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DIVISION 1

**UNIFORM MODEL RULES OF PROCEDURE
APPLICABLE TO RULEMAKING FUNCTIONS**

137-001-0005
Rulemaking Procedures

The words and phrases used in OAR 137-001-0005 to 137-003-0092 have the same meanings given them in ORS 183.310.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.310 & 183.341(1)

Hist.: IAG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86

137-001-0007
Public Input Prior to Rulemaking

(1) The agency may seek public input before giving notice of intent to adopt, amend or repeal a rule. Depending upon the type of rulemaking anticipated, the agency may appoint an advisory committee, solicit the views of persons on the agency's mailing list maintained pursuant to ORS 183.335(7), or use any other means to obtain public views to assist the agency.

(2) If the agency appoints an advisory committee, the agency shall make a good faith effort to ensure that the committee's members represent the interests of persons likely to be affected by the rule. The meetings of the advisory committee shall be open to the public and notice of committee meetings shall be provided to persons on the agency's mailing list maintained pursuant to ORS 183.335(7).

(3) Written minutes shall be taken at all advisory committee

meetings. The minutes must reflect all of the matters discussed and the views expressed by the participants. The agency's rules coordinator shall maintain copies of the minutes of any meetings of advisory committees appointed pursuant to this rule and any written input received by such committee or the agency concerning the anticipated rulemaking.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.025(2), 183.330(2) & 183.341(1)

Hist.: JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95

137-001-0011
Rulemaking Format

When the agency proposes to amend an existing rule, the agency shall set forth the rule in full with matter proposed to be deleted enclosed in brackets and proposed additions shown by bold face.

Stat. Auth.: ORS 183.341, 183.390 & 192.445

Stats. Implemented: ORS 183.355(2)(D) & 183.341(1)

Hist.: JD 1-1988, f. & cert. ef. 3-3-88; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93

137-001-0018
Limitation of Economic Effect on Businesses

(1) Based upon its economic effect analysis under ORS 183.335(2)(b)(D) or upon comments made in response to its rulemaking notice, the agency shall, before adoption of a rule, determine whether the economic effect upon small business is significantly adverse; and

(2) If the agency determines there is a significant adverse effect on a business or businesses, it shall, modify the rule to reduce the rule's adverse economic impact on those businesses to the extent consistent with the public health and safety purposes of the rule.

(3) Modification to reduce the rule's adverse economic impact on small business shall be as provided in ORS 183.540.

Stat. Auth.: ORS Ch. 183

Stats. Implemented: ORS 183.341(1) & 183.540

Hist.: IAG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86

137-001-0030
Conduct of Rulemaking Hearings

(1) The hearing to consider a rule shall be conducted by and shall be under the control of the presiding officer. The presiding officer may be the chief administrative officer of the agency, a member of its governing body, or any other person designated by the agency.

(2) At the beginning of the hearing, any person wishing to be heard shall provide name, address and affiliation to the presiding officer. The presiding officer may also require that the person complete a form showing any other information the presiding officer deems appropriate. Additional persons may be heard at the discretion of the presiding officer.

(3) At the beginning of the hearing, the presiding officer may summarize the content of the notice given under ORS 183.335, unless requested by a person present to read the notice in full.

(4) Subject to the discretion of the presiding officer, the order of the presentation shall be:

(a) Statements of proponents;

(b) Statements of opponents; and

(c) Statements of other witnesses present and wishing to be heard.

(5) The presiding officer or any member of the agency may question any witness making a statement at the hearing. The presiding officer may permit other persons to question witnesses.

(6) There shall be no additional statement given by any witness unless requested or permitted by the presiding officer.

(7) The hearing may be continued with recesses as determined by the presiding officer until all listed witnesses have had an opportunity to testify.

(8) The presiding officer shall, when practicable, receive all physical and documentary evidence presented by witnesses. Exhibits shall be marked and shall identify the witness offering

the exhibit. Any written exhibits shall be preserved by the agency pursuant to any applicable retention schedule for public records under ORS 192.001 et seq.

(9) The presiding officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious, or immaterial matter.

(10) The presiding officer shall make a record of the proceeding, by audio or video tape recording, stenographic reporting or minutes.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.335(3) & 183.341(1)

Hist.: IAG 14, f. & ef. 10-22-75; IAG 4-1979, f. & ef. 12-3-79; IAG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91

137-001-0040

Rulemaking Record

(1) The agency shall maintain a record of any data or views its receives in response to a notice of intent to adopt, amend or repeal a rule.

(2) If a hearing is held, the agency may require the presiding officer, within a reasonable time after the hearing, to provide the agency a written summary of statements given and exhibits received and a report of the officer's observations of physical experiments, demonstrations, or exhibits. The presiding officer may make recommendations but such recommendations are not binding upon the agency. The rulemaking record shall contain the presiding officer's summary, or a recording of oral submissions received at the hearing, and the presiding officer's recommendation, if any.

(3) The rulemaking record shall be maintained by the rules coordinator. The agency shall make the rulemaking record available to members of the public upon request.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.335(3), 183.341(1) & OR Laws 1993, Ch 729, §14

Hist.: IAG 14, f. & ef. 10-22-75; IAG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 7-1995, f. 8-25-95, cert. ef. 1-1-96

137-001-0050

Agency Rulemaking Action

At the conclusion of the hearing, or after receipt of the presiding officer's requested report and recommendation, if any, the agency may adopt, amend, or repeal rules covered by the notice of intended action. The agency shall fully consider all written and oral submissions.

Stat. Auth.: ORS Ch. 183

Stats. Implemented: ORS 183.335(3)

Hist.: IAG 14, f. & ef. 10-22-75; IAG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86

137-001-0060

Secretary of State Rule Filing

(1) The agency shall file in the office of the Secretary of State a certified copy of each rule adopted, including rules that amend or repeal any rule.

(2) The rule shall be effective upon filing with the Secretary of State unless a different effective date is required by statute or a later effective date is specified in the rule.

Stat. Auth.: ORS Ch. 183

Stats. Implemented: ORS 183.341(1) & 183.355

Hist.: IAG 14, f. & ef. 10-22-75; IAG 17, f. & ef. 11-25-77; IAG 4-1979, f. & ef. 12-3-79; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89

137-001-0070

Petition to Promulgate, Amend, or Repeal Rule

(OAR 137-001-0070 was adopted by the Attorney General as required by ORS 183.390. Agencies must apply this rule without further adoption or amendment.)

(1) An interested person may petition an agency to adopt, amend, or repeal a rule. The petition shall state the name and

address of the petitioner and any other person known to the petitioner to be interested in the rule. The petition shall be legible, signed by or on behalf of the petitioner, and shall contain a detailed statement of:

(a) The rule petitioner requests the agency to adopt, amend, or repeal. When a new rule is proposed, the petition shall set forth the proposed language in full. When an amendment of an existing rule is proposed, the rule shall be set forth in the petition in full with matter proposed to be deleted enclosed in brackets and proposed additions shown by boldface;

(b) Facts or arguments in sufficient detail to show the reasons for and effects of adoption, amendment, or repeal of the rule;

(c) All propositions of law to be asserted by petitioner.

(2) The agency:

(a) May provide a copy of the petition, together with a copy of the applicable rules of practice, to all persons named in the petition;

(b) May schedule oral presentations;

(c) Shall, in writing, within 30 days after receipt of the petition, either deny the petition or initiate rulemaking proceedings

Stat. Auth.: ORS 183.390

Stats. Implemented: ORS 183.341(1) & 183.390

Hist.: IAG 14, f. & ef. 10-22-75; IAG 1-1981, f. & ef. 11-17-81; JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95

137-001-0080

Temporary Rulemaking Requirements

(1) If no notice has been provided before adoption of a temporary rule, the agency shall give notice of its temporary rulemaking to persons, entities, and media specified under ORS 183.335(1) by mailing or personally delivering to each of them a copy of the rule or rules as adopted and a copy of the statements required under ORS 183.335(5). If a temporary rule or rules are over ten pages in length, the agency may provide a summary and state how and where a copy of the rule or rules may be obtained. Failure to give this notice shall not affect the validity of any rule.

(2) The agency shall file with the Secretary of State a certified copy of the temporary rule and a copy of the statement required by ORS 183.335(5).

(3) A temporary rule is effective for 180 days, unless a shorter period is specified in the temporary rule.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.335(5), 183.341(1), 183.355 & Or. Laws 1993, Ch. 729 §6

Hist.: IAG 14, f. & ef. 10-22-75; IAG 17, f. & ef. 11-25-77; IAG 4-1979, f. & ef. 12-3-79; IAG 1-1981, f. & ef. 11-17-81; JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 7-1995, f. 8-25-95, cert. ef. 1-1-96

137-001-0085

Periodic Rule Review

(1) Pursuant to ORS 183.545, the agency shall review and analyze all of its rules at least once every three years, including rules reviewed during prior reviews and rules adopted after the last review.

(2) As part of the review the agency shall invite public comment upon the rules and shall give notice of the review in accordance with ORS 183.335(1).

(3) The notice shall identify the rules under review by rule or division number and subject matter. It shall state that the agency invites written comments concerning the continued need for the rule; the complexity of the rule; the extent to which the rule duplicates, overlaps, or conflicts with other state rules, federal regulations, and local government regulations; the degree to which technology, economic conditions, or other factors have changed in the subject area affected by the rule; the rule's potential for enhancement of job-producing enterprises; and the legal basis for the rule.

(4) The notice shall state the date by which written comments must be received by the agency

and the address to which the comments should be sent.

(5) If the agency provides a public hearing to receive oral comments on the rules, the notice shall include the time and place of the hearing.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1), 183.545, 183.550; Or Laws 1992, Ch. 15 and Or Laws 1995, Ch. 535

Hist.: 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91

DIVISION 2

UNIFORM RULES OF PROCEDURE APPLICABLE TO PROCEEDINGS FOR AGENCY DECLARATORY RULINGS

[ED. NOTE: OAR 137-02-010 to 137-02-060 were adopted by the Attorney General as required by ORS 183.410. Agencies must apply these rules without further adoption or amendment.]

137-002-0010

Petition for Declaratory Ruling

The petition to initiate proceedings for declaratory rulings shall contain:

(1) The rule or statute that may apply to the person, property, or state of facts;

(2) A detailed statement of the relevant facts; including sufficient facts to show petitioner's interest;

(3) All propositions of law or contentions asserted by petitioner;

(4) The questions presented;

(5) The specific relief requested; and

(6) The name and address of petitioner and of any other person known by petitioner to be interested in the requested declaratory ruling.

Stat. Auth.: ORS Ch. 183

Stats. Implemented: ORS 183.410

Hist.: 1AG 14, f. & ef. 10-22-75; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89

137-002-0020

Service of Declaratory Ruling Petition

(1) The petition shall be deemed filed when received by the agency.

(2) Within 60 days after the petition is filed the agency shall notify the petitioner in writing whether it will issue a ruling. If the agency decides to issue a ruling, it shall serve all persons named in the petition by mailing:

(a) A copy of the petition together with a copy of the agency's rules of practice; and

(b) Notice of any proceeding including the hearing at which the petition will be considered. (See OAR 137-002-0030 for contents of notice.)

(3) Notwithstanding section (2) of this rule, the agency may decide at any time that it will not issue a declaratory ruling in any specific instance. The agency shall notify the petitioner in writing when the agency decides not to issue a declaratory ruling.

Stat. Auth.: ORS Ch. 183

Stats. Implemented: ORS 183.410

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 17, f. & ef. 11-25-77; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89

137-002-0025

Intervention in Declaratory Rulings

(1) Any person or entity may petition the agency for permission to participate in the proceeding as a party.

(2) The petition for intervention shall be in writing and shall contain:

(a) The rule or statute that may apply to the person, property, or state of facts;

(b) A statement of facts sufficient to show the intervenor's

interest;

(c) A statement that the intervenor accepts the petitioner's statement of facts for purposes of the declaratory ruling;

(d) All propositions of law or contentions asserted by the intervenor;

(e) A statement that the intervenor accepts the petitioner's statement of the questions presented or a statement of the questions presented by the intervenor;

(f) A statement of the specific relief requested.

(3) The agency may, in its discretion, invite any person or entity to file a petition for intervention.

(4) The agency, in its discretion, may grant or deny any petition for intervention. If a petition for intervention is granted, the status of the intervenor(s) shall be the same as that of an original petitioner, i.e. the declaratory ruling, if any, issued by the agency shall be binding between the intervenor and the agency on the facts stated in the petition, subject to review as provided in ORS 183.410

(5) The decision to grant or deny a petition for intervention shall be in writing and shall be served on all parties.

Stat. Auth.: ORS Ch. 183.410

Stats. Implemented: ORS 183.410

Hist.: JD 5-1989, f. 10-5-89, cert. ef. 10-15-89; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95

137-002-0030

Notice of Declaratory Ruling Hearing

The notice of hearing for a declaratory ruling shall:

(1) Be accompanied by a copy of the petition requesting the declaratory ruling and by a copy of any petition for intervention if copies of these petitions have not previously been served on the party;

(2) Set forth the time and place of the proceeding; and

(3) Identify the presiding officer.

Stat. Auth.: ORS Ch. 183

Stats. Implemented: ORS 183.410

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89

137-002-0040

Declaratory Ruling Procedure

(1) The proceeding shall be conducted by and shall be under the control of the presiding officer. The presiding officer may be the chief administrative officer of the agency, a member of its governing body or any other person designated by the agency.

(2) No testimony or other evidence shall be accepted at the hearing. The petition will be decided on the facts stated in the petition, except that the presiding officer may agree to accept, for consideration by the agency, a statement of alternative facts if such a statement has been stipulated to in writing by all parties to the proceeding, including any intervening parties.

(3) The parties and agency staff shall have the right to present oral argument. The presiding officer may impose reasonable time limits on the time allowed for oral argument. The parties and agency staff may file briefs in support of their respective positions. The presiding officer shall fix the time and order of filing briefs and may direct that the briefs be submitted prior to oral argument. The presiding officer may permit the filing of memoranda following the hearing.

(4) The proceeding may be conducted in person or by telephone.

(5) As used in this rule, "telephone" means any two-way electronic communication device.

Stat. Auth.: ORS 183.410

Stats. Implemented: ORS ORS 183.410

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95

137-002-0050

Presiding Officer's Proposed Declaratory Ruling

(1) Except when the presiding officer is the decision maker, the presiding officer shall prepare a proposed declaratory ruling in

accordance with OAR 137-002-0060 for consideration by the decision maker.

(2) When a proposed declaratory ruling is considered by the decision maker, the parties and agency staff shall have the right to present oral argument to the decision maker.

Stat. Auth.: ORS Ch. 183

Stats. Implemented: ORS 183.410

Hist.: IAG 14, f. & ef. 10-22-75; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89

137-002-0060

Issuance of Declaratory Ruling

(1) The agency shall issue its declaratory ruling within 60 days of the close of the record.

(2) The ruling shall be in writing and shall include:

(a) The facts upon which the ruling is based;

(b) The statute or rule in issue;

(c) The agency's conclusion as to the applicability of the statute or rule to those facts;

(d) The agency's conclusion as to the legal effect or result of applying the statute or rule to those facts;

(e) The reasons relied upon by the agency to support its conclusions;

(f) A statement that under ORS 183.480 the parties may obtain judicial review by filing a petition with the Court of Appeals within 60 days from the date the declaratory ruling is served.

(3) The ruling shall be served by mailing a copy to the parties.

Stat. Auth.: ORS Ch. 183

Stats. Implemented: ORS 183.410

Hist.: IAG 14, f. & ef. 10-22-75; IAG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89

DIVISION 3

MODEL RULES OF PROCEDURE APPLICABLE TO CONTESTED CASES

137-003-0001

Contested Case Notice

(1) In addition to the requirement of ORS 183.415(2), a contested case notice may include a statement that the record of the proceeding to date, including, information in the agency file or files on the subject of the contested case, automatically become part of the contested case record upon default for the purpose of proving a prima facie case.

(2) The contested case notice shall include a statement that if a request for hearing is not received by the agency within the time stated in the notice, the person shall have waived the right to a hearing under ORS Chapter 183, except as provided in OAR 137-003-0075(4).

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1), 183.413 & 183.415(6)

Hist.: IAG 14, f. & ef. 10-22-75; IAG 17, f. & ef. 11-25-77; IAG 4-1979, f. & ef. 12-3-79; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0002

Rights of Parties in Contested Cases

(1) In addition to the information required to be given under ORS 183.413(2) and 183.415(7), before commencement of a contested case hearing, the agency shall inform a party, if the party is an agency, corporation, or an unincorporated association, that such party must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise.

(2) Except as otherwise required by ORS 183.415(7), the information referred to in section (1) of this rule may be given in writing or orally before the commencement of the hearing.

(3) Upon the agreement of the agency and the parties, and unless otherwise precluded by law, alternative methods of dispute

resolution may be used in contested case matter. Such alternative methods of resolution may include non-binding arbitration, modified contested case proceedings, nonrecord abbreviated hearings or any collaborative method designed to encourage the agency and the parties to work together to develop a mutually agreeable solution, such as negotiation, mediation, use of a neutral facilitator or settlement conferences, but may not include binding arbitration.

(4) Final disposition of contested cases may be by a final hearing order or, unless precluded by law, by stipulation, agreed settlement, consent order or final order by default. Informal settlement may be made in license revocation proceedings by written agreement of the parties and the agency consenting to a suspension, fine or other form of intermediate sanction.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 9.320, 183.341(1), 183.413, 183.415 & 183.502

Hist.: IAG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95

137-003-0003

Late Filing

(1) Unless otherwise provided by law, when a person fails to file any document within the time specified by agency rules or these model rules of procedure, the late filing may be accepted if the agency or presiding officer determines that the cause for failure to file the document timely was beyond the reasonable control of the party.

(2) The agency may require a statement explaining the reasons for the late filing.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1)

Hist.: JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0005

Participation as Party or Limited Party

(1) When an agency gives notice that it intends to hold a contested case hearing, persons who have an interest in the outcome of the agency's proceeding or who represent a public interest in such result may request to participate as parties or limited parties.

(2) A person requesting to participate as a party or limited party shall file a petition with the agency at least 21 days before the date set for the hearing and shall include a sufficient number of copies of the petition for service on all parties. Petitions untimely filed shall not be considered unless the agency determines that good cause has been shown for failure to file timely.

(3) The petition shall include the following:

(a) Names and addresses of the petitioner and of any organization the petitioner represents;

(b) Name and address of the petitioner's attorney, if any;

(c) A statement of whether the request is for participation as a party or a limited party, and, if as a limited party, the precise area or areas in which participation is sought;

(d) If the petitioner seeks to protect a personal interest in the outcome of the agency's proceeding, a detailed statement of the petitioner's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding;

(e) If the petitioner seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the petitioner's qualifications to represent such public interest;

(f) A statement of the reasons why existing parties to the proceeding cannot adequately represent the interest identified in subsection (3)(d) or (e) of this rule.

(4) The agency shall serve a copy of the petition on each party personally or by mail. Each party shall have seven days from the date of personal service or agency mailing to file a response to the petition.

(5) If the agency determines under OAR 137-003-0003 that good cause has been shown for failure to file a timely petition, the

agency at its discretion may:

(a) Shorten the time within which answers to the petition shall be filed; or

(b) Postpone the hearing until disposition is made of the petition.

(6) If a person is granted participation as a party or a limited party, the agency may postpone or continue the hearing to a later date if necessary to avoid an undue burden to one or more of the parties in the case.

(7) In ruling on petitions to participate as a party or a limited party, the agency shall consider:

(a) Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding;

(b) Whether any such affected interest is within the scope of the agency's jurisdiction and within the scope of the notice of contested case hearing;

(c) When a public interest is alleged, the qualifications of the petitioner to represent that interest;

(d) The extent to which the petitioner's interest will be represented by existing parties.

(8) A petition to participate as a party may be treated as a petition to participate as a limited party.

(9) If the agency grants a petition, the agency shall specify areas of participation and procedural limitations as it deems appropriate.

(10) An agency ruling on a petition to participate as a party or as a limited party shall be by written order and served promptly on the petitioner and all parties. If the petition is allowed, the agency shall also serve petitioner with the notice of rights required by ORS 183.413(2).

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1), 183.415(4) & 183.450(3)

Hist.: IAG 17, f. & ef. 11-25-77; IAG 4-1979, f. & ef. 12-3-79; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0007

Agency Participation as Interested Agency or Party

(1) When an agency gives notice that it intends to hold a contested case hearing, it may also notify the parties that it intends to name any other agency that has an interest in the outcome of that proceeding as a party or as an interested agency, either on its own initiative or upon request by that other agency.

(2) Each party shall have seven days from the date of personal service or mailing of the notice to file objections.

(3) The agency decision to name an agency as a party of as an interested agency shall be by written order and served promptly on the parties and the named agency.

(4) An agency named as a party or as an interested agency has the same procedural rights and shall be given the same notices as any party in the proceeding. An interested agency, unlike a party, has no right to judicial review.

(5) An agency may not be named as a party under this rule without written authorization of the Attorney General.

Stat. Auth.: ORS Ch. 180, 183.341 & 183.390

Stats. Implemented: ORS 180.060, 180.220, 183.341(1) & 183.415(4)

Hist.: JD 2-1986, f. & ef. 1-27-86; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0008

Authorized Representative in Designated Agencies

(1) For purposes of this rule, the following words and phrases have the following meaning:

(a) "Agency" means State Landscape Contractors Board, Office of Energy and the Energy Facility Siting Council, Environmental Quality Commission and the Department of Environmental Quality; Insurance Division of the Department of Consumer and Business Services for proceedings in which an insured appears pursuant to ORS 737.505; the State Fire Marshal in the Department of State Police; Division of State Lands for proceedings regarding the issuance or denial of fill or removal permits under ORS 541.605 to 541.685; Public Utility Commission and the Water Resources Department; Land

Conservation and Development Commission and the Department of Land Conservation and Development; and State Department of Agriculture for purposes of hearings under ORS 215.705;

(b) "Authorized Representative" means a member of a partnership, an authorized officer or regular employee of a corporation, association or organized group, or an authorized officer or employee of a governmental authority other than a state agency;

(c) "Legal Argument" includes arguments on:

(A) The jurisdiction of the agency to hear the contested case;

(B) The constitutionality of a statute or rule of the application of a constitutional requirement to an agency;

(C) The application of court precedent to the facts of the particular contested case proceeding.

(d) "Legal Argument" does not include presentation of evidence, examination and cross-examination of witnesses or presentation of factual arguments or arguments on:

(A) The application of the facts to the statutes or rules directly applicable to the issues in the contested case;

(B) Comparison of prior actions of the agency in handling similar situations;

(C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case;

(D) The admissibility of evidence or the correctness of procedures being followed.

(2) A party or limited party participating in a contested case hearing before an agency listed in subsection (1)(a) of this rule may be represented by an authorized representative as provided in this rule if the agency has by rule specified that authorized representatives may appear in the type of contested case hearing involved.

(3) Before appearing in the case, an authorized representative must provide the presiding officer with a letter authorizing the named representative to appear on behalf of a party or limited party.

(4) The presiding officer may limit an authorized representative's presentation of evidence, examination and cross-examination of witnesses, or presentation of factual arguments to insure the orderly and timely development of the hearing records, and shall not allow an authorized representative to present legal argument as defined in subsection (1)(c) of this rule.

(5) When an authorized representative is presenting a party or limited party in a hearing, the presiding officer shall advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver or the duty to make timely objection. Where such objections may involve legal argument as defined in this rule, the presiding officer shall provide reasonable opportunity for the authorized representative to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after conclusion of the hearing.

Stat. Auth.: ORS 183.457

Stats. Implemented: ORS 183.341(1) & 183.457

Hist.: JD 4-1987(Temp), f. & ef. 7-22-87; JD 1-1988, f. & cert. ef. 3-3-88; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95

137-003-0010

Emergency License Suspension, Refusal to Renew

(1) If the agency finds there is a serious danger to the public health or safety, it may immediately suspend or refuse to renew a license. For purposes of this rule, such a decision is referred to as an emergency suspension order. An emergency suspension order must be in writing and may be issued without prior notice to the licensee or an opportunity for a hearing as required for contested cases under ORS Chapter 183.

(2)(a) Except where the danger to the public health or safety is so imminent that opportunity for the licensee to object under section (3) of this rule is not practicable as determined by the agency, the agency shall provide the licensee with notice and opportunity to object prior to issuing the emergency suspension order. For purposes of this rule, this notice is referred to as a

presuspension notice;

(b) The presuspension notice shall:

(A) Describe generally the acts of the licensee and the circumstances that would be grounds for revocation, suspension or refusal to renew the license under the agency's usual procedures;

(B) Describe generally the reasons why the acts of the licensee and the circumstances seriously and immediately endanger the public's health or safety;

(C) Identify a person in the agency whom the licensee may contact and who is authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order.

(c) The agency may provide the presuspension notice to the licensee in writing, orally by telephone or in person, or by any other means available to the agency.

(3) Following the presuspension notice, the agency shall provide the licensee an immediate opportunity to respond to the presuspension notice before a person authorized to issue the emergency suspension order or to make recommendations regarding the issuance of the emergency suspension order. An emergency suspension order may be issued anytime thereafter.

(4)(a) When the agency issues an emergency suspension order, the agency shall serve the order on the licensee either personally or by registered or certified mail;

(b) The order shall include the following statements:

(A) Those required under ORS 183.415(2) and (3);

(B) That the licensee has the right to demand a hearing to be held as soon as practicable to contest the emergency suspension order;

(C) That if the demand for hearing is not received by the agency within 90 days of the date of notice of the emergency suspension order the licensee shall have waived its right to a hearing under ORS Chapter 183;

(D) The effective date of the emergency suspension order;

(E) Findings of the specific acts or omissions of the licensee that are grounds for revocation, suspension or refusal to renew the license, and the reasons these acts or omissions seriously and immediately endanger the public's health or safety; and

(F) That the agency may combine the hearing on the emergency suspension order with any other agency proceeding affecting the license. The procedures for a combined proceeding shall be those applicable to the other proceeding affecting the license.

(5)(a) If timely requested by the licensee, the agency shall hold a hearing on the emergency suspension order as soon as practicable;

(b) At the hearing, the agency shall consider the facts and circumstances including, but not limited to:

(A) Whether the acts or omissions of the licensee pose a serious danger to the public's health or safety; and

(B) Whether circumstances at the time of the hearing justify confirmation, alteration or revocation of the order.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1) & 183.430

Hist.: IAG 14, f. & ef. 10-22-75; IAG 17, f. & ef. 11-25-77; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0025

Discovery in Contested Cases

(1) In its discretion, the agency may order discovery by the agency and any party in appropriate cases. This rule does not require the agency to authorize any discovery. If the agency does authorize discovery, the agency shall control the methods, timing and extent of discovery, but nothing in this rule prevents informal exchanges of information.

(2) Discovery may include but is not limited to one or more of the following:

(a) Depositions;

(b) Disclosure of names and addresses of witnesses expected to testify at the hearing;

(c) Production of documents, which may but need not be limited to documents which the party producing the documents plans to offer as evidence;

(d) Production of objects for inspection or permission to enter upon land to inspect land or other property;

(e) Requests for admissions;

(f) Written interrogatories;

(g) Prehearing conferences, as provided in this rule.

(3) Before requesting a discovery order, a party must seek the discovery through an informal exchange of information.

(4)(a) A party that seeks to take the testimony of a material witness by deposition shall file a written request with the agency. The request shall set forth the name and address of the witness, a showing a materiality of the witness's testimony, an explanation of why a deposition rather than informal or other means of discovery is necessary, and a request that the witness's testimony be taken before an officer named in the request for the purpose of recording testimony;

(b) For all other forms of discovery, a request for a discovery order must be in writing and must include a description of the attempts to obtain the requested discovery informally. The request shall be mailed or delivered to the agency, with a copy to other parties. The agency shall consider any objections by the party from whom discovery is sought.

(5) Any discovery request must be reasonably likely to produce information that is generally relevant to the case. If the relevance of the requested discovery is not apparent, the agency may require the party requesting discovery to explain how the request is likely to produce relevant information. If the request appears to be unduly burdensome, the agency may require an explanation of why the requested information is necessary or is likely to facilitate resolution of the case.

(6) The agency shall issue an order granting or denying a discovery request in whole or in part.

(7) Only the agency may issue subpoenas in support of discovery. The agency may apply to the circuit court to compel obedience to a subpoena.

(8) The presiding officer may refuse to admit evidence which has not been disclosed in response to a discovery order, unless the party that failed to provide discovery offers a satisfactory reason for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the presiding officer admits evidence which was not disclosed as ordered, the presiding officer may grant a continuance to allow an opportunity for the agency or other party to respond.

(9) The agency may delegate its authority to order and control discovery to a presiding officer. The delegation must be in writing, and it may be limited to specified forms of discovery.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1) & 183.425

Hist.: JD 7-1991, f. & cert. ef. 11-4-91

137-003-0035

Prehearing Conferences

(1) Prior to hearing, the agency may, in its discretion, conduct one or more prehearing conferences to facilitate the conduct and resolution of the case. The agency may convene the conference on its own initiative or at a party's request.

(2) The purposes of a prehearing conference may include, but are not limited to, one or more of the following:

(a) To facilitate discovery and to resolve disagreements about discovery;

(b) To identify, simplify and clarify issues;

(c) To eliminate irrelevant issues;

(d) To obtain stipulations of fact;

(e) To provide to the presiding officer, agency and parties, in advance of the hearing, copies of all documents intended to be offered as evidence at the hearing and the names of all witnesses expected to testify;

(f) To authenticate documents;

(g) To decide the order of proof and other procedural matters pertaining to the conduct of the hearing; and

(h) To discuss settlement or other resolution or partial resolution of the case.

(3) The prehearing conference may be conducted in person or

by telephone.

(4) The agency must make a record of any stipulations, rulings and agreements. The agency may make an audio or stenographic record of the pertinent portions of the conference or may place the substance of stipulations, rulings and agreements in the record by written summary. Stipulations to facts and to the authenticity of documents and agreements to narrow issues shall be binding upon the agency and the parties unless good cause is shown for rescinding a stipulation or agreement. Settlement discussions shall not be made a part of the record, except to the extent that the discussions result in agreement.

(5) After the hearing begins, the presiding officer may at any time recess the hearing to discuss any of the matters listed in section (2) of this rule.

(6) The agency may delegate to the presiding officer the discretion to conduct prehearing conferences.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1), 183.430 & 183.502

Hist.: JD 7-1991, f. & cert. ef. 11-4-91

137-003-0040

Conducting Contested Case Hearing

(1) The contested case hearing shall be conducted by and under the control of the presiding officer. The presiding officer may be the chief administrative officer of the agency, a member of its governing body, or any other person designated by the agency.

(2) If the presiding officer or any decision maker has an actual or potential conflict of interest as defined in ORS 244.020(1) or (7), that officer shall comply with the requirements of ORS Chapter 244 (e.g., ORS 244.120 and 244.130).

(3) The hearing shall be conducted, subject to the discretion of the presiding officer, so as to include the following:

(a) The statement and evidence of the proponent in support of its action;

(b) The statement and evidence of opponents, interested agencies, and other parties; except that limited parties may address only subjects within the area to which they have been limited;

(c) Any rebuttal evidence;

(d) Any closing arguments.

(4) Presiding officers or decision makers, agency representatives, interested agencies, and parties shall have the right to question witnesses. However, limited parties may question only those witnesses whose testimony may relate to the area or areas of participation granted by the agency.

(5) The hearing may be continued with recesses as determined by the presiding officer.

(6) The presiding officer may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious, or immaterial matter.

(7) Exhibits shall be marked and maintained by the agency as part of the record of the proceedings.

(8) If the presiding officer or any decision maker receives any written or oral ex parte communication on a fact in issue during the contested case proceeding, that person shall notify all parties and otherwise comply with the requirements of OAR 137-003-0055.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341(1), 183.415(9) & 183.462

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 4-1979, f. & ef. 12-3-79; JD 2-1986, f. & ef. 1-27-86; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1995, f. 8-25-95, cert. ef. 9-9-95

137-003-0045

Telephone Hearings

(1) Unless precluded by law, the agency may, in its discretion, hold a hearing or portion of a hearing by telephone. Nothing in this rule precludes an agency from allowing some parties or witnesses to attend by telephone while others attend in person.

(2) The agency may direct that a hearing be held by telephone upon request or on its own motion.

(3) The agency must make an audio or stenographic record of any telephone hearing.

(4) Prior to commencement of an evidentiary hearing that is held by telephone, each party shall provide to all other parties and to the agency copies of documentary evidence that it will seek to introduce into the record.

(5) Nothing in this rule precludes any party from seeking to introduce documentary evidence in addition to evidence described in section (4) of this rule during the telephone hearing and the presiding officer shall receive such evidence, subject to the applicable rules of evidence, if inclusion of the evidence in the record is necessary to conduct a full and fair hearing. If any evidence introduced during the hearing has not previously been provided to the agency and to the other parties, the hearing may be continued upon the request of any party or the agency for sufficient time to allow the party or the agency to obtain and review the evidence.

(6) The agency may delegate to the presiding officer the discretion to rule on issues raised under this rule.

(7) As used in this rule, "telephone" means any two-way electronic communication device.

Stat. Auth.: ORS 183.341, 183.390 & 192.445

Stats. Implemented: ORS 183.341(1)

Hist.: JD 6-1993, f. 11-1-93, cert. ef. 11-4-93

137-003-0050

Evidentiary Rules

(1) Evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible.

(2) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded.

(3) All offered evidence, not objected to, will be received by the presiding officer subject to the officer's power to exclude irrelevant, immaterial, or unduly repetitious matter.

(4) Evidence objected to may be received by the presiding officer. Rulings on its admissibility or exclusion, if not made at the hearing, shall be made on the record at or before the time a final order is issued.

(5) The presiding officer shall accept an offer of proof made for excluded evidence. The offer of proof shall contain sufficient detail to allow the reviewing agency or court to determine whether the evidence was properly excluded. The presiding officer shall have discretion to decide whether the offer of proof is to be oral or written and at what stage in the proceeding it will be made. The presiding officer may place reasonable limits on the offer of proof, including the time to be devoted to an oral offer or the number of pages in a written offer.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1), 183.415(11) & 183.450

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 17, f. & ef. 11-25-77; 1AG 4-1979, f. & ef. 12-3-79; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0055

Ex Parte Communications

(1) An ex parte communication is an oral or written communication to an agency decision maker or the presiding officer not made in the presence of all parties to the hearing, concerning a fact in issue in the proceeding, but does not include communication from agency staff or counsel about facts in the record.

(2) If an agency decision maker or presiding officer receives an ex parte communication during the pendency of the proceeding, the officer shall:

(a) Give all parties notice of the substance of the communication, if oral, or a copy of the communication, if written; and

(b) Provide any party who did not present the ex parte communication an opportunity to rebut the substance of the ex parte communication at the hearing, at a separate hearing for the limited purpose of receiving evidence relating to the ex parte

communication, or in writing.

(3) The agency's record of a contested case proceeding shall include:

- (a) The ex parte communication, if in writing;
- (b) A statement of the substance of the ex parte communication, if oral;
- (c) The agency or presiding officer's notice to the parties of the ex parte communication; and
- (d) Rebuttal evidence.

Stat. Auth.: ORS Ch. 183

Stats. Implemented: ORS 173.341(1), 183.415(9) & 183.462

Hist.: JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88

Contested Cases - Orders and Default Orders - Rehearing and Reconsideration

137-003-0060

Proposed Orders in Contested Cases, Filing Exceptions

(1) If a majority of the officials who are to render the final order in a contested case have neither attended the hearing nor reviewed and considered the record, and the order is adverse to a party, a proposed order including findings of fact and conclusions of law shall be served upon the parties.

(2) When the agency serves a proposed order on the parties, the agency shall at the same time or at a later date notify the parties:

(a) When written exceptions must be filed to be considered by the agency; and

(b) When and in what form argument may be made to the officials who will render the final order.

(3) The agency, after receiving exceptions and argument, may adopt the proposed order or prepare a new order.

(4) Nothing in this rule prohibits the staff of a non-party agency from commenting on the proposed order.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1), 183.460 & 183.464

Hist.: IAG 14, f. & ef. 10-22-75; IAG 17, f. & ef. 11-25-75; IAG 4-1979, f. & ef. 12-3-79; IAG 1-1981, f. & ef. 11-17-81; JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0070

Final Orders in Contested Cases

(1) Final orders on contested cases shall be in writing and shall include the following:

(a) Rulings on admissibility of offered evidence when the rulings are not set forth in the record;

(b) Findings of fact — Those matters that are either agreed as fact or that, when disputed, are determined by the fact finder, on substantial evidence to be facts over contentions to the contrary. A finding must be made on each fact necessary to reach the conclusions of law on which the order is based;

(c) Conclusion(s) of law — Applications of the controlling law to the facts found and the legal results arising therefrom;

(d) Order — The action taken by the agency as a result of the facts found and the legal conclusions arising therefrom;

(e) A citation of the statutes under which the order may be appealed.

(2) The date of service of the order to the parties shall be specified in writing and be part of or be attached to the order on file with the agency, unless service of the final order is not required by statute.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1) & 183.470

Hist.: IAG 14, f. & ef. 10-22-75; IAG 4-1979, f. & ef. 12-3-79; IAG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0075

Final Orders by Default

(1) The agency may issue a final order by default:

(a) When the agency has given a party an opportunity to request a hearing and the party fails to make a request within a specified time;

(b) When the party withdraws a request for a hearing;

(c) When the agency has scheduled a hearing and the party fails to appear at the specified time and place; or

(d) When the agency has scheduled a hearing in a matter in which only one party is before the agency and that party subsequently notifies the agency that the party will not appear at the specified time and place, unless the agency has agreed to reschedule the hearing.

(2) The agency may issue a final order by default only after making a prima facie case on the record. The record shall be made at a scheduled hearing on the matter or, if the hearing is cancelled or not held, at an agency meeting or at the time the final order by default is issued, unless the agency designates the agency file as the record at the time the contested case notice is issued in accordance with OAR 137-003-0001(1).

(3) The record may consist of oral (transcribed, recorded or reported) or written evidence or a combination of oral and written evidence. In all cases, the record must contain evidence that persuades the decision maker of the existence of facts necessary to support the order.

(4)(a) When a party requests a hearing after the time specified by the agency, but 70 days or less after the agency has entered a final order by default, the agency may grant the request only if the cause for failure to timely request the hearing was beyond the reasonable control of the party, unless other applicable law provides a different standard. The agency may require the request to be supported by an affidavit and may conduct such further inquiry, including holding a hearing, as it deems appropriate;

(b) If a final order by default has already been entered, the party requesting the hearing shall deliver or mail within a reasonable time a copy of the hearing request to all persons and agencies required by statute, rule, or order to receive notice of the proceeding;

(c) If the hearing request is allowed by the agency, it shall enter an order granting the request and schedule a hearing in due course. If the request is denied, the agency shall enter an order setting forth its reasons for the denial.

(5) The agency shall notify a defaulting party of the entry of a final order by default by delivering or mailing a copy of the order. If the contested case notice contained an order that was to become effective unless the party requested a hearing, and designated the agency file as the record, that order becomes a final order by default if no hearing is requested, and no further order need be served upon the party.

Stat. Auth.: ORS 183.341, 183.390 & 192.445

Stats. Implemented: ORS 183.341(1), 183.415(6) & 183.470

Hist.: JD 2-1986, f. & ef. 1-27-86; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93

137-003-0080

Reconsideration and Rehearing — Contested Cases

(1) A party may file a petition for reconsideration or rehearing of a final order in a contested case with the agency within 60 days after the order is served. A copy of the petition shall also be delivered or mailed to all parties and other persons and agencies required by statute, rule, or order to receive notice of the proceeding.

(2) The petition shall set forth the specific grounds for reconsideration or rehearing. The petition may be supported by a written argument.

(3) A rehearing may be limited by the agency to specific matters.

(4) The petition may include a request for stay of a final order if the petition complies with the requirements of OAR 137-003-0090(2).

(5) The agency may consider a petition for reconsideration or rehearing as a request for either or both. The petition may be granted or denied by summary order and, if no action is taken, shall be deemed denied as provided in ORS 183.482.

(6) Within 60 days after the order is served, the agency may, on its own initiative, reconsider the final order or rehear the case. The procedural and substantive effect of reconsideration or

rehearing under this section shall be identical to the effect of granting a party's petition for reconsideration or rehearing.

(7) Reconsideration or rehearing shall not be granted after the filing of a petition for judicial review, except in the manner provided by ORS 183.482(6).

(8) A final order remains in effect during reconsideration or rehearing until stayed or changed.

(9) Following reconsideration or rehearing, the agency shall enter a new order, which may be an order affirming the existing order.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1) & 183.482(1),(3)

Hist.: 1AG 14, f. & ef. 10-22-75; 1AG 17, f. & ef. 11-25-77; 1AG 1-1981, f. & ef. 11-17-81; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91

Contested Cases — Stay Proceedings

137-003-0090

Stay Request

(1) Any person who petitions for reconsideration, rehearing or judicial review may request the agency to stay the enforcement of the agency order that is the subject of the petition.

