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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, resulting in many internal inconsistencies and a code that was 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 chapters in the Oregon Revised Statutes (**ORS**): ORS 279A (policy for all contracting activities), ORS 279B (procurements of goods and services), and ORS 279C (construction as well as architectural, engineering, photogrammetric mapping, transportation planning, land surveying services, and related services).

ORS 279A.015 states the policy of the Code 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, for procuring goods and services, a contracting agency must use either a competitive sealed bidding process to award a contract to the lowest responsible bidder or a competitive sealed proposal process to award a contract to the proposer whose proposal is most advantageous to the agency.

Small procurements can be awarded under different methods. Any procurement of goods or services not exceeding \$10,000 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 between \$10,000 and \$150,000 may be awarded after the agency seeks at least three informally solicited competitive price quotes or

competitive proposals from prospective contractors.

If a contracting agency determines that the desired goods or services are available from only one supplier, the agency may award a contract without competition but must negotiate with the supplier to obtain terms that are advantageous to the agency.

In an emergency, a contracting agency may award a contract without competition, although competition is encouraged if it is reasonable.

An agency may award a contract with an approved special procurement process, which may be with or without competition. It must be unlikely to encourage favoritism or diminish competition and either likely results in substantial cost savings or promotion of the public interest.

The Public Contracting Code outlines several specific situations in which a contracting agency must or may give preference in rewarding contracts. For example, 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. In another example, contracting agencies are allowed to give preference for procuring goods fabricated or processed in Oregon or for services that are performed in Oregon if the goods or services do not cost more than 10 percent more than those not fabricated, processed, or performed in Oregon. In both circumstances, the contracting agency can set a higher percentage if they draft a written determination to support the order. A contracting agency can prefer an Oregon resident to break a tie.

Contracts for architectural, engineering, photogrammetric mapping, transportation planning, or land surveying, and related services are awarded using a qualification based selection (QBS) process. Consultants compete based on their level of experience and expertise. The

contracting agency has sole discretion in setting the criteria for screening and selecting consultants. Once selected, the contracting agency negotiates a contract at a price that is reasonable and fair to the agency. If a fair and reasonable price cannot be negotiated, the contracting agency can then negotiate with the next most-qualified firm. Contracting agencies can directly appoint a consultant on projects less than \$100,000. Until legislation passed in 2011 (House Bill 3316), most local government projects were not subject to the QBS process.

When contracting for construction services, the guiding policy in the Code is to make every effort to construct public improvements at the least cost to the contracting agency. The Code specifically exempts specific types of public construction projects from the competitive bidding process. In addition, a contracting agency can seek an exemption from the competitive bidding process if it finds that the exemption is unlikely to encourage favoritism or diminish competition and either likely results in substantial cost savings or allows a pilot project.

The Attorney General is directed under the Public Contracting Code to develop model public contracting rules that can be used by state agencies and local governments. However, the contracting agency must use the model rules when procuring construction manager/general contractor (CM/GC) services. The Attorney General is directed to consult with the Department of Administrative Services, the Department of Transportation, and representatives of municipal governments and school boards before adopting or amending the model rules. The Code establishes that if a contracting agency 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.

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 Department of Administrative Services Procurement [website](#).

## **DAS Procurement Service and Procurement Policy**

Effective July 2012, the State Procurement Office within the Department of Administrative Services (DAS) reorganized into two units: Procurement Services and Procurement Policy. Procurement Services procures goods and services on behalf of state agencies and combines the purchasing power of state agencies, local governments, and other states to ensure the cost-effective acquisition of goods and services. It also consults with and trains employees of the state, local governments, and suppliers on the application of purchasing laws, rules, procedures, and policies.

Procurement Policy provides enterprise-wide policy analysis and advice, delegates authority, approves special requests, and assists with the development and implementation of legislation, rules, and policies.

DAS maintains **ORPIN** – the Oregon Procurement Information Network. It is a centralized, web-based system that most state agencies and many local governments use to solicit goods and services from suppliers. Suppliers are able to access ORPIN at no charge to search for opportunities that match their business offerings.

## **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 resident 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 resident bidders, the Oregon agency must add 10 percent to that bidder's price when evaluating the bid.

According to DAS Procurement Services, 37 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 applies to any 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. The Act requires the contract 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. 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 assists the BOLI Commissioner in the administration of the PWR Law.

### **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 can include hazardous material spills, maintenance contracts, and demolition. A public works project on 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. There is an exception to the \$750,000 public funds threshold if the project is for residential construction that is privately owned and that predominantly provides affordable housing.

The PWR law does not apply to contracts of 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 for applicable projects), and the Oregon Health and Science University (but which 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, 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 must 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 project 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 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. 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.

If the wage 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.

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](#).

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

Department of Administrative Services  
[Procurement Service and Policy](#)  
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Department of Justice  
[Model Public Contract Rules](#)  
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Bureau of Labor and Industries  
[Prevailing Wage Rate Unit](#)  
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