive price quotes or competitive proposals from prospective contractors. If three quotes or proposals are not reasonably available, fewer will suffice, but the contracting agency

must create a written record of the efforts made to obtain the quotes or proposals.

A contracting agency may award a contract only under specific circumstances where it is determined that the goods or services are available from only one source, but must negotiate with the sole source to obtain contract terms advantageous to the contracting agency.

The Public Contracting Code outlines specific situations in which a contracting agency can give preference in rewarding contracts. Contracting agencies must give preference to goods that are manufactured from recycled materials if the products are available, meet applicable standards, can be substituted for a comparable nonrecycled product, and the costs of the recycled product do not exceed the costs of nonrecycled products by more than five percent. Contracting agencies can also give preference for procuring agricultural products that are produced and transported entirely within Oregon if the product does not cost more than 10 percent more than a product that is not produced and transported entirely in Oregon. In both circumstances, the contracting agency can set a higher percentage if they draft a written determination to support the order.

The Department of Administrative Services’ State Procurement Office is responsible for supporting public contracting for state agencies, universities, select non-profit organizations, and local governments. The agency is also the central procurement authority for the State of Oregon. The Attorney General is directed under the Public Contracting Code to develop public contracting rules that can be used by state agencies and local governments. The code establishes that if a contracting agency that has not adopted its own rules of procedure in accordance with the statute, the agency is subject to the model rules adopted by the Attorney General, except for personal services contracts of local contracting agencies outside of contracts for architectural, engineering, and land surveying services and related services.

The State Procurement Office also works with the Department of Justice to collect suggested

technical amendments and other law improvement proposals for the Code. Since the enactment of House Bill 2341, further technical fixes to the Code have been made through House Bill 2215 (2005) and House Bill 2140 (2007) (see Recent Legislation section for more information).

It is important to note that this is a very brief synopsis of Oregon public contracting law. Specific information regarding the Public Contracting Code and related administrative rules are located at the State Procurement Office [website](#).

Reciprocal Preference Law

Public contracting agencies, in determining the lowest responsible bidder, must add a percent increase to each out-of-state bidder's bid price equal to the percent of preference given to local bidders in the bidder's home state. For instance, if the low bidder is from a state that grants a 10 percent preference to its own in-state bidders, the Oregon agency must add 10 percent to that bidder's price when evaluating the bid.

According to the State Procurement Office's website, 35 states have some form of a reciprocal preference law.

Federal and State Prevailing Wage

The Davis-Bacon Act of 1931 is a federal law that established the requirement for paying prevailing wages on public works projects. The Act requires that each contract over \$2,000 in which either a federal or District of Columbia entity is a party for the construction, alteration, or repair of public buildings or public works to contain a clause setting forth the minimum wages, known as the prevailing wage rate (**PWR**) to be paid to various classes of laborers and mechanics employed under the contract. Contractors or their subcontractors are to pay workers employed directly upon the site of the work no less than the locally prevailing wages and fringe benefits paid on projects of a similar character. The Davis-Bacon Act directs the Secretary of Labor to determine such prevailing wage rates.

In addition to the Davis-Bacon Act, Congress has added prevailing wage provisions to approximately 60 statutes that assist construction projects through grants, loans, loan guarantees, and insurance, such as projects in such areas as transportation, air and water pollution reduction, and health. If a construction project is funded or assisted under more than one federal statute, the Davis-Bacon prevailing wage provisions may apply to the project if any of the applicable statutes require payment of Davis-Bacon wage rates.

Oregon is one of 32 states that currently have what is known as a "Little Davis-Bacon Act" prevailing wage law modeled after the Davis-Bacon Act; the state enacted prevailing wage laws in 1959 (see the *Overview of Oregon's Prevailing Wage Law* section). The Wage and Hour Division of the Bureau of Labor and Industries (**BOLI**) is responsible for administering and enforcing the prevailing wage law and for educating contractors, subcontractors, and public agencies about its requirements. The Prevailing Wage Advisory Committee was legislatively established in 1995 to assist the BOLI Commissioner in the administration of the PWR Law.

Ten other states once had prevailing wage statutes, but were either repealed or invalidated from a court decision.

Overview of Oregon's Prevailing Wage Law

Generally, public works projects are covered by the state's PWR law if the total project cost is \$50,000 or more; if the project is for construction, reconstruction, major renovation, or painting; and the project directly or indirectly uses a public agency's funds. Examples of covered activities also include hazardous material spills, maintenance contracts, and demolition. A public works on a privately owned land or building can be covered under PWR law if the project is for construction, reconstruction, major renovation or painting and uses at least \$750,000 in public funds; or is for construction and a public agency or multiple

public agencies will occupy or use at least 25 percent of the finished project's square footage.