(2) The stay request shall contain:

(a) The name, address and telephone number of the person filing the request and of that person's attorney, if any;

(b) The full title of the agency decision as it appears on the order and the date of the agency decision;

(c) A summary of the agency decision; and

(d) The name, address, and telephone number of each other party to the agency proceeding. When the party was represented by an attorney in the proceeding, then the name, address, and telephone number of the attorney shall be provided and the address and telephone number of the party may be omitted;

(e) A statement advising all persons whose names, addresses and telephone numbers are required to appear in the stay request as provided in subsection (2)(d) of this rule, that they may participate in the stay proceeding before the agency if they file a response in accordance with OAR 137-003-0091 within ten days from delivery or mailing of the stay request to the agency;

(f) A statement of facts and reasons sufficient to show that the stay request should be granted because:

(A) The petitioner will suffer irreparable injury if the order is not stayed;

(B) There is a colorable claim of error in the order; and

(C) Granting the stay will not result in substantial public harm.

(g) A statement identifying any person, including the public, who may suffer injury if the stay is granted. If the purposes of the stay can be achieved with limitations or conditions that minimize or eliminate possible injury to other persons, petitioner shall propose such limitations or conditions. If the possibility of injury to other persons cannot be eliminated or minimized by appropriate limitation or conditions, petitioner shall propose an amount of bond, irrevocable letter of credit or other undertaking to be imposed on the petitioner should the stay be granted, explaining why that amount is reasonable in light of the identified potential injuries;

(h) A description of additional procedures, if any, the petitioner believes should be followed by the agency in determining the appropriateness of the stay request;

(i) In a request for a stay of an order in a contested case, an appendix of affidavits containing evidence (other than evidence contained in the record of the contested case out of which the stay request arose) relied upon in support of the statements required under subsections (2)(f) and (g) of this rule. The record of the contested case out of which the stay request arose is a part of the record of the stay proceedings;

(j) In a request for stay of an order in other than a contested case, an appendix containing evidence relied upon in support of the statement required under subsections (2)(f) and (g) of this rule.

(3) The request must be delivered or mailed to the agency and on the same date a copy delivered or mailed to all parties

identified in the request as required by subsection (2)(d) of this rule.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1) & 183.482(3)

Hist.: JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86; JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0091

Intervention in Stay Proceeding

(1) Any party identified under OAR 137-003-0090(2)(d) desiring to participate as a party in the stay proceeding may file a response to the request for stay.

(2) The response shall contain:

(a) The full title of the agency decision as it appears on the order;

(b) The name, address, and telephone number of the person filing the response, except that if the person is represented by an attorney, then the name, address, and telephone number of the attorney shall be included and the person's address and telephone number may be deleted;

(c) A statement accepting or denying each of the statements of facts and reasons provided pursuant to OAR 137-003-0090(2)(f) in the petitioner's stay request;

(d) A statement accepting, rejecting, or proposing alternatives to the petitioner's statement on the bond, irrevocable letter of credit or undertaking amount or other reasonable conditions that should be imposed on petitioner should the stay request be granted.

(3) The response may contain affidavits containing additional evidence upon which the party relies in support of the statement required under subsections (2)(c) and (d) of this rule.

(4) The response must be delivered or mailed to the agency and to all parties identified in the stay request within ten days of the date of delivery or mailing to the agency of the stay request.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1) & 183.482(3)

Hist.: JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86; JD 7-1991, f. & cert. ef. 11-4-91

137-003-0092

Stay Proceeding and Order

(1) The agency may conduct such further proceedings pertaining to the stay request as it deems desirable. The agency shall commence such proceedings promptly after receiving the stay request.

(2) The agency shall issue an order granting or denying the stay request within 30 days after receiving it. The agency's order shall:

(a) Grant the stay request upon findings of irreparable injury to the petitioner and a colorable claim of error in the agency order and may impose reasonable conditions, including but not limited to, a bond, irrevocable letter of credit or other undertaking and that the petitioner file all documents necessary to bring the matter to issue before the Court of Appeals within a specified reasonable period of time; or

(b) Deny the stay request upon a finding that the petitioner failed to show irreparable injury or a colorable claim of error in the agency order; or

(c) Deny the stay request upon a finding that a specified substantial public harm would result from granting the stay, notwithstanding the petitioner's showing of irreparable injury and a colorable claim of error in the agency order; or

(d) Grant or deny the stay request as otherwise required by law.

(3) Nothing in OAR 137-003-0055 or in 137-003-0090 to 137-003-0092 prevents an agency from receiving evidence from agency staff concerning the stay request. Such evidence shall be presented by affidavit within the time limits imposed by OAR 137-003-0091(4). If there are further proceedings pursuant to section (1) of this rule, the agency staff may present additional evidence in the same manner that parties are permitted to present additional evidence.

Stat. Auth.: ORS 183.341 & 183.390

Stats. Implemented: ORS 183.341(1) & 183.482(3)
Hist.: JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86; JD 1-1988, f. & cert. ef. 3-3-88; JD 7-1991, f. & cert. ef. 11-4-91

DIVISION 4

MODEL RULES OF PROCEDURE APPLICABLE TO MISCELLANEOUS PROVISIONS

137-004-0000

Existing Rules Repealed

All existing Model Rules heretofore adopted are repealed. Such repeal, however, does not affect nor impair any act done, right acquired, or duty imposed prior to the effective date of these rules.

Stat. Auth.: ORS Ch. 183
Stats. Implemented: ORS 183.341(1)
Hist.: IAG 14, f. & ef. 10-22-75

137-004-0010

Unacceptable Conduct

A presiding officer may expel a person from an agency proceeding if that person engages in conduct that disrupts the proceeding.

Stat. Auth.: ORS Ch. 183
Stats. Implemented: ORS 183.341(1)
Hist.: IAG 1-1981, f. & ef. 11-17-81; JD 6-1983, f. 9-23-83, ef. 9-26-83; JD 2-1986, f. & ef. 1-27-86

137-004-0080

Reconsideration — Orders in Other Than Contested Case

(1) A person entitled to judicial review under ORS 183.484 of a final order in other than a contested may file a petition for reconsideration of a final order in other than a contested case with the agency within 60 days after the date of the order. A copy of the petition shall also be delivered or mailed to all other persons and agencies required by statute or rule to be notified.

(2) The petition shall set forth the specific grounds for reconsideration. The petition may be supported by a written argument.

(3) The petition may include a request for a stay of a final order if the petition complies with the requirements of OAR 137-003-0090(2).

(4) The petition may be granted or denied by summary order, and, if no action is taken, shall be deemed denied as provided by ORS 183.484(2).

(5) Within 60 days after the date of the order, the agency may, on its own initiative, reconsider the final order. The procedural and substantive effect of granting reconsideration under this section shall be identical to the effect of granting a party's petition for reconsideration.

(6) Reconsideration shall not be granted after the filing of a petition for judicial review, unless permitted by the court.

(7) A final order remains in effect during reconsideration until stayed or changed.

(8) Following reconsideration, the agency shall enter a new order, which may be an order affirming the existing order.

Stat. Auth.: ORS 183.341, 183.390 & 192.445
Stats. Implemented: ORS
Hist.: JD 5-1989, f. 10-6-89, cert. ef. 10-15-89; JD 7-1991, f. & cert. ef. 11-4-91; JD 6-1993, f. 11-1-93, cert. ef. 11-4-93

137-004-0100

Public Records Exemption for Home Address

(1) An individual may request that a public body not disclose the information in a specified public record that indicates the home address or personal telephone number of the individual. If the individual demonstrates to the satisfaction of the public body that the personal safety of the individual or the personal safety of a family member residing with the individual is in danger if the home address or personal telephone number remains available for public inspection, the public body shall not disclose that

information from the specified public record, except in compliance with a court order, to a law enforcement agency at the request of the law enforcement agency, or with the consent of the individual.

(2) A request under section (1) of this rule shall be submitted to the custodian of public records for the public record that is the subject of the request. The request shall be in writing, signed by the requestor, and shall include:

(a) The name or a description of the public record sufficient to identify the record;

(b) Mailing address for the requestor;

(c) Evidence sufficient to establish to the satisfaction of the public body that disclosure of the requestor's home address or personal telephone number would constitute a danger to the personal safety of the requestor or of a family member residing with the requestor. Such evidence may include copies of the following documents:

(A) An affidavit, medical records, police reports or court records showing that the requestor or a family member residing with the requestor has been a victim of domestic violence;

(B) A citation or an order issued under ORS 133.055 for the protection of the requestor or a family member residing with the requestor;

(C) An affidavit or police reports showing that a law enforcement officer has been contacted concerning domestic violence, other physical abuse or threatening or harassing letters or telephone calls directed at the requestor or a family member residing with the requestor;

(D) A temporary restraining order or other no-contact order to protect the requestor or a family member residing with the requestor from future physical abuse;

(E) Court records showing that criminal or civil legal proceedings have been filed regarding physical protection for the requestor or a family member residing with the requestor;

(F) A citation or a court's stalking protective order pursuant to Chapter 626, Oregon Laws 1993 (SB 833) ORS 163.735 or 163.738, obtained for the protection of the requestor or a family member residing with the requestor;

(G) An affidavit or police reports showing that the requestor or a family member residing with the requestor has been a victim of a person convicted of the crime of stalking, of violating a court's stalking protective order;

(H) A conditional release agreement issued under ORS 135.250 - 135.260 providing protection for the requestor or a family member residing with the requestor;

(I) A protective order issued pursuant to ORS 135.873 or 135.970 protecting the identity or place or residence of the requestor or a family member residing with the requestor;

(J) An affidavit from a district attorney or deputy district attorney stating that the requestor or a family member residing with the requestor is scheduled to testify or has testified as a witness at a criminal trial, grand jury hearing or preliminary hearing and that such testimony places the personal safety of the witness in danger;

(K) A court order stating that the requestor or a family member residing with the requestor is or has been a party, juror, judge, attorney or involved in some other capacity in a trial, grand jury proceeding or other court proceeding and that such involvement places the personal safety of that individual in danger; or

(L) Such other documentary evidence that establishes to the satisfaction of the public body that disclosure of the requestor's home address or personal telephone number would constitute a danger to the personal safety of the requestor or of a family member residing with the requestor.

(3) A public body receiving a request under this rule promptly shall review the request and notify the requestor, in writing, whether the evidence submitted is sufficient to demonstrate to the satisfaction of the public body that the personal safety of the requestor or of a family member residing with the requestor would be in danger if the home address or personal telephone number remains available for public inspection. The public body may request that the requestor submit additional

information concerning the request.

(4) If a public body grants the request for exemption with respect to records other than a voter registration record, the public body shall include a statement in its notice to the requestor that:

(a) The exemption shall remain effective for five years from the date the public body received the request, unless the requestor submits a written request for termination of the exemption before the end of the five years; and

(b) The requestor may make a new request for exemption at the end of the five years. If a public body grants the request for exemption with respect to a voter registration record, the public body shall include a statement in its notice to the requestor that:

(A) The exemption shall remain effective until the requestor must update the individual's voter registration, unless the requestor submits a written request for termination of the exemption before that time; and

(B) The requestor may make a new request for exemption from disclosure at that time.

(5) A person who has requested that a public body not disclose his or her home address or personal telephone number may revoke the request by notifying, in writing, the public body to which the request was made that disclosure no longer constitutes a danger to personal safety. The notification shall be signed by the person who submitted the original request for nondisclosure of the home address or personal telephone number.

(6) This rule does not apply to county property and lien records.

(7) As used in this rule:

(a) "Custodian" has the meaning given that term in ORS 192.410(1);

(b) "Public Body" has the same meaning given that phrase in ORS 192.410(3).

Stat. Auth.: ORS 192.445

Stats. Implemented: ORS 192.445

Hist.: JD 6-1993, f. 11-1-93, cert. ef. 11-4-93; JD 8-1995, 8-25-95, cert. ef. 9-9-95

DIVISION 8

PROCEDURAL RULES

137-008-0000

Notice of Proposed Rule

(1) Prior to the adoption, amend-ment, or repeal of any rule, including the Model Rules, the Attorney General shall give notice of the proposed adoption, amendment, or repeal:

(a) In the Secretary of State's Bulletin referred to in ORS 183.3560 at least 21 days before the effective date of the rule;

(b) By mailing a copy of the Notice to persons on the Attorney General's mailing list established pursuant to ORS 183.335(7) at least 28 days before the effective date of the rule;

(c) By mailing or furnishing a copy of the Notice to:

- (A) The Oregon State Bar;
- (B) The Associated Press; and
- (C) The Capitol Press Room.

(2) When the department adopts, amends or repeals rules specifically applicable to one of its programs listed below, notice in addition to that required by section (1) of this rule shall be provided by mailing a copy of the notice to the individual(s) or organization(s) listed in this section for the program:

(a) For the Crime Victims' Compensation Program, to:

- (A) The Workers' Compensation Board;
- (B) Each district attorney in the state; and

(C) Each person on the program's mailing list established pursuant to ORS 183.335(7).

(b) For the Crime Victims Assistance Program to:

(A) Each city attorney that has a certified, comprehensive victims assistance program;

(B) Each district attorney in the state; and

(C) Each person on the program's mailing list established pursuant to ORS 183.335(7).

(c) For the Support Enforcement Division, (child support

program) to:

(A) Oregon Legal Services Corporation;

(B) Multnomah County Legal Aid Service;

(C) Oregon District Attorney's Association;

(D) Each Support Enforcement Division branch office, to be posted in the area most frequently visited by the public;

(E) The Child Support Section of the Department of Human Resources; and

(F) Each person on the Division's mailing list established pursuant to ORS 183.335(7).

(d) For the Charitable Activities Section:

(A) For professional fund raising regulation, to all professional fund raising firms registered pursuant to ORS 128.821;

(B) For charitable organization regulation, to all charitable corporations and trusts registered pursuant to ORS 128.650;

(C) For bingo game regulation, to all bingo licensees licensed pursuant to ORS 167.118 and 464.250, et seq.;

(D) For raffle game regulation, to all raffle licensees licensed pursuant to ORS 167.118 and 464.250 et seq.; and

(E) Each person on the section's mailing list established pursuant to ORS 183.335(7) for the appropriate program identified in A-D above.

(e) For the Criminal Intelligence Unit, Organized Crime Section, of the Criminal Justice Division:

(A) Each District Attorney in the state;

(B) Each Sheriff in the state;

(C) Each Chief of Police in the state;

(D) The Superintendent of the Oregon State Police; and

(E) Each attendee of the Basic Officer's Intelligence Course conducted by the Criminal Justice Division.

Stat.

Auth.: ORS 183.341(2) & (4), 192.430(2) & 193.440(3)

Stats.

Implemented: ORS 183.341(4)

Hist.:

1AG 13, f. & ef. 10-21-75; JD 3-1983, f. & ef. 6-22-83; JD 8-1983, f. & ef. 11-10-83; JD 7-1989, f. 12-21-89, cert. ef. 12-20-89; JD 6-1994, f. 10-31-94, cert. ef. 11-1-94

137-008-0005

Model Rules of Procedure

Pursuant to ORS 183.341, the Attorney General adopts the Attorney General's Model Rules of Procedure under the Administrative Procedures Act as amended and effective November 4, 1993.

Stat.

Auth.: ORS 183.341(2) & (4), 192.430(2) & 193.440(3)

Stats.

Implemented: ORS 183.341(2), 183.341(4) & 183.390

Hist.:

1AG 5-1979, f. & ef. 12-3-79; JD 7-1989, f. 12-21-89, cert. ef. 12-20-89; JD 6-1994, f. 10-31-94, cert. ef. 11-1-94

137-008-0010

Fees for Public Records and Publications

(1)(a) The Department of Justice may charge a fee reasonably calculated to reimburse the department for costs of providing and conveying copies of public records. The department shall charge 25¢ per page for the first 20 pages and 15¢ per page thereafter to recover the costs of photocopying and normal and reasonable staff time to locate, separate, photocopy and return document(s) to file and to prepare/mail public record(s) to requestors.

(b) "Page" refers to the number of copies produced, either 8 1/2 x 11 or 8 1/2 x 14. Staff will not reduce the copy size or otherwise manipulate records in order to fit additional records on a page, unless staff concludes that it would be the most effective use of their time. Consistent with ORS 192.240, all copies will be double-sided. A double-sided copy consists of two pages. Because of the increased staff time involved in double-sided copying, there is no reduction in the per page fee.

(c) "Normal and reasonable" staff time is 10 minutes or less

percent request.

(2) Additional charges for staff time may be made when responding to record requests that require more than the "normal and reasonable" time for responding to routine record requests. Staff time shall be charged at the department's hourly billing rate, by position, as follows:

- (a) Assistant Attorney General, \$73/hr;
- (b) Paralegal, \$38/hr;
- (c) Law Clerk, \$28/hr;
- (d) General Clerical, \$25/hr;

(e) These charges are for staff time in excess of 10 minutes spent locating, compiling, sorting and reviewing records to prepare them for inspection, as well as all time required to segregate or redact exempt information or to supervise inspection of documents.

(3) The Department shall estimate the costs of making records available for inspection or providing copies of records to requestors. All estimated fees and charges must be paid before public records will be made available for inspection or copies provided.

(4) The Department of Justice may charge a fee reasonably calculated to reimburse the department for costs of department publications, Oregon District Attorney Association publications prepared by the department and other department materials intended for distribution. A listing of such available publications and materials shall be maintained by the Department of Justice librarian. The Department of Justice shall charge the following for its regular publications:

- (a) Attorney General's Administrative Laws Conference Papers, \$30;
- (b) Attorney General's Administrative law Manual and Uniform and Model Rules of Procedure Under the (APA), \$15;
- (c) Attorney General's Model Public Contract Rules Manual, \$15;
- (d) Oregon Attorney General's Public Records and Meetings Manual, \$15;
- (e) Automobile Advertising in Oregon, \$10;
- (f) Agency Administrator's Handbook of Basic Public Law, \$10;
- (g) Attorney General Opinions:
 - (A) Bound Volumes - Volume 20 (1940-42) through Volume 46 (1987-93) including 2-volume index, \$721;
 - (B) Future Bound Volumes, \$65;
 - (C) Slip Opinion Service (yearly), \$60;
 - (D) Letters of Advice Index, 1969-83, \$20;
 - (E) Letters of Advice Index, 1983-88, \$40;
 - (F) Letters of Advice Index, 1988-93, \$40;
 - (G) Future Letters of Advice Indices, \$40.

Stat.

Auth.: ORS 183.341(2) & (4), 192.430(2) & 193.440(3)

Stats.

Implemented: ORS 192.440(3)

Hist.: JD 1-1982, f. & ef. 1-7-82; JD 1-1983(Temp), f. & ef. 5-3-83; JD 7-1983, f. & ef. 11-2-83; JD 4-1984(Temp), f. & ef. 11-7-84; JD 1-1985, f. & ef. 1-23-85; JD 3-1986, f. & ef. 1-27-

86; JD 2-1990, f. & cert. ef. 2-14-90; JD 6-1994, f. 10-31-94, cert. ef. 11-1-94

137-008-0015

Fees for Mailing, Faxing Records

(1) The Department of Justice may charge requestors to recover actual postage costs for mailing of records. When mailing voluminous records or responding to special requests, the department shall charge, in accordance with OAR 137-008-0010(2), for staff time required to prepare the records for mailing, in addition to actual postage.

(2) When faxing records to requestors, the Department of justice shall charge \$5 per page for the first page and \$1 per page thereafter. The department limits the number of pages it will fax to 30 pages.

Stat.

Auth.: ORS 183.341(2) & (4), 192.430(2) & 193.440(3)

Stats.

Implemented: ORS 192.440(3)

Hist.: JD 6-1994, f. 10-31-94, cert. ef. 11-1-94

137-008-0020

Fees for Electronic Reproduction of Records

(1) The Department of Justice shall charge \$25 per hour, with a \$7.50 minimum, for the staff time required to fill public record requests that require electronic reproduction. Charges include time spent locating, downloading, formatting, copying and transferring records to media.

(2) The department will provide reproduction media at the following rates:

- (a) Diskettes, 5 1/4 or 3 1/2, \$1.00/each;
- (b) Video Cassettes, 2 hours, \$6.00/each;
- (c) Audio Cassettes, \$2.00/each.

(3) Due to the threat of computer viruses, the department will not permit requestors to provide diskettes for electronic reproduction of computer records.

Stat.

Auth.: ORS 183.341(2) & (4), 192.430(2) & 193.440(3)

Stats.

Implemented: ORS 192.430(2) & 192.440(3)

Hist.: JD 6-1994, f. 10-31-94, cert. ef. 11-1-94

DIVISION 9

SELECTION AND HIRING OF PERSONS TO PERFORM PERSONAL SERVICES

137-009-0000

Introduction

(1) The Department of Justice may require the services of consultants, court reporters, expert witnesses, investigators and special assis-tant attorneys general for special projects. These rules establish a procedure which will require:

- (a) Review of a list of qualified consultants;
- (b) Review the consultant's proposals; and
- (c) Select the consultant to do the work.

(2) No person shall hire a consultant on behalf of the Department of Justice before clearance through this procedure has been obtained.

Stat. Auth.: ORS Ch. 279

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0005

Definitions

(1) "Consultant" — An individual or firm capable of performing needed personal services by contract with the Department. (Persons performing routine services for the Department on a continuous ad hoc basis, such as process servers, are specifically exempted from this definition.)

(2) "Department" — The Oregon Department of Justice.

(3) "Originator" — Individual responsible for requesting and hiring consultants.

Stat. Auth.: ORS Ch. 279

Hist.: JD 2-1983, f. & ef. 5-17-83

Guidelines

137-009-0010

Procedure is Necessary

The Department has discretionary authority to contract with consultants. However, all agencies are required by ORS 279.051 to establish procedures for the screening and selection of personal service contractors.

Stat. Auth.: ORS Ch. 279

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0015

Conditions for Hiring Consultant

The Department will contract for consultant services only when at least one of the following factors exist:

- (1) Work cannot be done within a reasonable time with the

Department's own work force;

(2) The required skills or expertise are not available within the Department; or

(3) A consultant personal service contract will result in significant cost savings to the Department.

Stat. Auth.: ORS Ch. 279

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0020

Consultant Who is a Member of PERS

A contract for the services of a consultant who is a member of Public Employees' Retirement System (PERS) and who is employed in another department will normally be in the form of an interagency agreement, OAR 122-20-005.

Stat. Auth.: ORS Ch. 279

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0025

Consultant Who is not a Member of PERS

A consultant who is not a member of PERS will be selected through the selection process established herein, OAR 122-020-0015.

Stat. Auth.: ORS Ch. 279

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0030

Executive Department Approval Required

A contract with a consultant that will make a total contract amount of \$1,000 per contract or \$2,000 per consultant for the fiscal year shall be submitted to the Executive Department for approval after execution by the parties, unless an exemption is obtained. Funds for the contract shall be available and authorized for expenditure in the agency budget. The source of funds must be described in the contract. No costs can be incurred prior to approval by the Executive Department, OAR 122-020-0015.

Stat. Auth.: ORS Ch. 279

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0035

Exceptions

The Attorney General or Deputy Attorney General may approve the employment of a consultant directly without following the procedures established by these rules in the following instances. However, a contract shall be executed in all cases. Approval must still be obtained by the Executive Department before any work may be done by the consultant unless the Executive Department has delegated the approval authority or granted an exemption:

(1) Emergency — An emergency, either time-wise or because of unforeseen developments, where the person is needed in order for the Department to properly represent an agency in a legal matter or perform other necessary activities.

(2) Expert Witness — When the employment of an expert witness with particular qualifications is necessary for the Department to properly represent an agency in a legal matter, or where a technical expert is necessary to instruct or inform Department attorneys regarding the understanding and appropriate presentation of legal issues.

(3) Single Source — Where only a single individual known to the Department is qualified to do the particular job or perform the particular services required, or only the single individual has reasonable access to factual, technical or statistical information necessary to perform the services required (i.e., for purposes of these rules, the employment of individuals pursuant to requests from the Trial Division will be generally considered to fit within sections (2) or (3) of this rule. A contract complying with these rules is still mandatory.)

Stat. Auth.: ORS Ch. 279

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0040

Contract Form

The contract for Court Reporters (Non-PERS) shall be based

on the format agreement, **Exhibit 1**. The contract for Non-PERS Special Assistant Attorneys General, Investigators and Expert Witnesses shall be based on the format

agreement, **Exhibit 2**. For contracts involving PERS members, the format contract adopted to agency needs promulgated as **Exhibit 1** shall be utilized, if required. The format contract shall in all cases certify that adequate funds are available. Deviations to the format contract must be negotiated and require the approval of the Attorney General or the Deputy Attorney General.

[ED. NOTE: The Exhibits referenced in this rule are not printed in the OAR Compilation. Copies are available from the Department of Justice.]

Stat. Auth.: ORS Ch. 279

Hist.: JD 2-1983, f. & ef. 5-17-83

137-009-0045

Responsibility and Action

Selection process shall involve the following:

(1) Attorney General — Designates the Division Administrators to review all proposed requests for personal service contracts.

(2) Originator — Determines that the services of a consultant are necessary; prepares a "Request for Proposal" for consultant services containing complete justification and detailed data, including: (A sample format for this request is **Exhibit 3**):

(a) Description of work and whether the individual attorney must be designated as Special Attorney General;

(b) Why the work cannot be accomplished with the resources available to the Department;

(c) A cost estimate for the project and agency to be billed if Department is not to be responsible for payment;

(d) Any special equipment requirements;

(e) Special contracting requirements, if any.

(3) Division Administrator — Reviews and takes appropriate action.

(4) Administrative Services — Certification that funds are available for the duration of the contract or the end of the biennium, whichever is earlier.

(5) Attorney General — Reviews and takes appropriate action.

(6) Originator — Sends request for proposal to all prequalified consultants, requesting either a proposal or a statement that they do not wish to make a proposal. Receives replies from consultants. For ongoing and continuous types of consultant activities, consultants can prequalify by submitting a resume and fees to originator who has provided a description of the activity to all interested persons.

(7) Originator — Receives and reviews final proposals. After receiving approval from Division Administrator, negotiates a contract with best qualified applicant. Forwards the contract already signed by the consultant to the Deputy Attorney General for review and approval. In no case shall the contract extend beyond the existing biennium.

(8) Administrative Services — Forwards contract to the Oregon Executive Department for approval of the contract when the total cost is over \$1,000 per contract or \$2,000 per fiscal year per consultant. (If architectural or engineering service contracts are involved, Department of General Services approval is required, ORS 279.712(2).) Assures that the contract is approved and signed by all concerned. Upon receipt of the signed contract, Administrative Services shall establish a billing and payment schedule if required in accordance with normal Department policy. In no event shall any contract payments be made after the contract expires without a contract extension. In no case shall a Department employee prepare and sign invoices for an independent contractor.

[ED. NOTE: The Exhibits referenced in this rule are not printed in the OAR Compilation. Copies are available from the Department of Justice.]

Stat. Auth.: ORS Ch. 279

Hist.: JD 2-1983, f. & ef. 5-17-83

Hiring of Expert Witnesses and Consultants

137-009-0055

Regarding Expert Witnesses and Consultants in Actions to Establish Paternity

(1) Notwithstanding any other provision of OAR 137-009-0000 to 137-009-0045, the Support Enforcement Division (SED) may retain consultants and expert witness as required in actions filed to establish paternity in accordance with this rule.

(2) SED may request orally or in writing that the physician or other health care professional who provided obstetrical care to the mother of the child for whom paternity is being established complete interrogatories regarding that care, including that person's opinion regarding the date of conception. Under the procedure authorized by this rule, SED may pay the physician or other health care professional a fee which is reasonable and customary within the local community.

(3) SED may request, orally or in writing, that the physician or other health care professional who provided obstetrical care to the mother of the child for whom paternity is being established appear and testify as an expert witness at any proceeding incident to the action to establish paternity. Under the procedure authorized by this rule SED may pay such a witness a fee which is reasonable and customary in the local community.

(4) No contract executed under the authority of this rule shall be for an amount in excess of \$1,000.

(5) The contractor shall perform all work as an independent contractor and will be responsible for any state or federal taxes applicable to the services rendered, nor shall the contractor be eligible for federal social security, workers' compensation or unemployment insurance as a result of this contract.

(6) The contractor, its subcontractors, if any, and all employers providing work, labor or materials under any contract entered into under this rule are subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017, which requires them to provide workers' compensation coverage for all their subject workers.

(7) The hiring of a consultant or expert witness for any purpose not described in this rule must comply with the contracting provisions of OAR 137-009-0000 to 137-009-0045 and other applicable laws.

Stat. Auth.: ORS 279.051

Hist.: JD 8-1991(Temp), f. & cert. ef. 11-8-91; JD 11-1992, f. & cert. ef. 5-14-92

DIVISION 10

**GENERAL CHARITABLE ORGANIZATION
REGISTRATION AND REPORTING REQUIREMENTS**

137-010-0005

General Registration

(1) Charitable corporations and trustees, including trustees of charitable remainder trusts, which hold property for charitable purposes over which the State or the Attorney General has enforcement or supervisory power are required to register with the Charitable Activities Section of the office of the Attorney General.

(2) Charitable organizations are not required to register under this section if:

(a) The charitable organization is exempt under ORS 128.640; or

(b) The charitable organization has not received property for charitable purposes; or

(c) The organization is an educational institution which does not hold property in this state and solicitations of individuals residing in this state are confined to alumni of the institution; or

(d) A trustee of a charitable remainder trust is also the sole charitable beneficiary of the trust estate.

(3) Registration shall be on forms provided by the Attorney General and shall be accompanied by a copy of the articles of incorporation and bylaws, trust agreement, or other instruments governing the charitable corporation or trustee. In the case of a testamentary trust, the attachments shall include a copy of the decree of distribution.

Stat. Auth.: ORS 128.876

Hist.: 1AG 2, f. 2-17-64; 1AG 5, f. 8-3-72, ef. 8-15-72; 1AG 15, f. & ef. 5-27-76; 1AG 1-1979, f. & ef. 2-1-79; 1AG 2-1981, f. & ef. 12-1-81; JD 2-1982, f. & ef. 12-30-82; JD 1-1990, f. & cert. ef. 1-25-90

137-010-0010

Contents of General Registration Statement

Every registration statement filed pursuant to the general registration and reporting provisions of the Charitable Trust and Corporation Act shall set forth in detail the following information:

(1) Name and address of the charitable corporation or trustee subject to the Act.

(2) Type of instrument creating or governing the charitable corporation or trustee, date of instrument, and where filed.

(3) Names and addresses of trustees or corporation officers and directors.

(4) Titles of instruments attached to the registration statement.

(5) Description and value of charitable corporation or trust assets and liabilities, identifying whether computed at book or market value.

(6) Purpose of the charitable corporation or trust.

(7) Accounting year adopted by the charitable corporation or trust.

(8) Names and addresses of beneficiaries designated by the instrument governing the charitable corporation or trust.

Stat. Auth.: ORS 128.876

Hist.: 1AG 2, f. 2-17-64; 1AG 15, f. & ef. 5-27-76; 1AG 2-1981, f. & ef. 12-1-81; JD 2-1982, f. & ef. 12-30-82; JD 1-1990, f. & cert. ef. 1-25-90

137-010-0015

General Reporting Requirements

(1) Charitable corporations and trustees required to register under OAR 137-010-0005 shall submit annual reports to the Charitable Activities Section of the office of the Attorney General.

(2) Charitable organizations are not required to complete and file Form CT-12, Parts I and II if:

(a) All of the following conditions were met during the reporting period:

(A) Total gross receipts were not more than \$25,000; and

(B) The book value of total assets at the end of the reporting period was not more than \$50,000; and

(C) The charitable organization has delivered to the Charitable Activities Section a completed Form CT-12E or a written statement containing the same information.

(b) The reporting requirements have been suspended by the Attorney General as to a particular charitable organization pursuant to ORS 128.670(3).

(3) When a charitable trust or corporation is terminated or dissolved, a final report shall be filed with the Attorney General showing the disposition of all remaining assets.

(4) The annual reports shall be on forms as specified in OAR 137-010-0020.

(5) Organizations required to register due to the enactment of Chapter 334, Oregon Laws 1989 shall file a report for reporting periods ending December 31, 1989, and thereafter.

Stat. Auth.: ORS 128.876

Hist.: 1AG 2, f. 2-17-64; 1AG 3, f. 12-31-68; 1AG 5, f. 8-3-72, ef. 8-15-72; 1AG 6, f. 8-3-72, ef. 8-15-72; 1AG 1-1979, f. & ef. 2-1-79; 1AG 2-1981, f. & ef. 12-1-81; JD 2-1982, f. & ef. 12-30-82; JD 1-1990, f. & cert. ef. 1-25-90

137-010-0020

Contents of Annual Reports

(1) Charitable organizations required under the **Internal Revenue Code of 1986**, as amended, to file federal reporting

forms with the Internal Revenue Service shall complete the Attorney General's Form CT-12, Part I and attach a copy of the federal reporting forms filed with the Internal Revenue Service for the same period.

(2) Charitable organizations not required to file any federal reporting forms with the Internal Revenue Service, based on a gross income limitation, shall complete either the Attorney General's Form CT-12, Parts I and II or the Form CT-12, Part I and an Internal Revenue Service Form 990. The Form 990 shall be completed in conformance with the federal instructions for that form, except for any references not to complete a full report due to gross income limitations.

(3) If the Federal Form 990 is submitted as part of the report to the Attorney General, the charitable organization shall not attach a list of contributors as may be required as part of the submission to the Internal Revenue Service. This list is not intended to be subject to public inspection but could be inspected if submitted to the Attorney General's office.

(4) In lieu of the information required to be filed in section (2) of this rule, a trustee may file a copy of an account filed in any court having jurisdiction over the trust, if the account contains substantially the same information as required by the Attorney General's Form CT-12, Parts I and II.

[Publications: The Publication(s) referred to or incorporated by reference in this rule are available from the office of the Department of Justice.]

Stat. Auth.: ORS 128.876

Hist.: IAG 2, f. 2-17-64; IAG 5, f. 8-3-72, ef. 8-15-72; IAG 2-1981, f. & ef. 12-1-81; JD 2-1982, f. & ef. 12-30-82; JD 1-1990, f. & cert. ef. 1-25-90

137-010-0025 **Reporting Period**

(1) Annual reports required by the Charitable Trust and Corporation Act shall be on a calendar or fiscal year basis selected by the charitable corporation or trustee.

(2) Annual reports shall be submitted not later than four months and 15 days following the close of each calendar or fiscal year adopted by the charitable corporation or trustee.

(3) When the filing day as specified in section (2) of this rule falls on a Saturday or a legal holiday, the due date is the next business day following such Saturday or legal holiday.

(4) Any change in the accounting year should be reported to the Charitable Activities Section, Department of Justice. A short period report is required to be filed with a change of accounting year, covering the financial transactions from the day after the close of the former accounting period to the day before the beginning of the new accounting period. This short period report is treated the same as any report required by the Act, and is due not later than four months and 15 days following the close of the period.

(5) An extension of time may be granted by the Attorney General for a reasonable period for filing a report upon written application filed by or on behalf of the charitable corporation or trustee stating the reason that additional time should be allowed for filing the report beyond the ordinary due date. The request should be submitted on or before the due date for filing the report. An extension of time for filing any required information return with the Internal Revenue Service does not extend the time for filing the report with the Attorney General. However, if the charitable corporation or trustee intends to file a copy of the federal reporting form as part of the report to the Attorney General and if a request for an extension of time has been submitted to the Internal Revenue Service, a signed copy of the federal extension request may be furnished as the form of similar request for an extension of time for filing the complete report with the Attorney General.

Stat. Auth.: ORS 128.876

Hist.: IAG 2, f. 2-17-64; IAG 5, f. 8-3-72, ef. 8-15-72; IAG 1-1979, f. & ef. 2-1-79; IAG 2-1981, f. & ef. 12-1-81; JD 2-1982, f. & ef. 12-30-82; JD 1-1990, f. & cert. ef. 1-25-90

137-010-0030 **Payment of Fees**

(1) Except as otherwise provided in this rule, each charitable organization filing a report required by this Act shall pay to the Department of Justice, with each such report, a fee as provided in ORS 128.670(7).

(2) The filing fee paid with the filing of a short period report, due to a change of accounting year, shall be based on the organization's reported fund balance at the end of the period, prorated for the number of months covered by the report, and the organization's reported income and receipts for the period covered by the report. This section shall apply to all such reports received for reporting periods ending after December 31, 1986.

(3) If the fee is not paid when due or if the charitable corporation or trustee fails to file a report by the date due, a penalty charge of an additional \$20 shall be paid to the Department of Justice, except that if a written request for an extension of time is submitted on or prior to the due date for filing the report and is approved, the \$20 penalty charge will not be due unless the report and fee are thereafter not filed within the extended period granted for filing the report. If the extension request is denied, the \$20 penalty charge will not be due if the report and fee are filed within ten days after the denial is received by the charitable corporation or trust or the filing has subsequently been completed by the ordinary due date for filing the report.

(4) A foreign charitable corporation or trustee subject to the reporting requirements of this Act shall pay a fee based on the same fee schedule as identified in section (1) of this rule. The fee shall be based on its total income and receipts in Oregon and its assets held in Oregon. If, for any reporting year, it cannot be determined from the organization's records the exact amount of income and receipts in Oregon, the revenue fee may be computed on an estimated amount to be substantiated at a later date if requested by the Department of Justice. A foreign charitable corporation or trustee shall identify its Oregon income and receipts and its assets held in Oregon in the space provided on lines 1 and 10 of Form CT-12, Part I. A foreign organization that fails to complete the above information will be assessed a revenue fee based upon a per capita calculation, utilizing the latest available census figures.

(5) Charitable remainder trusts shall pay a fee based on the total fund balance of the trust plus a fee based on the amount of income and receipts received by the charitable beneficiary(s) during the reporting period.

Stat. Auth.: ORS 128.876

Hist.: IAG 5, f. 8-2-72, ef. 8-15-72; IAG 6, f. 8-2-72, ef. 8-15-72; IAG 11, f. 3-29-74, ef. 4-25-74; IAG 1-1979, f. & ef. 2-1-79; IAG 2-1981, f. & ef. 12-1-81; JD 1-1990, f. & cert. ef. 1-25-90

137-010-0033 **Notice of Delinquency and Imposition of Additional Penalty**

(1) At any time after a report or filing fee is delinquent the Attorney General may, after giving written notice by certified mail to the charitable corporation, trustee, or other charitable organization of the delinquency and requiring it to correct the delinquency, impose an additional penalty, unless the report and the filing fee, including the \$20 penalty charge referred to in OAR 137-010-0030(3), are filed within a specified number of days thereafter, but not less than ten. The additional penalty may be imposed in an amount not to exceed a fee as provided for in ORS 128.670(8)(b).

(2) The charitable corporation, trustee, or other charitable organization receiving a notice of imposition of penalty shall, upon its written request received within ten days, be entitled to a contested case hearing before the Attorney General or his designee to dispute the imposition of the penalty or to submit evidence in mitigation. The hearing shall be held and the Attorney General's order may be appealed in accordance with the procedure for contested cases provided in ORS Chapter 183, but the order shall be reversed or modified only if the court finds that

the Attorney General lacked authority to impose the penalty or the amount of the penalty imposed was unconscionable in the circumstances.

(3) The Attorney General may file a certified copy of the original notice assessing an additional penalty, or of the order entered after hearing, with the clerk of any circuit court in the state, after expiration of the time to request a hearing, or expiration of the time in which to appeal, or after final determination of the matter on appeal, whichever is appropriate, and such notice or order shall be docketed in the judgment docket and may be enforced in the same manner as a judgment.

Stat. Auth.: ORS 128.876

Hist.: 1AG 15, f. & ef. 5-27-76; 1AG 2-1981, f. & ef. 12-1-81; JD 1-1990, f. & cert. ef. 1-25-90

137-010-0034

Mitigating and Aggravating Factors to be Considered

In establishing the amount of the additional penalty to be imposed, the Attorney General may consider the following factors and shall cite those found applicable:

(1) The past history of the charitable corporation, trustee or other charitable organization in delinquent filing of reports.

(2) Whether a request for an extension of time was received prior to the due date for filing the report.

(3) Whether the cause of the delinquency was unavoidable, or was due to negligence or an intentional act of the charitable corporation, trustee, or other charitable organization.

(4) The opportunity and degree of difficulty to correct the delinquency.

(5) The cooperativeness and efforts made by the charitable corporation, trustee or other charitable organization to correct the delinquency for which the additional penalty is to be imposed.

(6) The cost to the Department of Justice and time involved in investigation and correspondence prior to the time the delinquency is actually corrected.

(7) Any other relevant factor.

Stat. Auth.: ORS 128.876

Hist.: 1AG 15, f. & ef. 5-27-76; 1AG 1-1981, f. & ef. 12-1-81; JD 1-1990, f. & cert. ef. 1-25-90

137-010-0039 [Renumbered to 137-010-0055]

Miscellaneous

137-010-0040

Place of Filing

Registration and annual reports required by either the Charitable Solicitations Act or the Charitable Trust and Corporation Act shall be submitted to the Charitable Activities Section, Office of the Attorney General, 1515 S.W. 5th, Suite 410, Portland, Oregon 97201-5451.

