



LPRO: Legislative Policy and Research Office

PUBLIC CONTRACTING

BACKGROUND BRIEF

OVERVIEW OF THE PUBLIC CONTRACTING CODE

The Public Contracting Code applies to state and local government agencies and public educational institutions when they are procuring goods and services or contracting for construction, engineering and related services. The Code has been developed around six broad policy goals, as stated in statute:

- Simplify, clarify and modernize procurement practices so that they reflect the marketplace and industry standards.
- 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.
- Promote efficient use of state and local government resources, maximizing the economic investment in public contracting within this state.
- 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.

- Allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement.

- 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 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).

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

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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.

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



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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 will likely result 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 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 [website](#).

DAS PROCUREMENT SERVICES

The Department of Administrative Services (DAS) 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.

DAS also provides enterprise-wide policy analysis and advice, 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 adopted 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 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 governing grants, loans, loan guarantees, and insurance programs assisting construction projects. 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, along with 31 other states, has adopted its own "Little Davis-Bacon Act" prevailing wage rate law modeled after the Davis-Bacon Act; the state enacted its prevailing wage rate 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 rate law and for educating contractors, subcontractors, and public agencies about its requirements. The Prevailing Wage Rate Advisory Committee assists the BOLI Commissioner in the administration of the law.

OREGON'S PREVAILING WAGE RATE LAW

Generally, public works projects are covered by the state's prevailing wage rate 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 a structure or building that is privately owned can be covered under the 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 exemption for residential construction projects that are privately owned and that predominantly provide affordable housing.

The prevailing wage rate law does not apply to contracts of certain state agencies, although other wage-related regulations often apply. Agencies that are not regulated by the 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). Prevailing wage rate 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 prevailing wage rate law does not regulate the reconstruction or renovation of privately owned property that a public agency leases,



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but it does cover construction on such property if \$750,000 of public funds are used. 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 prevailing wage rate 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.

An exemption to the bonding requirement is allowed for any certified disadvantaged business enterprise, minority-owned business, woman-owned business, business owned by a service-disabled veteran, and emerging small business for four years after certification.

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 determine wage and benefit levels different classifications of workers.

If the wage survey results do not provide enough information to determine a prevailing

wage rate for a particular region and worker classification, 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 and amendments to the rates are published quarterly.

It is important to note that this is a brief synopsis of Oregon's prevailing wage rate law. BOLI provides a comprehensive overview of the [Prevailing Wage Rate Law](#).

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