The PWR law does not apply to contracts with certain state agencies, although other wage-related regulations often apply. Agencies that are not regulated by the PWR law include the Oregon Lottery Commission; Travel Information Council; People's Utility Districts (who have similar laws that apply to applicable projects); and the Oregon Health and Science University (but must ensure that prevailing wages are paid to workers). PWR law also establishes that it is not necessary to pay prevailing wages to Oregon Department of Corrections inmates assigned to a work release program when working on covered projects, or Oregon Youth Conservation Corps members when working on covered projects.

A public works project includes, but is not limited to roads, highways, buildings, structures and improvements of all types, or the construction, reconstruction, major renovation, or painting of which is carried on or contracted for by a public agency. The PWR law does not regulate the reconstruction or renovation of privately owned property that a public agency leases, but it does cover construction on such property. The PWR coverage is determined by the type of work performed on the project. For instance, if a project includes covered activities, such as rewiring a major portion of a building, and meets the other jurisdictional requirements of the PWR law, the entire project is covered. Anyone that is employed on a public works project and whose duties are manual or physical in nature is required to be paid the applicable prevailing wage rate.

Contractors and subcontractors must file a \$30,000 public works bond with the Construction Contractors Board (CCB) before beginning work on a public works project if the contract price is over \$100,000. Before allowing a subcontractor to start work on a public works project, the contractor must ensure the subcontractor has filed the public works bond. The bond must provide that the contractor or subcontractor will pay claims ordered by the BOLI to workers on public works projects.

Unlike other required payment and performance bonds, the public works bond remains in effect continuously and covers all public works projects worked on during the duration of the bond.

Any person who is required to pay prevailing wages on a public project, such as a temporary employment agency that employs workers on a public works project, must file a public works bond with the CCB. An exemption is allowed for certified disadvantaged, minority, women, or emerging small business enterprises for four years after certification. Qualified businesses must provide the CCB with written notification of its certification and must notify the public agency and the primary contractor that a public works bond has not been filed by the business enterprise.

Prevailing wage rates are determined by data collected from an annual survey issued by BOLI. Wage surveys are sent to contractors and subcontractors in all 14 regions of the state to find out what they are paying to different types, or classifications, of workers. If survey results do not provide enough information to determine the prevailing wage rates, BOLI considers other information, including prevailing wage rates determined by the U.S. Department of Labor. Prevailing wage rate booklets are published twice a year, usually in January and July, and amendments to the rates are published quarterly.

In 2009, BOLI made changes to the survey methodology in response to concerns from stakeholders regarding the data validity and reducing the burden on reporting the data. Beginning in 2010, the survey will collect data from four pre-determined weeks versus the previous methodology of using the data from a contractor's "peak week." The definitions of "journeyman" and "sub-journeyman" have been clarified in regards to level of verifiable trade-specific experience and whether they have completed a state-certified apprenticeship program in the applicable trade. Also, per diem and zone pay is excluded from reported basic hourly wage rates, and designating the type of construction for reported hours will no longer be required.

It is important to note that this is a very brief synopsis of Oregon's PWR law. BOLI provides a comprehensive overview of [Prevailing Wage Rate Laws](#).

Recent Legislation

House Bill 2867 (2009) – The measure requires a contracting agency, before conducting a procurement for goods or services with an estimated contract price that exceeds \$250,000, to demonstrate with cost analysis or by other means that the cost of providing goods or performing service with a contracting agency's own personnel or resources is greater than the cost of procuring goods or services from the contractor, or determining that using the contracting agency's personnel to perform the proposed services is not feasible. Also, before entering into a public contract, the contracting agency must establish measurable standards to assess the quality of a contractor's performance and clear consequences for failing to meet those standards.

House Bill 2763 (2009) allows contracting agencies to pay up to 10 percent more than the lowest bidder for agricultural products produced and transported entirely within Oregon, if the agency finds and explains good cause in a written determination.

Staff and Agency Contacts

United States Department of Labor
[Employment Standards Administration](#)
1-866-4-USWAGE

United States Government Printing Office
[Davis-Bacon Wage Determinations](#)

Department of Administrative Services
[State Procurement Office](#)
503-378-4642

Department of Justice
[Model Public Contract Rules](#)
503-378-4400

Bureau of Labor and Industries
[Wage and Hour Division](#)
971-673-0761

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