Stat. Auth.: ORS 128.876

Hist.: JD 2-1982, f. & ef. 12-30-82; JD 1-1990, f. & cert. ef. 1-25-90

137-010-0041

Model APA Rules and Definitions

(1) The Attorney General's Model Rules of Procedure Under the Administrative Procedures Act, effective March 1988, are by this reference adopted as the rules and procedures for carrying out the Charitable Solicitations Act (ORS 128.801 to 128.898 and 128.995) and the Charitable Trust and Corporation Act (ORS 128.610 to 128.750 and 128.896), except as otherwise specifically provided herein.

(2) As used in the Charitable Solicitations Act and these rules, solicitation "campaign" means the day the first solicitation, as defined in ORS 128.801(6), is made until the later of the following dates:

(a) The last day a solicitation is made; or

(b) The day that an entertainment event, if any, occurs in

conjunction with the solicitations.

(3) As used in ORS 128.821(3), "personal address" means the street address of a person's dwelling, house or usual place of abode.

(4) As used in the Charitable Solicitations Act, "clear and conspicuous" means that a message is conveyed in a manner that is readily noticeable and will be readily understood by a person being solicited. The location of a written statement on the reverse side of a document is rebuttably presumed not to be conspicuous.

Stat. Auth.: ORS 128.876

Hist.: JD 1-1990, f. & cert. ef. 1-25-90; JD 5-1991, f. & cert. ef. 10-22-91

137-010-0042

Civil Penalty Against Officers and Trustees for Violation of Charitable Trust and Corporation Act

Where, after investigation, the Attorney General finds a violation of ORS 128.896(1) and determines that a civil penalty of up to \$1,000 is an appropriate penalty, the Attorney General shall issue a proposed and final order for assessment of the civil penalty, along with the notice required under ORS 183.415 and in accordance with the requirements of ORS 128.896.

Stat. Auth.: ORS 128.876

Hist.: JD 1-1990, f. & cert. ef. 1-25-90

137-010-0043

Denial of Registration or Revocation of Registration of Commercial Fund Raising Firm or Professional Fund Raising Firm

(1) After notice and opportunity for hearing as provided in ORS 183.310 et seq., the Attorney General may deny registration or revoke any registration issued to a commercial fund raising firm or professional fund raising firm. The Attorney General shall deny the registration within ten days of receipt of a completed application or the registration shall be deemed to be approved. A hearing shall be granted within 30 days of receipt of a written request for a hearing from the applicant.

(2) The Attorney General may revoke a firm's registration or deny a registration application if the Attorney General finds:

(a) A material misrepresentation or false statement in the application for registration or other statement filed with the Attorney General, as provided in the Charitable Solicitations Act or these rules; or

(b) Any material violation of ORS 128.821 to 128.861, 128.886 and 128.891 or the rules adopted by the Attorney General pursuant to the Charitable Solicitations Act.

(3) A "material misrepresentation" or a "material violation" will be determined on the facts in each individual case. However, the following circumstances shall always constitute material violations:

(a) The failure to complete and file a fund raising notice with the Attorney General as required by ORS 128.826 or Section 18, Chapter 532, Oregon Laws 1991, prior to making solicitations;

(b) The use of solicitation materials in the course of a solicitation campaign which do not contain the disclosures required by Sections 6 or 20, Chapter 532, Oregon Laws 1991.

(4) A false statement is any statement contrary to truth or fact.

Stat. Auth.: ORS 128.876

Hist.: JD 1-1990, f. & cert. ef. 1-25-90; JD 5-1991, f. & cert. ef. 10-22-91

137-010-0044

Refund of Fees

Any refund of \$10 or less of a filing fee paid pursuant to the Charitable Solicitations Act or the Charitable Trust and Corporation Act shall be made only upon a written request from a representative of the organization which overpaid the fee. Unless the Department of Justice, in its discretion, agrees to waive the fee, the department shall retain a fee of \$25 to process refunds of overpayments of fees paid pursuant to ORS 128.670(7). The department is not required to process refunds as described above, if the amount of the refund due does not exceed \$25.

Stat. Auth.: ORS 128.876

Hist.: JD 1-1990, f. & cert. ef. 1-25-90; JD 5-1991, f. & cert. ef. 10-22-91

**Charitable Solicitation Registration and Reporting
Requirements**

137-010-0045

Professional Fund Raising Firm Status

(1) "Professional fund raising firm" means any sole proprietorship, partnership, corporation or any other legal entity, organized for profit or as a nonprofit mutual benefit corporation, who, for compensation or other consideration, manages or conducts the solicitation of funds, not including commercial fund raising solicitations, on behalf of any nonprofit organization.

(2) Professional fund raising firm status is evidenced by one or more of the following characteristics:

(a) Access to contributions or other receipts from a solicitation and/or authority to pay expenses associated with the solicitation, including amounts owed to the professional fund raising firm or third party vendors;

(b) Conducting direct solicitations of prospective donors, whether in person or by telephone and whether such solicitations are performed personally or through employees or agents;

(c) Advising nonprofit organizations with regard to the volume, targeting, duration or content of a direct mail solicitation campaign and also having primary responsibility for the campaign's production.

Stat. Auth.: ORS 128.876

Hist.: JD 5-1991, f. & cert. ef. 10-22-91

137-010-0050

Professional Fund Raising Firm Registration and Reports

(1) Any person required by Section 17, Chapter 532, Oregon Laws 1991 to register as a professional fund raising firm shall pay an annual registration fee as provided in that section and shall complete and file Form PF-20, "State of Oregon Annual Registration Statement of Professional Fund Raising Firm" with the Attorney General. This procedure shall apply to both new registrations and registration renewals. In addition to the items listed in Section 17, a completed form shall include a confirmation that the applicant has registered with the Oregon Secretary of State's Corporation Division, if it is a foreign corporation, and has registered any assumed business names with that same office, if such registrations are required by ORS 60.701.

(2) At least ten days prior to undertaking each solicitation campaign, a professional fund raising firm shall complete and file Form PF-21, "Professional Fund Raising Firm Solicitation Campaign Notice", as required by Section 18, Chapter 532, Oregon Laws 1991.

(3) Professional fund raising firms required by Section 21, Chapter 532, Oregon Laws 1991, to file financial reports shall complete and file Form PF-22, "Professional Fund Raising Firm Solicitation Campaigns Financial Reports" with the Attorney General.

(4) A person who conducts activities as both a commercial fund raising firm and a professional fund raising firm may operate under either registration.

Stat. Auth.: ORS 128.876

Hist.: JD 5-1991, f. & cert. ef. 10-22-91

137-010-0055

Commercial Fund Raising Firm Registration and Reports

(1) Any person required by ORS 128.821 to register as a commercial fund raising firm shall pay an annual registration fee as provided in ORS 128.821 and shall complete and file Form PF-10, "State of Oregon Annual Registration Statement of Commercial Fund Raising Firm", with the Attorney General. This procedure shall apply to both new registrations and registration renewals. In addition to the items listed in ORS 128.821(3) a completed form shall include a confirmation that the applicant has registered with the Oregon Secretary of State's Corporation Division, if it is a foreign corporation, and has registered any assumed business names with that same office.

(2) At least ten days prior to undertaking each solicitation

campaign, a commercial fund raising firm shall complete and file Form PF-11, "Commercial Fund Raising Firm Solicitation Campaign Notice", as required by ORS 128.826.

(3) Commercial fund raising firms required by ORS 128.841 to file financial reports shall complete and file Form PF-12, "Commercial Fund Raising Firm Solicitation Campaign Financial Report", with the Attorney General.

(4) A person who conducts activities as both a commercial fund raising firm and a professional fund raising firm may operate under either registration.

Stat. Auth.: ORS 128.876

Hist.: JD 1-1990, f. & cert. ef. 1-25-90; JD 5-1991, f. & cert. ef. 10-22-91;
Renumbered from 137-10-039

DIVISION 20

MISLEADING PRICE REPRESENTATIONS

137-020-0010

Trade Practices Act

(1) Purpose: It is the purpose of this rule to declare as an unlawful trade practice certain representations relating to price reductions.

(2) Scope: At present, it is unlawful under ORS 646.608(1)(j) to make "false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions." This rule is intended to define types of price comparisons which are in violation of that section, by establishing permissible types of reference price advertising. The rule does not address misrepresentations regarding the "reasons for" price reductions. The Examples provided in this rule are for illustrative purposes only.

(3) Authority: This rule is adopted pursuant to ORS Chapter 183 on authority granted to the Attorney General by ORS 646.608(1)(s) and (4).

(4) Effective Date: This rule applies to all advertisements (other than catalogues) printed, distributed, or broadcast, or offers for sale made, after September 1, 1976. Subsection (6)(e) of this rule applies to all catalogues distributed in Oregon after January 1, 1977.

(5) Definitions: As used in this rule:

(a) The definitions of terms set forth in ORS 646.605(1975) are applicable;

(b) "Catalogue" means a multi-page solicitation in which a person offers more than one specific type of goods for sale from which a consumer can order goods directly without going to the seller's place of business, and which is distributed to consumers by means other than by inclusion in a newspaper;

(c) "Competitor" means a retail outlet in the person's geographic market area with whom the person in fact competes for sales;

(d) "Offering Price" means the price at which a person represents that goods will be sold or leased, whether stated as a definite sum of money or as a determinate reduction from a reference price;

(e) "Reference Price" means any price, whether stated in dollars, in terms of a percentage or fraction, or by any other method, to which a person compares the currently represented offering price of its own goods. Examples of "reference prices" include manufacturer's suggested list or suggested retail prices; a competitor's offering price for the same or similar goods; a price at which the person formerly offered for sale or sold the same or similar goods; and an unspecified price at which the person formerly offered for sale or sold the same or similar goods suggested by the use of terms such as "on sale", "reduced to", " % off", or the like;

(f) "Readily Ascertainable Reference Price" means a reference price which is capable of being determined, from a stated offering price, by means of a simple arithmetic computation;

(g) "Similar Goods" mean goods associated with a reference

price which are similar in each significant aspect, including size, grade, quality, quantity, ingredients, utility and operating characteristics, to the offered goods.

(6) **Unfair or Deceptive Use of Reference Prices:** A person engages in conduct which unfair or deceptive in trade or commerce when it represents that goods are available for sale or lease by it at an offering price less than a reference price *unless* such reference price comes within any one of the following exceptions:

(a) The reference price is stated or readily ascertainable, and is a price at which the person, in the regular course of its business, made good faith sales of the same or similar goods or, if no sales were made, offered in good faith to make sales of the same or similar goods, either:

(A) Within the preceding 30 days; or

(B) At any other time in the past which is identified.

EXAMPLE: This exception is intended to identify the most common price comparison — to a former price charged by the seller himself. The former price must be one which was used in good faith to make or offer to make sales. Good faith is absent if the person raises his price for the purpose of subsequently claiming reductions. Comparisons to “a” legitimate former price are allowed. Thus, if a chain store reduces its price in one or two outlets to meet localized competition, its price throughout the rest of the chain can be used as a reference price.

Seasonal comparisons from year-to-year are also permitted.

(b) The reference price is the price at which the person will offer the same or similar goods for sale in the future, provided that:

(A) The reference price is stated or readily ascertainable; and

(B) If the reference price will not be put into effect for more than 90 days after the representation, the effective date of the reference price is stated; and

(C) Such reference price is actually put into effect for the purpose of offering in good faith to make sales.

EXAMPLE: This exception permits introductory offering prices and the like.

(c) The reference price is stated or readily ascertainable, and is a price at which an identified or identifiable competitor is or has in the recent regular course of its business offered to make good faith sales of the same or similar goods.

EXAMPLE: A person may rely upon the recent advertised price of a competitor for the same or similar goods, if he reasonably believes the competitor was attempting to make sales at that price. Alternatively, a person can “shop” his competitor to determine the latter’s recent offering price.

(d) The reference price is stated or readily ascertainable, and is required by federal or Oregon law to be affixed to the goods, and clear disclosure is made in the same representation that all sales of such goods are not necessarily made at such reference price, if such is in fact the case.

EXAMPLE: This rule is directed at claimed price reductions from the “sticker prices” of automobiles. If a person makes such a price comparison and in fact similar automobiles are sold at less than the “sticker price”, that fact must be disclosed clearly in the same representation.

(e) The reference price is stated in a catalogue, so long as the person employing such reference price includes a statement, printed in a manner which a reader of the catalogue is likely to notice, explaining:

(A) The source of the reference price; and

(B) That the reference prices may not continue to be in effect during the entire life of the catalogue, if such is in fact the case. The requirements of this section are satisfied by a single disclosure statement, which applies to the catalogue as a whole, made in conjunction with the explanation to the reader of how to make a purchase from the catalogue.

(f) The reference price is stated and is a price, such as a manufacturer’s list price, which the person can document as having been employed in good faith offers to sell the same or similar goods within his market area during the preceding 30 days.

EXAMPLE: Comparing one’s current offering price to a manufacturer’s list price is valid if the offeror can substantiate that goods have been offered or sold, in good faith, at that list price during the preceding

30 days.

(g) Notwithstanding subsections (6)(a) through (f) of this rule, a person may represent a general price reduction on a variety of merchandise without using a stated or readily ascertainable reference price, so long as:

(A) The amount of reduction is stated expressly, either in terms of a dollar amount or a percentage;

(B) The reduction is from a price or prices at which the person made good faith sales of the same or similar goods at a time in the past which is identified; and

(C) The represented reduction is true as to each item offered for sale.

EXAMPLE: This would permit advertising seasonal clearance sales and the like by means of a general representation as to price reductions, without stating specifically either the reference price or the offering price.

Stat. Auth.: ORS Ch. 646

Stats. Implemented: ORS 646.608(1)(u)

Hist.: 1AG 16, f. 7-21-76, ef. 9-1-76

137-020-0015

Misleading Use of “Free” Offers

(1) **Definitions:** As used in this rule:

(a) The definitions of terms set forth in ORS 646.605 are applicable;

(b) “Free” means without charge or cost, monetary or otherwise, to the recipient, and includes terms of essentially identical import, such as “1¢ sale”, “2 for the price of 1” and “give away” and, in the case of real estate, goods or services described in subsection (2)(a) of this rule, an offer of any combination of real estate, goods or services at a single price. A free offer in conjunction with the sale or lease of real estate, goods or services is one that conveys to customers the message that real estate, goods or services are offered at no cost in conjunction with the purchase of other real estate, goods or services for no more than their regular price;

(c) “Verifiable retail value” means:

(A) A price at which an offer or can demonstrate that a substantial number of free items have been sold at retail in Oregon by a person other than the offeror; or

(B) If substantiation described in this section is not available to an offeror, no more than one and one-half times the amount an offeror paid for a free item.

EXAMPLE: If substantiation, as described in this section, is not available, and the offeror pays \$10 for a free item, the verifiable retail value of that free item would be \$15.

(2) **Unfair or Deceptive Use of “FREE” Offers:** A person engages in conduct which is unfair or deceptive in trade or commerce:

(a) When it makes a free offer in conjunction with the purchase or lease of real estate, goods or services, the price, size, quantity, or quality of which is normally determined by that seller by bargaining with potential purchasers. For purposes of this section, an offer of any combination of real estate, goods and services for a single price is not a free offer if:

(A) The “free” item is offered by a manufacturer or another party, separate from the seller, and there is no direct cost to the seller; or

(B) The offer includes no terms, other than the offer of the combination itself, indicative of a free offer as defined in subsection (1)(b) of this rule and the offer includes one of the following disclaimers, communicated in a clear and conspicuous manner, as defined in OAR 137-20-050:

(i) **“Cost of promotion may increase price of _____”.** (The phrase shall be completed with a description of the basic real estate, goods or services offered for sale.); or

(ii) **“This is a combination offer. Make your best deal on a package price”.**

(b) When it makes a free offer combined with the offer of real estate, goods or services, the price of which is not normally determined by bargaining and in order to receive the “free” real estate, goods or services the recipient must at any time purchase or lease other real estate, goods or services at a price which is

higher than that at which the person offered for sale or sold such real estate, goods or services in the ordinary course of business during the 30 days preceding the "free" offer (unless such higher price is the regular price at which such real estate, goods or services are thereafter sold in the regular course of business);

(c) When it makes a free offer and in order to qualify for the offer, the recipient will be given a presentation intended to result in the promotion of a business or sale or lease of real estate, goods or services unless the offer contains a clear and conspicuous disclosure:

(A) Identifying the business promoted or the goods or services offered for sale or lease;

(B) That the recipient must listen to a sales or promotional presentation in order to receive the free offer or that the recipient is entitled to receive the free offer after refusing to listen to the presentation, whichever is the case. If the free item described is not immediately available for delivery to the recipient after the recipient has listened to a sales or promotional presentation, the recipient shall be given the verifiable retail value of the free item in cash or by a valid check;

(C) Including a description of each potentially free item and its verifiable retail value in the trade area in which the offer is made;

(D) If the free item is one or more of a larger group, if received on a random basis, (in addition to compliance with subsection (e) of this section) a description of the actual odds of receiving each item based on the initial odds and revised to reflect actual current odds at the beginning of each month of use of the free promotion; if not on a random basis, a description of the method of selection used. The description of the initial odds and the current odds shall include a statement of the total number of each free item to be given away by the offeror and the total number of chances to obtain the free item being distributed by the offeror. If the promotion utilizing the free item involves distribution by more than one offeror or sponsor, the description of the initial odds and the actual current odds also include a statement of the total number of each free item to be given away by all offerors or sponsors and the total number of chances to obtain the free item being distributed by all offerors or sponsors. The odds and verifiable retail value shall be printed in the same size type as the principal description of each free item and shall appear immediately adjacent to said description;

(E) In a telephone or door-to-door solicitation, inclusion of the information required by ORS 646.608(1)(n) within 30 seconds after beginning the conversation.

(d) When it makes a free offer as described in subsection (b) or (c) of this section and, in order to receive the free real estate, goods or services, the recipient is required to pay money to the offeror, promoter or any other person for any fee, including but not limited to a fee for postage, shipping, storage, handling, processing, registration or verification, which terms are used herein for purposes of illustration and not by means of limitation;

(e) In the case of all free goods or services offered on a random basis as described in paragraph (2)(c)(D) of this rule, unless it retains for at least one year a list of the names and addresses of all persons receiving free goods or services with a verifiable retail value of \$10 or more.

Stat. Auth.: ORS 646.608(4)

Stats. Implemented: ORS 646.608(1)(u)

Hist.: IAG 16, f. 7-21-76, ef. 9-1-76; IAG 2-1979, f. 6-22-79, ef. 8-1-79; JD 1-1987, f. 2-5-87, ef. 2-15-87; JD 5-1990, f. 7-5-90, cert. ef. 9-1-90

137-020-0020

Motor Vehicle Price Disclosure

(1) Purpose: The purpose of this rule is to declare as unfair or deceptive in trade or commerce certain motor vehicle pricing practices.

(2) For purposes of this rule, the following definitions shall apply:

(a) "Administrative fee" means any monies or other thing of value which a dealer charges for preparing any and all paperwork to close the sale or lease of a motor vehicle except as prohibited by ORS 802.030(2)(e);

(b) "Advertisement" means any oral, written or graphic notice given in a manner designed to attract public attention and includes, without limitation, public broadcasts, mailings and published notices;

(c) An "average" person, viewer or listener means a person other than one allied with the vehicle industry;

(d) "Buy-down rate" means a financing rate which, due to a dealer's payment of finance charges to a third party, is below the prevailing market financing rate;

(e) "Clear and conspicuous" means that a message is conveyed in a manner that is readily noticeable, will be easily understood by the audience to whom it is directed, and is in a meaningful sequence. In order for a message to be considered "clear and conspicuous", it shall, at a minimum:

(A) Not contradict or substantially alter any terms it purports to clarify, explain or otherwise relate to;

(B) Use abbreviations or terms only if they are commonly understood by the average person or approved by federal or state law;

(C) In the case of radio advertising:

(i) The information required to be disclosed by law shall be spoken with sufficient deliberateness, clarity, and volume so as to be understood by the average radio listener;

(ii) The information shall not be obscured by sounds which interfere with or distract from the disclosure; and

(iii) Any information required in radio advertising shall be deemed to be clear and conspicuous if the ad complies with 15 USC § 1667c(b) and any disclosure required by 15 USC § 1667c(b)(C) also includes all disclosures required by Oregon law.

(D) In the case of television advertising:

(i) The information required to be disclosed by law shall be completely disclosed audibly, visually, or using a combination thereof;

(ii) Any visual message shall be presented unobscured by other images and in a size and time sufficient to allow an average viewer to read with reasonable ease; and

(iii) Any audible message shall be presented with sufficient deliberateness, clarity, and volume so as to be understood by the average television listener unobscured by other sounds which interfere with or distract from the disclosure.

(E) In the case of printed advertising:

(i) The information shall be in close proximity to the terms it purports to clarify, explain or otherwise relate to; and

(ii) The information shall be of sufficient prominence in terms of print style, size and contrast as compared with the remainder of the advertisement so as to be readily noticeable to an average person in the audience to whom it is directed. Print size which is 8 point type or larger in display advertisements which are less than 200 square inches in size or print size which is 10 point type or larger in display advertisements which are 200 square inches or larger in size shall be rebuttably presumed to be of sufficient size to be readily noticeable.

(f) "Dealer" means a person who sells, trades, leases, displays or offers for sale, trade or exchange motor vehicles or offers to negotiate or purchase motor vehicles on behalf of third parties. "Dealer" does not include a security interest holder as shown by the vehicle title issued by any jurisdiction or any person excluded by ORS 822.015 (1) to (4) or ORS 822.015 (6) to (9);

(g) "Extension sticker" means a label (other than a Monroney sticker or other label bearing the manufacturer's suggested retail price), affixed to a new motor vehicle, displaying the offering price of the motor vehicle;

(h) "Manufacturer's Suggested Retail Price" or "MSRP" means the Monroney price, or if there is no Monroney sticker, then the total price of the vehicle after all factory installed options and factory costs have been added together, less any option package savings offered by the manufacturer;

(i) "Monroney sticker" means the label required by Section 3 of the Automobile Information Disclosure Act, 15 USC Section 1232;

(j) "Motor Vehicle" means any self-propelled vehicle normally obtained for personal, family, or household purposes, including all terrain vehicles, snowmobiles and personal

watercraft other than boats. Motor vehicle does not include aircraft;

(k) "Offering price" means the full cash price for which a dealer will sell or lease a motor vehicle to every purchaser or member of the general public without exception, excluding only taxes, license and registration costs, and a maximum administrative fee of \$35;

OFFICIAL COMMENTARY: An example of a correctly calculated offering price would be as follows: A vehicle's MSRP is \$10,000, taxes are \$500, license and registration are \$100, undercoat is \$100 and administrative fees are \$35. The offering price of the vehicle is \$10,100.00. The use of the term "maximum" modifying "administrative fee" is meant to signal that \$35 is the highest amount which may be charged. Nothing in this or any other rule requires a dealer to charge any administrative fee.

(l) "Pattern" means repeated acts that are the same or similar in nature and appear to have some overall connection;

(m) "Practice" means, for purposes of OAR 137-020-0050(2)(k), often, repeated, or customary action;

(n) "Personal Watercraft" means a jet ski or other aquatic device of similar design;

(o) "Rebate" means the payment of money to a consumer or payment to a dealer or third party on behalf of a consumer on the condition that the consumer purchase or lease a motor vehicle;

(p) "Taxes, license and registration costs" means those usual taxes, charges and fees payable to or collected on behalf of governmental agencies and necessary for the transfer of any interest in a motor vehicle or for the use of a motor vehicle; and

(q) "Used vehicle" means any vehicle which has been previously delivered to any person for his or her discretionary use for personal or business purposes and for more than a try-out before a contemplated purchase or preparation for sale.

OFFICIAL COMMENTARY: Vehicles that would be considered "used" include, but are not limited to:

(i) Dealer demonstrators that are delivered to a consumer on a purchase order or retail instalment contract, then subsequently returned to the dealer due to an inability to obtain financing; and

(ii) Demonstrators and company cars that have never been sold to a retail customer, but have been driven for purposes other than test drives or moving, including use by the dealer, the dealer's employees, the dealer's corporate officers or anyone else; and

(iii) All vehicles that have been driven more than the limited use necessary in moving or road testing a new vehicle prior to purchase or delivery to a consumer.

The intention of this definition is to conform the applicability of the rule to the maximum extent permitted by ORS 646.608 and Weigel v. Ron Tonkin Chevrolet Co., 298 OR 127, 690 P2d 488 (1984).

(3) Failure by a dealer to comply with this rule constitutes unfair or deceptive conduct in trade or commerce.

(a) Any motor vehicle offered for sale or lease in an advertisement stating an offering price or capitalized cost for the motor vehicle shall have affixed to it a clear and conspicuous label or extension sticker stating the offering price of the motor vehicle listed in the advertisement. If a motor vehicle bears a label which states a MSRP and the MSRP is the offering price or capitalized cost for the vehicle, no additional label or extension sticker is required;

(b) Any motor vehicle offered for sale bearing a Monroney sticker or a label stating a MSRP shall have an extension sticker affixed stating the offering price of the vehicle if the offering price is greater than the Monroney sticker price or the stated MSRP;

(c) Any price stated in an advertisement or in a written or oral price quotation given to a prospective buyer shall be the offering price plus taxes, license, registration costs and a maximum administrative fee of \$35. Any written or oral price quotation given in good faith to a prospective buyer, which is less than or on different terms than the offering price on the motor vehicle, may be given by an agent subject to approval by the dealer;

(d) An extension sticker shall accurately itemize and describe the charge(s) added to or subtracted from the MSRP to reach the offering price. No charge may be added for goods or services not actually provided. No charge may be added for services required

by the manufacturer or distributor which are performed by a dealer prior to delivery of a motor vehicle to a retail buyer. No charge may be added for any overhead expense such as warehousing, flooring, advertising, and clerical costs; or for transportation costs charged by the manufacturer or distributor to the dealer and included in the MSRP. In the case of inland freight, setup and dealer preparation, the charge listed must be the dealer's actual cost for freight from the port of entry to the dealership, and the actual cost of setup and dealer preparation and not included in the MSRP;

(e) If the offering price is greater than the MSRP, the portion of the difference shown on the extension sticker between the offering price and the MSRP not representing additional goods or services shall be described as "additional dealer profit," "additional mark-up" or by a term of similar import;

(f) A dealer may not make false or misleading representations concerning the nature or amounts of charges listed on a label or the extension sticker by listing charges for additional goods or services provided which are substantially higher than the charges used by the dealer for the sale of the same or substantially similar goods or services to other buyers;

(g) The administrative fee may be separately stated in all advertisements and sales documents and shall not exceed \$35. If separately stated the disclosure shall be clear and conspicuous; and

(h) A dealer shall not represent an administrative fee as a governmental fee or one required by government.

Stat. Auth: ORS Ch. 646.608(1)(u) & (4)

Stats. Implemented: ORS Ch. 646.608(1)(u)

Hist.: 1AG 6-1979, f. & ef. 12-19-79; JD 4-1993, f. 8-6-93, cert. ef. 8-16-93;

JD 3-1996, f. 10-18-96, cert. ef. 10-23-96

137-020-0025

Mobile Home Consignment

(1) Purpose: The purpose of this rule is to declare as unfair or deceptive in trade or commerce the practice of selling mobile homes on consignment without complying with this rule.

(2) Authority: This rule is adopted pursuant to ORS Chapter 183 on authority granted to the Attorney General by ORS 646.608(1)(u) and (4).

(3) Effective Date: This rule applies to con-signment sales agreements entered into on or after January 1, 1980.

(4) Definitions: For purposes of this rule:

(a) The definitions of terms set forth in ORS 646.605 are applicable;

(b) "Mobile Home Dealer" means a person who regularly engages in the sale of mobile homes as defined by this rule;

(c) "Mobile Home" means a non-self propelled structure, transportable in one or more sections, which is designed to be used as a permanent family dwelling;

(d) "Consignment Seller" means the owner of a mobile home who enlists the assistance of a mobile home dealer to offer his or her mobile home for sale to a third party and where the mobile home dealer receives consideration for such assistance. For purposes of this rule, it does not matter that the mobile home dealer does not take possession of the mobile home;

(e) "Minimum Net Agreement" means an agreement characterized by an arrangement in which a consignment seller agrees to accept a fixed dollar amount as his or her share of the proceeds regardless of the total sale price of the unit sold.

(5) Unfair or Deceptive Mobile Home Consignment Practices: A mobile home dealer engages in conduct which is unfair or deceptive in trade or commerce when it fails to deliver to a consignment seller the written agreements in compliance with the following:

(a) A mobile home dealer shall provide a mobile home consignment seller with a copy of a written consignment agreement prior to the date that the mobile home is offered for sale;

(b) The written consignment agreement shall contain the following:

(A) Identification of the mobile home offered for sale;

(B) The length of the term of the consignment agreement;

(C) If the mobile home dealer advises the consignment seller

of an estimated retail value of the mobile home, a statement of that value shall be included;

(D) Identification of any class of expenses, including, but not limited to, taxes, repairs, transportation cost or tear down expenses, to be deducted from the consignment seller's portion of the proceeds of the sale in addition to the mobile home dealer's commission;

(E) The mobile home dealer's commission, stated in terms of a dollar amount or percentage of the sales price, unless it is a minimum net agreement;

(F) In the event of a minimum net agreement, the amount to be paid to the consignment seller shall be so stated;

(G) A statement of whether or not the con-signment seller will have the right to approve the final purchase price; and

(H) The signature of the consignment seller.

(c) The mobile home dealer shall promptly deliver to the consignment seller a copy of the purchase agreement, which shall include the sales price, after the purchase agreement has been executed by the third party purchaser.

Stat. Auth.: ORS Ch. 646

Stats. Implemented: ORS 646.608(1)(u)

Hist.: 1AG 3-1979, f. 10-11-79, ef. 1-1-80

137-020-0030

Updating

(1) Purpose: It is the purpose of this rule to define as an unfair trade practice the failure to disclose the year in which a motor vehicle or motor vehicle chassis was actually manufactured.

(2) Authority: This rule is adopted pursuant to ORS Chapter 183 on authority granted to the Attorney General by ORS 646.608(1)(s) and (4).

(3) Definitions: For purposes of these rules:

(a) "Person" is defined in ORS 646.605(4);

(b) "Motor Vehicle" means a self-propelled vehicle intended for use upon public highways which is or may be used or bought primarily for personal, family, or household purposes. For purposes of this rule, the term "motor vehicle" includes mobile homes, motor homes and recreational vehicles, but does not include automobiles and motorcycles;

(c) "Motor Vehicle Chassis" means the frame assembly, power plant, and all other appurtenances necessary to make a motor vehicle self-propelled.

(4) This rule is effective on and after September 1, 1976.

(5) Failure to Disclose Year of Manufacture:

(a) It is unfair or deceptive conduct in trade or commerce to sell, or offer for sale, a motor vehicle to its first purchaser for purposes other than resale without disclosing prior to the time of entering into any binding sales agreement:

(A) The month and year in which such motor vehicle was manufactured; and

(B) If the motor vehicle chassis was manufactured in a month or year different from that of the completed motor vehicle, the month and year in which such motor vehicle chassis was manufactured.

(b) Providing a prospective purchaser with a copy of certificate of origin issued by the manufacturer of the motor vehicle or motor vehicle chassis which sets forth the month and year of manufacture shall constitute adequate disclosure for purposes of this rule.

Stat. Auth.: ORS Ch.

Stats. Implemented: ORS 646.608(1)(u)

Hist.: 1AG 16, f. 7-21-76, ef. 9-1-76

137-020-0040

Adoption of Federal Credit and Leasing Law

(1) For purposes of this rule, the following definitions shall apply:

(a) "Truth-in-Lending" means the Federal Truth-in-Lending Act, as amended prior to January 1, 1987, (including **15 U.S.C. 1601-1665(a)**), and any regulations which have been adopted thereto prior to January 1, 1987, including **Regulation Z (12 CFR 226)**;

(b) "Federal Consumer Leasing Law" means the consumer

leasing portions of the Truth-in-Lending Act, **15 USC §1667** as amended by the **Community Development Act of September 23, 1994, Public Law No. 103-325, §336, 108 Stat 2160, 2234** and all regulations which implement this section including **Regulation M (12 CFR 213)**;

(c) "Person" refers to those individuals and entities as defined in ORS 646.605(4);

(d) "Real Estate, Goods or services" refers to those items defined in ORS 646.605(7).

(2) It is unfair or deceptive conduct in trade or commerce for a person to advertise, offer credit or extend credit related to the purchase of real estate, goods or services in violation of Truth-in-Lending or the Federal Consumer Leasing Law.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the Department of Justice.]

Stat. Auth.: ORS Ch. 646

Stats. Implemented: ORS 646.608(1)(u)

Hist.: JD 1-1987, f. 2-5-87, ef. 2-15-87; JD 9-1994(Temp), f. & cert. ef. 11-23-94; JD 5-1995, f. & cert. ef. 4-7-95

137-020-0050

Motor Vehicle Advertising

137-20-050 (1) For purposes of this rule, the definitions specified in OAR 137-020-0020 shall apply.

(2) It is unfair or deceptive in trade or commerce for a dealer to advertise motor vehicles if:

(a) The dealer represents that motor vehicles or other property to be received in trade in conjunction with the purchase of a motor vehicle will be valued at a specific amount, range of amounts or guaranteed minimum amount;

(b) The dealer represents that purchasers of vehicles will receive a cash rebate, discount certificate, coupon or other similar promotion unless it is offered by a manufacturer or another party, independent of the dealer and without dealer participation;

OFFICIAL COMMENTARY: Rebates controlled by the dealer may be illusory because the dealer may simply increase the offering price or limit the dealer's negotiated price by the same amount as the ostensible value of the rebate. The rule eliminates this possibility by prohibiting such rebates. Rebates which do not expose consumers to those risks are not intended to be prohibited by this rule.

(c) The dealer includes lease and sale offers in the same advertisement without making a clear and conspicuous distinction as to which terms shall apply to each respective offer;

(d) The dealer represents that motor vehicles are offered for sale at a price that is compared in any manner to the dealer's "cost" or terms of essentially identical import unless the advertisement:

(A) Exclusively uses the term "invoice" or "invoice price"; and

(B) Complies with the following:

(i) The invoice price shall be the final price listed on the manufacturer's invoice after subtracting any amount identified on the invoice as being held back for the dealer's account, and after subtracting any advertising fees or manufacturer to dealer rebates or incentives;

(ii) Purchasers shall be able to purchase any vehicle described by the advertisement at the offering price; and

(iii) The invoice shall be readily available for inspection by prospective customers.

(e) The dealer represents that financing is available for the purchase of motor vehicles at a buy-down rate unless the advertisement includes a clear and conspicuous disclosure that the interest rate is not sponsored by the manufacturer, if such is the case, and the amount of the buy-down is reflected in the Federal Truth in Lending Statement, unless the dealer can clearly substantiate that the cost of the buy-down is spread throughout all of the dealer's transactions. For purposes of this subsection, "manufacturer" includes any subsidiaries of the manufacturer which offer motor vehicle financing;

(f) The dealer fails to incorporate a material statement in motor vehicle advertising:

(A) Which is required by law or by these rules, or without which the advertisement would be false or misleading, and

(B) Which is not presented in a clear and conspicuous manner.

(g) The offering price or an offer to lease applies to a specific vehicle, or to a specific or limited number of vehicles of a specific model or type, unless:

(A) The number of vehicles available is disclosed; and

(B) Each vehicle is clearly and conspicuously identified in the advertisement by stock number, vehicle identification number or license plate number.

(h) The vehicle is not available for immediate delivery, unless the advertisement clearly and conspicuously states the vehicle is in transit, on order, or obtainable only by special order or dealer trade, and that it is not in stock;

(i) The dealer advertises a used vehicle, which was manufactured less than five years prior to the date of the advertisement, without designating the vehicle as "used." Other descriptive terms may be substituted for the term used, but not so as to create ambiguity as to whether the vehicle is new or used;

OFFICIAL COMMENTARY: Examples of alternative terms include "executive return," "lease return," "dealer demonstrator," or "rental return."

(j) The dealer uses the word "program" unless the advertisement clearly and conspicuously discloses the nature of the "program" or "certification" that is offered with the motor vehicle, and the origin and prior use of the vehicle;

(k) The dealer advertises or posts on a vehicle any words which imply that the offering price of the vehicle is non-negotiable when in fact the dealer has a pattern or practice of negotiating the offering price of the advertised vehicles;

(l) The dealer advertises any vehicle without disclosing material limitations of the terms listed in the offer, including, but not limited to, the length of time that the offering price is in effect. Advertisements which do not list any effective dates will be presumed to offer advertised vehicles at the "advertised price" until such time as the vehicles are subsequently advertised at different terms or for a period of 30 days, whichever comes sooner;

(m) The dealer advertises any vehicle for sale and does not identify the dealer by the complete business name which indicates that it is a dealer of vehicles, or by the word "dealer" or abbreviation "DLR;"

(n) The dealer advertises a vehicle is reduced in price from the dealer's former price, or that the price is a percentage or dollar amount of savings from the dealer's former price, or words to that effect, unless:

(A) The dealer actually advertised or has records showing that the vehicle has been offered for sale at the former price for no less than 10 days in the prior 30 days; and

(B) For new vehicles only, the dealer lists the MSRP in the advertisement.

(o) The dealer uses images, words, phrases, initials, abbreviations or any other items which are not clear and conspicuous;

(p) The dealer explicitly or implicitly claims that the dealer's offering price is lower than another dealer or dealers', unless the dealer can clearly show, through statistical analysis of other prices in the target market and records of the dealership, that such is the case;

(q) The dealer advertises an interest rate that is adjustable without clearly and conspicuously disclosing that the interest rate is adjustable;

(r) The dealer advertises the offering price of a vehicle as discounted or in any way reduced by a specified amount below the MSRP or the dealer's sale price unless the MSRP, the amount of any discount, rebate, or other price reduction and the final offering price are clearly and conspicuously displayed in figures. Each figure shall be labeled with a clear and conspicuous description;

(s) The dealer advertises that more than one vehicle of a given model is available and identifies the offering price of a vehicle using the words "as low as" or "starting at" or words to that effect, unless the advertisement clearly and conspicuously states the number of vehicles available at the offering price; or

(t) The advertisement includes any rebates or reductions, unless the offering price, including such rebates and reductions, is available to every purchaser or member of the general public

without exception. Rebates or reductions which are not available to every purchaser or member of the general public, such as "commercial rebate," "college graduate rebate," or "first time buyers' rebate" may be listed in the advertisement, but may not be subtracted from the price so as to reduce the final price.

(3) It is unfair or deceptive in trade or commerce for a dealer to advertise the lease of any vehicles unless the following information is clearly and conspicuously stated:

(a) That the vehicle price stated is for a "lease";

(b) The MSRP and the capitalized cost if different than the MSRP;

(c) The capitalized cost reduction, initial payment, security deposit, administrative fees and any other additional costs due at the time of delivery, and the total of those amounts;

(d) The total lease charge, which includes:

(A) The total of the monthly payments;

(B) Any lease acquisition fees;

(C) The total of the amounts listed in 3(C); and

(D) Any required lease disposition or termination fee.

(e) The monthly lease payment and term of the lease;

(f) The residual value of the vehicle at the end of the lease term; and

(g) Any lease return fee which a consumer must pay if the consumer chooses not to purchase the vehicle at the end of the lease.

Stat. Auth: 646.608(1)(u) & (4)

Stats. Implemented: 646.608(1)(u)

Hist.: JD 1-1987, f. 2-5-87, ef. 2-15-87; JD 3-1996, f. 10-18-96, cert. ef. 10-23-96

137-020-0100

Plain Language

(1) Definitions: For purposes of this rule:

(a) "Department" is defined as Oregon Department of Justice;

(b) "Consumer Contract" is defined in ORS 180.540(3) and does not include contracts which state agencies other than the Department may review under ORS 180.540(2);

(c) "Reasonable Fees" includes the prevailing billing rate which the Department has established in OAR 137-08-010.

(2) Application: Any seller or extender of credit may submit a consumer contract to the Department by:

(a) Completing an application for review. The application may be obtained by calling or writing the Financial Fraud Section, 100 Justice Building, Salem, OR 97310, 378-4732;

(b) Including a \$250 fee for each contract to be reviewed, and such additional "reasonable fees" as the Department determines is necessary to review the contract;

(c) Submitting three copies of the contract to be reviewed;

(d) Underlining in red any words, phrases or provisions which are specifically required, recommended or endorsed by a state or federal statute, rule or regulation.

(3) Review: After a contract is submitted the Department will:

(a) Return the contract and the fee if the Department determines that the contract submitted for review is not a consumer contract; or

(b) Certify the consumer contract meets Oregon Plain Language guidelines if it meets the standards set forth in ORS 180.540, et seq.;

(c) Inform the person submitting the contract that the contract does not comply with Oregon's Plain Language Standard. The Department shall provide a brief explanation of its determination. The explanation need not include every reason for non-compliance and corrections of each stated deficiency will not assure compliance;

(d) Return any fees charged over and above the initial \$250 filing fee to the extent the fee exceeded the cost of review.

(4) Certification: Certification of a consumer contract under this rule is not an approval of the contract's legality or legal effect. The fact that a consumer contract has been certified or not certified shall not be admissible in any action to interpret or enforce a contract or any term of a contract.

(5) No person may use a contract which represents it meets Oregon's Plain Language guidelines unless the person has received certification of the contract pursuant to this rule.

(6) Any oral or written reference to the Department's certification must be accompanied by the following statement: **The Department of Justice Certification of a contract under the Plain Language Contract Act is not an approval of the contract's legality or legal effect.**

Stat. Auth.: ORS 180.540, 183.310 - 183.550 & Ch. 646

Stats. Implemented: ORS 180.540, 180.545 & 180.555

Hist.: JD 5-1985, f. 12-20-85, ef. 1-1-86; JD 13-1992, f. & cert. ef. 6-5-92

Gasoline Advertising

137-020-0150

Gasoline Price Advertising

(1) Definitions: For purposes of OAR 137-020-0150 to 137-020-0160 the following definitions shall apply:

(a) "Retailer" means any person who operates a service station, business or other place for the purpose of retailing and delivering gasoline, diesel or other fuel into the tanks of motor vehicles;

(b) "Displayed" means visible from a street or highway adjacent to the place of business;

(c) "Clear and Conspicuous" means in a form that is readily visible to and easily readable by a customer or potential customer who would be materially affected by the information and means in a location that a person who would be materially affected by the information ought to have noticed the information displayed;

(d) "Full Service" includes services such as washing windshields, windows and headlights, checking fluid levels, checking or adjusting tire pressure and inspecting belts and hoses but does not include a car wash.

(2) Advertising: A retailer is not required to display prices charged for gasoline, diesel or other fuel.

(3) Displayed Prices: Except as provided in section (4) of this rule a retailer displaying a price for gasoline or diesel shall:

(a) Display clearly and conspicuously on each sign the lowest cash price for each grade of gasoline or diesel fuel offered for sale. Each lowest cash price displayed shall be the same size as all other prices displayed on the sign;

(b) Identify clearly and conspicuously for each price the grade of gasoline or diesel fuel;

(c) Arrange all prices in a meaningful and consistent order;

(d) State clearly and conspicuously on the dispensing device and on the sign all conditions applying to the lowest cash price. Conditions limiting the cash price on the display must comply with the following criteria:

(A) All words or symbols of limitations or condition must be presented in equal size and must be equally visible to the consumer;

(B) All words or symbols of limitations or condition must be no less than one-third the size of the words or symbols setting forth the cash price.

(e) Not display prices for products other than gasoline or diesel fuel in a manner creating a likelihood of confusion or misunderstanding with the price of gasoline or diesel fuel;

(f) Not charge a customer more than the amount registered on the dispensing device or per unit that the unit price calibrated on the dispensing device, unless the dispensing device is for diesel fuel and at least 85 percent of the fuel sold during the preceding 12 months by the retailer is diesel;

(g) Calibrate all dispensing devices in the same unit of measurement;

(h) Display the price per unit of measurement and the unit of measurement for each type of fuel in the same unit of measurement as shown on the dispensing device. In the event both cash and credit sales under a discount for cash program are made from the same dispensing device, a sign stating the cash price, and identifying it as such, at least two inches in height must be placed on the pump face in the immediate vicinity of the metered price so both may be observed by the consumer at the same time.

(4) Exceptions:

(a) A retailer who displays only the price of diesel for vehicles with PUC permits and who sells during the preceding 12 months at least 85 percent of its total fuel as diesel need not comply with subsections (3)(a) through (e) of this rule;

(b) A retailer who has a sign existing as of January 1, 1986, more than 20 feet in height as measured from ground level to the bottom of the sign must:

(A) Display clearly and conspicuously on the sign the lowest cash price for the two predominant grades of fuel which the retailer sells to motor vehicles. For purposes of this section, "predominant grades of fuel" means the grades sold in the greatest volume during the preceding 90 days;

(B) Display clearly and conspicuously on a sign visible from the street the lowest cash price for all grades of gasoline or diesel sold;

(C) Comply with all other provisions of section (3) of this rule.

(5) Limitations: A retailer displaying prices for a particular grade of gasoline or diesel shall:

(a) Not require as a condition of buying fuel at the displayed price that the buyer fill the fuel tank of the buyer's vehicle or purchase a specific quantity or dollar amount of fuel. This section shall not apply to sales to truckers with PUC permits;

(b) State clearly and conspicuously in commonly understood terms on each display and at each dispensing device any limitations applying to the price:

(A) For purposes of this rule limitations include but are limited to methods of payment, e.g., credit or cash; level of service, e.g., full service or mini-serve;

(B) In the event each dispensing device on a dispensing island is subject to the same limitations, clear and conspicuous signs may be placed on the canopy above the island that are visible from each side of the island or at the entry points of the island stating the limitation in lieu of a sign placed on each dispensing device on the island.

(6) Other Locations: If a price displayed on a sign is available only in a certain area of the service station or business, the area where the price displayed is available must be clearly and conspicuously identified so customers may readily determine the location of the displayed price.

Stat. Auth.: ORS Ch. 646

Stats. Implemented: ORS 646.915 & 646.930

Hist.: JD 7-1985, f. 12-31-85, ef. 1-1-86

137-020-0160

Sales Practices

(1) A retailer may not limit the price advertised for a particular grade of gasoline or diesel to a consumer purchasing or receiving goods or services in addition to the gasoline or diesel fuel except for full services. For purposes of this rule consumer does not include truckers with PUC permits who purchase diesel fuel.

(2) The location at which any grade of gasoline or diesel fuel is dispensed or at which any limitation is applicable shall not be changed except for a bona fide reason and shall not be changed within 60 days of another change except for an emergency or legal necessity.

(3) Violation of OAR 137-20-150 and this rule is a violation of the Unlawful Trade Practices Act, ORS 646.608(1)(u).

Stat. Auth.: ORS Ch. 646

Stats. Implemented: ORS 646.915 & 646.930

Hist.: JD 7-1985, f. 12-31-85, ef. 1-1-86

Registration of Telemarketers

137-020-0200

Definitions

For purposes of OAR 137-020-0200 through 137-020-0203:

(1) "Telephonic Seller" applies to all persons required to register with the Oregon Department of Justice pursuant to ORS 646.551 through 646.565.

(2) "Doing Business in This State" means making telephonic solicitations of prospective purchasers from locations in this state

or making telephonic solicitations of prospective purchasers who are located in this state.

(3) "Department" means Department of Justice.

(4) "Item" means any goods and services and includes coupon books which are to be used with businesses other than the seller's business.

(5) "Owner" means a person who owns or controls ten percent or more of the net income of a telephonic seller.

(6) "Person" includes an individual firm, association, corporation, partnership, joint venture, or any other business entity.

(7) "Principal" means an owner, an executive officer of a corporation, a general partner of a partnership, a sole proprietor of a sole pro-prietorship, a trustee of a trust, or any other individual with similar supervisory functions with respect to any person.

(8) "Purchaser" or "Prospective Purchaser" means a person who is solicited to become or does become obligated to a telephonic seller.

(9) "Salesperson" means any individual employed, appointed or authorized by a telephonic seller, whether referred to by the telephonic seller as an agent, representative, or independent contractor, who attempts to solicit or solicits a sale on behalf of the telephonic seller. The principals of a seller are themselves salespersons if they solicit sales on behalf of the telephonic seller.

(10) "Newspaper of General Circulation" is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, and which has been established, printed and published at regular intervals in the state, county, or city where publication, notice by publication, or official advertising is to be given or made for at least one year preceding the date of the publication, notice or advertisement.

Stat. Auth.: ORS Ch. 646

Stats. Implemented: ORS 646.551

Hist.: JD 4-1989, f. & cert. ef. 10-3-89

137-020-0201

Registration

(1) Not less than ten days prior to doing business in this state, a telephonic seller shall register with the Department of Justice by filing the information required by OAR 137-020-0202 and a filing fee of \$400. A seller shall be deemed to do business in this state if the seller solicits prospective purchasers from locations in this state or solicits prospective purchasers who are located in this state.

(2) The information required by OAR 137-020-0202 shall be submitted on a form provided by the Department of Justice and shall be verified by a declaration signed by each principal of the telephonic seller under penalty of perjury. The declaration shall specify the date and location of signing. Information submitted pursuant to OAR 137-020-0202(12) or (13) shall be clearly identified and appended to the filing.

(3) Registration of a telephonic seller shall be valid one year from the effective date thereof and may be annually renewed by making the filing required by OAR 137-020-0202 and paying a filing fee of \$400.

(4) Whenever, prior to expiration of a seller's annual registration, there is a material change in the information required by OAR 137-020-0202, the seller shall, within ten days, file an addendum updating the information with the Department of Justice. However, changes in salespersons soliciting on behalf of a seller shall be updated by addenda filed, if necessary, in quarterly intervals computed from the effective date of registration. The addendum shall provide the required information for all salespersons who are currently soliciting or have solicited on behalf of the seller at any time during the period between the filing of the registration, or the last addendum, and the current addendum, and shall include salespersons no longer soliciting for the seller as of the date of the filing of the current addendum.

(5) Upon receipt of a filing and filing fee pursuant to section (1) or (3) of this rule, the department shall send the telephonic seller a written confirmation of receipt of the filing. If the seller has more than one business location, the written confirmation shall be sent to the principal business location identified in the

seller's filing in sufficient number so that the seller has one for each business location. The seller shall post the confirmation of receipt of filing, within ten days of receipt thereof, in a conspicuous place at each of the seller's business locations and shall have available for inspection by any governmental agency at each location a copy of the entire registration statement which has been filed with the department. Until confirmation of receipt of filing is received and posted, the seller shall post in a conspicuous place at each of the seller's business locations within this state a copy of the first page of the registration form sent to the department. The seller shall also post in close proximity to either the confirmation of receipt of filing, or until the confirmation is received, the first page of the submitted registration form, the name of the individual or individuals in charge of each location from which the seller does business in this state, as defined in OAR 137-020-0200(2).

Stat. Auth.: ORS Ch. 646

Stats. Implemented: ORS 646.553

Hist.: JD 4-1989, f. & cert. ef. 10-3-89

137-020-0202

Filing Information

Each filing pursuant to OAR 137-020-0201(1) through (5) shall contain the following information:

(1) The name or names of the seller, including the name under which the seller is doing or intends to do business, if different from the seller's, and the name of any parent or affiliated organization that will engage in business transactions with purchasers relating to sales solicited by the seller or that accepts responsibility for statements made by, or acts of, the seller relating to sales solicited by the seller.

(2) The seller's business form and place of organization and, if the seller is a corporation, a copy of its articles of incorporation and bylaws and amendments thereto; or, if a partnership, a copy of the partnership agreement; or if operating under a fictitious business name, the location where the fictitious name has been registered. All the same information shall be included for any parent or affiliated organization disclosed pursuant to section (1) of this rule.

(3) The complete street address or addresses of all locations, designating the principal location from which the telephonic seller will be conducting business. If the principal location of the seller is not in this state, then the seller shall also designate which of its locations within this state is its main location in the state.

(4) A listing of all telephone numbers to be used by the seller and the address where each telephone using each of these telephone numbers is located.

(5) The name of, and the office held by, the seller's officers, directors, trustees, general and limited partners, sole proprietor, and owners, as the case may be, and the names of those persons who have management responsibilities in connection with the seller's business activities.

(6) The complete address of the principal residence, the date of birth and the driver's license number and state of issuance of each of the persons whose names are disclosed pursuant to section (5) of this rule.

(7) The name and principal residence address of each person the telephonic seller leaves in charge at each location from which the seller does business in this state, as defined in OAR 137-020-0200(2), and the business location which each of these persons is or will be in charge of.

(8) A statement, meeting the requirements of this rule, as to both the seller, whether a corporation, partnership, firm, association, joint venture, or any other type of business entity (and whether identified pursuant to section (5) or (7) of this rule or not), and as to any person identified pursuant to sections (5) and (7) of this rule, who:

(a) Has been convicted of a felony or mis-demeanor involving fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property. For purposes of this paragraph, a plea of nolo contendere is a conviction;

(b) Has had entered against him or her a final judgment or order in a civil or administrative action, including a stipulated

judgment or order, if the complaint or petition in the civil or administrative action alleged acts constituting a violation of the Unlawful Trade Practices Act, fraud, theft, embezzlement, fraudulent conversion, or misappropriation of property, the use of untrue or misleading representations in an attempt to sell or dispose of real or personal property, or the use of unfair, unlawful or deceptive business practices;

(c) Is subject to any currently effective injunction or restrictive court order relating to business activity as the result of an action brought by a federal, state, or local public agency or unit thereof, including, but not limited to, an action affecting any vocational license;

(d) Has at any time during the previous seven tax years filed for bankruptcy, been adjudged a bankrupt, been reorganized due to insolvency, or been a principal, director, officer, trustee, general or limited partner, or had management responsibilities of any other corporation, partnership, joint venture, or business entity that has so filed or was so adjudicated or reorganized during or within one year after the period that the person held that position. For purposes of subsections (a), (b) and (c) of this section, the statement required by this subdivision shall identify the seller or person, the court or administrative agency rendering the judgment or order, the docket number of the matter, the date of the judgment or order, and the name of the governmental agency, if any, that brought the action resulting in the judgment or order. For purposes of this subsection, the statement required by this subdivision shall include the name and location of the seller or person filing in bankruptcy, adjudged a bankrupt, or reorganized due to insolvency, and shall include the date thereof, the court which exercised jurisdiction, and the docket number of the matter.

(9) The name of the financial institution and account number for each of the seller's demand accounts; checking accounts; and merchant accounts used for the deposit of any credit card charge slips, including but not limited to credit cards issued by VISA, MasterCard, Discover Card, American Express, Diners Club or Carte Blanche.

(10) Every pseudonym or alias ever used or now being used by a salesperson, manager or principal of the telephonic seller's business.

(11) A list of the names and principal residence addresses of salespersons who solicit on behalf of the telephonic seller and the names the salespersons use while so soliciting.

(12) A description of the items the seller is offering for sale and a copy of all sales scripts the telephonic seller requires salespersons to use when soliciting prospective purchasers, or if no sales script is required to be used, a statement to that effect.

(13) A copy of all sales information and literature (including but not limited to scripts, outlines, instructions, and information regarding how to conduct telephonic sales, sample introductions, sample closings, product information, and contest or premium-award information) provided by the telephonic seller to salespersons or of which the seller informs salespersons, and a copy of all written materials the seller sends to any prospective or actual purchaser.

(14) If the telephonic seller represents or implies, or directs salespersons to represent or imply to purchasers that the purchaser will receive certain specific items (including a certificate of any type which the purchaser must redeem to obtain the item described in the certificate) or one or more items from among designated items, whether the items are denominated as gifts, premiums, bonuses, prizes, or otherwise, the filing shall include the following:

(a) A list of the items offered;

(b) The value or worth of each item described to prospective purchasers and the basis for the valuation;

(c) The price paid by the telephonic seller to its supplier for each of these items and the name, address, and telephone number of each item's supplier;

(d) If the purchaser is to receive fewer than all of the items described by the seller, the filing shall include the following:

(A) The manner in which the telephonic seller decides which item or items a particular prospective purchaser is to receive;

(B) The odds a single prospective purchaser has of receiving

each described item;

(C) The name and address of each recipient who has, during the preceding 12 months (or if the seller has not been in business that long, during the period the telephonic seller has been in business) received the item having the greatest value and the item with the smallest odds of being received.

(e) All rules, regulations, terms, and conditions a prospective purchaser must meet in order to receive the item.

(15) If the telephonic seller is offering to sell any metal, stone, or mineral, the filing shall include the following:

(a) The name, address, and telephone number of each of the seller's suppliers and a description of each metal, stone, or mineral provided by the supplier;

(b) If possession of any metal, stone, or mineral is to be retained by the seller or will not be transferred to the purchaser until the purchaser has paid in full, the filing shall include the following:

(A) The address of each location where the metal, stone, or material will be kept;

(B) If not kept on premises owned by the seller or at an address or addresses set forth in compliance with section (3) of this rule, the name of the owner of the business at which the metal, stone, or mineral will be kept;

(C) A copy of any contract or other document which evidences the seller's right to store the metal, stone, or mineral at the address or addresses designated pursuant to paragraph (A) of this subsection.

(c) If the seller is not selling the metal, stone, or mineral from its own inventory, but instead purchases the metal, stone, or mineral to fill orders taken from purchasers, the filing shall include copies of all contracts or other documents evidencing the seller's ability to call upon suppliers to fill the seller's orders;

(d) If the seller represents to purchasers that the seller has insurance or a surety bond of any type relating to a purchaser's purchase of any metal, stone, or mineral from the seller, the filing shall include a complete copy of all these insurance policies and bonds;

(e) If the seller makes any representations as to the earning or profit potential of purchases of any metal, stone, or mineral, the filing shall include data to substantiate the claims made. If the representation relates to previous sales made by the seller or a related entity, substantiating data shall be based on the experiences of at least 50 percent of the persons who have purchased the particular metal, stone, or mineral from the seller or related entity during the preceding six months (or if the seller or related entity has not been in business that long, during the period the seller or related entity has been in business) and shall include the raw data upon which the representation is based, including, but not limited to, all of the following:

(A) The length of time the seller or related entity has been selling the particular metal, stone, or mineral being offered;

(B) The number of purchasers thereof from the seller or related entity known to the seller or related entity to have made at least the same earnings or profit as those represented;

(C) The percentage that the number disclosed pursuant to paragraph (B) of this subsection represents of the total number of purchasers from the seller or related entity of the particular metal, stone, or mineral.

(16) If the telephonic seller is offering to sell an interest in oil, gas, or mineral fields, wells, or exploration sites, the filing shall include disclosure of the following:

(a) The seller's ownership interest, if any, in each field, well, or site being offered for sale;

(b) The total number of interests to be sold in each field, well, or site being offered for sale;

(c) If, in selling an interest in any particular field, well, or site, reference is made to an investigation of these fields, wells, or sites by the seller or anyone else, the filing shall include the following:

(A) The name, business address, telephone number, and professional credentials of the person or persons who made the investigation;

(B) A copy of the report and other documents relating to the

investigation prepared by the person or persons.

(d) If the seller makes any representation as to the earning or profit potential of purchases of any interest in these fields, wells, or sites, the filing shall include data to substantiate the claims made. If the representation relates to previous sales made by the seller or a related entity, the substantiating data shall be based on the experiences of at least 50 percent of the purchasers of the particular interests from the seller or the related entity during the preceding six months (or if the seller has not been in business that long, during the period the seller or related entity has been in business) and shall include the raw data upon which the representation is based, including, but not limited to, all of the following:

(A) The length of time the seller or related entity has been selling the particular interests in the fields, wells, or sites being offered;

(B) The number of purchasers of the particular interests from the seller or related entity known to the seller to have made at least the same earnings as those represented;

(C) The percentage which the number disclosed pursuant to paragraph (B) of this subsection represents of the total number of purchasers of the particular interests from the seller or related entity.

Stat. Auth.: ORS Ch. 646

Stats. Implemented: ORS 646.557

Hist.: JD 4-1989, f. & cert. ef. 10-3-89

137-020-0203

Information to be Provided Each Prospective Purchaser

In addition to complying with the requirements of OAR 137-020-0202, as applicable, each telephonic seller, shall, at the time the solicitation is made and prior to consummation of any sales transaction, provide all of the following information to each prospective purchaser:

(1) If the telephonic seller represents or implies that a prospective purchaser will receive, without charge therefor, certain specific items or one item from among designated items, whether the items are denominated as gifts, premiums, bonuses, prizes, or otherwise, the seller shall provide the following:

(a) The information required to be filed by OAR 137-020-0202(14)(d)(A) and (B), and (e);

(b) The complete street address of the location from which the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location;

(c) The total number of individuals who have actually received from the telephonic seller, during the preceding months (or if the seller has not been in business that long, during the period the telephonic seller has been in business), the item having the greatest value and the item with the smallest odds of being received.

(2) If the telephonic seller is offering to sell any metal, stone, or mineral, the seller shall provide the following information:

(a) The complete street address of the location from which the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location;

(b) The information specified in OAR 137-020-0202(15)(b) (A) and (B) and (e).

(3) If the telephonic seller is offering to sell an interest in oil, gas, or mineral fields, wells, or exploration sites, the seller shall provide the following information:

(a) The complete street address of the location from which the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location;

(b) The information required to be filed by OAR 137-020-0202(16)(a), (b) and (d) and (c)(A).

(4) If the telephonic seller represents that office equipment or supplies being offered are offered at prices which are below those usually charged for these items, the seller shall provide the following information:

(a) The complete street address of the location from which

the salesperson is calling the prospective purchaser and, if different, the complete street address of the telephonic seller's principal location;

(b) The name of the manufacturer of each of the items the telephonic seller has represented for sale and in which the prospective purchaser expresses interest.

Stat. Auth.: ORS Ch. 646

Stats. Implemented: ORS 646.557

Hist.: JD 4-1989, f. & cert. ef. 10-3-89

137-020-0250

Loan Brokers and Misleading Activities

(1) Definitions: As used in this rule:

(a) The definitions of terms set forth in ORS 646.605 are applicable;

(b) "Advance Fee" means any consideration which is assessed or collected, prior to the closing of a loan, by a loan broker and includes, but is not limited to, payments to information providers as defined under ORS 759.700 et seq.;

(c) "Advertise" means any form of solicitation including but not limited to newspaper, radio and television advertisements;

(d) "Borrower" means a person obtaining or attempting to obtain a loan of money or a line of credit for personal use;

(e) "Loan Broker" means any person who:

(A) For or in expectation of consideration arranges or attempts to arrange or offers to find a loan of money or a line of credit;

(B) For or in expectation of consideration assists or advises a borrower in obtaining or attempting to obtain a loan of money, a line of credit, or related guarantee, enhancement, or collateral of any kind or nature; or

(C) Acts for or on behalf of a loan broker for the purpose of soliciting borrowers;

(D) "Loan broker" does not include:

(i) Any person making a direct loan to a consumer;

(ii) Any bank or savings and loan association, trust company, building and loan association, credit union, mutual bank and savings bank, consumer finance company, securities broker-dealer, real estate broker or salesperson, attorney, Federal Housing Administration or Veterans' Administration approved lender, mortgage broker or lender, or insurance company, provided that the person excepted is licensed by or approved by and subject to regulation or supervision of any agency of the United States or this state and is acting within the scope of the license or approval; and also excepting subsidiaries of licensed or chartered consumer finance companies, banks, credit unions, savings and loan associations;

(iii) Mortgage brokers exempt from licensing under ORS Chapter 59 or as defined in ORS 59.015(10);

(iv) Mortgage bankers as defined in ORS 59.015(9);

(v) A person making a retail installment sales;

(vi) Any person who has a contractual correspondent agreement with any qualified lender to deliver first or second mortgages secured by real estate; and

(vii) Any employee of the above exempted persons.

(f) "Principal" means any officer, director, partner, joint venturer, branch manager, or other person with similar managerial or supervisory responsibilities for a loan broker;

(g) "Qualified Lender" means any bank or savings and loan association, trust company, building and loan association, credit union, consumer finance company, retail installment sales company, Federal Housing Administration or Veterans' Administration approved lender or person who has available through a state or federally regulated financial institution \$250,000 which the person has agreed to use to finance loans and who has executed a written contract with a loan broker according to this rule.

(2) It is unfair or deceptive in trade or commerce for a loan broker to charge an advance fee unless the loan broker:

(a) Prior to accepting any advance fees, provides to the prospective borrower a written contract which includes:

(A) The names of the loan broker and any parent organizations under which the parent organization is doing

business;

(B) The length of time the loan broker has been in business;

(C) A full and detailed description of the actual services that the loan broker will perform for the prospective borrower;

(D) The number of contracts that the loan broker has entered into in the past 12 months;

(E) The number of loans that have been made to consumers through contracts with the loan broker in the past 12 months and the dollar amount of those loans;

(F) The name of the bank into which the borrower's advance fees will be deposited;

(G) Information concerning who the advance fees are paid to and for what service;

(H) The names of the qualified lenders that are providing loans to the loan broker's customers and the criteria that the qualified lenders are using to determine whether to make a loan to prospective borrowers referred to them by the broker; and

(I) A provision outlining the refund requirement set forth in subsection (3)(a) of this rule.

(b) Has a written contract from a qualified lender agreeing to accept or reject a loan within the time specified in this rule and agreeing to make a loan if an individual meets specified criteria set forth in the contract;

(c) Notifies the borrower within 14 days of receipt of the application whether the loan has been accepted or rejected and provides the loan within seven days of acceptance;

(d) Provides to the borrower, upon request, all correspondence and written materials with the qualified lender concerning the loan application;

(e) Submits the borrower's application within five days of receiving the application to a qualified lender with whom the loan broker has a written contract;

(f) Place any advance fees in an escrow account; and

(g) Complies with the provisions of section (3) of this rule.

(3) It is unfair and deceptive in trade or commerce for a loan broker to:

(a) Fail to refund within 48 hours of rejecting a loan the advance fees paid;

(b) Advertise or represents that all or most borrowers will qualify for a loan or that persons with bad credit histories or no credit histories will qualify for a loan;

(c) Fail to substantiate to the Oregon Department of Justice, within 14 days of a request, representations made regarding any offer to obtain a loan;

(d) Spend any advance fees until the loan has been granted; and

(e) Advertise loan brokering services without disclosing as a part of that advertisement:

(A) Any material restrictions regarding obtaining a loan;

(B) The qualified lenders who will provide the loans;

(C) The dollar amount of loans which the loan broker has obtained for borrowers;

(D) The cost of the service; and

(E) The maximum period of time the loan broker will take to obtain a written commitment from a qualified lender to loan money.

Stat. Auth.: ORS 183.310 - 183.550, 183.335(5) & 646.608(1)(u) & (4)

Stats. Implemented: ORS 646.608(1)(u)

Hist.: JD 1-1992(Temp), f. & cert. ef. 2-13-92; JD 9-1992, f. & cert. ef. 4-15-92

137-020-0300

Unordered Real Estate, Goods, or Services

(1) As used in OAR 137-020-0300:

(a) "Goods" includes real estate and services;

(b) "Mistake" means unintentionally providing or sending goods to consumers;

(c) "Person" includes individual, corporation, partnership, association or any other legal entity;

(d) "Real Estate, Goods or Services" has the same meaning as ORS 646.605(7);

(e) "Send" includes delivery, mail, provide, or caused to be delivered, mailed or provided;

(f) "Unordered Goods" means any real estate, goods or services which are sent without prior expressed request or consent from the person receiving the goods;

(g) "Unordered Goods" do not include:

(A) Goods sent or services performed by mistake;

(B) A gift given free of charge to a consumer;

(C) Additions to existing services or levels of services already provided to consumers for which there is no separate and specific charge for such additions;

(D) Restructuring, after notice pursuant to section (2) of this rule of existing goods or services or levels of services already provided, where the restructuring does not result in a substantial change in goods or services;

(E) Goods sent pursuant to an agreement that is in compliance with **16 CFR § 425**.

(2) A person satisfies the notice requirement of paragraph (1)(g)(D) of this rule when:

(a) The consumer receives one notice separate from the provider's regular billings, at least 30 but not more than 45 days, in advance of the effective date of the delivery of the new goods, clearly and conspicuously:

(A) Describing the specific goods to be delivered;

(B) Stating the price of the goods to be delivered;

(C) Informing the consumer that the goods will be delivered unless the consumer informs the provider that the goods are not wanted; and

(D) Informing the consumer of at least two methods, at least one of which is expense-free to the consumer, by which the consumer can inform the provider of the consumer's desire not to receive the goods.

(b) The first bill, containing a charge for the goods, clearly and conspicuously, and in direct proximity to an itemized listing of the new charge on the face of the bill, advises the consumer of the inclusion of the new charge on the bill for the new goods and of the consumer's right to cancel those goods within ten days of the receipt of the bill at no cost to the consumer for the period during which those goods were provided prior to effective cancellation.

(3) The notice required by section (2) of this rule shall not require the consumer to cancel the goods to avoid the charge prior to ten days after the consumer's receipt of the first bill containing the charges for goods.

(4) For purposes of this rule, cancellation by mail shall be effective upon the date of mailing the request for cancellation.

(5) It shall be unfair and deceptive in trade or commerce for any person to:

(a) Send a consumer unordered goods unless the person sending the goods proves the goods were sent by mistake, as a gift, or as a result of the consumer's prior expressed request or consent;

(b) Send any bill to a consumer for any unordered goods;

(c) Interrupt, delay, terminate, cancel, or deny delivery of or other provision of goods to a consumer because the consumer has not paid for or returned unordered goods;

(d) Require a consumer to consent to or authorize the receipt of unordered goods as a condition of doing business with the person.

[Publications: The Publication(s) referred to or incorporated by reference in this rule are available from the office of the Department of Justice.]

Stat. Auth.: ORS 183.310 - 183.410 & 646.608(1)(u) & (4)

Stats. Implemented: ORS 646.608(1)(u)

Hist.: JD 3-1991(Temp), f. & cert. ef. 5-31-91; JD 9-1991, f. & cert. ef. 11-26-91

Contest, Sweepstakes and Prize Notification Rules

137-020-0410

Definitions and Exemptions

(1) Purpose: The purpose of OAR 137-020-0410 to 137-020-0440 is to declare as unfair or deceptive in trade or commerce certain practices in promotions.

(2) Authority: OAR 137-020-0410 to 137-020-0440 are adopted pursuant to ORS Chapter 183 on authority granted to the

Chapter 137 Department of Justice
OREGON ADMINISTRATIVE RULES 1997 COMPILATION

Attorney General by ORS 646.608(4) and ORS 646.608(1)(u).

(3) Definitions: For purposes of OAR 137-020-0410 to 137-020-0440:

(a) The definitions set forth in ORS 646.605 are applicable.

(b) "Advertisement" or "solicitation" means any oral, written or graphic notice given in a manner designed to attract public attention and includes without limitation, public broadcasts, and notices published in the electronic press as well as telephone and mail solicitations used to encourage any type of action by the person solicited relating to a promotion.

(c) "Clear and conspicuous" means the message is conveyed in a manner that is reasonably apparent to the audience to whom it is directed. In order for a message to be considered clear and conspicuous, it shall, at a minimum:

(A) Not contradict or substantially alter any terms it purports to clarify, explain or otherwise relate to; and

(B) In the case of printed advertising or solicitations:

(i) Be in close proximity to the terms it purports to clarify, explain or otherwise relate to; and

(ii) Be of sufficient prominence in terms of placement, font or color contrast as compared with the remainder of the advertisement or solicitation so as to be reasonably apparent to the audience to whom it is directed.

(d) "Contest" means a procedure where a prize is awarded or offered in which the outcome depends on the skill of the contestant and includes puzzles, games, and competitions. "Contest" includes any such procedure in which a person is required to purchase anything, pay anything of value or make a donation. "Contest" includes also any such procedure which is advertised in a way creating the reasonable impression that a payment of anything of value, purchase of anything, or making a donation is a condition of awarding a prize or receiving, using, competing for, or obtaining information about a prize.

(e) "Prize" means a gift, award, cash award, or other thing of value offered or awarded to a person in a promotion.

(f) "Promotion" means any contest, sweepstakes or scheme. "Promotion" does not include any contest, sweepstakes or scheme in which the sole act required for entry, participation, or receipt of a prize is that the participant mail or deposit a form or game piece with the sponsor, place a call to a local or toll free number, or mail a request or place a call to a local or toll-free number to obtain a game piece or form which the entrant can then return by mail or deposit at a local retail establishment, provided:

(A) That the fact that no purchase or payment of anything of value to the sponsor is required is clearly and conspicuously disclosed in each advertisement or solicitation; and

(B) No advertisements or solicitations for the contest, sweepstakes, or scheme create the reasonable impression that a payment of anything of value, purchase of anything, or making a donation is a condition of awarding a prize or receiving, using, competing for, or obtaining information about a prize.

(g) "Personal Financial Data" means personal financial data about the person, including but not limited to income, credit card ownership, bank account information, or similar financial information.

(h) "Scheme" means any advertisement or solicitation which requires a person to pay anything of value, make a donation, or creates the reasonable impression that a payment of anything of value, purchase of anything, or making a donation is a condition of awarding a prize or receiving, using, competing for, or obtaining information about a prize.

(i) "Sponsor" means any person who, in connection with any promotion, awards or offers another person a prize or who allows the person to receive, use, compete for, or obtain information about a prize.

(j) "Sweepstakes" means a procedure based on chance of awarding a prize. "Sweepstakes" includes any such procedure in which a person is required to purchase anything, pay anything of value or make a donation as a condition of awarding a prize or receiving, using, competing for, or obtaining information about a prize. "Sweepstakes" includes also any such procedure which is advertised in a way creating the reasonable impression that a payment of anything of value, purchase of anything, or making a

donation, is a condition of awarding a prize or receiving, using, competing for, or obtaining information about a prize.

(k) "Verifiable Retail Value" has the meaning given in OAR 137-020-0015(1)(c).

(4) OAR 137-020-0410 to 137-020-0440 apply only to promotions. These rules do not apply to:

(a) Any activity by the State of Oregon or by a private person acting as a duly authorized contractee of the State Lottery Commission;

(b) A qualified nonprofit organization conducting a raffle pursuant to ORS Chapter 464; or

(c) Activity described in ORS 646.612 (2).

(5) The information required to be disclosed pursuant to OAR 137-020-0420, OAR 137-020-0430 and OAR 137-020-0440 shall be deemed to be clearly and conspicuously disclosed if it is printed in compliance with this subsection in a distinct portion of the solicitation entitled "Consumer Disclosure", "Official Rules," or words of similar meaning. To comply with this subsection, the main text of the advertisement or solicitation shall contain clear and conspicuous reference to this portion, and the reference to the portion shall appear in close proximity to each description of the principal prize.

(6) Broadcast advertisements shall be exempt from the requirements of OAR 137-020-0420 and 137-020-0430 (2)(a), (b), and (c) if:

(a) The information otherwise required by OAR 137-020-0420 to 137-020-0440 is available in writing; and

(b) The broadcast advertisement clearly and conspicuously refers the consumer to the location where the information is available.

Stat. Auth.: ORS 180.520(1)(c), 646.608(1)(u) & 646.608(1)(u)

Stats. Implemented: ORS 180.520(1)(c), 646.608(1)(u) & 646.608(1)(u)

Hist.: JD 2-1996, f. 6-21-96, cert. ef. 7-8-96

137-020-0420

Rules of Unique Application to Contests

It is unfair or deceptive in trade or commerce for a sponsor to advertise or solicit any person to participate in any contest which requires a person to pay money or make a donation or creates the impression in a reasonable person that a payment of anything of value, purchase of anything, or making a donation is a condition of participation in the contest, unless there is clear and conspicuous disclosure of:

(1) The maximum number of rounds or levels, if the contest has more than one round or level;

(2) The date the final winner will be determined;

(3) The maximum total cost the final winner will have paid to the sponsor to participate in the contest, and, if the final winner must purchase or pay anything of value to a person other than the sponsor as a condition of eligibility, then that fact must be clearly and conspicuously disclosed;

(4) If the contest involves multiple rounds of increasing difficulty, an example illustrative of the last determinative round or a statement that subsequent rounds will be more difficult;

(5) If the contest is judged by other than the sponsor, the identity of or description of the qualifications of the judges;

(6) The method used in judging; and

(7) The name and address of the sponsor, or the sponsor's agent, consistently stated wherever it is used in a promotion, and:

(a) The name and address of the sponsor, or the sponsor's agent, stated on the envelope used to mail the advertisement or solicitation; or

(b) The name and address of the sponsor, or the sponsor's agent, stated on the entry form.

Stat. Auth.: ORS 180.520(1)(c), 646.608(1)(u) & 646.608(1)(u)

Stats. Implemented: ORS 180.520(1)(c), 646.608(1)(u) & 646.608(1)(u)

Hist.: JD 2-1996, f. 6-21-96, cert. ef. 7-8-96

137-020-0430

Rules of Unique Application to Sweepstakes

It is unfair or deceptive in trade or commerce for a sponsor to advertise or solicit any sweepstakes unless there is a clear and conspicuous disclosure of:

(1) The statement of odds of winning in arabic numerals; provided that if the odds of winning depend on the number of entries received, a statement to that effect will be deemed sufficient;

(2) The name and address of the sponsor, or the sponsor's agent, consistently stated wherever it is used in a promotion, and:

(a) The name and address of the sponsor, or the sponsor's agent, stated on the envelope used to mail the advertisement or solicitation; or

(b) The name and address of the sponsor, or the sponsor's agent, stated on the entry form or on the heading to the solicitation; and

(3) The rules for entry without purchase.

Stat. Auth.: ORS 180.520(1)(c), 646.608(1)(u) & 646.608(1)(u)

Stats. Implemented: ORS 180.520(1)(c), 646.608(1)(u) & 646.608(1)(u)

Hist.: JD 2-1996, f. 6-21-96, cert. ef. 7-8-96

137-020-0440

Prohibitions applicable to all promotions (Including Schemes, Sweepstakes, and Contest)

It is unfair or deceptive in trade or commerce for a sponsor to advertise or solicit for a promotion if the sponsor:

(1) Misleads a person as to the source of the promotion. This prohibition includes but is not limited to a promotion which indicates or implies that the promotion originates from a government agency, public utility, insurance company, consumer reporting agency, debt collector, law firm, or common carrier, unless such is the case;

(2) Misleads a person to believe the number of persons eligible for the prize, contest, or next level of the contest is limited, or that a person has been selected to receive a particular prize, unless such is the case;

(3) Represents that a person has been declared a finalist, is in first place, or is otherwise in a limited group of persons with an enhanced likelihood of winning or receiving a prize, from which a single winner or select group of winners will receive a prize, when more than 25% of those receiving the notice have the same chance of winning;

(4) Represents directly or by implication that a person will have an increased chance of receiving a prize by making multiple or duplicate purchases, payments or donations, or by entering more than once, unless such is the case;

(5) Misleads a person that the person is being notified a second or final time of the opportunity to receive or compete for a prize, unless such is the case;

(6) Requires as a condition of participation in any promotion any person to disclose the person's personal financial data;

(7) Creates the reasonable impression that disclosure of a person's personal financial data is a condition of participating in any promotion;

(8) Makes or solicits any charge or fee that is not clearly and conspicuously disclosed in the initial advertisement or solicitation, as a condition of entering or continuing to participate in that promotion;

(9) Connects or combines prizes from different promotions unless the fact that the same prizes may be offered in various promotions is clearly and conspicuously disclosed and the combination of prizes will not affect the stated odds of winning;

(10) Issues any writing which simulates or resembles:

(a) A negotiable instrument as described in ORS 73.1040(1) unless the writing clearly and conspicuously discloses its true value and purposes and the writing would not mislead a reasonable consumer; or

(b) An invoice unless the invoice seeks payment for goods, property or services which the recipient has previously agreed to receive from the sponsor;

(11) Fails to clearly and conspicuously disclose the verifiable retail value in arabic numerals of any prize which the person receiving the notice has been selected to receive or may be eligible to receive;

(12) Fails to clearly and conspicuously disclose the cost of shipping or handling fees or any other charges necessary to participate in a promotion;

(13) Fails to clearly and conspicuously make any other disclosure necessary to assure that the promotion is not misleading, unfair, or deceptive;

(14) Charges a participant in a promotion for shipping, unless the charge is:

(a) Less than or equal to the average cost of postage or the average charge of a delivery service in the business of delivering goods of like size, weight, and kind for shippers other than the offeror of the gift; or

(b) Less than or equal to the exact amount for shipping paid to an independent fulfillment house or an independent supplier, either of which is in the business of shipping goods for shippers other than the offeror of the gift; or

(15) Charges a participant in a promotion for handling, unless the charge is:

(a) Reasonable;

(b) Less than or equal to the actual cost of handling; or

(c) In the case of a general merchandise retailer, less than or equal to the actual amount for handling paid to an independent fulfillment house or supplier, either of which is in the business of handling goods for businesses other than the offeror of the gift.

Stat. Auth.: ORS 180.520(1)(c), 646.608(1)(u) & 646.608(1)(u)

Stats. Implemented: ORS 180.520(1)(c), 646.608(1)(u) & 646.608(1)(u)

Hist.: JD 2-1996, f. 6-21-96, cert. ef. 7-8-96

DIVISION 25

BINGO/RAFFLES

General Provisions

137-025-0020

Definitions

For purposes of these rules, the following definitions shall apply:

(1) The "Department" means the Oregon Department of Justice.

(2) "Bingo" means a game played on a printed form or card containing a grid bearing horizontal and vertical lines of numbers. Each card must include the same number of numbers. The numbers may be pre-printed or completed by the players. Numbers are drawn from a receptacle containing no more than 90 numbers, until there are one or more winners. A winner(s) is determined by the player(s) to first cover or uncover the selected numbers in a designated combination, sequence or pattern as they appear on the player's card. The progress toward a "bingo" of the non-winning players shall be irrelevant in determining the prize payout for the winner(s). A "blackout" (i.e., covering all squares on the grid) shall qualify as a designated sequence or pattern. Games which do not qualify as bingo include, but are not limited to, games marketed as "quick shot bonanza," "pick X" bingo, and "pick-8" bingo in the format utilizing a 40 square grid.

(3) "Pull Tab" means a single folded or banded ticket or card, the face of which is initially covered or otherwise hidden from view to conceal a number, symbol or set of symbols, a few of which numbers or symbols out of every set of pull tabs have been designated in advance and at random as prize winners.

(4) "Raffle" means a form of a lottery in which each participant buys a ticket for an article or money designated as a prize and where the winner is determined by a random drawing. A raffle includes the elements of consideration, chance and a prize. Consideration is presumed to be present unless it is clearly and conspicuously disclosed to prospective participants that tickets to the drawing may be acquired without contributing something of economic value.

(5) "Door Prize Drawing" means a drawing held by a nonprofit organization at a meeting of the organization where both the sale of tickets and the drawing(s) occur during the meeting and the total value of the prize(s) does not exceed \$500.

(6) "Handle" means the total amount of revenue raised from the sale of bingo cards and raffle tickets.

(7) "Responsible Officials of the Organization" means the

officers of the organization and the board of directors, if any.

(8) "Bingo Game Manager" means any person who is responsible for the overall conduct of bingo games of a charitable, fraternal or religious organization.

(9) "Regular Bingo Game" means a bingo game where players use hard cards or paper cards from a packet which have been purchased for a package price and may be used by players during more than one game of a session.

(10) "Special Bingo Game" means a bingo game where players must purchase individual paper cards where use is limited to a specific bingo game.

(11) "Concessions" means the sale of food, beverages, related bingo supplies, such as daubers, glue and other retail items using a bingo theme sold to bingo players, except:

(a) When sold from booths, kitchens and other locations operated by nonprofit tax-exempt organizations and less than one-half of all of the locations' sales during the reporting period are made to bingo players; or

(b) When sold from a restaurant, tavern or other for-profit establishment which is organized primarily to sell food and beverages to the public and which makes sales to bingo players of Class C or D bingo licensees and such sales are made not more than one day per week per establishment and the establishment is open to the public and serves nonplayers during the bingo session.

(12) "Management or Operation" means supervising the games.

(13) "Administration or Operation" means supervising the games.

(14) "Supervise" means to direct, oversee and inspect the work of others; to exercise authority with respect to decision-making or the implementing of decisions; and responsibility for the performance of functions integral to the operation of bingo and raffles, including operation of the games and operation of the facility used to conduct the games.

(15) "Drawing" means an approved random selection process for determining winners in a raffle. To be random, each number in the drawing must have an equal chance of selection.

Stat. Auth.: ORS 464.250(1) & Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87; JD 1-1989, f. & cert. ef. 3-1-89; JD 1-1991, f. 2-1-91, cert. ef. 3-1-91; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0030

Eligibility for Licenses in General

(1) Every applicant for a license to conduct bingo or raffle games must:

(a) Be organized primarily for purposes other than the operation of bingo and raffle games;

(b) Have a valid organizational governing structure, and the members of the governing structure must exercise independent control over the organization's activities and budget;

(c) Be exempt from the payment of federal income taxes and have held that exempt status for at least one year preceding its application for a license. The application must be accompanied by a copy of a determination letter from the Internal Revenue Service, verifying tax exempt status or, if the organization qualifies for tax exempt status other than pursuant to **IRC 501(c)**, a signed opinion letter from an attorney or certified public accountant stating that the organization holds tax exempt status and citing the relevant provisions of the **Internal Revenue Code** which support the tax exempt status. If an Internal Revenue Service determination letter is dated less than one year prior to the date of application to the Department, the applicant shall have the burden of demonstrating that it has met all organizational and operational tests for the exempt status and has been organized primarily for charitable, fraternal or religious purposes for a period of not less than one year prior to the date of the application. Any applicant that claims its tax exempt status through a ruling by the Internal Revenue Service as to its parent organization's tax exempt status must demonstrate that it is covered by such a ruling. The applicant must have been chartered by the parent organization for a period of one year preceding its application for a license.

(2) No joint license for conducting bingo or raffle games will be issued to two or more organizations. However, the Department

may grant approval for a licensee to share the operation of the games with other organizations which would otherwise qualify for a license under section (1) of this rule.

(3) Licenses to conduct bingo or raffle games may not be transferred or assigned.

(4) A licensee shall promptly notify the Department if the licensee loses its federal tax exempt status. A license ceases to be valid if the licensee loses its tax exempt status.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the Department of Justice.]

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-8

137-025-0040

General Requirements of Operations

(1) No person shall conduct bingo or raffle games unless he or she conducts such activities on behalf of a charitable, fraternal or religious organization licensed by the Department to operate such games or engages in such activity as is otherwise exempt from licensing as provided in section (2) of this rule. The sale of pull tabs shall not qualify as bingo or raffle and is not permitted by these rules.

(2) The following activities shall not require a license under these rules:

(a) Door prize drawings;

(b) Operating bingo with a handle of no more than \$2,000 per session and with a total handle of no more than \$5,000 per calendar year;

(c) Holding raffles with a handle of no more than \$2,000 per raffle and with a total handle of no more than \$5,000 per calendar year.

(3) All individuals involved in the operation of bingo and raffle games shall be volunteers or employees of the licensee. Operation of the games shall not be conducted by independent contractors. However, a bingo licensee may contract with a third party to provide specific collateral services required for the proper and efficient operation of a bingo game. Such services may include bookkeeping/ accounting services, payroll services, janitorial services, security services, construction services and legal services. Contract shall be permitted only if the third party regularly performs such services for clients other than licensees and the fee, if any, charged for the service(s) provided is customary and reasonable.

(4) A licensee shall not permit the operating expenses of its bingo and raffle games, excluding prizes and money paid to players, to exceed 15 percent of the annual handle of its bingo and raffle operations. If the expenses of bingo and raffle games operated by the licensee in the preceding 12 months have exceeded 15 percent, the bingo or raffle license shall not be renewed unless the licensee files, on a form prescribed by the Department, a satisfactory plan for operating in compliance with the 15 percent expense limitation. The license shall be conditioned on continued compliance with the plan and may be revoked or suspended in the event of noncompliance.

(5) In the event that compensation is paid to personnel for services related to the operation of bingo and raffle games, the compensation shall not exceed:

(a) 200 percent of the federal minimum wage for nonsupervisory personnel; and

(b) 300 percent of the federal minimum wage for supervisory personnel.

(6)(a) Unless excepted by the Department, the annual handle of combined bingo and raffle operations of any charitable, fraternal or religious organization shall not exceed \$1 million for license years ending prior to December 31, 1991, and thereafter, shall not exceed an amount calculated annually as provided in subsection (b) of this section;

(b) The handle limitation for license years ending December 31, 1991, to December 30, 1992, shall be \$1,160,000. Each subsequent increase shall be based on a percentage equal to the percentage increase in the cost of living for the previous calendar year. The change in the cost of living shall be measured by the change in the Portland Consumer Price Index for all Urban

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Consumers for All Items as prepared by the Bureau of Labor Statistics of the United States Department of Labor.

(7) No bingo card or raffle tickets shall be sold to persons under 18 years of age unless the sale is made in the presence of their parent or legal guardian.

(8) Unless excepted by the Department, no person shall spend more than 30 hours per week administering or operating bingo and raffle games.

Stat. Auth.: ORS 464.250(1) & Ch. 914

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; JD 6-1991, f. & cert. ef. 10-22-91;

JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

Bingo Licenses

137-025-0050

Classes of Licenses

(1) Unless excepted by the Department, a "Class A" bingo license shall authorize a licensee to collect a bingo handle of no more than \$1 million during the license year.

(2) A "Class B" bingo license shall authorize a licensee to collect a bingo handle of no more than \$250,000 during the license year.

(3) A "Class C" bingo license shall authorize a licensee to collect a bingo handle of no more than \$75,000 during the license year.

(4) A "Class D" bingo license shall authorize a licensee to collect a bingo handle of no more than \$20,000 during the license year.

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0060

Application for Bingo License

(1) An application for a bingo license or license renewal shall be made on a form prescribed by the Department, shall be signed by a responsible official of the organization and shall be accompanied by the license application fee as provided in section (3) of this rule. The Department shall reject applications which are incomplete, are not accompanied by the documents required by this section or are not accompanied by a sufficient license fee. An applicant shall be immediately notified of any such deficiencies. The license application shall include the following information:

(a) The name, address and telephone number of the organization;

(b) A statement of the purposes for which the money received from the bingo games will be used;

(c) A statement as to whether or not the organization has had a license to operate bingo or raffle games denied, revoked or suspended by the State of Oregon or any other licensing authority;

(d) The full names and addresses of the responsible officials of the organization;

(e) For Class A or B bingo licensees, the name and address of the individual proposed by the applicant to act as its supervising bingo game manager;

(f) The address of the location proposed by the applicant where the bingo games will be held; the amount of rent to be paid for the location if not owned by the applicant; the party who is to be paid rent, if any; and a statement that rent will not be paid to a related taxpayer (as defined in **Section 1313(c) of the Internal Revenue Code**) of the organization's officers, directors or bingo game manager;

(g) The class of license sought by the applicant; and

(h) For Class A or B bingo licensees, the name and address of the financial institution and the account number for the bingo account(s) to be used by the applicant.

(2) The applicant shall submit the following documents with the application. The information required in subsections (c) through (f) of this section shall be on forms prescribed by the Department:

(a) A copy of a letter supporting tax exempt status as specified in OAR 137-025-0030(c);

(b) For a Class A or B license, a copy of a current or

proposed lease agreement for the location of the bingo games if the applicant does not own the premises intended for use;

(c) For a Class A or B bingo license, a completed authorization to inspect bank records on a form furnished by the Department, authorizing the financial institution to disclose customer information regarding the applicant's bingo account to the Department;

(d) As required by Chapter 914, Oregon Law 1987, a waiver of potential liability claims against the State of Oregon, its agencies, employees and agents for any damages resulting from any disclosure or publication of any information acquired by the Department during any of its investigations, inquiries or hearings;

(e) A consent to inspections authorized by Chapter 914, Oregon Laws 1987, and the rules adopted thereto;

(f) A statement verifying whether or not the applicant has conducted bingo operations during the 12 months prior to submitting the application for a license and, if so, a financial summary of its operation; and

(g) Such other information as may be requested by the Department.

(3) The application fees are as follows:

(a) Class A license — \$100;

(b) Class B license — \$50;

(c) Class C license — \$20;

(d) Class D license — \$20.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the Department of Justice.]

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0070

Issuance of License to Conduct Bingo

(1) Within 60 days after the filing of a completed application for a license or license renewal to conduct bingo, the Department shall either issue a license or notify the applicant in writing, in accordance with ORS 183.310 to 183.550, that the license has been denied, and that the applicant is entitled to a hearing. The license shall be effective for one year from the date it is issued and may be renewed annually, except that a license issued prior to January 1, 1988, shall be effective until January 1, 1989. The form of the license shall be prescribed by the Department and shall include:

(a) The name of the licensed organization;

(b) The class of license;

(c) The expiration date of the license;

(d) The authorized county and specific location where bingo games may be operated by the licensee; and

(e) Any special conditions of the license.

(2) Each license shall be conspicuously displayed by the licensee during operating hours at its authorized location.

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0080

Bingo License Renewal and Amendment

(1) Within 60 days prior to the expiration of an existing bingo license, the licensee may apply to the Department to renew the license. The application and fee shall be the same as for the initial license.

(2) A licensee shall not exceed the class limit for gross receipts:

(a) As soon as it is apparent to the licensee that the class limit on annual receipts from licensed activities will be exceeded, it shall immediately notify the Department and shall apply for the license class which is proper, submitting the basic fee required for that class less the amount originally submitted for the previous license;

(b) Any such additional license issued by the Department shall be valid only for the period which remains in the term of the previous license at the time such additional license is issued.

(3) A licensee shall not conduct any bingo operations at a location in addition to the location designated on its license unless

approved in advance by the Department. A licensee desiring to change its regular authorized location to operate bingo shall submit an application to amend its license on a form prescribed by the Department.

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0090

Bingo Game Manager Permit

(1) No person shall act as a bingo game manager for a Class A or B licensee unless he or she has a current bingo game manager permit or temporary authorization from the Department. A Class A or B bingo licensee shall not allow any person to act as a bingo game manager unless he or she possesses a current bingo game manager permit or temporary authorization from the Department. Temporary authorization to act as a manager may be granted by the Department upon the filing of a completed bingo game manager application.

(2) An application for a bingo game manager permit shall be made on a form prescribed by the Department and shall be accompanied by a \$20 permit application fee. The Department shall reject applications which are incomplete or are not accompanied by a sufficient fee. All applicants shall be immediately notified of any such deficiencies. The license application shall include a personal information statement, including information regarding personal identity and personal history; a description of prior bingo employment activity and compensation received; a criminal history statement; finger prints and a completed release of educational, employment and military records form.

(3) A Class A and B licensee shall designate a bingo game manager for the licensee. The bingo game manager permit for the licensee's manager shall be conspicuously displayed by the licensee during operating hours at its authorized location. The licensee shall notify the Department in writing if it intends to designate a different bingo game manager:

(a) The bingo game manager shall be responsible for the overall operation of the bingo games by ensuring that:

(A) The public and the licensees are protected from fraud;

(B) All provisions of ORS 167.118, ORS Chapter 464 and OAR 137-025-0010 et seq. are followed;

(C) All records are completed and correct; and

(D) All monies derived from the bingo game are safeguarded until transferred to the licensee's bingo checking account.

(b) To the extent that they are not assumed by the board of directors or a bingo committee designated by the board, the duties and responsibilities of a bingo game manager include the following:

(A) Personnel actions regarding bingo workers including hiring, firing, training, evaluating, scheduling work periods, and/or setting salaries;

(B) Scheduling the bingo activity, including determining the time and days of operation;

(C) Setting the scope of the bingo activity by determining:

(i) The number of games to be played;

(ii) The type of games to be played;

(iii) The cost to each player to participate; and

(iv) The type and amount of prizes to be awarded.

(D) Setting the scope of marketing activities related to the bingo activity by determining:

(i) Type and scope of promotional activities; and

(ii) The media, content, timing, and target market area of advertising.

(4) A bingo game manager shall be knowledgeable regarding the rules for the conduct of bingo games.

(5) Within 60 days after the filing of a completed application for a permit, the Department shall either issue a permit or notify the applicant in writing, in accordance with ORS 183.310 to 184.550 that the permit has been denied and that the applicant is entitled to a hearing. The permit shall be effective for one year from the date it is issued and may be renewed annually. The form of the permit shall be prescribed by the Department.

(6) No person may concurrently act as a bingo game manager for more than one licensee unless such participation is approved

by the Department.

(7) The organization's designated bingo game manager shall be physically present and shall personally oversee the operation of the game at least 50 percent of the time the licensee's bingo games are in session for each reporting period. The Department may approve a lower percentage requirement for designated managers of licensees holding exceptions pursuant to OAR 137-025-0190.

(8) Any person to whom a bingo game manager permit is issued shall notify the Department upon any change of the person's name, residence or mailing address, or change of employment if employed by a licensee. Notice required under this section may be given in person or by mail and:

(a) Must be given within 30 days of the date of the change;

(b) Must be in writing and contain the old and new name, residence or mailing address, or employer(s); and

(c) Must contain the person's bingo game manager permit number.

Stat. Auth.: ORS 464.250(1)

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0091

Licensee/Permittee Qualifications

Pursuant to ORS 464.280, an applicant or holder of a bingo or raffle license or permit shall establish the following qualifications:

(1) Basic knowledge of the rules and regulations governing the operation of bingo by Class A and B licensees;

(2) Honesty, integrity and forthrightness, including completeness of relevant information submitted by the applicant in the course of the application process;

(3) Adherence to local, state and federal laws and regulations;

(4) Financial responsibility and integrity in financial transactions. Past insolvency, bankruptcy or intention to file for bankruptcy shall not per se disqualify an applicant.

Stat. Auth.: ORS 464.250(1)

Hist.: JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0100

Notice of Bingo Activities

Prior to conducting bingo operations, each Class A or B bingo licensee shall file with the Department a schedule of bingo activities on a form provided by the Department. The form shall list the regular sessions conducted by the licensee, specifying the days and hours of the week. The licensee shall not conduct operations except during the times on file with the Department. A licensee desiring to change its scheduled bingo activities shall file an amended schedule with the Department on a form prescribed by the Department.

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0110

Operator Lists

Each Class A or B bingo licensee shall submit to the Department, on a form prescribed by the Department, a list of the names, address and dates of birth of all employees who conduct bingo operations on behalf of the licensee. An initial list shall be submitted on or before the date the licensee begins conducting bingo operations pursuant to these rules. An updated list of employees shall be filed once every 90 days.

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

Bingo Records and Reports

137-025-0120

Daily Bingo Records

Each Class A or B bingo licensee shall prepare and retain a daily bingo record on a form prescribed by the Department. A form shall be completed for each session and shall require the

following information:

- (1) The date, time and location of the session.
- (2) A count of the attendance and the time the attendance count was made.
- (3) The handle collected during the session.
- (4) The gross receipts collected during session from the sale of concessions if the sale of concessions is operated by the licensee.
- (5) The number of regular bingo game cards sold and the total money collected from such sales.
- (6) For special bingo games, the number of cards sold and the total money collected from such sales for each game.
- (7) For each bingo game of a session, the value of the prizes awarded to the winner(s) and the number of winners receiving such prizes.
- (8) The total value of prizes awarded during the session.

Stat. Auth.: ORS Ch. 914

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0130

Bingo Receipts

(1) Each Class A or Class B licensee shall maintain a record of all winners of prizes valued at \$100 or more. The record shall be completed on a form prescribed by the Department. A form shall be completed for each session and shall require the following information:

- (a) The name of the licensee;
- (b) The date;
- (c) A description of the prize;
- (d) The amount of each cash prize;
- (e) The name and address of the prize winner; and
- (f) The signature of the prize winner.

(2) It shall be the responsibility of the licensee to see that the prize winner is accurately identified, and the licensee shall require such proof of identification as is necessary to establish the winner's identity. The licensee shall not pay out any prize until the winner has furnished to the licensee all information required by this rule to be upon the prize record.

(3) The record of prize winners shall be affixed to the daily bingo report for that session, along with a copy of the games schedule for that session, and shall be retained for a period of three years.

Stat. Auth.: ORS Ch. 914

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0140

Bingo Reports

(1) Each Class C or D licensee shall file an annual report with the Department no later than 60 days after the end of its license year. The report shall be on a form prescribed by the Department. The report shall include the following information:

- (a) The total number of bingo sessions held during the license year;
- (b) The total bingo handle;
- (c) The total receipts from concessions if operated by the licensee;
- (d) The total amount of cash prizes and the total cost to the licensee of all noncash prizes awarded;
- (e) The total expenses directly related to the operation of bingo, including concessions if operated by the licensee, itemized by major categories of expenses;
- (f) The total expenses expressed as a percentage of the total of the bingo handle plus the total receipts from concessions if operated by the licensee; and
- (g) The net income from bingo activities.

(2) A Class B licensee shall file an annual report no later than 60 days after the end of the license year. The report shall be on a form prescribed by the Department. The report shall include the following information:

- (a) The total number of bingo sessions held during the license year;
- (b) The total bingo handle for the license year;
- (c) The total receipts from concessions if operated by the

licensee;

(d) The total amount of cash prizes and the total cost to the licensee of all noncash prizes awarded;

(e) The total expenses directly related to the operation of bingo, including concessions if operated by the licensee, itemized by major categories of expenses, including the following:

(A) A listing of each employee connected with the management, promotion, conduct or operation of the bingo game along with the employee's duties, hours and compensation;

(B) A statement describing the allocation method used in allocating common use expenses; and

(C) A detailed listing of all other expenses.

(f) The total expenses expressed as a percentage of the bingo handle plus the total receipts from concessions if operated by the licensee; and

(g) The total number of customers participating.

(3) A Class A licensee shall file a quarterly report for each of the following periods of the year: January 1 through March 31; April 1 through June 30; July 1, through September 30; and October 1, through December 31. The reports shall be on a form prescribed by the Department. The reports shall be filed no later than 30 days after the end of the reporting period. A licensee need not file a report for a quarterly period if the license was issued during the last month of the quarterly reporting period. However, if the licensee elects not to file a report, any activities during that month shall be included in the next quarterly report. The report shall include the following information:

(a) The total number of bingo sessions held during the quarter;

(b) The total bingo handle for the quarter;

(c) The total receipts from concessions if operated by the licensee;

(d) The total amount of cash prizes, and the total cost to the licensee of all noncash prizes awarded;

(e) The total expenses directly related to the operation of bingo, including concessions if operated by the licensee, itemized by major categories of expenses, including the following:

(A) A listing of each employee connected with the management, promotion, conduct or operation of the bingo game along with the employee's duties, hours and compensation;

(B) A statement describing the allocation method used in allocating common use expenses; and

(C) A detailed listing of all other expenses.

(f) The total expenses expressed as a percentage of the bingo handle plus the total receipts from concessions if operated by the licensee; and

(g) The total number of customers participating during the reporting period.

(4) All bingo reports shall be signed by the bingo game manager and a responsible official of the organization who shall be a different person than the bingo game manager.

Stat. Auth.: ORS Ch. 914

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0150

Bingo Fees

(1) All annual and quarterly bingo reports filed with the Department shall be accompanied by a fee, made payable to the Department of Justice, as follows:

(a) Class D license — No fee;

(b) Class C license — A fee of \$10 plus 0.4 of 1 percent of the bingo handle in excess of \$20,000;

(c) Class B license — A fee of 0.4 of 1 percent of the bingo handle up to \$75,000 and 0.8 of 1 percent of the bingo handle in excess of \$75,000;

(d) Class A license — A fee of 0.95 of 1 percent of the bingo handle.

(2) A delinquency fee of \$20 or 1 percent of the fee described above, whichever is greater, shall be paid by the licensee if the report or regular fee is not delivered to the Department by the due date.

(3) When the filing date for reports and fees falls on a Saturday or legal holiday, the due date is the next business day

following the Saturday or legal holiday.

(4) The amended fee schedule shall apply to annual and quarterly reporting periods ending September 30, 1993, and thereafter.

Stat. Auth.: ORS 464.250(1)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

Operation of Bingo Games

137-025-0160

Conduct of Bingo in General

(1) No employee of the licensee involved in the conduct of bingo games may receive a prize or participate as a player at a bingo game session in which the employee is actually involved in the conduct of the bingo games.

(2) All prizes awarded in connection with bingo games, whether in cash or merchandise, and all rules by which such prizes may be won, including costs to a participant, shall be disclosed to each participant prior to that participant taking part in the activity or paying for the opportunity to take part in the activity. Disclosures shall be made by conspicuously posting or displaying upon the premises where the activity is operated a complete description of the rules of the activity, an explanation of how each prize can be won, and the cost to participate in the activity.

(3) The numbers for bingo shall be physically selected from a container, and players shall be able to view the selection process, including an unobstructed view of the container or blower chamber. Immediately following the drawing of each number in the bingo game, the caller shall display the letter and number for viewing by the participants. Numbers shall not be selected by electronic equipment, such as by computer.

(4) All prizes, or script redeemable for prizes, paid to the winner(s) shall be paid by the licensee; no prizes or script shall be transferred from non-winners to the winner(s).

(5) Bingo cards may not be purchased or played other than at the approved location of the licensee's game; a player must be present to win.

(6) Except for the conduct of "bonanza" bingo described in section (7) of this rule, the numbers shall be drawn and announced during the play of the game; each player covers the corresponding number, if present on the bingo card, as each number is called.

(7) A licensee may play "bonanza" bingo by drawing a predesignated quantity of bingo numbers before the actual playing of the bonanza bingo game only if the licensee complies with the following procedures:

(a) Bonanza bingo cards shall remain sealed until such time as they are sold to the players;

(b) The balls drawn in advance of the bonanza bingo game shall be drawn during a bingo session in the presence of the players; and

(c) The quantity of numbers drawn in advance shall be fewer than the number which would produce a probable instant winner, based upon the rules of the game and the expected number of players.

(8) No operator shall engage in any act, practice, or course of operation as would operate as a fraud to affect the outcome of any bingo game.

(9) Cages or blowers used to mix and select bingo numbers shall be designed and constructed in such a manner which reasonably provides a thorough mix of the numbers and random selection. Cages and blowers shall be cleaned and maintained in good repair so as to prevent damage to the bingo numbers.

(10) Bingo numbers shall be periodically inspected, cleaned and maintained in good condition by the licensee. No bingo numbers may be used in play which are defective, cracked, broken, illegible, out of round or damaged in such a manner that would interfere with or affect the random selection process. Only sequentially complete sets of bingo numbers shall be placed in play; there shall be no duplication of numbers.

(11) No person shall tamper with, mutilate, weight, or otherwise alter a bingo number in any manner that would interfere

with or affect the random selection process.

(12) The Department may immediately remove any bingo number or set of bingo numbers from play if a violation is found. The number or number set shall not be returned to play until the violation is corrected. The Department may require that any bingo number or number set be replaced or tested for compliance if a violation is found or suspected.

Stat. Auth.: ORS 464.250(1) & Ch. 918

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; JD 1-1991, f. 2-1-91, cert. ef. 3-1-91; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0170

Bingo Checking Account

Each Class A or B licensee shall have one or more separate checking accounts for bingo related purposes. All bingo proceeds, except amounts paid for prizes shall be deposited in the bingo checking account within three business days of their collection. Expenses which are exclusively related to the conduct of bingo games shall be paid from the bingo account. After bingo expenses have been paid, the licensee may transfer funds from the bingo account to another account of the licensee. The licensee shall retain a copy of all bingo checking account records, including account statements, canceled checks, check registers, and deposit slips for a period of three years.

Stat. Auth.: ORS Ch. 914

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0180

Bingo Operating Limits

(1) Unless excepted by the Department, a licensee shall not operate bingo games for more than 15 hours nor more than three days in any one calendar week. However, a Class C or D licensee may operate without restriction as to number of days or hours per week if its total operations are limited to no more than 12 consecutive days during its license year.

(2) A licensee shall not award a prize exceeding \$750 in value in any one game.

(3) The "operating expenses" of all bingo and raffle games, conducted by the licensee as defined in Section 3(6)(b), Oregon Laws 1987, Chapter 914, excluding prizes and money paid to players, shall not exceed 15 percent of the total of the annual handle of those games plus the total receipts from concessions, if operated by the licensee:

(a) Operating expenses shall include the cost of concessions if operated by the licensee, but shall not include the wholesale cost of food, beverages and other related concessions of such operations;

(b) If expenses are related to both the bingo operations and the nonbingo operations of a licensee (such as rent, utilities and employee salaries), a reasonable allocation shall be made between the bingo and nonbingo activities. Employee salaries shall be allocated based upon hours spent in bingo and nonbingo activities;

(c) All leasehold improvements and improvements to bingo facilities owned by the licensee may be reasonably amortized;

(d) No salary of an employee of the licensee shall be considered an operating expense for purposes of this subsection, if less than 20 percent of the employee's time is devoted to activities directly related to the games;

(e) Fees paid to the Department are not operating expenses for purposes of this subsection;

(f) If a licensee subleases its space or equipment to one or more additional licensees, the licensee may pro rate its rental expenses based on proportional use of the property; the pro rate shall be based on the actual hours of use by that licensee compared to the total hours of use of the other licensees.

Stat. Auth.: ORS 464.250(1)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0190

Exceptions Approved by Department

(1) A bingo licensee that has received tax exempt status

under the **Internal Revenue Code Section 501(c)(3)** and was operating a bingo game in Oregon in January, 1987, may apply for certain exceptions as provided in Section 28, Chapter 914, Oregon Laws 1987. Requests for exceptions shall be prepared on forms prescribed by the Department. The forms shall include a description of why the licensee believes there is a compelling community need for the charitable activities funded by its bingo operations, a list of limits for which it seeks an exception plus the desired levels for which approval is sought, an explanation as to why its funding will be reduced unless the specific exceptions are granted, a monthly financial summary of its bingo operations for the period of January 1, 1986 to June 30, 1987, including the handle, the amount paid for prizes, the net receipts and the organization's regular hours of operation and such other information as may be requested by the Department.

(2) For purposes of this rule, "funding" shall refer to the net receipts from bingo operations available to the licensee after prizes, expenses and fees to the Department have been paid.

(3) The Department shall consider the following factors in evaluating whether there is a compelling community need for the charitable activities funded by a bingo operation:

(a) The nature of the charitable activities conducted or supported to date;

(b) The importance of those activities to the community;

(c) The prospect that those activities will be assumed by another organization or governmental entity or that a charitable beneficiary can find similar funding or services elsewhere in the community; and

(d) The level of community involvement in the organization's activities, including community financial support received through fundraising other than bingo and participation by individuals in the community in the management of the organization.

(4) For purposes of determining whether or not the Act will seriously reduce an organization's funding, the Department shall consider the level of net receipts generated by the bingo operation prior to June 30, 1987 and shall account for inflation in approving any exception. In approving any exception, the Department shall presume that, except for the payment of fees required by this Act, the net receipts as a percentage of handle for the period covered by the exception shall not be less than the comparable relationship which existed prior to June 30, 1987.

[Publications: The Publication(s) referred to or incorporated by reference in this rule are available from the office of the Department of Justice.]

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0191

Multi License Supervision

(1) Pursuant to ORS 464.310(2), the Department may authorize an individual to manage the operation of a bingo facility on behalf of more than one licensee if:

(a) The individual is employed by or is a member of a bingo licensee and manages one or more functions described below for all of the licensees conducting bingo at the same facility;

(b) The individual's management responsibilities on behalf of the other licensees are solely related to the use, maintenance or upkeep of the facility, which may include janitorial and security services and ordering supplies relating to these functions;

(c) The individual does not exercise supervision or control over functions related to the operation of the games of more than one bingo licensee.

(2) An individual seeking the Department's approval to operate on behalf of more than one licensee as provided in section (1) of this rule, shall make application to the Department on a form prescribed by the Department.

Stat. Auth.: ORS 464.250(1)

Hist.: JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

Raffle Licenses

137-025-0200

Classes of Licenses

(1) A "Class A" raffle license shall authorize a licensee to conduct raffle games throughout the license year, but games with a handle of more than \$1,000 and no more than \$5,000 shall not exceed 12 per license year, and games with a handle of more than \$5,000 shall not exceed two per license year.

(2) A "Class B" raffle license shall authorize a licensee to conduct raffle games throughout the license year with the handle for each such game not to exceed \$5,000, but games with a handle of more than \$1,000 shall not exceed 12 per license year.

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0210

Application for Raffle License

(1) An application for a raffle license or license renewal shall be made on a form prescribed by the Department, shall be signed by a responsible official of the organization, and must be accompanied by the license application fee as provided in section (3) of this rule. The Department shall reject applications which are incomplete, are not accompanied by the documents required by this section, or are not accompanied by a sufficient license fee. An applicant shall be immediately notified of any such deficiencies. The license application shall include the following information:

(a) The name, address and telephone number of the organization;

(b) A statement of the purposes for which the money received from the raffle games will be used;

(c) A statement as to whether or not the organization has had a license to operate bingo or raffle games denied, revoked or suspended by the State of Oregon or any other licensing authority; and

(d) The full names and addresses of the responsible officials of the organization.

(2) The applicant shall submit the following documents with the application. The information required in subsections (b) and (c) of this section shall be on forms prescribed by the Department and shall be signed by a responsible official of the organization:

(a) A copy of a letter supporting tax exempt status as specified in OAR 137-025-0030(1)(c);

(b) As required by Oregon Laws 1987, Chapter 914, a waiver of potential liability claims against the State of Oregon, its agencies, employees and agents for any damages resulting from any disclosure or publication of any information acquired by the Department during any of its investigations, inquiries or hearings;

(c) A consent to inspection authorized by Chapter 914, Oregon Laws 1987, and the rules adopted thereto; and

(d) Such other information as requested by the Department.

(3) The application fees are as follows:

(a) Class A raffle license — \$50;

(b) Class B raffle license — \$20.

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0220

Issuance of License to Conduct Raffles

(1) Within 60 days after the filing of a completed application for a license or license renewal to conduct raffles, the Department shall either issue a license or notify the applicant in writing, in accordance with ORS 183.310 to 183.550, that the license has been denied, and that the applicant is entitled to a hearing. The license shall be effective for one year from the date it is issued and may be renewed annually, except that a license issued prior to January 1, 1988, shall be effective until January 1, 1989.

(2) The form of the license shall be prescribed by the Department and shall include:

(a) The name of the licensed organization;

(b) The class of license;

(c) The expiration date of the license;

(d) Any special conditions of the license.

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0230

Raffle License Renewal and Amendment

(1) Within 60 days prior to the expiration of an existing raffle license, the licensee may apply to the Department to renew the license. The application and fee shall be the same as for the initial license.

(2) A licensee shall not exceed the class limit for gross receipts:

(a) If a Class B licensee desires to conduct games with sales in excess of \$5,000, it shall notify the Department and shall apply for a Class A license, submitting the basic fee required for that class less the amount originally submitted for the previous license;

(b) Any such additional license issued by the Department shall be valid only for the period which remains in the term of the previous license at the time such additional license is issued.

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

Raffle Records and Reports

137-025-0240

Raffle Records

(1) A raffle licensee shall maintain the following records or information with regard to individual raffle games and retain the information for a period of three years:

(a) The total amount of proceeds received from the sale of tickets for each raffle game;

(b) All expenses relating to the conduct of each raffle game; and

(c) The winning ticket stubs.

(2) A Class A licensee shall maintain a raffle log book for all raffle games where sales are intended to exceed \$5,000. The raffle log book shall be retained by the licensee for a period of three years. The raffle log book shall contain:

(a) A list of the names of all volunteers or employees who receive raffle tickets for sale;

(b) The numbers of tickets received by each seller;

(c) The number of purchased tickets returned to the licensee by each seller; and

(d) The amount of money from ticket sales returned to the licensee by each seller.

Stat. Auth.: ORS Ch. 914

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0250

Raffle Receipts

(1) A record shall be prepared by a raffle licensee for each winner of a prize with a retail value of \$100 or more, which shall include:

(a) The name of the licensee;

(b) The date of the drawing;

(c) A description of the prize;

(d) The name and address of the prize winner; and

(e) The signature of the prize winner.

(2) A raffle licensee shall obtain a receipt from the seller/distributor for all noncash prizes awarded with a retail value of more than \$500.

(3) The preceding receipts shall be retained by the licensee for a period of three years.

Stat. Auth.: ORS Ch. 914

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0260

Notice of Raffle Game

(1) Prior to conducting sales of raffle tickets, each Class A raffle licensee shall submit to the Department a completed raffle notice for all raffles where sales are intended to exceed \$5,000.

(2) The notice shall be submitted on a form to be obtained from the Department. The information to be submitted shall include:

(a) The name of the organization;

(b) The organization's raffle license number;

(c) The location, date and time for the draw;

(d) A description of and the retail value of the prizes to be awarded;

(e) The total number of tickets to be offered for sale and the price of each ticket; and

(f) A copy of a sample ticket.

Stat. Auth.: ORS Ch. 914

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0270

Raffle Reports

(1) A raffle licensee shall file an annual report with the Department of Justice no later than 60 days after the end of the license year. The report shall be on a form prescribed by the Department. The report shall include the following information:

(a) The number of raffle games held during the license year;

(b) The date of each drawing;

(c) The total sales of each game;

(d) The total expenses relating to the conduct of each raffle game;

(e) The total amount of cash prizes and the total cost to the licensee of all noncash prizes awarded;

(f) The total expenses of all games expressed as a percentage of the total raffle handle; and

(g) The net income from raffle games.

(2) All raffle reports shall be signed by a responsible official of the organization.

Stat. Auth.: ORS Ch. 914

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0280

Raffle Fees

(1) All annual raffle reports filed with the Department shall be accompanied by a fee, made payable to the Department of Justice, of 0.5 of 1 percent of the raffle handle listed in the report. A delinquency fee of \$20 or one percent of the fee described above, whichever is greater, shall be paid by the licensee if the report or regular fee is not delivered to the Department by the due date.

(2) When the filing date for reports and fees falls on a Saturday or legal holiday, the due date is the next business day following the Saturday or legal holiday.

Stat. Auth.: ORS Ch. 914

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

Operation of Raffle Games

137-025-0290

Conduct of Raffles in General

(1) Tickets for entry into a raffle shall constitute a separate and equal chance to win with all other tickets sold or issued. No person may be required to obtain more than one ticket, or to pay for anything other than the ticket, in order to enter a raffle.

(2) No person may be required to be present at a raffle drawing in order to be eligible to receive a prize.

(3) In conducting a drawing in connection with any raffle, each ticket seller shall return to the organization stubs or other detachable sections of all tickets sold. Except for duck races as provided for in OAR 137-025-0291 and alternate drawing formats approved by the Department in section (8) of this rule, the organization shall place each stub or other detachable section of each ticket sold in a receptacle out of which the winning tickets are to be drawn. The receptacle must be designed so that each ticket placed therein has an equal opportunity with every other ticket to be the one withdrawn.

(4) No unsold ticket or stub shall be entered in the draw container or be otherwise considered for the draw to determine the winner or winners of any prize.

(5) Where prizes for a raffle are unclaimed, the prizes shall be held in a trust for a period of one year from the date of the draw. If at that time the prizes are unclaimed, the prize shall be donated to the licensee.

(6) A raffle licensee shall not sell tickets more than twelve months in advance of the draw date.

(7) If for any reason the raffle is not completed and the prizes not awarded on the scheduled drawing date, the sponsoring organization must take all steps necessary to notify ticket purchasers of that fact and return all money received from ticket purchasers within 30 days.

(8) An alternate drawing format may be used to determine the winner(s) if such a format is approved by the Department prior to the sale of any ticket or other form of raffle entry. The alternate format must meet the definition of a drawing as defined in OAR 137-025-0020(16). To be approved, an alternate drawing format request must be submitted to the Department in writing at least 30 days prior to the sale of entries and must contain at a minimum, the following information:

- (a) The time, date and location of the drawing;
- (b) The type of random selection process to be used and complete details of its operations;
- (c) A description of how game integrity will be ensured so that each participant has an equal chance of winning.

Stat. Auth.: ORS 464.250(1)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0291

Duck Race Regulations

A licensee conducting a "Duck Race" raffle shall comply with the following:

(1) All ducks shall be positioned above the river at the same location and shall be released simultaneously. Once dropped, the ducks shall enter the river without interference or obstruction.

(2) Once the ducks enter the river, the ducks shall not receive human assistance until the race is concluded.

(3) The ducks shall be identified so that each duck corresponds to a separate numbered raffle ticket. The method of identification of the ducks shall be waterproof.

(4) At the finish line, the licensee shall construct a boom which will be designed to act to funnel the ducks to a chute. The chute shall be constructed so as to allow one duck at a time to pass through. The boom and the chute shall be reasonably secure. The boom shall be wide enough to capture the ducks that reach the finish line area as they move down stream.

(5) The course for the race shall be established so that the race may be observed by raffle purchasers. The length of the course shall be established so that the race will be conducted in less than one hour. The licensee shall conduct a test of the course, by releasing a sample of ducks and observing their progress, within one week prior to the race date. Once the race has started, a course shall not be altered.

(6) If a duck race is not completed in 90 minutes from the time the ducks are released into the river, the race shall be terminated and the licensee shall conduct the raffle by drawing tickets from a container as provided in OAR 137-029-0290(1) - (5).

Stat. Auth.: ORS 464-250(1)

Hist.: JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0300

Raffle Prize Limits

(1) No cash prize shall be offered or awarded in excess of \$750.

(2) No prize shall be offered or awarded with a retail market value in excess of \$50,000.

Stat. Auth.: ORS Ch. 914

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88

137-025-0310

Raffle Tickets

(1) The following information must be printed upon each ticket sold or shall be otherwise provided to each purchaser at the time of the sale:

- (a) The date and time of the drawing;
- (b) The location of the drawing;
- (c) The name of the organization conducting the raffle;
- (d) The price of the chance;

(e) A full and fair description of the prize or prizes to be awarded;

(f) The retail market value of each prize to be awarded; and

(g) The total number of tickets which may be sold.

(2) The preceding rules regarding raffle tickets do not apply to operations exempted by OAR 137-025-0040(2).

Stat. Auth.: ORS Ch. 914

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; JD 1-1989, f. & cert. ef. 3-1-89

Miscellaneous

137-025-0320

Suspension, Revocation and Civil Penalties

(1) After notice and opportunity for hearing, as provided in ORS 183.310 to 183.550, the Department may assess a civil penalty not to exceed \$10,000 and may deny, revoke, suspend or refuse to renew any license or permit, for conduct as specified in Oregon Laws 1987, Chapter 914, Section 12. In setting the amount of the civil penalty or the term of suspension, the Department shall consider the nature of the violation and whether the applicant, licensee, permit holder, or person with an interest in the bingo or raffles operation or proposed operation knew or should have known that the conduct constituted grounds for such action.

(2) The Department may take actions as specified in subparagraph (1) for conduct as described in Section 12, Chapter 914, Oregon Laws 1987. Such conduct includes, but is not limited to:

(a) Violating Chapter 914, Oregon Laws 1987, or these rules;

(b) Denying representatives of the Department or any law enforcement officer access to a location where a licensee conducts bingo or raffle game activity, or failing to promptly produce for the preceding officials for inspection or audit any records or receipts related to bingo or raffle operations;

(c) Misrepresenting or failing to disclose to the Department any material fact;

(d) Failing to file completed reports or pay fees within 30 days after receiving notification from the Department of a delinquency; and

(e) Operating a bingo or raffle game without a license, unless exempt under OAR 137-25-040;

(f) Failing to maintain an adequate financial record keeping system and/or failure to keep accurate financial books and records.

(3) In determining whether to deny, revoke or suspend a license or permit due to past criminal activity, the Department will consider the following with respect to the applicant/licensee/permittee:

(a) The nature and severity of the criminal act(s);

(b) The relevance of the crime as it relates to the legal operation of nonprofit gaming;

(c) Mitigating or extenuating circumstances;

(d) Proximity in time of the criminal activity;

(e) Age at the time of the criminal activity;

(f) Pattern or frequency of criminal activity; and

(g) Honesty and forthrightness in disclosing the past criminal activity to department personnel.

(4) The Department may deny, revoke or suspend a license or permit if the applicant is a relative or associate of another individual or organization who has engaged in conduct in violation of ORS 464.470(1) and there is clear and convincing evidence that the applicant is likely to be subject to the control or influence of the violator.

(5) The Department may require an applicant, permittee or licensee whose permit or license has been denied or revoked to wait a period of time designated by the Department before reapplying for a permit/license.

Stat. Auth.: ORS 464.250(1)

Hist.: JD 7-1987, f. 10-30-87, ef. 1-1-88; JD 2-1993, f. 6-21-93, cert. ef. 7-1-93

137-025-0330

Model APA Rules

The Attorney General's Model Rules of Procedure under the

Administrative Procedures Act, effective January 27, 1986, are by this reference adopted as the rules and procedures for carrying out Chapter 914, Oregon Laws 1987, except as otherwise specifically provided herein.

[ED. NOTE: The full text of the Attorney General's Model Rules of Procedure is available from the office of the Attorney General or Department of Justice.]

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

137-025-0340
Effective Dates

(1) OAR 137-025-0010 is repealed, effective January 1, 1988.

(2) OAR 137-025-0020 to 137-025-0030, 137-025-0050 to 137-025-0110, 137-025-0190 to 137-025-0230 and 137-025-0330 shall take effect on November 1, 1987.

(3) OAR 137-025-0040, 137-025-0120 to 137-025-0180 and 137-025-0240 to 137-025-0320 shall take effect on January 1, 1988.

Stat. Auth.: ORS Ch. 914

Hist.: JD 8-1987, f. 10-30-87, ef. 11-1-87

DIVISION 30

PUBLIC PROCUREMENT RULES

137-030-0000
Definitions

The following definitions apply to the rules in OAR Chapter 137, Division 30 and 40:

(1) "Addenda to the Solicitation Documents": Addenda are additions or deletions to, materials changes in, or general interest explanations of the agency's solicitation documents. Addenda shall be labeled as such and distributed to all interested persons in accordance with these rules.

(2) "Agency" As used in OAR Chapter 137, Divisions 30 and 40, means any agency of the State of Oregon of any political subdivision thereof authorized by law to enter into public contracts and any public body created by intergovernmental agreement.

(3) "Bid": A competitive offer, which is binding on the bidder, in which price, delivery (or project completion) and conformance with specification and the requirements of the Invitation to Bid will be the predominant award criteria.

(4) "Bidder": An individual, firm or corporation who submits a bid in response to the agency's Invitation to Bid.

(5) "Bidding period": The span of time between the date of issuance of the Invitation to Bid and closing of the solicitation, i.e., the time and date set as the deadline for submitting bids. A minimum of fourteen (14) calendar days shall be provided, unless a shorter time is deemed necessary in the public interest for a particular procurement.

(6) "Closing": The date and time announced in the agency's solicitation (e.g., Invitation to Bid or Request for Proposals) as the deadline for submitting bids or proposals.

(7) "Contract": The written agreement, including the agency's solicitation document and the accepted portions of a bid or proposal, between the agency and the contractor describing the work to be done and the obligations of the parties. Depending upon the goods and services being procured, the agency may use "contract" document in addition to the agency's solicitation document and the accepted portions improvement, the "contract" may consist of the agency's solicitation document, including any addenda, the general and special conditions governing the work, the accepted portions of the bid or proposal, the performance and payment bond (if required), plans, technical specifications, approved shop drawings, and any contract amendments, including approved change orders.

(8) "Contract Price": The total of the awarded bid or proposal amount, including any approved alternates, and any fully executed change orders or amendments.

(9) "Contract release order": The document authorizing a purchase on an existing requirements contract or price agreement.

(10) "Contractor": The individual, firm or corporation awarded the public contract to furnish the agency the goods, services or work procured in the agency's solicitation.

(11) "Days": Calendar days, including weekdays, weekends and holidays, unless otherwise specified.

(12) "Descriptive literature": Materials submitted by bidders or proposers to provide information concerning the products available in response to the bid.

(13) "Electronic Data Interchange (EDI)": The movement of electronic information from computer to computer. The electronic transfer of standard business transaction information between organizations in a structured application.

(14) "Facsimile": Electronic equipment that communicates and reproduces both printed and handwritten material. If used in conjunction with a reference to a document, e.g., facsimile bid, the term refers to a document (in the example given, a bid) that has been transmitted to an received by the agency via facsimile.

(15) "Foreign Contractors": One who is not domiciled in or registered to do business in the State of Oregon. (ORS 279.021.)

(16) "Novation": A novation substitutes a new party and discharges one of the original parties to a contract by agreement of all three parties. A new contract is created with the same terms as the original one but only the parties are changed.

(17) "Opening": The date, time and place announced in the agency's solicitation for the public opening of written, sealed, bids or proposals.

(18) "Prequalification of Bidder or Proposer": A process followed by an agency, in advance of issuance of solicitation documents, to determine the qualifications of prospective bidders or proposers to perform public contracts.

(19) "Product Sample": A representative specimen of the item offered by the bidder or proposer in response to the agency's solicitation. Unless otherwise provided in the solicitation, the required sample shall be the exact product or a representative portion of that product offered in the bid or proposal.

(20) "Proposal": A competitive offer, binding on the proposer and submitted in response to a Request for Proposals, where proposal evaluation and contract award is based on criteria such as proposer qualifications and experience, product features and characteristics, service quality and efficiency, and conformance with the specifications and requirements of the solicitation. Price may be evaluation criterion for proposals, but will not necessarily be the predominant basis for contract award.

(21) "Proposal Period": The span of time between the date of issuance of the Request for Proposals and closing, i.e., the time and date set as the deadline for submitting proposals. A period in the range of 30 to 45 days shall be provided unless a shorter time is deemed necessary in the public interest for a particular procurement.

(22) "Proposer": A person who submits a proposal in response to an agency's Request for Proposals.

(23) "Responsible Bidder or Proposer": Responsibility bidder or proposer means an individual, firm or corporation who has the capability in all respects to perform fully the contract requirements, the integrity and reliability which will assure good faith performance and who has not been disqualified by the public contracting agency under ORS 279.037. (ORS 279.029(1)); (see, e.g., OAR 125-030-0003).

(24) "Responsive Bid or Proposal": A bid proposal which conforms in all material respect with the agency's solicitation document (See, e.g., OAR 125-030-0004).

(25) "Solicitation Document": An Invitation to Bid or Request for Proposals, which includes all documents, whether attached or incorporated by reference, utilized for soliciting bids or proposals.

(26) "Specification": Any description of the physical or functional characteristics, or of the nature of a supply, service or construction item. Specifications may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery and the quantities or qualities of materials to be furnished under the contract. Specifications

generally will state the result to be obtained and may, on occasion, describe the method and manner of doing the work to be performed. Specifications may be incorporated by reference and/or through attachment to the contract.

(27) "Work": The furnishing of all materials, equipment, labor, and incidentals necessary to successfully complete any individual item or the entire contract and the timely carrying out and completion of all duties and obligations imposed by the contract.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.011 & 279.049(1)

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0005

Competitive Procurement

All public contracts shall be awarded by competitive procurement except as otherwise allowed or required in ORS 279.015 (1)(a)-(g), (2), (3) or (4), 279.029(2), 279.053, 279.056, 279.059 (2), 279.095, 279.570, 279.850 or 282.210.

NOTES:

-1- Historically, competitive procurement under ORS chapter 279 has been viewed as a price-driven process involving a written solicitation document, public advertisement and the submission of written, sealed offers which are opened and read aloud at a publicly announced (through the advertisement) day, time and place. The resulting contract has traditionally been awarded to the lowest responsive, responsible bidder. Competition in public contracting continues to be a paramount concern. In ORS 279.005, the 1993 Legislature declared that it is the "policy of the State of Oregon to encourage public contracting competition that supports openness and impartiality to the maximum extent possible."

-2- Competition must be fostered even when alternatives selection methods are used, as provided in ORS 279.007(1). Variations on the price-driven selection process are possible where allowed by statute or administrative rule. For example, a state agency may use the class exemption in OAR 125-310-0200, promulgated pursuant to ORS 279.015(2), to create a Request for Proposal procurement where price is an evaluative criterion, but not necessarily the most important of the selection criteria. Variations on the traditional lowest-dollar-award can also occur when other policy considerations take precedence, as described in the statutes listed in OAR 137-030-0005.

-3- In support of the use of alternative selection methods within an overall policy of fostering competition, the 1993 Legislative Assembly made findings in ORS 279.005(2)(c) that "meaningful competition can be achieved through a variety of methods when procuring products or services." (Note however, that ORS 279.009 specifically exempts public improvement contracts from ORS 279.005 and 279.007.) In order to make all public contracts under conditions that foster competition, when an alternative selection method is used, e.g., the Request for Proposal process mentioned above, many if not all of the same competition-enhancing elements, such as public advertisement, a written solicitation document and sealed, written offers will be present.

-4- Briefly, the exception statutes listed in OAR 137-030-0005 include the following types of contracts ORS 279.015(1):

- a- Contracts with other public agencies or the federal government;
- b- Contracts with qualified nonprofit agencies providing employment opportunities for disabled individuals;
- c- Contracts specifically exempted by the appropriate public contract review authority;
- d- Contracts of a value under \$2,500;
- e- Certain contracts for insurance;
- f- Contracts for maintenance and repair of properties owned by the Department of Veterans' Affairs; and
- g- Contracts between public agencies to use an existing solicitation or current requirements contract of one of the public agencies which meet certain listed requirements.
- A- ORS 279.015(2) - Exemption by board or director of certain public contracts or classes of public contracts.
- B- ORS 279.015(3) - Covers:
- i- Emergency conditions, and

-ii- Liquidation sales of surplus property.

-C- ORS 279.015(4) - Requires procedures for award of contracts when emergency is declared.

-D- ORS 279.029(2) - Reciprocal Preference Law, which favors Oregon bidders or proposers by adding a percentage to the bids or proposals of out-of-state vendors whose state of residence gives preference to its resident bidders.

-E- ORS 279.053 - Authority to limit competitive bidding on any public contract estimated to cost \$50,000 or less for affirmative action purposes.

-F- ORS 279.056 - Where a procurement is federally funded and there is a conflict between federal and Oregon state law.

-G- ORS 279.059 - Subcontracting to emerging small businesses.

-H- ORS 279.095 - Arrangements by local public bodies for use, operation, maintenance or disposition of personal property.

-I- ORS 279.570 - Preference for recycled materials

-J- ORS 279.850 - Procurement of products and services of disabled individuals.

-K- ORS 282.210 - In-state performance of public printing binding and stationery work.

NOTE: There may be serious consequences for both the agency and the vendor if an agreement is not made in compliance with competitive procurement procedures for public contracts, because such an agreement may be found to be unenforceable, voidable or even void. See *Photo-Art v. Hunter*, 42 Or App 207, 600 P2d 471(1979) (agreement for filming the construction of a bridge was found in violation of the requirements of ORS chapter 279 and declared void). See also *Mountain Fir Lumber Co. v. EBI Co.*, 296 Or 639, 679 P2d 296(1984) (following general rule that contracts made in violation of statute are unenforceable or voidable); *Harsh Investment Corp. v. State Housing Division*, 88 Or App 151 (1987) (when an agency has the authority to adopt regulations and does so, it must follow them; where an agency entered into a letter of commitment, but not in accordance with its administrative rules, the letter was held invalid); *Terwilliger Land Co. v. City of Portland*, 62 Or 101 (1912) (contracts held invalid where specifications improperly limited the bidding to a sole provider; court recited the "well-settled general rule" that public contracts not based on "the competition required by statute, are void"); Oregon Attorney General Letter of Advice dated February 6, 1987, to District Attorney Foster A. Glass (OP-6063) (performance of agreement entered into in violation of statutes is unenforceable).

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.015(1)

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0006

Bidder Prequalification

(1) The agency may, by rule, resolution, ordinance or other regulation, require mandatory prequalification of bidders or proposers on forms prescribed by the Director of the Oregon Department of Administrative Services. When prequalification is required by the solicitation documents as a condition for bidding or proposing the agency shall not consider the bid or proposal of any prospective bidder or proposer who is not prequalified in accordance with the agency's adopted rules and regulations. (ORS 279.039)

(2) If a bidder or proposer is currently prequalified by either the Oregon Department of Transportation or the Oregon Department of Administrative Services to perform public contracts, the bidder or proposer shall be rebuttably presumed qualified to perform the same kind of work for other public agencies. (ORS 279.047).

NOTES:

-1- "Prequalification" refers to a decision made by an agency prior to the procurement process to determine a prospective bidder's or proposer's eligibility to submit a bid or proposal. Prequalification enables the agency to establish certain objective criteria by which prospective bidders or proposers may be measured in terms of their abilities to perform the contracted work at the level of expertise or proficiency required to meet agency need. Among other things, prequalification enables the agency to determine whether a bidder or proposer has adequate financial, technical, personnel and facilities resources to

perform the contracted work and also whether they have a positive record of integrity and satisfactory performance.

-2- On the other hand, prequalification may be subject to challenge as restricting full and open competition and discouraging market entry by new competitors. (See e.g., D. Moody & Co., 55 Comp. Gen. 1, 75-2 CPD sec. 1 (1975); 53 Comp. Gen. 209 (1973); 52 Comp. Gen. 569 (1973), construed in J. Cibinic, Jr. v. R.C. Nash, Jr., Formation of Government Contracts at 250-51 (2d Ed. 1986). See also Kenneth M. Jackson, Prequalification and qualification; Discouragement of New Competitors, 19 Pub. Contract L.J. 702 (Summer 1990).
Stat. Auth.: ORS 279.049(1)
Stats. Implemented: ORS 279.039, 279.041 & 279.047
Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95;
Renumbered from 137-30-025

137-030-0007 [Renumbered to 137-030-0012]

137-030-0008

Eligibility to Bid or Propose on Construction Contracts

A person shall not submit a bid or proposal to do work as a construction "contractor", as defined in ORS 701.005(2), unless that person is first registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board. Bids or proposals received from persons who fail to comply with this requirement shall be deemed nonresponsive and be rejected, unless contrary to federal law.

NOTE: This rule is based on ORS 279.025(2)(k) and 701.055. However, limiting competition to persons registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board may not be allowed on certain projects if federal funds are involved and the registration or licensure requirement conflicts with federal laws, rules or regulations. See ORS 279.056. Further, ORS 701.010 lists categories of persons who are exempt from the registration requirement.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.049(1)

Hist.: JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0010

Preparation of Solicitation Documents

(1) The solicitation documents shall include the following:

(a) Instructions and information to bidders or proposers concerning the bid or proposal submission requirements, including the time and date set for opening of bids or proposals, the address of the office to which bids or proposals are to be delivered, and any other special information, e.g. whether bids or proposals may be submitted by facsimile or electronic data interchange (EDI);

(b) Where applicable, the purchase description, specifications, delivery or performance schedule, inspection and acceptance requirements, and special evaluation factors; and

(c) The contract terms and conditions, including warranty and bonding or other bid security requirements, as applicable;

(d) All addenda issued by the agency.

(2) Determination of contractual terms and conditions:

(a) The agency is authorized to determine the terms and conditions of solicitations and contracts, provided such terms and conditions are not contrary to statutory or regulatory requirements.

(3) Terms and conditions applicable to public contracts:

(a) In addition to the Oregon preference requirement in ORS 279.021(1), and the reciprocal preference requirements of ORS 279.029(2) and (3), the agency shall establish terms and conditions including those applicable to public contracts as prescribed by ORS 279.310 to 279.650:

(A) Payment of laborers and materialmen; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279.312);

(B) Payment of claims by public officers (ORS 279.314);

(C) Hours of labor (ORS 279.316 and 279.338);

(D) Health care benefits for employees (ORS 279.315);

(E) Environmental and natural resources regulations (ORS 279.318);

(F) Payment for medical care and attention to employees

(ORS 279.320);

(G) Voluntary termination of the contract (ORS 279.326);

(H) Suspension of the work (ORS 279.328 to 279.333);

(I) Maximum hours and overtime (ORS 279.334);

(J) Claims for overtime (ORS 279.336);

(K) Overtime requirement for local governments (ORS 279.340 and 279.342);

(L) Prevailing wage rates (ORS 279.348 to 279.365);

(M) Retainage (ORS 279.400 to 279.430 and 279.575);

(N) Prompt payment policy (ORS 279.435);

(O) Contractor's relations with subcontractors (ORS 279.445);

(P) Contractor's bonds (ORS 279.526 and 279.536);

(Q) Notice of claim (ORS 279.528);

(R) Labor and material liens (ORS 279.538 and 279.540);

(S) Liability in absence of bond (ORS 279.542);

(T) Use of recovered resources and recycled materials (ORS 279.545 to 279.55);

(U) Paper conservation guidelines (ORS 279.565);

(V) Preference for recycled material (ORS 279.570);

(W) Recycled oil use and preference (ORS 279.580 to 279.595);

(X) Retreaded tires use and preference (ORS 279.605 to 279.617);

(Y) Preference to paper products that reduce waste or are recycled (ORS 279.621 to 279.630 and 279.650);

(b) Other terms, conditions and requirements applicable to public contracts include:

(A) Certification by contractor of compliance with the Oregon tax laws in accordance with ORS 305.385;

(B) Certification by contractor of nondiscrimination in obtaining required subcontractors in accordance with ORS 279.111. (See OAR 137-030-0100(4));

(C) A provision substantially providing that: **"The Contractor, its subcontractors, if any, and all employers working under this Agreement/Contract are subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017, which requires them to provide Workers' Compensation coverage for all their subject workers."** (ORS 279.320(2)); and

(D) In cases where the contract calls for work described in ORS 701.005(2) (i.e., construction work), certification by the "contractor" that the contractor is registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055. (Federal regulations may prohibit this requirement when federal funds are involved);

(E) Certification by the contractor that all subcontractors performing work described in ORS 701.005(2) (i.e., construction work) will be registered with the Construction Contractors Board or licensed by the State landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence work under the contract;

(F) A condition requiring the use of a certified inmate work force in accordance with ORS 279.319, if the contract is for the removal, abatement or demolition of asbestos in a state building;

(G) Any other requirement imposed by federal or state law, regulation, rule or ordinance which is applicable to the contract. ORS 279.056 provides that where federal funds are involved, federal laws, rules and regulations shall govern in case of conflict with any of the provisions of ORS 279.011 to 279.063.

(c) Such terms, conditions and requirements shall become an integral part of each contract.

(4) Special terms and conditions: The agency also may establish special terms and conditions applicable to specified categories of contracts. Any special terms and conditions shall be included in the solicitation documents and become an integral part of those contracts.

(5) Compliance and exceptions to terms and conditions:

(a) Bidders and proposers are responsible for noting the terms and conditions included as applicable to each set of solicitation documents;

(b) By signing and returning the bid or proposal form, the

bidder or proposer, as the case may be acknowledges acceptance of and agrees to be bound by the terms and conditions;

(c) An agency has the right to reject any bid or proposal that takes exception to specifications or to contract terms unless the right to take exception is expressly granted in the Invitation to Bid or Request for Proposals. Bids or proposals which take exception to the specifications or contract terms, or which are made contingent upon the agency's acceptance of different or additional specifications or terms, may be rejected because they are not responsive to the Invitation to Bid or the Request for Proposals;

(d) Any exceptions to the terms and conditions, if allowed by solicitation, must be clearly stated in writing by the bidder or proposer in the signed returned bid or proposal. Exceptions to the terms and conditions become contractual obligations only upon written acceptance by the agency.

NOTES:

-1- Generally, a bidder or proposer who makes its bid or proposal contingent on the agency's acceptance of materially differing terms or specifications must be rejected. See *Smith/Tug vs. Columbia-Pac. Towing*, 250 Or 612, 643-44, 443 P2d 205 (1968) (bidder's conditioning of bid on state agency's acceptance of additional contract terms that were advantageous to the bidder was a material variance from the bid invitation, and the resulting contract consequently was invalid).

-2- In some instances, an agency may authorize, in the Invitation to Bid or the Request for Proposals, the taking of exceptions. Additionally, when an agency, pursuant to an exemption from traditional, price-based competitive bidding, leaves certain specifications, terms or conditions open to negotiations, as is not uncommon under certain federal Request for Proposal processes, proposers may take exceptions or propose additional provisions. However, the general rule is that bidders and proposers must object to specifications or contract terms and conditions prior to bid or proposal closing, as provided in OAR 137-030-0050. Thus, under the general rule, a public contracting agency must reject any bid or proposal which does not substantially comply with all prescribed public bidding procedures and requirements, including but not limited to, a bid or proposal which expressly or impliedly takes exception to such procedures or requirements.

-3- In compliance with the provisions of ORS 279.318 and paragraph (3)(a)(E) of this rule, the following is a list of federal, state and local agencies of which the agency has knowledge that have enacted ordinances or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that may affect the performance of the contract:

-1- Federal Agencies:

-a- Agriculture, Department of

-A- Forest Service

-B- Soil Conservation Service

-b- Defense, Department of: Army Corps of Engineers

-c- Energy, Department of: Federal Energy Regulatory Commission

-d- Environmental Protection Agency

-e- Health and Human Services, Department of

-f- Housing and Urban Development, Department of Solar Energy and Energy

Conservation Bank

-g- Interior, Department of

-A- Bureau of Land Management

-B- Bureau of Indian Affairs

-C- Bureau of Mines

-D- Bureau of Reclamation

-E- Geological Survey

-F- Mineral Management Service

-G- U.S. Fish and wildlife Service

-h- Labor, Department of: Occupational Safety and Health Administration

-i- Mine Safety and Health Administration

-j- Occupational Safety and Health Administration, Transportation,

Department of

-A- Coast Guard

-B- Federal Highway Administration

-C- Water Resources Council

-2- State Agencies:

-a- Administrative Services, Department of

-b- Agriculture, Department of

-c- Columbia River Gorge Commission

-d- Consumer & Business Services, Department of Oregon Occupational

Safety & Health Division

-e- Environmental Quality, Department of

-g- Fish and Wildlife, Department of

-h- Forestry, Department of

-i- Geology and Mineral Industries, Department of

-j- Human Resources, Department of

-k- Land Conservation and Development Commission

-l- Parks and Recreation, Department of

-m- Soil and Water Conservation Commission

-n- State Engineer

-o- State Land Board (Lands, Division of State)

-p- Water Resources Department

-3- Local Agencies:

-a- City Council

-b- County Court

-c- County Commissioners, Board of

-d- Port Districts

-e- Metropolitan Service Districts

-f- County Service Districts

-g- Sanitary Districts

-h- Water Districts

-i- Fire Protection Districts

-j- Historical Preservation Commissions

-k- Planning Commissions.

Stat. Auth.: ORS 279.049(1)

Stat. Implemented: ORS 279.007, 279.017, 279.021(1) & 279.025, 279.029(2), (3), 279.310 - 279.650, 701.005 & 701.055

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0011

Brand Name Products

Product requirement by brand name prohibited.

(1) Specifications for public contracts shall not expressly or implicitly require any product by any brand name or mark, nor the product of any particular manufacturer or seller except pursuant to exemptions granted under ORS 279.017(2).

(2) The agency may identify products by brand names so long as "approved equal", "or equal", "approved equivalent", "or equivalent", or similar language is included in the solicitation documents. The agency shall determine, in its sole discretion, whether a proposed or offered alternate is "equal" or "equivalent".

NOTES:

-1- Some agencies have developed procedures for approved equals and also have made an effort to promulgate exemptions as authorized by ORS 279.017(2). See, e.g., OAR 125-300-0100 (formerly 125-030-0010). It is recognized that there is tension between either setting forth an approved equal or exempting certain products from the public procurement process, or from the requirement that no specification of brand name or mark be made. This tension is caused by the requirement in ORS 279.029 that contracts be awarded to the lowest responsible bidder. ORS 279.023 also requires public agencies to make every effort to construct public improvements at the least cost to the public agency. This least cost policy carries over in all other types of public contracts. The public agency, and the citizens of Oregon who support it with their tax dollars desire to get the most value for the public dollar spent. However, in some circumstances it is necessary, in order to get the kind of quality demanded by the public, either to exempt certain classes of materials or to set forth preapproved equals.

-2- When an agency contracts with a design professional, such as an architect or engineer, to develop technical specifications for a public improvement project, whether the project is new construction, remodeling or renovation of an existing structure, care must be taken to advise the design professional to avoid calling for brand name items or describing items in such a way as to restrict bidders or proposers to a brand name or to a particular manufacturer or seller. To guard against the design professional unknowingly causing a violation of ORS 279.017 by drafting technical specifications that call out products by brand name, mark, manufacturer, or seller, some state agencies have used language such as that set forth below in their contracts with design professional:

EXAMPLE A: All specified items shall be standard, cataloged, manufactured items or "off the shelf" items. No custom items are to be

designed or specified without prior written authorization of the owner. No proprietary or "sole source" items shall be specified. Brand name products may be specified so long as "approved equal" is included with their specification.

EXAMPLE B: No custom-made and brand name components shall be specified unless each such item is first approved by the department. At the time of submitting the specifications to the Department, consultant shall submit a list showing each item in the specifications that is a custom-made item or component, or that has been specified by brand name or trademark. Except where such items have been pre-approved in writing by the Department, consultant shall select and specify only standard, generic, off-the-shelf components for the work to be performed under exhibit, the scope of work statement attached to this contract. When the department approves the specification of a brand name or trademarked item or component, the consultant will generally be required to specify one or more competing items and include the phrase "or equal" or "approved equal" in the specification. ORS 279.017, OAR 137-030-0045(2).
Stat. Auth.: ORS 279.049(1)
Stats. Implemented: ORS 279.017(1), (2)
Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; Renumbered from 137-30-045

137-030-0012

Bids or Proposals Are Offers

(1) The bid or proposal is the bidder's or proposer's offer to enter into a contract which, if the bid or proposal is accepted for award by the agency, binds the bidder or proposer to a contract and the terms and conditions contained in the solicitation unless the bid or proposal is withdrawn in accordance with OAR 137-030-0060(2) prior to the time of bid or proposal opening.

(2) The bid or proposal shall be a complete offer and fully responsive to the Invitation to Bid or the Request for proposals, unless bidders or proposers are specifically authorized by the solicitation to take exceptions or to leave terms open to negotiation.

(3) Unless expressly authorized by the Invitation to Bid or the Request for Proposals, bidders or proposers shall not make their bids or proposals contingent upon the agency's acceptance of specifications or contract terms that conflict with or are in addition to those advertised in the Invitation to Bid or Request for Proposals.

NOTES:

-1- The statutory requirement for competitive bidding is intended for the benefit of the public, and not for the advantage of any particular bidder.

Judson Pacific-Murphy Co. v. Durkee, 144 Cal App2d 377, 383, 301 P2d 97 (1956); accord, *Anderson v. Patterson*, 375 NW2d 901, 904 (Neb 1985) (competitive bid statutes, which exist to invite competition, guard against favoritism, improvidence, extravagance, fraud, and corruption, and to secure the best work or supplies at the lowest possible price, are enacted for the benefit of taxpayers). This rule emphasizes that under a competitive contracting system that authorizes the rejection of any or all bids or proposals (ORS 279.025(2)(i), 279.035), no bidder or proposer has a legal right to compel the acceptance of its bid or proposal. Accord, *Dept. of Transport. v. Groves-Watkins Constr.*, 530 So2d 912, 913 (Fla 1988) (where the agency is authorized to reject all bids, judicial intervention to prevent the rejection of a bid should occur only when the purpose or effect of the rejection is to defeat the object and integrity of competitive bidding). Instead, the bid or proposal constitutes an offer which is binding on the bidder or proposer but not binding on the agency until the offer is finally accepted for contract award by the agency. Therefore, the agency's mere notice of tentative award to the "lowest responsible bidder" or "best" proposer does not constitute the formation of a contract.

-2- Conversely, the bid or proposal, if otherwise in substantial compliance with all prescribed bidding procedures, does result in a contract if the bid or proposal is not withdrawn prior to the time and date set for bid or proposal closing (OAR 137-030-0060), and the public contracting agency has made a final decision to award the contract to the bidder or proposer. Therefore, unless the Invitation to Bid or the Request for Proposals expressly authorizes the taking of exceptions, or reserves the right to negotiate the contract terms or specifications, no terms of the solicitation may be changed by conditions stated in the

submitted bid or proposal. Generally, the time for bidders or proposers to seek changes in the specifications or contractual terms is prior to bid or proposal closing, as provided in OAR 137-030-0050. Bidders and proposers run a serious risk that their bids or proposals will be rejected if they make their bids or proposals contingent on the agency's acceptance of changes in or additions to specifications or contract terms.
Stat. Auth.: ORS 279.049(1)
Stats. Implemented: ORS 279.029, 279.035 & 279.037
Hist.: JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95; Renumbered from 137-30-007

137-030-0013

Facsimile Bids and Proposals

(1) Agency authorization. The agency may authorize the submission of bids or proposals by facsimile. However, prior to authorizing the submission of bids or proposals by facsimile, the agency shall consider whether its equipment, personnel and procedures are ready to receive a reasonable number of transmissions within a short period of time and, in addition, the agency, prior to authorizing submission by facsimile, shall establish the means and method for sealing or securing the transmitted documents to preserve the "sealed" requirement of competitive procurement.

(2) Required factors. In determining whether to authorize facsimile bids or proposals, the agency shall consider factors such as:

- (a) Anticipated bid or proposal size and volume;
- (b) Whether there is an urgent need for the goods or services bring procured;
- (c) Frequency of price changes;
- (d) Availability, reliability, speed, and capacity of the receiving facsimile equipment;
- (e) Adequacy of administrative procedures and controls for receiving, identifying, recording, and safeguarding facsimile bids or proposals, and ensuring their timely delivery to the bid or proposal opening location; and
- (f) Whether bid proposal security must or will be required to be submitted since it cannot be acceptably transmitted by facsimile.

(3) Provision to be included in Solicitation Document. If facsimile transmission is authorized, the agency will modify the following provision to meet its needs and insert it into the agency's solicitation document:

(a) "Definition": Facsimile bid or proposal, as used in this solicitation, means a bid or proposal, modification of a bid or proposal, or withdrawal of a bid or proposal that is transmitted to and received by the agency via electronic equipment that communicates and reproduces both printed and handwritten material.

(b) "Timely bidders": Bidders (or proposers) may submit facsimile bids (or proposals) in response to this solicitation. The entire response must arrive at the place and by the time specified in the solicitation document.

(c) "Rejection of Bids or Proposals": Facsimile bids or proposals that fail to furnish required representations or information, or that reject or take exception to any of the terms, conditions, and provisions of the solicitation, may be rejected and excluded from consideration.

(d) "Signatures": Facsimile bids or proposals must contain the required signatures.

(e) "Request for original": The agency reserves the rights to make the contract award solely on the facsimile bid or proposal. However, if requested to do so by the agency representative, the apparently successful bidder or proposer agrees to promptly submit the complete original signed bid or proposal.

(f) "Transmission information": Facsimile receiving data and compatibility characteristics are as follows:

- (A) Telephone number of receiving facsimile equipment;
- (B) Compatibility characteristics of receiving facsimile equipment, e.g., make and model number, receiving speed, communications protocol.

(g) "Responsibility for transmission failure": If the bidder or proposer chooses to transmit a facsimile bid or proposal, the agency will not be responsible for any failure attributable to the transmission or receipt of the facsimile bid or proposal including,

but not limited to the following:

(A) Receipt of garbled or incomplete bid or proposal documents;

(B) Availability or condition of the receiving facsimile equipment;

(C) Incompatibility between the sending and receiving equipment;

(D) Delay in transmission or receipt of bid or proposal documents;

(E) Failure of the bidder or proposer to properly identify the bid or proposal documents;

(F) Illegibility of bid or proposal documents;

(G) Security and confidentiality of bid or proposal data.

NOTES:

-1- The transmission of business documents between parties by facsimile has become an accepted commercial practice. It may provide convenience for both the agency and its prospective bidders and proposers. In a market where prices change quickly and often, it may allow the agency to achieve more competitive pricing. A decision by an agency to authorize the submission of bids or proposals by facsimile may also foster competition by allowing bidders or proposers in distant locations to submit bids or proposals more quickly than through traditional methods.

-2- However, there are several issues which must be considered when an agency authorizes facsimile submittals:

-a- Does the agency have the resources reasonably to allow submissions to be received and handled promptly, without the loss or nonreceipt of a bid or proposal response due to overcrowded phone lines, equipment failure or lack of staff?

-b- Does the agency have the means and methods to "seal" and secure the documents, as they are received, until bid or proposal opening? Further, does the agency have the capability to maintain the security and confidentiality of trade secret or proprietary data? If security and confidentiality prior to bid or proposal opening cannot be maintained, the agency should not allow facsimile submission, because to do so would violate the requirement in ORS 279.027(1)(c) that bids and proposals remain sealed until the date and time of public opening.

-c- Is the document authentic? Will the agency be able to verify the authenticity of bids and proposals?

-3- An agency that authorizes the submission of bids or proposals by facsimile will want to consider the issues surrounding this activity and establish appropriate procedures for staff members to follow in receiving and handling facsimile submissions. Also, the agency may decide to include instructions to its solicitation documents, in addition to those contained in section (3) of this rule, to instruct bidders or proposers further in the specific procedural requirements of the agency to ensure proper identification or timely receipt of facsimile submissions.

NOTE: On Archival of Facsimile Documents: Images made on thermal facsimile paper darken and deteriorate quickly because of the qualities of the paper. Special care must be taken to preserve official records when made on such paper because the images can become unreadable within a matter of months after the facsimile transmission is made using the thermal paper. Bid or proposal submittals are official public records which are subject to archival rules of the Oregon Secretary of State. Thus, if an agency has facsimile equipment which uses thermal facsimile paper and the agency authorizes the submission of bids or proposals by facsimile, the agency should photocopy the facsimile bid or proposal upon receipt and staple the copy to the facsimile for archival purposes.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.027

Hist.: JD 1-1995, f. & cert. ef. 1-9-95

137-030-0014

Use of Electronic Data Interchange (EDI)

(1) Agency Authorization. The agency may authorize submission of bids or proposals by electronic data interchange (EDI). Prior to authorizing the submission of bids or proposals by EDI, the agency shall:

(a) Consider whether its equipment, personnel and procedures are ready to receive and process a reasonable number of EDI transmissions within a short period of time:

(b) Establish the means and methods for authenticating and securing the transmitted documents to preserve the "sealed bid" requirement of competitive procurement; and

(c) Enter into EDI "trading partner" or operating agreements with vendors who desire to submit bids or proposals to the agency through EDI.

(2) Required factors. In determining whether to authorize submission of bids or proposals by EDI, the agency should consider factors such as:

(a) Availability, reliability, speed, and capacity of the receiving data processing equipment;

(b) Adequacy of the administrative procedures and controls for receiving, identifying, recording, safeguarding and archiving bids or proposals submitted by EDI, and ensuring their timely delivery to the bid or proposal opening location;

(c) Whether bid or proposal security must or will be required to be submitted since it cannot acceptably be transmitted by EDI by the bidder or proposer;

(3) Operating agreements. Prior to authorizing the submission of bids or proposals by EDI, the agency will enter into EDI "trading partner" or operating agreements with any vendors who want to submit EDI documents. Such agreements will address the rights and obligations of both parties to the interchange and should contain, at a minimum, the following issues:

(a) Transmission standards;

(b) Document guidelines;

(c) Security and authentication procedures; and

(d) Document backup and replacement procedures.

(4) Provision to be included in solicitation. If submission of EDI bids and proposals is authorized, the agency will insert the following provision, or a substantially similar provisional in the agency's solicitation document:

(a) Definition. EDI bids or proposals, as used in this solicitation, means a bid or proposal modification of a bid or proposal, or withdrawal of a bid or proposal, that is transmitted to and received by the agency via electronic data interchange;

(b) Timely submission. Bidders or proposers may submit EDI bids or proposals as responses to this solicitation. The entire response must arrive at the place and by the time specified in the solicitation document;

(c) Rejection of bids or proposals. EDI bids or proposals that fail to furnish required representations or information, or that reject or take exception to any of the terms, conditions, and provisions of the solicitation, may be rejected and excluded from consideration;

(d) Authentication. EDI bids or proposals must contain the required electronic authentication which substitutes for a handwritten signature, e.g., a Personal Identification Number (PIN), issued by the agency;

(e) Request for original. The agency reserves the right to make an award based solely on the EDI bid or proposal. However, if requested to do so by the agency representative, the bidder or proposer agrees to promptly submit the complete original signed bid or proposal;

(f) Transmission Information. EDI receiving data and compatibility characteristics are as follows (or "have been previously established in the EDI trading partner agreement"):

(A) Transmission Protocol;

(B) Compatibility characteristics of receiving data processing equipment, e.g. make and model number, receiving speed, communications protocol; and

(C) Document guidelines.

(g) Responsibility for transmission failure. If the bidder or proposer chooses to transmit an EDI bid or proposal, the agency will not be responsible for any failure attributable to the transmission or receipt of the bid or proposal including, but not limited to the following:

(A) Receipt of garbled or incomplete bid or proposal documents;

(B) Availability or condition of the receiving data processing equipment;

(C) Incompatibility between the sending and receiving

equipment;

(D) Delay in transmission or receipt of bid or proposal documents;

(E) Failure of the bidder or proposer to properly identify the bid or proposal documents;

(F) Illegibility of bid or proposal documents;

(G) Security and confidentiality of bid or proposal data.

NOTES:

-1- The transmission of business documents between parties by electronic data interchange is becoming an accepted commercial practice. It may provide convenience for both the agency and its prospective bidders and proposers. In a market where prices change quickly and often, it may allow the agency to achieve more competitive pricing. A decision by an agency to authorize the submission of bids or proposals by EDI may also foster competition by allowing bidders or proposers in distant locations to submit bids or proposals more quickly than through traditional methods.

-2- However, there are several issues which an agency must consider before authorizing EDI submittals:

-a- Does the agency have the resources reasonably to allow submissions to be received and handled promptly, without the loss or nonreceipt of a bid or proposal response due to overcrowded phone lines, equipment failure or lack of staff?

(2) Does the agency have the means and methods to "seal" and secure the documents, as they are received, until bid or proposal opening? Further, does the agency have the capability to maintain the security and confidentiality of trade secret or proprietary data? If security and confidentiality prior to bid or proposal opening cannot be maintained, the agency should not allow EDI submission where written, sealed bids or proposals are being solicited through a formal (as opposed to informal) competitive procurement process, because to do so would violate the requirement in ORS 279.027(1)(c) that bids and proposals remain sealed until the date and time of public opening.

(3) Is the document authentic? Will the agency be able to verify the authenticity of bids and proposals?

(4) Does the agency have trading partner or operating agreements in place with vendors who want to submit documents by EDI? EDI operating agreements set forth the rights and obligation of both parties to the interchange. For a detailed discussion and a model agreement, see Electronic Messaging Services Task Force, The Commercial Use of Electronic Data Interchange - A Report and Model Trading Partner Agreement, 45 The Business Lawyer 1645, June 1990.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.027

Hist.: JD 1-1995, f. & cert. ef. 1-9-95

137-030-0015

Public Notice of Solicitation

(1) Distribution. Solicitation documents and notices of the availability of solicitation documents shall be mailed, placed on the Oregon Department of Administrative Services; electronic procurement system known as the "Vendor Information Program," or otherwise made available or furnished to a sufficient number of bidders or proposers for the purpose of fostering and promoting competition. Notices of availability shall indicate where, when, how, and for how long the solicitation documents may be obtained; generally describe the supply, service or construction desired; and may contain other appropriate information. The agency may charge a fee or require a deposit for the solicitation documents.

(2) Advertising:

(a) Unless exempted (e.g., for contracts under certain dollar amount pursuant to OAR 125-310-0012), every notice of solicitation of bids or proposals shall be advertised. An advertisement for bids or proposals shall be published at least once in at least one newspaper of general circulation in the area where the contract is to be performed and in as many additional issues and publications as the public agency may determine to be necessary or desirable to foster and promote competition. If the contract is for a public improvement with an estimated cost in excess of \$50,000, the advertisement for bids or proposals shall be published in at least one trade newspaper of general statewide circulation, in

accordance with OAR 137-040-0010(1);

(b) All advertisements for bids or proposals shall state:

(A) The date and time after which bids or proposals will not be received; which date shall not be less than five days after the date of the last publication of the advertisement;

(B) The date that prequalification applications must be filed if prequalification is a requirement;

(C) The character of the work to be done or the items to be purchased;

(D) The office where contract terms, conditions and specifications may be seen;

(E) The name title and address of the person designated to receive bids or proposals ;

(F) The date, time, and place that bids or proposals will be publicly opened;

(G) That the bid or proposal may be rejected for not complying with all prescribed public procurement procedures and requirements;

(H) That any or all bids or proposals may be rejected for good cause upon a finding that it is in the public interest to do so;

(I) That the bid or proposal must include a statement indicating whether the bidder or proposer is a "resident bidder," as defined in ORS 279.029;

(J) Whether or not a contractor or subcontractor must be licensed, under ORS 468A.720, to work with asbestos-containing materials; and

(K) That no bid or proposal for a construction contract shall be received or considered by the agency unless the bidder or proposer is registered with the Construction Contractors Board, as required by ORS 701.035 et seq., or licensed by the State Landscape Contractors Board, as required by ORS 671.530.

(3) Posting of solicitation advertisement. A copy of each solicitation advertisement shall be posted at the business office of the agency. Bidders and proposers may obtain a copy upon request.

(4) Notice to advocate for Minority, Women and Emerging Small Business. State agencies shall provide timely notice of all solicitations for goods or services, when the estimated contract price exceeds \$1,000, to the Advocate for Minority, Women and Emerging Small Business and to the Oregon Department of Administrative Services for the Oregon Opportunity Register and Clearinghouse. (ORS 200.035)

NOTES:

-1- In accordance with ORS 279.007, all public contracts shall be made under conditions that foster competition. Competition is fostered by making information on contracting opportunities readily available to prospective bidders and proposers, including but not limited to advertising in publications of general circulation; placing solicitations on the Oregon Department of Administrative Service's electronic procurement system known as the "Vendor Information Program;" and using any other reasonable methods of public notice that reach a sufficient number of potential suppliers, encourage competition, and are consistent with ORS 279.025.

-2- Competition is also fostered by seeking new sources of supply, both in-state and out-of-state. Prospective bidders and proposers and potential suppliers who are not familiar with Oregon public contracting opportunities and methods of procurement will need sufficient time to seek out the necessary information and submit responsive bids or proposals. In order to foster and promote competition among a sufficient number of potential suppliers who offer a wide spectrum of products and services and represent a broad marketplace, agencies are encouraged to allow as much time as possible between the first date of advertisement and the final deadline for submitting bids or proposals.

-3- ORS 200.035 requires state agencies to provide "timely notice" to the Advocate for Minority, Women and Emerging Small Business. At the time of this revision, the Advocate's office is in the process of promulgating administrative rules that will, among other things, define "timely" notice under ORS 200.035. Currently, the Advocate's office advises that notice will be timely if the Advocate is provided with the form, "Opportunity Register & Clearinghouse," at the time the agency releases its solicitation to the Public.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.007, 279.025 & 200.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

Bid or Proposal Preparation

137-030-0020

Bid or Proposal Preparation Instructions

(1) Except as otherwise allowed in OAR 137-030-0013 or 137-030-0014, as applicable, bids or proposals shall be typed or prepared in ink and shall be signed in ink by the bidder, proposer, or an authorized representative of the bidder or proposer.

(2) Bids or proposals shall be made on the forms provided unless bidders or proposers are otherwise instructed in the solicitation document.

(3) Except as otherwise allowed in OAR 137-030-0013 or 137-030-0014, as applicable, alterations or erasures, if any, shall be initialed in ink by the person signing the bid or proposal.

(4) Bids and proposals shall contain a fully executed bid or proposal package, including all required documents and descriptive literature.

(5) If specifically allowed by the solicitation documents, bids or proposals may be submitted by facsimile or electronic data interchange (EDI), but only if:

(a) The agency has the equipment and means necessary to receive bids or proposals by facsimile or EDI; and

(b) Prospective contractors who desire to submit bids or proposals by EDI have entered into an agreement with the agency which expresses the EDI standards by which data will be exchanged, as well as the rights and obligations of both parties in making the interchange. The agency shall not accept bid or proposal security instruments by telephonic facsimile or EDI.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.027

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0025 [Renumbered to 137-030-0006]

137-030-0030

Bidder or Proposer Submissions

(1) Product samples and descriptive literature. Product samples or descriptive literature may be required when it is necessary or desirable to evaluate the quality, features or characteristics of the items bid or proposed. Product samples will be returned, disposed of, or made available for return to the bidder or proposer in accordance with provisions contained in the solicitation documents.

(2) Identification of bids or proposals:

(a) To ensure proper identification and special handling, bids or proposals shall be submitted in a sealed envelope appropriately marked or in the envelope provided by the agency, whichever is applicable. If the agency permits bids or proposals to be submitted by facsimile or electronic data interchange (EDI), the bidder or proposer must identify and submit bid or proposal documents exactly as required in the agency's solicitation documents;

(b) The agency shall not be responsible for the proper identification and handling of bids or proposals not submitted in the designated manner or format, to the required delivery point.

(3) Receipt of bids or proposals. It is the bidder's or proposer's responsibility to ensure that bids or proposals are received by the agency at the required delivery point, prior to the stated bid or proposal closing time, regardless of the method used to submit or transmit them.

NOTES:

-1- Bidders and proposers are solely responsible for delivering bids and proposals in the designated manner or format, to the required delivery point, prior to the stated bid or proposal closing time. This means that bidders and proposers, rather than the agency, bear the risk of delay or misdelivery of bids and proposals. See, e.g., Unitron Engineering Co., Inc., B-194707, 58 Comp Gen 748 (1979) (late bid properly rejected, even though the delay--a common carrier shut down during the Three Mile Island nuclear emergency--was beyond the bidder's control); Bio-

Metric Systems, Inc., B-234330, 3 CGen ¶ 102,870 (1989) (late proposal properly rejected, even though the delay was caused by a winter storm, an "act of God"); Futura Systems, Inc., B-241069, 5 CGen ¶ 104,708 (1990) (proposal misdelivered by parcel courier to a government warehouse rather than the designated delivery point, properly rejected as late); Fire Security Systems, Inc. B-236132, 4 CGen ¶ 103,682 (late bid properly rejected where delay was allegedly due to an altercation instigated by a rival bidder).

-2- Note, though, that OAR 137-030-0030 (2) (b), in providing that the agency is not responsible for the handling of bids and proposals that have not been submitted in the required manner and format, implies that the agency is responsible for the proper handling of bids and proposals that have been timely submitted in the designated manner or format, to the required delivery point. This implication is consistent with federal decisional authority. See, e.g., Orange Shipbuilding Co., Inc. B-230285, 2 CGen ¶ 101,712 (1988) (late bids may be considered for award where improper government action--defined as government action making it impossible for the offeror to deliver its bid on time--was the paramount cause for the late receipt); Data General Corp. B-252239, 8 CGen ¶ 107,635 (1993) (bid delivered to government two days before scheduled opening, and received in the bid room after opening because government varied from its normal handling procedures, was properly considered for award).]

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.027

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0035

Bid or Proposal Security

(1) Public improvement contracts. Bid or proposal security not to exceed ten percent of the base bid(s) or proposal(s) shall be required for public improvement contracts where the amount of the contract exceeds \$10,000. (See ORS 279.027(3); 279.033; cf., OAR 125-360-0010 and 125-360-0020.) The bid or proposal security shall be forfeited if the bidder or proposer fails to execute the contract promptly and properly if awarded. (ORS 279.031).

(2) Other public contracts. Bid or proposal security not to exceed 10 percent of the bid or proposal may be required by the agency for other contracts in order to guarantee acceptance of the award. This requirement shall be stated in the solicitation documents. (Cf. OAR 125-360-0010). Bid or proposal security for contracts of less than \$25,000 may be required by the agency, but shall not be used to discourage competition. (Cf. ORS 279.027(3), OAR 125-360-0020).

(3) Form of bid or proposal security. The following forms of bid or proposal security may be accepted by the agency:

(a) Surety bond from a surety company authorized to do business in the State of Oregon; or

(b) Cashier's check, certified check, or savings and loan secured check; or

(c) Annual surety bond filed with the agency (except for public improvements contracts).

(4) Return of bid or proposal security. The bid or proposal security of all unsuccessful bidders or proposers shall be returned or released after a contract has been executed and a performance bond provided (if such a required), or after all bids or proposals have been rejected. The agency may return the bid or proposal security of unsuccessful bidders or proposers after bid or proposal opening but prior to award, if the return does not prejudice contract award and provided that the security of at least the three lowest bidders, or the three highest scoring proposers, is retained pending the execution of a contract.

NOTES:

-1- Annual Surety Bonds. A number of agencies have established procedures whereby an annual surety bond is filed with the agency for bidding purposes in an amount sufficient to provide adequate bid security, pursuant to ORS 279.027, for all bids during the year for a particular bidder. The common practice is to file a surety bond for bid bond purposes in an amount of \$50,000 to \$100,000, which will cover 10 percent of the amount of the bid for the contract for any given number of bids that are outstanding with that agency at any given time. Agencies are encouraged to develop procedures such as this which

facilitate bidders submitting bids and not having to provide new bid bonds each time. This is especially true when bidders are doing a volume of business with an agency such as the Oregon Department of Transportation of the Oregon Administrative Services.

-2- Waiver of Bid or Proposal Security. ORS 279.027(3) provides: A surety bond, cashier's check, or certified check of the bidder shall be attached to all bids as bid security unless the contract for which the bid is submitted has been exempted from this requirement pursuant to ORS 279.033. Such security shall not exceed 10 percent of the amount bid for the contract.

-3- The Oregon Department of Administrative Services, as the public contract review authority for state agencies, has promulgated an administrative rule which allows state agencies to waive, in their discretion, the requirement for bid or proposal security for contracts other than those for public improvement. See OAR 125-360-0010. For public improvement contracts, state agencies, may, in their discretion, waive the requirement for bid or proposal security if the amount of the contract for the public improvement is less than \$10,000. See OAR 125-360-020.

-4- As a practical matter, agencies often choose not to require bid or proposal security unless a performance and payment bond is also required. Conversely, bid or proposal security is usually required whenever a performance bond or a performance and payment bond is required. Nevertheless, there may be occasions where the agency chooses to require bid or proposal security without requiring a performance bond. The agency should consider which practice is most effective in protecting its interests, given the type of contract or class of contracts it is procuring. Some of the factors an agency might consider are:

-a- As a surety bond industry practice, bid or proposal security is most often a precursor to performance security. Surety firms generally treat the issuance of bid or proposal bonds and performance bonds as one transaction and require the contractor to submit the same qualifying information for either or both. The surety firm performs basically the same amount of analysis for both bid and proposal or performance bonds, therefore, the surety's fee structure may reflect anticipation that the surety will provide both a bid or proposal bond and a performance bond. Bonding costs are passed on to the agency through the bid or proposal prices.

-b- Requiring bid or proposal and performance security may tend to diminish competition, particularly in certain classes of contracts, e.g., smaller dollar value or requirements contracts. Under the authority of ORS 279.033, public contract review authorities can exempt certain contracts or classes of contracts from such requirements. For example, OAR 125-360-0010 allows state agencies to waive bid or proposal security requirements for all public contracts, other than those for public improvements. For the latter category of contracts, OAR 125-360-0020 allows state agencies to waive the requirements for bid or proposal security and a performance bond if the amount of the public improvement contract is less than \$10,000. Also, an exemption might be made to foster competition in those procurement areas where disadvantaged, minority-owned or woman-owned business enterprises are encouraged to participate, as in OAR 125-360-0030 for qualifying public improvement projects under \$100,000.

-c- The process of qualifying for a bid, proposal or performance bond is time-consuming for the bidder or proposer and therefore, indirectly, for the agency. Note that OAR 137-030-0035(1) provides for forfeiture of the bid or proposal security if the bidder or proposer fails to execute the contract promptly and properly if awarded. It is up to the agency to make a policy determination as to what constitutes "prompt" execution. Many agencies name in their solicitation documents an actual number of days, e.g., ten (10) calendar days, that the prospective awardee has in which to complete contract execution timely. Agencies, when setting such timeframes, should be mindful of the potential for delay due to the issuance requirements of the bonding company. The agency should use discretion in defining "prompt" so as not to forego an otherwise acceptable bid or proposal and, at the same time, be able to proceed with the work to be performed under the contract.

-5- On the other side of this discussion, the question might be asked how an agency knows when bid or proposal security and a performance bond should be required in situations other than public improvements. First, it is always best to consult with the agency's risk management officer in any particular situation. Generally, however, bid or proposal security and performance bonding are recommended when the work to be

performed is time-critical to the agency's operations. Another factor is how many contractors there are, equally capable of performing, who can take on the work to be performed with little notice or start-up cost. If there are few contractors capable of picking up the work without significant notice or start-up costs, this would suggest a need for the protection of bid or proposal and performance bonding. A third consideration is whether the agency will have significant dollars invested in equipment or material as the project progresses or a potential for significant liability exposure during contract performance. Note that these considerations are all present in a public improvement; critical time factors, a contractor who would be difficult and expensive to replace, and significant agency dollars invested in the progress of the project, plus potential liability exposure during contract performance.

-6- It follows that an agency needs to look at the overall need, in any procurement situation, for the protection that bid or proposal and performance security offers and to decide if the procurement, and ultimately, the contracted work to be performed, requires such protection. If the anticipated procurement does not need such protection, or is a type of contract where the fostering of competition may be of more social or economic value to the agency, the agency may want to use an exemption promulgated by the agency's public contract review authority. If such exemptions are not available or are inapplicable to the situation, the agency may want to seek an exemption from the requirements for bid or proposal security and performance bonding from its public contract review authority. However, please note the caution contained in the commentary to OAR 137-30-140, below.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.027(3), 279.031 & 279.033

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0140

Pre-Bid and Pre-Proposal Conferences

(1) Purpose. The agency may hold pre-bid conferences with prospective bidders or proposers, prior to the date and time set for solicitation closing to explain the procurement requirements or to conduct site inspections.

(2) Required attendance. As a condition for bidding or proposing, the agency may require attendance at the pre-bid or pre-proposal conference.

(3) Schedule time. The pre-bid or pre-proposal conference shall be held within a reasonable time after the solicitation documents have been issued, but sufficiently before the bid or proposal closing date to allow consideration by bidders and proposers of the conference results in preparing bids or proposals.

(4) Statements not binding. Statements made by agency representatives at the pre-bid or pre-proposal conference shall not change the solicitation documents unless they are confirmed to all prospective bidders or proposers by written addendum to the solicitation documents.

(5) Agency announcement. The agency shall announce, to all prospective bidders or proposers, in the solicitation documents:

(a) The time, date and location of the conference; and

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

(c) That statements made by agency representatives at the conference are not binding upon the agency unless confirmed by written addendum.

NOTES:

-1- Pre-bid or pre-proposal conferences are meetings held by an agency for its own benefit as well as the benefit of prospective bidders or proposers. The purpose of the conference is to answer questions from bidders or proposers about the agency's specifications and the work to be performed, take attendees on "walk-through" inspections of the work-site(s), and generally give them an opportunity to meet with agency representatives about the work to be performed as described in the solicitation documents.

-2- These conferences can benefit the agency as well. The quality of bid or proposal submissions is enhanced when bidders or proposers are well-informed about all aspects of the work to be performed. In the discussion, the attendees may alert agency representatives to errors, omissions or unclear materials in the solicitation documents, which can be corrected or clarified by addenda before the bid or proposal closing date.

-3- When the work is to be performed on the agency's premises, a pre-bid or pre-proposal conference will often have a three-part agenda. The first part is a general informational meeting. Agency representatives lead the prospective bidders or proposers through a review and discussion of all aspects of the work to be performed and the contractual terms and conditions. The second part of the conference will usually be the on-site inspection, sometimes called a "walk-through", where agency representatives guide the attendees around the location where the work will be performed. Finally, the on-site inspection may be followed by a group question and answer period to allow attendees time to get further clarification after the walk-through.

-4- The three-part agenda works well for "trade" service procurements, e.g., custodial work, or public improvements. For other types of procurements, e.g., acquisition of computer equipment, the agency may leave out the "walk-through" and concentrate on achieving an effective exchange of questions and answers between the bidders or proposers and the agency staff and consultants responsible for ensuring the conformity of the products offered to the requirements of the specifications.

-5- The agency will decide in advance whether attendance by all prospective bidders or proposers at the pre-submission conference shall be "mandatory". If the pre-submission conference is made "mandatory", the agency will decline to consider bids or proposals received from those persons who did not attend. The agency's decision to make attendance at the pre-submission conference mandatory may depend on such factors as:

-a- Whether part or all of the contracted work will be performed on agency property or premises;

-b- The nature of the commodity or service being procured;

-c- Whether the agency wants or needs to know the makeup of the prospective bidder or proposer group before the closing date of the solicitation. e.g., whether its advertising was effective in drawing interested prospective competitors;

-d- Whether the agency believes its staff time is best used in holding one meeting with bidders and proposers as a group, as opposed to responding to questions on an individual basis; and

-5- Whether there is less chance of confusion or misinformation on the part of bidders and proposers if a group conference is held.

-6- Sometimes, for its own convenience, the agency may decide to hold more than one pre-submission conference. The agency may require mandatory attendance by prospective bidders or proposers at only one of the meetings, or at all of the meetings, depending on its needs and the project.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.007, 279.025(2)(e)

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0045 [Renumbered to 137-030-0011]

137-030-0050

Request for Change or Protest of Solicitation Specifications or Contract Provisions

(1) Time for submission of request for change or protest. Unless a different deadline is specified in the Invitation to Bid or Request for Proposals, requests for change or protests of solicitation specifications or contract provisions shall be presented to the agency in writing and in accordance with the following deadlines:

(a) Public improvement contracts — Ten (10) calendar days prior to bid or proposal closing;

(b) Other public contracts — Five (5) calendar days prior to bid or proposal closing;

(c) Such request for change or protest shall include the reasons for the request or protest, and any proposed changes to specifications or provisions. No request for change or protest of the content of solicitation specifications or contract provisions shall be considered after the deadline established for submitting such request or protest.

(2) Extension of closing date. If any request for change or protest is received in accordance with section (1) of this rule, the bid or proposal closing date may be extended if the agency determines an extension is necessary to allow consideration of the

request or protest and issuance of any addenda to the solicitation documents.

(3) Identification of request for change or protest. Envelopes containing requests for change or protests of solicitation specifications shall be marked as follows:

(a) Solicitation specification or contract provisions request for change (or protest);

(b) Solicitation document number (or other identification).

NOTES:

-1- As noted in the commentary to OAR 137-030-0010(5), bids or proposals that contain or are contingent upon material changes in specifications or contract provisions generally run the risk of being rejected as non-responsive to the solicitation documents. Therefore, if bidders or proposers find certain specifications or contract provisions unacceptable, they must request changes to or protest them within the time lines established by this rule; requests for change or protests made at any other time will not be considered.

-2- The purpose of this requirement is to permit agencies to correct, prior to the submission of bids or proposals, technical or contractual requirements that may be unlawful, improvident, or which unjustifiably may restrict competition. By permitting corrections prior to the submission of bids or proposals, this requirement eliminates the waste of resources inherent in post-selection protests and in the possible rejection of bids or proposals. In order to have their complaints or requests considered, bidders or proposers must submit them within the time established in this rule.

-3- The agency shall not be required to consider, at any subsequent time, a bidder's or proposer's objections to specifications or contract provisions unless those objections have been presented in a timely manner under this rule.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.017, 279.023, 279.025 & 279.67

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0055

Addenda to Solicitation Documents

(1) Form. Changes to solicitation documents shall be accomplished by addenda. The bidder or proposer shall acknowledge receipt of all addenda issued, either with the bid or proposal or separately prior to bid or proposal closing.

(2) Distribution. Addenda shall be sent to all prospective bidders or proposers known either to have obtained the solicitation documents or attended any mandatory pre-bid or pre-proposal conference.

(3)(a) Timelines. Addenda shall be issued within a reasonable time (preferably at least five days prior to bid or proposal closing) to allow prospective bidders or proposers to consider the addenda in preparing their bids or proposals, but in no case less than 72 hours before the bid or proposal closing time. If necessary, the agency may notify prospective bidders or proposers of addenda by telegram, telephonic facsimile or telephone. If telephone is used, the agency shall confirm the oral notice with a written addendum.

(b) Extensions. In its discretion, the agency may extend the bid or proposal closing date and time to allow prospective bidders or proposers to analyze and adjust to changes made by addenda. The agency shall notify prospective bidders or proposers of the new closing date and time either in the addendum or in writing accompanying the addendum.

NOTES:

-1- It should be emphasized that the time periods included in OAR 137-030-0055 are minimums; prospective bidders and proposers should be allowed enough time to not only receive the addended materials, but also to analyze and adjust to changes made by addenda. The amount of time appropriate to a particularly complex or voluminous procurement may easily exceed the minimum periods in the rule. If too little time is allowed to analyze an addendum, the agency risks confusion among the bidders or proposers and the submission of non-responsive bids or proposals.

-2- Agencies should consider including in the solicitation documents, and again in any addenda issued, their specific instructions to bidders or proposers regarding acknowledgment of addenda, e.g., whether the

bidder or proposer is to attach a signed copy of each addendum to their bid or proposal or whether they are to follow some other method of fulfilling the acknowledgment requirement of OAR 137-030-0055(1).

-3- It is suggested that the agency, in its addenda, include the related instructions on pre-opening modification or withdrawal of bids or proposals (OAR 137-030-0060) to assist bidders and proposers to correctly modify or withdraw bids or proposals they may have already submitted prior to the changes

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.035 & 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0060

Pre-Opening Modification or Withdrawal of Bids or Proposals

(1) Modifications. Once submitted, bids or proposals may be modified in writing prior to the time and date set for bid or proposal closing. Any modifications shall be prepared on the bidder's or proposer's letterhead, signed by an authorized representative of the bidder or proposer, state that the new document supersedes or modifies the prior bid or proposal and be submitted in a sealed envelope, appropriately marked. The agency may accept telegraphic modification, telephonic facsimile, or similar modifications, if it has authorized the submittal of documents by one or more of these means in accordance with OAR 137-030-0013 or 137-030-0014. To ensure the integrity of the bidding process, the envelope or electronically transmitted document containing any modifications to a bid or proposal shall be marked as follows:

- (a) Bid (or proposal) modification;
- (b) Solicitation number or other identification
- (2) Withdrawals:

(a) Bids or proposals may be withdrawn by written notification on the bidder's or proposer's letterhead, signed by an authorized representative of the bidder or proposer, and received prior to the time and date set for bid or proposal closing. Bids also may be withdrawn in person, prior to the scheduled bid or proposal closing, upon presentation of appropriate identification;

(b) Unopened bids or proposals withdrawn under subsection (a) of this section, may be released to the bidder or proposer after voiding any date and time stamp used;

(c) Requests to withdraw mailed bids or proposals shall be marked as follows:

- (A) Bid (or proposal) withdrawal;
- (B) Solicitation number or other identification.

(3) Documentation. All documents relating to the modification or withdrawal of bids or proposals shall be made a part of the appropriate bid or proposal file.

NOTE: The NOTE to this rule has been moved to OAR 137-030-0070, Late Bids and proposals".

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.025(2), 279.027, 279.049, 279.029(6)(a) & 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 12-1995, f. & cert. ef. 1-9-95

137-030-0065

Receipt, Opening, and Recording of Bids and Proposals

(1) Receipt. Each bid or proposal, and any modifications, shall, upon receipt, be electronically or mechanically time-stamped or marked by hand but not opened, and shall be stored in a secure place until bid or proposal opening. If bids, proposals or modifications are opened inadvertently or are opened prior to the time and date set for bid or proposal opening because they were improperly identified by the bidder or proposer, the opened bids, proposals or modification documents shall be resealed and stored for opening at the correct time. When this occurs, documentation of the resealing shall be placed in the solicitation file.

(2) Opening and recording. Bids, proposals and modifications shall be opened publicly, at the time, date, and place designated in the solicitation documents. In the case of invitations to bid, to the extent practicable, the name of each bidder, the bid

price(s), and such other information as considered appropriate shall be read aloud. In the case of requests for proposals or on voluminous bids, the agency may advise bidders and proposers, as part of the solicitation documents, that the bid or proposal items and prices will not be read aloud.

(3) Availability. Prior to award, and except to the extent the bidder or proposer designates trade secrets or other proprietary data to be confidential, the opened bids or proposal shall be available for public inspection. See ORS 192.501(2); ORS 646.461 to 646.475. Application of the Oregon Public Records Law shall determine if the confidential information claimed to be exempt is in fact exempt from disclosure. In order to facilitate public inspection of the nonconfidential portion of the bid or proposal, material designated as confidential shall accompany the bid or proposal but shall be readily separable from it. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment shall be publicly available regardless of any designation to the contrary.

NOTE:

-1- After opening, agencies need time prior to award to evaluate the bids or proposals that were submitted. This requirement is especially valid in cases where a large number of specifications have been included and the bids or proposals have been submitted as a base bid or proposal, with additive or deductive alternates.

-2- However, the agency must recognize that open bids and proposals shall be available for public inspection following bid or proposal opening except to the extent the bids or proposals contain trade secrets as defined in ORS 192.501(2) or 646.461(4). Submitted bids and proposals are a matter of record and agencies should make every effort to make these available to interested members of the public.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.027 & 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0070

Late Bids and Proposals, Late Withdrawals, and Late Modifications

(1) Definition. Any bid or proposal received after the time and date set in the solicitation documents for receipt of bids or proposals is late. Any request for bid or proposal withdrawal or modification received after the time and date set for bid or proposal closing is late.

(2) Disposition. No late bids, late proposals, late modifications, or late withdrawals shall be considered.

NOTES:

-1- All of the rules on submission of bids and proposals by bidders and proposers recognize that the burden of submitting information and getting the bid or proposal in on time is on the offeror. No exceptions can be allowed to this requirement since one of the fundamentals of the public competitive procurement process is that all bidders and proposers be treated equitably. Once an exception is made to allow submission of a bid or proposal after the scheduled bid or proposal closing, there is no way to narrow that exception in such a manner that it will be applied fairly to all bidders or proposers. Therefore, a strict rule must be applied that prevents acceptance of any kind of bid or proposal, or other necessary pre-closing submission, that is received after the time and date listed in the notification of solicitation.

-2- Agencies are encouraged to use a date and time stamp in order to verify the time and day of receipt of the bids or proposals. The official clock should be that of a purchasing officer in charge of opening the bids or proposals, or some other identifiable time piece located in the purchasing office of the agency.

-3- If an agency authorizes the submission of bids or proposals by facsimile or electronic data interchange, it must adopt procedures to address the timely receipt requirement, in accordance with OAR 137-30-013 or 137-30-014.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.027 & 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0075

Mistakes in Bids or Proposals

(1) General. Clarification or withdrawal of a bid or proposal because of an inadvertent, nonjudgmental mistake in the bid or proposal requires careful consideration to protect the integrity of the competitive bidding system, and to assure fairness. Except as provided in this rule, if the mistake is attributable to an error in judgment, the bid or proposal may not be corrected. Bid or proposal correction or withdrawal by reason of a nonjudgmental mistake is permissible but only to the extent it is not contrary to the interest of the agency or the fair treatment of other bidders or proposers.

(2) Mistakes discovered after bid or proposal closing but before award. This subsection prescribes procedures to be applied in situations where mistakes or proposals in bids are discovered after the time and date set for bid or proposal closing but before award:

(a) Minor informalities. Minor informalities are matters of form rather than substance that are evident from the bid or proposal documents, or are insignificant mistakes that can be waived or corrected promptly without prejudice to other bidders, proposers or the agency; that is, the informality does not affect price, quantity, quality, delivery, or contractual conditions except in the case of informalities involving unit price. Examples include, but are not limited to the failure of a bidder or proposer to:

(A) Return the number of signed bids or proposals or the number of other documents required by the bid solicitation documents;

(B) Sign the bid or proposal form in the designated block so long as a signature appears in the bid or proposal documents evidencing an intent to be bound;

(C) Acknowledge receipt of an addendum to the solicitation documents, but only if:

(i) It is clear from the bid or proposal that the bidder or proposer received the addendum and intended to be bound by its terms; or

(ii) The addendum involved did not affect price, quantity, quality, or delivery.

(b) Mistakes where intended correct bid or proposal is evident. If the mistake and the intended correct bid or proposal item are clearly evident on the face of the bid form or proposal document, or can be substantiated from accompanying documents, the agency may accept the bid or proposal. Examples of mistakes that may be clearly evident on the face of the bid form or proposal document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors. Mistakes that are clearly evident on the face of the bid form or proposal document also may include instances in which the intended correct bid or proposal item is made clearly evident by simple arithmetic calculations. For example, a missing unit price may be established by dividing the total bid or proposal item by the quantity of units for that item, and a missing or incorrect total bid or proposal price for an item may be established by multiplying the unit price by the quantity when those figures are available on the bid or proposal. For discrepancies between unit prices and extended prices, unit prices shall prevail;

(c) Mistakes where intended correct bid or proposal is not evident. The agency shall not accept a bid or proposal in which a mistake is clearly evident on the face of the bid form or proposal document but the intended correct bid or proposal is not clearly evident or cannot be substantiated from accompanying documents, i.e., documents submitted with the bid or proposal, pursuant to solicitation requirements.

NOTE: Bidders and proposers should be especially careful to avoid mistakes, omissions, and ambiguities in their submissions. Unless an agency can determine with reasonable certainty, exclusively from the face of the bid or proposal and any accompanying documents required by the solicitation and submitted with the bid or proposal narratives, price lists, etc., the intended meaning of a bid or proposal item, the bid or proposal generally must be rejected as nonresponsive for failing to comply with required procurement procedures. Additionally, ambiguous bids or proposals (those that reasonably can be read in more than one way) create serious problems in determining the bidder's or proposer's intent, and are vulnerable to rejection. (See, e.g., OAR 125-030-

0004(2)(a) which provides that a "nonresponsive bid or proposal" is one which "omits, or is unclear as to, the price." OAR 125-030-0004(3) provides that nonresponsive bids or proposal shall be rejected.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.029 & 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0080

Time for Acceptance

Bids shall be valid and binding offers for 30 days unless otherwise specified in the bid documents.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.029(1)

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0085

Extension of Time for Acceptance of Bid or Proposal

Notwithstanding OAR 137-030-0080, after opening bids or proposals, the agency may request orally or in writing that bidders or proposers, extend, in writing, the time during which the agency may accept their bids or proposals.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.029(1)

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0090

Bid and Proposal Evaluation and Award

(1) General. The contract, if awarded, is to be awarded to the lowest, responsive and responsible bidder or the best, responsive and responsible proposer. Consistent with the provisions of the solicitation documents, and in the public interest as determined by the agency, awards may be made by item, groups of items, or entire bid or proposal. The agency reserves the right to reject any bid or proposal not in compliance with the solicitation documents or with all prescribed public bidding procedures (ORS 279.025 (2)(i)), and to reject any or all bids or proposals upon a finding of the agency that it is in the public interest to do so (ORS 279.035).

(2) Special requirements. The solicitation documents shall set forth any special requirements and criteria which will be used to determine the lowest responsible bidder or best responsible proposer. No bid or proposal shall be evaluated for any requirement or criterion that is not disclosed in the solicitation documents or agency regulation.

(3) Product acceptability:

(a) The solicitation documents shall set forth the evaluation criteria to be used in determining product acceptability. The agency may require the submission of bid product samples, descriptive literature, technical data, or other material, and may also provide for accomplishing any of the following prior to award:

(A) Demonstration, inspection or testing of a product prior to award for such characteristics as quality or workmanship;

(B) Examination of such elements as appearance, finish, taste, or feel; or

(C) Other examinations to determine whether the product conforms with specifications.

(b) The acceptability evaluation is conducted only to determine that a bidder's proposer's offering is acceptable as provided in the solicitation documents. Any bidder's proposer's product which does not meet the minimum requirements shall be rejected. Product rejections are not considered bidder or proposer disqualifications and are not grounds for appeal under ORS 279.043.

(4) Determination of lowest, responsive and responsible bidder. Following determination of product acceptability as set forth in section (3) of this rule, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the agency in accordance with the evaluation criteria set forth in the solicitation documents. Only objectively measurable criteria which are set forth in the solicitation documents shall be applied in determining the lowest responsible bidder. Examples of such

criteria include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, ownership or life cycle cost formulas, performance history on other private and public contracts, experience of key personnel, adequacy of equipment and physical plant, financial wherewithal, sources of supply, references and warranty provisions. Evaluation factors need not be precise predictors of actual future costs; but to the extent possible, such evaluation factors shall:

(a) Be reasonable estimates based upon information the agency has available concerning future use;

(b) Treat all bids equitably; and

(c) Recognize that public policy requires acquisitions and public improvements to be accomplished at the least cost. ORS 279.023(1).

(5) Restrictions. Nothing in this section shall be deemed to permit contract award to a bidder submitting a higher quality item than that designated in the bid documents if such bidder is not also the lowest responsible bidder as determined under section (4) of this rule. Further, this section does not permit negotiations with any bidder.

(6) Determination of best, responsive and responsible proposer. Proposals will be evaluated to determine which proposer offers the best solution to the agency in accordance with the evaluation criteria set forth in the solicitation documents. Only the criteria which are set forth in the solicitation documents shall be applied. The criteria shall be as objective as possible. Examples of evaluation criteria may include, but are not limited to, costs, quality, service, compatibility, product reliability, operating efficient, expansion potential, performance history on other private and public contracts, experience of key personnel, adequacy of equipment and/or physical plant, financial wherewithal, sources of supply, references and warranty provisions. Evaluation factors need not be precise predictors of actual future costs and performance; but to the extent possible, such evaluation factors shall:

(a) Be reasonable estimates based on information available to the agency;

(b) Treat all proposals equitably;

(c) Recognize that public policy requires acquisitions and public improvements to be accomplished at the least cost. ORS 279.023(1).

(7) Restrictions. Nothing in this section shall be deemed to permit contract award to a proposer submitting a higher quality item than that designated in the solicitation documents if such proposer is not also the best, responsive and responsible proposer as determined under section (6) of this rule. Negotiations with proposers are permitted in accordance with OAR 137-030-0105

(8) No assignment or transfer of contract rights. Unless an express provision of the public contract otherwise provides, the contractor shall not assign, sell, or transfer rights, nor delegate responsibilities, under a public contract, either in whole or in part, without first obtaining the agency's prior written consent. Unless otherwise agreed by the agency in writing, such consent shall not relieve the contractor of any obligations under a public contract, and any assignee or transferee shall be considered the agent of the contractor and bound to abide by all provisions of the public contract. Except in the event of a novation, if the agency consents in writing to an assignment, sale, or transfer of the contractor's rights and responsibilities, the contractor and its surety. If any, shall remain ultimately liable to the agency for complete performance of the public contract as if no such assignment, sale, or transfer had occurred.

NOTES:

-1- Although section (4) and (6) of this rule suggest that price evaluation will be conducted only after product acceptability has been examined, nothing in this rule is intended to prescribe the order or timing of the evaluation of particular components of a bid or proposal. Frequently, in order to save resources, agencies will review price first, and then determine whether the apparent low bid or best proposal meets all product specifications. This promotes efficiency by minimizing the time spent in evaluating proposals or bids that do not appear to be competitive. An agency has discretion to evaluate bids or proposals and

product acceptability in the order that best meets its needs, consistent with fairness to all bidders and proposers.

-2- Depending upon whether product acceptability or price is evaluated first, the agency must evaluate each bid or proposal (or the apparent low bid or proposal) and determine whether such bids or proposals substantially complied with all prescribed public procurement procedures and requirements. If two or more bids substantially comply with such procedures and requirements, the agency must award the contract to the lowest responsible bidder. If two or more proposals substantially comply with all prescribed public procurement procedures and requirements, the agency must award the contract to the responsible proposer whose proposal best meets the terms, conditions, specifications and requirements which are expressly stated in, or necessarily implied from, the Request for Proposals.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.029

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0095

Low Tie Bids

(1) Definition. Low tie bids are low responsive bids from responsible bidders that are identical in price, fitness, availability and quality and which meet all the requirements and criteria set forth in the solicitation documents.

(2) Award:

(a) Low tie bids are subject to the Oregon preference contained in ORS 279.021(1): **"In all public contracts, the public contracting agency shall prefer goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal"**.

(b) Low tie bids that remain tied after application of the statutory Oregon preference shall be awarded according to the following sequence:

(A) Preference shall be given to the bidder whose principal offices or headquarters are located in Oregon;

(B) If a tie still remains after applying paragraph (A) of this subsection, award shall be made by drawing lots among any tied Oregon bidders. Such bidders shall be given notice and an opportunity to be present when the lots are drawn;

(C) If none of the tied bidders is located in Oregon, award of the contract shall be made by drawing lots.

NOTES:

-1- Pursuant to ORS 279.021, public contracting agencies are required to prefer goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal. This means that the Oregon Preference Law applies only when there is a tie bid.

-2- Note that this preference statute only applies to goods or services that are manufactured in this state. Thus, the application of the statute sometimes can result in some interesting disparities and perceived unequal treatment. For example, a firm may be headquartered in Oregon and have all of its plants in Oregon except one, which is located in another state, and the goods offered pursuant to the solicitation might be from the out-of-state plant. Those goods would not qualify for the Oregon Preference Law.

-3- See also the reciprocal preference requirements of ORS 279.029(2) and (3). The Oregon Department of Administrative Services maintains a list of states providing for instate preference. See OAR 125-30-070

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.021 & 279.029

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0100

Rejection of Individual Bids or Proposals

(1) General. This section applies to rejections, in whole or in part, of individual bids or proposals. In accordance with ORS 279.035, the agency may reject in whole or in part, any bid or proposal not in compliance with all prescribed bidding procedures and requirements, and may reject for good cause any bid or proposal upon a written finding of the agency that it is in the public interest to do so.

(2) Reasons for rejection. Reasons for rejecting a bid or proposal include but are not limited to finding that:

(a) The bidder or proposer has not prequalified under ORS 279.039, or is disqualified under ORS 200.075, 279.037 or OAR 137-030-0110; or

(b) The bidder or proposer has been declared ineligible by the Commissioner of the Bureau of Labor and Industries under ORS 279.361; or

(c) The bid or proposal is nonresponsive, that is, it does not conform in all material respects to solicitation document requirements, including all prescribed public procurement procedures and requirements; or

(d) The supply, service, or construction item offered in the bid or proposal is unacceptable by reason of its failure to meet the requirements of the solicitation documents or permissible alternates or other acceptability criteria set forth in the solicitation documents; or

(e) The bidder or proposer is nonresponsive, i.e., is not capable of satisfying the terms and conditions of the public contract in a timely manner due to financial incapacity, inability to obtain bonding, loss of license, poor performance history or other objective cause; or

(f) The bidder or proposer within the last five years has been found, in a civil, criminal or administrative proceeding, to have committed or engaged in fraud, misrepresentation, price-rigging, unlawful anti-competitive conduct, or similar behavior; or

(g) The bidder or proposer has been determined responsible (i.e., adjudicated by a court, or as determined in writing by the contracting agency in the case of a public contract) for more than one breach of a public or private contract or contracts in the last 3 calendar years before the scheduled date of the bid or proposal opening; or

(h) The bid or proposal security has not been submitted or properly executed as required by the solicitation documents; or

(i) The bidder or proposer has not met the emerging small business, disadvantaged business, minority business and women business enterprise requirements, if any, established by the agency, and has not made a good faith effort in accordance with ORS 200.075 and 279.059 to comply with the requirements prior to the time bids or proposals are opened; or

(j) The bidder or proposer has failed to certify in accordance with section (4) of this rule; or

(k) Other circumstances of the particular bid or proposal, or bidder or proposer, indicate that acceptance of the bid or proposal would impair the integrity of the selection process or result in an imprudent contract by the agency.

(3) Form of Business Entity. For purposes of this rule the corporate or business form of bidders or proposers shall be subject to scrutiny, so that previously-disqualified bidders or proposers, or their officers and directors, may not by subterfuge, change of apparent ownership, or other adjustments in formal appearance, avoid application of this rule or of the disqualification provisions of ORS 279.037 to 279.045 and OAR 137-030-0110.

(4) The bidder or proposer shall certify as part of the bid or proposal documents accompanying the bid or proposal on a public contract that the bidder or proposer has not discriminated against minority, women or emerging small business enterprises in obtaining any required subcontracts.

NOTES:

-1- Although agencies are authorized to reject bids or proposals that do not materially comply with the solicitation documents and with all prescribed procurement procedures, a bidder or proposer frequently will not receive notice of a defective bid or proposer in instances when that bid or proposal would not, in any event, have been the successful bid or proposal. Rather than undertaking the additional task of rejecting the or proposal, agencies frequently treat such bids or proposals simply as "losing" bids or proposals.

-2- Therefore, the fact that an unsuccessful bid or proposal was not rejected does not constitute a representation or indication by the agency that the bid or proposal was in compliance with the solicitation documents or with prescribed procurement procedures, and bidders or proposers cannot rely on the fact that earlier bids or proposals were not rejected as an indication that their bids or proposals were acceptable.

-3- For the rejection of individual bids or proposals otherwise complying with prescribed procurement procedures and requirements, for good cause and upon a finding of public interest, see the commentary to OAR 137-030-0102. See also, OAR 125-030-0003 and 125-030-0004, two administrative rules of the Oregon Department of Administrative Services which define the concepts of, respectively, bidder or proposer responsibility and bid or proposal responsiveness.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0102

Rejection of All Bids or Proposals

(1) Bid or proposal rejection. All bids or proposals may be rejected for good cause upon a written finding by the agency it is in the public interest to do so. Notification of rejection of all bids or proposals, along with the good cause justification and finding of public interest, shall be sent to all who submitted a bid or proposal.

(2) Rejection criteria. Reasons for rejecting all bids or proposals include but are not limited to finding that:

(a) Due to the content of or error in the solicitation documents, including its terms, conditions or specifications, the solicitation process unnecessarily restricted competition for the public contract; or

(b) The price, quality, or performance presented by the lowest responsible bidder or best proposer is, in the opinion of the agency, too costly or of insufficient quality to justify acceptance of the bid or proposal; or

(c) Misconduct, error, or ambiguous or misleading provisions in the solicitation documents threaten the fairness and integrity of the competitive process; or

(d) Causes other than legitimate market forces threaten the integrity of the competitive procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and inadvertent or intentional errors in the documents.

NOTES:

-1- Pursuant to ORS 279.035, a public agency may reject any or all bids or proposals for good cause upon a written finding by the agency that it is in the public interest to do so. This does not allow arbitrary or discriminatory action on the part of the agency, but does allow rejection of bids or proposals where flaws in the award criteria or other defects in the specifications have been discovered pursuant to the scrutiny generated by the public procurement process.

-2- The agency shall create a written record of its reasons for bid or proposal rejection which provides a concise explanation of the reasons why such action is in the public interest.

-3- ORS 279.025(2)(i) and 279.035 confer broad discretion on agencies to reject all bids or proposals when the rejection is in the public interest. This statutory authority is a valuable protection against the establishment of questionable or legally vulnerable public contracts in cases in which the competitive procedure, due to apparent or latent defects or other problems, is questionable. Bid rejection also may protect agencies in instances in which bids or price proposals are higher than the funds budgeted and allocated to finance a particular contract. Additionally, bid or proposal rejection may protect a agency from being required to contract for goods, services, or projects that, due to defects in the agency's specifications, will not meet the agency's needs. However, the rejection of bids or proposals frequently is uneconomical, because it wipes out efforts both of the agency and of bidders or proposers in the preparation of bid and proposal documents.

-4- In the case of the rejection of individual bids or proposals, even greater care needs to be taken. ORS 279.035 does allow agencies to reject any bid not in compliance with prescribed bidding procedures and the requirements of the solicitation documents. However, a rejection of individual bids or proposals for other reasons requires specific written findings by the agency that good cause exists and that such action is in the public interest.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.035

Hist.: JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0104

Protest of Contractor Selection, Contract Award

(1) Purpose. The purpose of this rule is to require adversely affected or aggrieved bidders or proposers on an agency solicitation to exhaust all avenues of administrative review and relief before seeking judicial review of the agency's contractor selection or contract award decision.

(2) Notice of award:

(a) The agency's written notice of contract award (or other contract initiating document, e.g., a notice of intent to award or purchase order, hereinafter referred to collectively as the "award document"), shall constitute a final decision of the agency to award the contract or proceed with the purchase if no written protest of the contractor selection or contract award is filed with the agency within 14 calendar days following issuance of the award documents, or such other period as provided in the agency's solicitation. If a protest of contractor selection or contract award is timely filed by an actual aggrieved bidder or proposer, the award documents shall constitute a final decision of the agency only upon issuance to the protesting bidder or proposer of a written decision denying the protest and affirming the selection or the award;

(b) Unsuccessful bidders or proposers will generally not be notified that a contract has been awarded. See OAR 137-030-0135(2).

(3) Right to protest. Any actual bidder or proposer who is adversely affected or aggrieved by the agency's award of the contract to another bidder or proposer shall have 14 calendar days after issuance of the award documents to submit to the agency a written protest of the award. The written protest shall specify the grounds upon which the protest is based. The period of 14 calendar days in which to submit a written protest may be shortened or lengthened by the agency, as provided in the agency's solicitation. In order to be an adversely affected or aggrieved bidder or proposer with a right to submit a written protest, a bidder or proposer must itself claim to be eligible for award of the contract as the lowest responsive, responsible bidder or best proposer and must be next in line for award, i.e., the protester must claim that all lower bidders or higher-scored proposers are ineligible for award:

(a) Because their bids or proposal were nonresponsive; or

(b) As a result of the agency committing a material violation of a solicitation provision or of an applicable procurement statute or administrative rule, the protester was unfairly evaluated and would have, but for such material violation, been the lowest bidder or the highest-ranked proposer. The agency shall not entertain a protest submitted after the time period established in this rule or such different period as may be provided in the agency's solicitation.

(4) Authority to resolve protests. The head of the agency, or such person's designee, shall have the authority to settle or resolve a written protest submitted in accordance with these requirements of section (3) of this rule.

(5) Decision. If the protest is not settled or resolved by mutual agreement, the head of the agency, or such person's designee, shall promptly issue a written decision on the protest. Judicial review of this decision will be available when provided for in statute.

NOTES:

-1- Judicial review of agency contractor selections or contract award decisions is available where provided for in statute. However, settling procurement disputes in circuit court may be costly and time-consuming for the agency, the aggrieved bidder or proposer, and the bidder or proposer named as awardee of the contract. This rule affords adversely affected or aggrieved bidders or proposers the opportunity to protest an agency's award of a contract to another bidder or proposer through an administrative review process and, perhaps, resolve the dispute without

litigation.

-2- The process has three parts:

-a- The agency makes its selection or award decision public through the issuance of a document to the intended awardee;

-b- This decision is final unless an adversely affected or aggrieved bidder or proposer makes a timely written protest of the agency's decision;

-c- The agency promptly reviews the protest and, if it affirms its original award decision, issues a written statement to that effect to the adversely affected or aggrieved bidder or proposer.

-3- The goal of this process is get selection disputes resolved and to avoid situations where an agency makes an award decision, the contractor begins work and, some time later, an adversely affected or aggrieved bidder or proposer seeks judicial review of the decision. Agencies and contractors need a reasonable degree of assurance, when entering into public contracts, that performance will not be interrupted or terminated due to unresolved procurement disputes.

-4- It is important to recognize that the administrative review process provided in this rule is limited to disputes concerning the agency's contractor selection or contract award decisions. This rule does not provide an administrative review process for any issues or concerns which could have been raised pursuant to OAR 137-030-0050, prior to the close of the solicitation. To illustrate, a protest concerning the potential number of points available for an "experience" criterion under an RFP would not be properly reviewable under OAR 137-30-104 (such a protest should be raised only under OAR 137-030-0050). However, a protest over the number of points awarded to the protester for "experience" would be appropriate for administrative review pursuant to OAR 137-030-0104, assuming all other requirements of this rule are met.

-5- In short, an award or contractor selection protest under OAR 137-030-0104 is not a substitute for a pre-solicitation closing protest under OAR 137-030-0050. The former rule is limited to award or selection decisions; the latter rule addresses the structure of the solicitation document, the method to be used to select an awardee, the terms and conditions of the contract to be awarded, and any other desired changes or alleged deficiencies that reasonably could have been identified and raised prior to the close of the solicitation.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.067

Hist.: JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0105

Negotiation With Bidders Prohibited

Unless a Request for Proposal process is used, the agency shall not negotiate with any bidder prior to award of a contract. After award of the contract, modifications to the contract shall be made through change orders or amendments to the contract and in accordance with the exemption rules of the applicable public contract review authority. See e.g., OAR 137-310-0010 (formerly 125-310-0150).

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.005, 279.015, 279.023, 279.027 & 279.029

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0110

Bidder or Proposer Disqualification

(1) Definitions. As used in this rule:

(a) "Disqualification" means the debarment, exclusion or suspension of a person from the right to submit bids or proposals in response to agency solicitation for a reasonable, specified period of time named in the order of disqualification. A contractor or vendor so debarred, excluded or suspended is disqualified;

(b) "Person" means an individual, partnership or corporation. Disqualification attaches to and follows the individual, so that an individual who is a partner in a partnership or an officer or principal in a corporation which is disqualified may not reform the business entity as a way of avoiding the disqualification.

(2) Grounds for disqualification. As provided in ORS 279.037, the following are grounds for bidder or proposer disqualification:

(a) The person does not have sufficient financial ability to perform the contract. If a bond is required to ensure performance of a contract, evidence that the person can acquire a surety bond in the amount and type required shall be sufficient to establish financial ability;

(b) The person does not have equipment available to perform the contract;

(c) The person does not have key personnel available of sufficient experience to perform the contract; or

(d) The person has repeatedly breached contractual obligations to public and private contracting agencies.

(3) Prohibited conduct. As provided in ORS 200.075, the following are grounds for suspension of a bidder's, proposer's, contractor's or subcontractor's right to bid, propose or participate in a public contract:

(a) If the person has entered into any agreement representing that a disadvantaged, minority, women, or emerging small business enterprise, certified pursuant to ORS 200.055, will be performing or supplying materials under a public improvement contract without the knowledge and consent of the certified enterprise;

(b) If the person exercises management and decision making control over the internal operations, as defined by ORS 200.075(1)(b), of any certified disadvantaged, minority, women or emerging small business enterprise;

(c) If the person uses a disadvantaged, minority women or emerging small business enterprise to perform contracting services or provide supplies under a public improvement contract to meet an established DBE/MBE/WBE/ESB goal, when the enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the contract.

(4) Investigation. The agency may make such investigation as is necessary to determine whether there are grounds for disqualifying a person. If a bidder or proposer or prospective bidder or proposer fails to supply information promptly as requested by the agency, such failure is grounds for disqualification.

(5) Trade secret. Any information voluntarily submitted by a bidder or proposer or prospective bidder or propose pursuant to an investigation under section (4) of this rule or, in a prequalification statement required by ORS 279.039, or in a prequalification request submitted pursuant to ORS 279.041 shall be deemed a trade secret pursuant to ORS 192.501(2), if requested by the person submitting the information and verified to be a trade secret by the agency.

(6) Notice of disqualification. The bidder or proposer or prospective bidder or proposer will be notified in writing by personal service or certified mail of the agency's decision to disqualify the person from bidding or proposing with the agency. The notice shall contain:

(a) The effective date of the disqualification and the effective period of disqualification;

(b) The grounds for disqualification from bidding or proposing; and

(c) A statement of the person's appeal rights and applicable appeal deadlines.

(7) Appeal of disqualification. If a person wishes to appeal the agency decision to disqualify, the person must notify the agency in writing within three business days after receipt of the notification, as provided in ORS 279.043.

NOTES:

-1- Disqualification is a stringent measure taken by an agency when it is necessary to exclude a prospective bidder or proposer from participating in public purchasing activities for a reasonable, specified period of time. Disqualification is a different process than that taken by an agency when it rejects a single bid or proposal received in response to a solicitation as nonresponsive, or rejects a bidder or proposer for being nonresponsive. See, e.g. OAR 125-030-0003 and 125-030-0004. Rather, the disqualification process examines a person's past and present conduct to determine if there are grounds for disqualifying the person. If such grounds are determined to exist, the person is sanctioned by being prohibited from submitting bids or proposals, in response to the

agency's solicitations, for a reasonable period of time commensurate with the seriousness of the person's conduct.

-2- Disqualification is a process which should be used with some care by the agency because it is an actual suspension of a person's right to participate in the agency's competitive procurement process for a period of time. Disqualification is not a punishment. It is a sanction imposed only in the public interest for the protection of public resources. Therefore, agencies should determine a reasonable amount of time for the disqualification.

Stat. Auth.: ORS 279.037, 279.043 & 279.045

Stats. Implemented: ORS 279.037, 279.043 & 279.045

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0115

Cancellation of Invitations to Bid or Requests for Proposals

(1) Cancellation in the public interest. An invitation to bid or request for proposals may be cancelled in whole or in part when cancellation is in the public interest, as determined by the agency. The reasons for taking this action shall be made part of the bid or proposal file.

(2) Notice of cancellation. When an invitation to bid or request for proposals is cancelled prior to bid or proposal opening, notice of cancellation shall be mailed, placed on the Oregon Department of Administrative Service's electronic procurement system known as the "Vendor Information Program", or otherwise made available or furnished to all holders of solicitation documents. Such notice of cancellation shall:

(a) Identify the invitation to bid or request for proposals;

(b) Briefly explain the reason for cancellation; and

(c) Where appropriate, explain that an opportunity will be given to compete on any resolicitation. (ORS 279.035).

NOTE:

-1- See the discussion in the NOTES to OAR 137-030-0102.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0120

Disposition of Bids or Proposals if Solicitation Cancelled

(1) Prior to bid or proposal opening. When an invitation for bids or request for proposals is cancelled prior to bid or proposal opening, all bids or proposals received will be returned to bidders or proposers unopened, if submitted in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the bid or proposal will be opened to determine the source and then returned to sender.

(2) After bid or proposal opening. When all bids or proposals are rejected, the bids or proposals received shall be retained and become part of the agency's permanent solicitation file.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.035

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0125

Documentation of Award

(1) Basis of award. Following award, a record showing the basis for determining the successful bidder or proposer shall be made a part of the solicitation file.

(2) Contents of award record. The record shall consist of:

(a) Completed bid tabulation sheet; or

(b) Completed proposal evaluations; and

(c) Written justification for any rejection of lower bids; or

(d) Written explanation for any rejection of proposals for failing to meet mandatory requirements of the Request for proposals.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.039

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0130

Foreign Contractor (ORS 279.021)

If the amount of the contract exceeds \$10,000 and the contractor is a "foreign contractor", the contractor shall promptly report to the Oregon Department of Revenue on forms provided by the Department of Revenue, the total contract price, terms of payment, length of contract and such other information as the Department of Revenue may require before final payment can be received on the contract. A copy of the report shall be forwarded to the agency. The agency awarding the contract shall satisfy itself that the above requirements have been complied with before it issues final payment on the contract. For the purposes of this rule, a foreign contractor is one who is not domiciled in or registered to do business in the State of Oregon.

NOTE: The submission of statements regarding the status of foreign contractors is recommended to be made as promptly as possible to the Oregon Department of Revenue. This should normally be accomplished within 60 days from the date of the execution of a contract. The Oregon Department of Revenue should be consulted for information in this regard. In order to avoid a claim for back corporate income taxes or appropriate withholding of wages to the State of Oregon, a prompt execution of this form is required.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.021

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0135

Availability of Award Decisions

(1) Contract documents. A signed purchase order, price agreement, or other contract document(s), as applicable, shall be sent to the successful bidder or proposer.

(2) Notification to unsuccessful bidders or proposers. Unsuccessful bidders or proposers generally will not be notified that a contract has been awarded. Tabulations of awarded bids or evaluation summaries of proposals may be obtained for a nominal charge in person or by submitting to the agency a written request, accompanied by payment, stating the Invitation to bid or Request for Proposals number and enclosing a self-addressed, stamped envelope. In addition, many tabulations of bids and proposals awarded by the Oregon Department of Administrative Services and other participating agency purchasing offices are available to viewers on-line through the State of Oregon Vendor Information Program.

(3) Availability of solicitation files. Completed bid and proposal files shall be available for public review at the agency.

(4) Copies from solicitation files. Copies of material from solicitation files may be obtained upon payment of a reasonable copying charge.

NOTES:

-1- Secretary of State rule OAR 166-040-0060(2) includes the following requirements on retention of contract documents after award:

-a- Maintenance and service for equipment contracts must be kept for two years after the contract has been completed satisfactorily;

-b- Capital construction contracts (including specification and change orders) must be kept permanently;

-c- Goods contracts must be kept for seven years after maturity;

-d- Intergovernmental and interagency agreements must be kept permanently.

-2- Any other housekeeping copies of the originals must be kept for two years after maturity in all of the categories listed above. These rules are binding on all state agencies and all political subdivisions of the State of Oregon.

-3- When an agency authorizes submission of bids or proposals by electronic data interchange, it also must create procedures to make these documents reasonably available for public viewing. The agency may choose to create a hard copy procurement file, at the time of exchange, of those documents that result in a contract; or it may provide on-line viewing access to the public at the agency's offices with the ability to furnish hard copies of all or portions of the pertinent procurement documents to the public upon request.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.027(2)

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD

1-1995, f. & cert. ef. 1-9-95

137-030-0140

Performance Security

(1) Public improvements contract. Except in emergencies, when the requirement may be waived pursuant to ORS 279.029(5), or unless the requirement is exempted pursuant to ORS 279.033, a performance bond in a sum equal to the contract price shall be required for all public improvement contracts in excess of \$10,000.

(2) Other public contracts. The agency may require performance security for other public contracts. Such requirements shall be stated in the solicitation documents.

(3) Contracts under \$10,000. Performance bonds for a contract under \$10,000 may be required by the agency, but shall not be used to discourage competition.

(4) Requirement for surety bond. A surety bond furnished by a surety company authorized to do business in Oregon is the only acceptable form of performance security unless otherwise specified in the solicitation documents.

(5) Time for submission. Upon request by the agency, the apparent successful bidder or proposer must furnish the required performance bond within ten days. Prompt submittal of the performance bond is required to ensure timely project initiation. Failure to furnish the bond prior to the deadline may result in rejection of the bid or proposal, forfeiture of bid or proposal security, and award to the next lowest responsive responsible bidder or next highest-scoring proposer.

NOTES:

-1- Agencies are encouraged to provide sufficient information in the solicitation documents regarding the requirements for acceptable performance security. --2- ORS 279.029 requires that all contracts for public improvements include a performance bond. An exception from this requirement is authorized, for state agencies, under OAR 125-360-0020 if the amount of the public improvement contract is less than \$10,000. Except for this exception, or for exceptions promulgated in the rules or order of local public contract review authorities, the bond required by ORS 279.029 can be waived only in cases:

-a- Where an emergency exists, or

-b- Where the interest or property of the agency probably would suffer material injury by delay or other cause; or

-c- As provided in ORS 279.033.

-3- To declare such an emergency, all members of the governing board of the agency must concur. "Emergency" is defined in ORS 279.011(4). Agencies are advised to be cautious when considering whether an emergency exists, since under ORS 279.542, whenever a bond is not executed, there is joint liability on the part of both the officers of the agency which let the contract and the public body itself for payment of any liens which may be filed. This liability can include personal liability of the agency officials. Therefore, caution is recommended in the declaration of an emergency pursuant to ORS 279.029(5). All agencies should be advised of the liability requirements imposed under Oregon law. In addition, ORS 279.542 appears to create this potential liability when the agency required the bond for other than public improvement contracts and contracts under \$10,000. Therefore, once the bond is required, it should not be released until the period for filing claims has run.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.029(4), (5) & 279.033

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0145

Records Maintenance; Right to Audit Records

(1) Records maintenance; access. Contractors and subcontractors shall maintain all fiscal records relating to public contracts in accordance with generally accepted accounting principles. In addition, contractors and subcontractors shall maintain any other records necessary to clearly document:

(a) Their performance; and

(b) Any claims arising from or relating to their performance under a public contract. Contractors and subcontractors shall make all records pertaining to their performance and any claims under a

public contract accessible to the agency at reasonable times and places, regardless whether litigation has been filed as to such claims.

(2) Inspection and audit of cost or pricing data. The agency may, at reasonable times and places, have access to an opportunity to inspect, examine, copy, and audit the books and records of any person who has submitted cost or pricing data according to the terms of a contract to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, for which cost or pricing data are required, shall maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

(3) Records inspection; contract audit. The agency, and its authorized representatives, shall be entitled to inspect, examine, copy, and audit the books and records of any contractor or subcontractor, as provided in section (1) of this rule. Such books and records shall be maintained by the contractor and subcontractor, and kept accessible and available at reasonable times and places for a minimum period of three years from the date of final payment under the public contract, and by the subcontractor for a period of three years from the date of final payment under the subcontract, or until the conclusion of any audit, controversy or litigation arising out of or related to the public contract, whichever date is later, unless a shorter period is otherwise authorized in writing.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.029(1), 279.037 & 279.056

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0150

Right to Inspect Plant

(1) Time for inspection. The agency may, at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded.

(2) Access to plant or place of business. As a condition of bidding or proposing, bidders and proposers agree that representative of the agency may enter a contractor's or subcontractor's plant or place of business during normal business hours for the following purposes:

(a) Inspect and/or test supplies or services for acceptance by the agency pursuant to the terms of the bid or proposal;

(b) Investigate in connection with a bidder's or proposer's application, a minority business certification, or bidder or proposer qualification.

(3) Contractual provisions. Contracts may provide that the agency may inspect supplies and services at the contractor's or subcontractor's facility and perform tests to determine whether they conform to the solicitation documents, or, after award, to the contract requirements, and therefore are acceptable. Such inspections and tests shall be conducted in accordance with the terms of the contract.

(4) Procedures for trial use and testing. The agency may establish operational procedures governing the testing and trial use of equipment, materials and the application of resulting information and data to specifications or procurements.

(5) Conduct of inspections:

(a) Inspectors. Inspections or tests shall be performed so as not to unduly delay the work of the contractor or subcontractor. No change of any provision of the specifications or the contract may be required by the inspector without written authorization of the agency, unless otherwise specified in the solicitation documents. The presence or absence of an inspector shall not relieve the contractor or subcontractor from any requirement of the contract;

(b) Location. When an inspection is made in the plant or place of business of a contractor or subcontractor, such contractor or subcontractor shall provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing;

(c) Time of testing or inspection. Inspection or testing of

supplies and services performed at the plant or place of business of any contractor or subcontractor shall be performed at reasonable times during normal business hours.

(6) Inspection of construction projects. On-site inspection of construction shall be performed in accordance with the terms of the contract.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.029(1) & 279.037

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-030-0155

Contract Cancellation, Contractor Termination Procedures

(1) Grounds for cancellation. The agency may, at its option, cancel a public contract or terminate the contractor's performance, for any material violation of the provisions of the contract. Such provisions generally include, but are not limited to:

(a) Standard terms and conditions included in all contracts;

(b) Product or service specifications;

(c) Delivery or completion requirements; or

(d) Contracted pricing and price escalation/de-escalation clauses.

(2) Remedies cumulative. No cancellation of a public contract or termination of the contractor's performance shall, unless other remedies are expressly limited by the terms of the particular contract, restrict or abrogate any other remedy available to the agency that is provided either by law or under the particular contract.

(3) Notice. The agency shall provide the contractor written notice of the grounds for cancellation or termination and of its intention to cancel the contract or terminate the contractor's performance. If the contractor provided a performance and payment

bond, the surety shall also be provided with a copy of the notice of contract cancellation or contractor termination. The notice shall include:

(a) The effective date of the intended cancellation or termination (which may be the date of notice receipt);

(b) The grounds for cancellation or termination; and

(c) Notice of the amount of time (if any) in which the agency will permit the contractor to correct the failure to perform. The public contract may provide contract cancellation or contractor termination procedures that are different from, or in addition to, those provided in this rule.

(4) Contract Completion by Substitute Contractor. If the contractor has provided a performance and payment bond, the agency may afford the contractor's surety the opportunity, upon the surety's receipt of a contractor termination notice, to provide a substitute contractor to complete performance of the contract. Performance by the substitute contractor shall be rendered pursuant to all material provisions of the original contract, including the provisions of the performance and payment bond. Such substitute performance does not involve the award of a new public contract and shall not be subject to the competitive procurement provisions of ORS 279.005 to 279.111. (See, e.g., OAR 125-310-0010(6).

NOTES:

-1- Care should be taken when canceling a contract, or terminating a contractor, for failure to perform, in accordance with OAR 137-030-0155. Canceling a contract or terminating a contractor's further performance may result in delivery delays of necessary goods or services and cause the agency to incur additional contract administration expense. Also, there may be potential legal expense and liability if the contractor challenges the agency's grounds or process for cancellation or termination. Whenever possible, the agency should document the contractor's failure to perform at the time it occurs, then promptly provide the contractor with notice of the failure and a reasonable opportunity to correct the deficient performance.

-2- The amount of time allowed to correct deficiencies should be reasonable-under the circumstances, given the public interest in performance of the contract. For example, if the contractor is to provide security patrol service to an agency premises, the failure to provide that service jeopardizes the public interest in the safekeeping of public

property. Notice to correct in such a situation may require the contractor to take corrective action within a matter of hours to avoid termination or contract cancellation.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.326 - 279.333

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

DIVISION 35

MODEL RULES FOR PUBLIC CONTRACTING AGENCY SCREENING AND SELECTION OF PERSONS TO PERFORM ARCHITECTURAL AND ENGINEERING PERSONAL SERVICE CONTRACTS

137-035-0000

Purpose and Intent

Pursuant to ORS 279.049(2), the Attorney General is responsible for preparing and maintaining model rules of procedure appropriate for use by all public contracting agencies governing the screening and selection of consultants to perform architectural or engineering services. When adopted by public contracting agencies, the model rules are intended to result in the competitive selection of the most qualified consultant based on the consultant's demonstrated competence and qualifications to perform the professional services required at a fair and reasonable price.

COMMENTARY: The model rules, when adopted by public contracting agencies, are not necessarily intended to abrogate, preempt, displace or limit contractual obligations, or obligations and duties arising under other laws. Such obligations or duties may arise from a variety of sources, including but not necessarily limited to:

- 1- Constitutions, statutes, charters or other governing documents or provisions; or
- 2- Contracts, deeds, grants, bequests or other specific instruments.

Before adopting the model rules, a public contracting agency should have them reviewed by legal counsel to determine whether particular changes or procedural steps are necessary to comply with contractual obligations, or obligations and duties arising under other laws.

Stat. Auth.: ORS 279.049(2)

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92

137-035-0010

Definitions

(1) "Compensation Requirements": A general indication of the cost of architectural or engineering services based on factors which may include, but are not necessarily limited to, each consultant's:

- (a) Costing procedures and/or pricing structure;
- (b) Hourly rates and fee schedules;
- (c) Overhead costs; and
- (d) Fee range, as a percentage of direct construction costs, on previous similar projects.

COMMENTARY: Compensation requirements provide only a general indication of the cost of professional services and, particularly during a formal selection process, should not be used to calculate firm, fixed prices for each consultant, or as the sole basis for selecting a consultant. This is particularly true where the public contracting agency has not developed a detailed statement of work; in such instances, using compensation requirements to, in effect, make a price-based selection would result in a false comparison if competing consultants are offering widely varying levels of service.

(2) "Proposal": A competitive written offer submitted in response to a public contracting agency's Request for Proposals.

COMMENTARY: Once submitted, proposals may be modified in writing, or withdrawn by written notification, prior to the time and date set for close of the solicitation. After close of the solicitation, proposals may be modified or withdrawn, if at all, only:

- 1- With the agency's written consent;
- 2- Due to unforeseeable circumstances or events beyond the consultant's reasonable control; and
- 3- To the extent such modification or withdrawal would not be contrary

to the interests of the public contracting agency and the fair treatment of other proposers.

(3) "Request for Proposals": A public contracting agency's written document soliciting competitive written proposals and setting forth the criteria and method to be used by the agency to select the best proposal. The document:

- (a) Provides a general description of a proposed project or projects, including a proposed statement of work;
- (b) Indicates the type of services needed; and
- (c) Requests prospective consultants to submit written proposals that address the specific requirements of the project or projects.

COMMENTARY: The evaluation criteria in an RFP focus, primarily, on the proposers' qualifications and proposed project approach, and, secondarily, on the proposers' compensation requirements. An RFP, in the professional services context, is used by a public contracting agency to select the most qualified consultant for purposes of negotiating and entering into a contract.

(4) "Request for Qualifications": A public contracting agency's written document which:

- (a) Provides a general description of a proposed project;
- (b) Indicates the type of services needed, including, if deemed necessary or appropriate, a description of particular services needed for part or all of a proposed project or projects; and

(c) Requests each prospective consultant to provide a written response setting forth the consultant's specific experience and qualifications for performing the type of services required.

COMMENTARY: An RFQ, in the professional services context, is used to identify those prospective consultants who are particularly qualified and capable of performing the type of professional services needed for a proposed project.

(5) "Statement of Work": A written statement that describes the:

(a) Phases of work, major tasks, or areas of responsibility to be performed by the consultant;

(b) On an individual project or series of projects, or within a particular locale during a stated period of time. Such statement may be altered or modified during contract negotiations, but only as reasonably necessary to accurately describe the project approach and exact scope of services agreed to by the public contracting agency and the consultant.

Stat. Auth.: ORS 279.049(2)

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92

137-035-0020

List of Interested Consultants; Performance Record

(1) Consultants who are engaged in the lawful practice of their profession and interested in performing architectural or engineering services may submit annually a statement of qualifications and performance data to the office address provided by the public contracting agency. The information will be compiled and maintained as a list of prospective consultants; the list will be reviewed and updated at least every two years.

(2) A record of each consultant's performance, including information gained during an exit interview, may be compiled and maintained by the public contracting agency. A copy of such record shall be made available upon request to the consultant; unless lawfully exempt, in whole or in part, from disclosure pursuant to ORS 192.410 to 192.505, e.g., as a trade secret or other confidential information, a copy of the record may also be made available upon request to other persons and organizations.

Stat. Auth.: ORS 279.049(2)

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92

137-035-0030

Use of Professional Consultants; Selection Methods; Notice; Solicitation Provision

(1) A contract with a qualified consultant for architectural or engineering services, as defined in, respectively, ORS 671.010(5), 671.310(3) and 672.005 to 672.007, may be entered into when:

(a) The required services cannot be performed within a reasonable time using the agency's own work force;

(b) The skills necessary to perform the required services are not available within the agency; or

(c) An impartial opinion or evaluation is necessary or appropriate.

(2) Formal. Architectural or engineering services may be obtained using the formal selection procedure set forth in OAR 137-35-060; the formal procedure shall be used whenever the consultant's estimated fee exceeds \$50,000.

(3) Informal. When the consultant's estimated fee is equal to or less than \$50,000, the informal selection procedure set forth in OAR 137-035-0050 may be used.

(4) Direct Appointment. When the circumstances set forth in OAR 137-035-0040 are found to exist, the direct appointment procedure provided for in that rule may be used.

(5) Notice. Except where the circumstances stated in OAR 137-035-0040(2)(a) exist, requiring direct appointment of a qualified consultant and making timely notice impracticable, a state public contracting agency shall provide timely *prior* notice pursuant to ORS 200.035 for *all* solicitations for architectural or engineering services with an estimated fee exceeding \$1,000. A state public contracting agency using the direct appointment procedure pursuant to OAR 137-035-0040(2)(a) shall provide notice in accordance with ORS 200.035 as soon as it is reasonably practicable to do so.

(6) Solicitation Provision. All state public contracting agency solicitations (RFPs) for architectural or engineering services shall, regardless of amount, include the following language: **"In accordance with ORS 279.555(2), consultants shall use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this document"**.

Stat. Auth.: ORS 279.049(2)

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92

137-035-0040

Direct Appointment Procedure

(1) A qualified consultant may be appointed directly from:

(a) The public contracting agency's current list of consultants;

(b) Another public contracting agency's current list of consultants, pursuant to an interagency or intergovernmental agreement entered into in accordance with ORS Chapter 190; or

(c) Among all consultants offering the necessary services that the agency reasonably can locate, following public advertisement.

(2) The direct appointment procedure may be used when:

(a) Circumstances which could not reasonably have been foreseen create a substantial risk of loss, damage, interruption of services or threat to the public health or safety and require the prompt performance of architectural or engineering services to remedy the situation; or

(b) The consultant's estimated fee does not exceed \$10,000; or

(c) The project:

(A) Consists of work which has been substantially described, planned or otherwise previously studied or rendered in an earlier contract, as in continuation of a project;

(B) The consultant's estimated fee for such project does not exceed \$50,000; and

(C) The selection procedure used for the original project was the formal selection procedure set forth in OAR 137-035-0060 (or a substantially equivalent procedure if the consultant services for the original project were procured prior to adoption of these rules); or

(d) The consultant will be assisting legal counsel, through expert analysis, testing, testimony or otherwise, on a project which is, or is reasonably anticipated to be, the subject of a claim, lawsuit or other form of action, whether legal, equitable, administrative or otherwise.

(3) A direct appointment pursuant to subsection (2)(a) or (b) of this rule, shall be competitive to the extent practicable and may be based on criteria which include but are not limited to:

(a) The consultant's availability, capabilities, staffing, experience, and compensation requirements; and

(b) The project's location.

Stat. Auth.: ORS 279.049(2)

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92

137-035-0050

Informal Selection Procedure

(1) The informal selection procedure may be used to obtain architectural or engineering services if the consultant's estimated fee is equal to or less than \$50,000.

(2) Following public advertisement as provided in OAR 137-035-0060(2)(a), a written solicitation inviting written proposals shall be sent to a minimum of five prospective consultants drawn from:

(a) The public contracting agency's current list of consultants;

(b) Another public contracting agency's current list of consultants, pursuant to an interagency or intergovernmental agreement entered into in accordance with ORS Chapter 190; or

(c) Among all consultants offering the necessary services that the agency reasonably can locate.

(3) All proposals shall be reviewed and the three most qualified consultants selected and ranked.

(4) The informal selection procedure shall be competitive to the maximum extent practicable and the selection and ranking may be based on criteria which include but are not limited to each consultant's:

(a) Particular capability to perform the architectural or engineering services for the project being considered;

(b) Number of experienced staff available to perform the services required by the project, including each consultant's recent, current, and projected workloads;

(c) Performance history on past projects for public or private clients;

(d) Project approach and design philosophy;

(e) Compensation requirements; and

(f) Geographic proximity to the project;

(g) The public contracting agency may also consider the volume of work, if any, previously awarded to each consultant, with the object of effecting an equitable distribution of contracts among qualified consultants, *provided such distribution does not violate the principle of selecting the most highly qualified consultant*.

(5) Contract negotiations with the highest ranked consultant shall be directed toward obtaining written agreement on:

(a) The consultant's tasks and a performance schedule;

(b) A maximum, not-to-exceed contract price which is consistent with the consultant's proposal and fair and reasonable to the public contracting agency, taking into account the estimated value, scope, complexity, and nature of the professional services.

(6) Negotiations may be formally terminated if they fail to result in a contract within a reasonable amount of time. Negotiations will then ensue with the second ranked consultant. This second round of negotiations may be formally terminated if it, too, fails to result in a contract within a reasonable amount of time. Negotiations with the third ranked consultant will then begin promptly. If this third round of negotiations fails to result in a contract within a reasonable amount of time, the solicitation may be formally terminated. Thereafter, the services of a qualified consultant may be solicited using the formal selection procedure set forth in OAR 137-035-0060, or, depending upon the circumstances, the direct appointment procedure provided for in OAR 137-035-0040.

(7) If the scope of a project is revised during negotiations so that the estimated cost of the consultant's services exceeds \$50,000, then the informal process shall be terminated and the services of a qualified consultant solicited using the formal selection procedure set forth in OAR 137-035-0060. Provided, however, that negotiations with the informally selected consultant may continue if the public contracting agency makes written findings that contracting with the consultant will:

(a) Not encourage favoritism in the awarding of architectural and engineering personal service contracts or substantially diminish competition for such contracts; and

(b) Will result in substantial cost savings to the public contracting agency.

(8) Notwithstanding the submission of proposals from potential consultants during an informal selection process, a public contracting agency may at any time during the solicitation process or during contract negotiations reject all consultant proposals and cancel the solicitation, without liability therefor, upon a finding by the public contracting agency that there is good cause for rejecting all proposals and that it would be in the public interest to cancel the solicitation. Further, a public contracting agency which solicits proposals shall under no circumstances be responsible for any consultant costs and expenses incurred in submitting responses to the solicitation. Each prospective consultant who responds to a public contracting agency's solicitation does so solely at the consultant's cost and expense and each solicitation shall so provide.

Stat. Auth.: ORS 279.049(2)

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92

137-035-0060

Formal Selection Procedure

(1) The formal selection procedure shall be used whenever the estimated cost of architectural or engineering services exceeds \$50,000.

(2) Responses shall be solicited through public advertisement and:

(a) A Request for Proposal (RFP); or

(b) A Request for Qualifications (RFQ) to establish a short list, followed by an RFP:

(A) The advertisement shall appear at least once in at least one newspaper of general circulation in the area where the project is to be located and in as many additional issues and publications as may be necessary or desirable to achieve adequate competition. Such other publications may include, but are not limited to, local newspapers, trade journals, and publications targeted to reach the minority, women and emerging small business enterprises audiences. The advertisement(s) shall be published a reasonable time before the deadline for responding and no fewer than 14 calendar days before close of the solicitation. The advertisement(s) shall briefly describe:

(i) The project;

(ii) The professional services sought;

(iii) Where copies of the solicitation may be obtained; and

(iv) The deadline for submitting a response.

(B) In addition, direct notice of the solicitation may be sent to all consultants on the agency's current list of consultants (or on a list of consultants available pursuant to an interagency or intergovernmental agreement).

(3) RFQ Procedures: When an RFQ is used to evaluate qualifications, screen potential consultants and establish a short list, the RFQ shall, at a minimum contain:

(a) The information listed in subsection (2)(a) of this rule;

(b) A statement of the particular consultant qualifications required for the project;

(c) The evaluation criteria (including the weights or points applicable to each criterion); and

(d) The screening or evaluation method to be used. The RFQ may request any or all of the following:

(A) The information set forth in OAR 137-035-0020(1), unless it has already been obtained;

(B) The consultant's particular capability to perform the architectural or engineering services required for the project, and the consultant's recent, current, and projected workloads;

(C) The number of the consultant's experienced staff available to perform the professional services required by the project, including such personnel's specific qualifications and experience;

(D) A list of similar projects completed by the consultant with references concerning past performance, including copies of any performance records maintained pursuant to OAR 137-035-0020(2);

(E) Any other information which is deemed reasonably necessary to evaluate consultant qualifications.

(4) An RFQ consultant screening and evaluation committee of no fewer than two individuals shall be established to review, score and rank the consultants according to the solicitation criteria and the results of any oral interviews. The committee may be composed of members who, collectively, have experience in areas such as architecture, engineering, construction, and public contracting. Members may be appointed from qualified professional employees of the public contracting agency or other agencies, and if authorized by agency procedure, may include private practitioners of architecture, engineering, or related professions. One public contracting agency member of the committee shall be designated as the chairperson.

(5) Following screening and evaluation, a short list of at least three qualified professional consultants shall be established. Provided, however, that if four or fewer potential consultants respond to the RFQ, then:

(a) A short list of fewer than three qualified professional consultants may be established; or

(b) The RFQ may be canceled and an RFP issued. *Provided, further, that no person or firm shall be eligible for placement on an RFQ consultant short list during the period in which any of the person's or firm's principals, partners or associates are participating as members of the public contracting agency's consultant screening and evaluation committee.* Except where the RFQ is canceled, every consultant who is placed on a short list shall thereafter receive a copy of the RFP and have an opportunity to submit a proposal. *Notwithstanding the foregoing, issuance of an RFQ shall under no circumstances make a public contracting agency responsible for any consultant costs and expenses incurred in submitting responses to the RFQ. All potential consultants who respond to an RFQ do so solely at the consultant's cost and expense and each RFQ shall so provide.*

(6) Any reasonable screening or evaluation method may be used to establish a short list of qualified consultants, including, but not limited to:

(a) Requiring potential consultants to achieve a threshold score to be placed on a short list;

(b) Placing the three, or more, highest scoring consultants on a short list; or

(c) Placing on a short list only those consultants who possess certain essential qualifications or experience, whose practice is limited to a particular subject area, or who practice in a particular geographic locale or region, *provided that such factors are material, would not unduly restrict competition, and were announced as dispositive in the RFQ.* Thereafter, an RFP shall be issued in accordance with the procedures set forth in sections (7) through (16) of this rule, to each of the consultants placed on the short list.

(7) RFP Procedures: The RFP, whether or not preceded by an RFQ, shall describe or contain the following information:

(a) General background information, including a description of the project and the specific consultant services sought, the estimated construction cost, and the time period in which the project is to be completed;

(b) The evaluation process and the criteria which will be used to select the consultant, including the weight or points applicable to each criterion;

(c) Whether interviews are anticipated;

(d) The closing date and time of the solicitation and the delivery location for consultant proposals;

(e) Reservation of the right to seek clarifications of each consultant's proposal and, further, the right to negotiate a final contract which is in the best interests of the agency, considering cost effectiveness and the level of consultant time and effort required for the project; and

(f) Reservation of the right to reject any or all proposals if there is good cause therefor and, further, the right to cancel the solicitation if doing so would be in the public interest.

(8) The RFP, whether or not preceded by an RFQ, should also describe or contain the following information, when applicable:

(a) Special contract requirements, including, but not limited to, DBE/MBE/WBE/ESB participation goals or good faith efforts

and federal requirements where federal funds are involved;

(b) A sample of the contract the consultant will be expected to execute; and

(c) Any other information which is reasonably necessary to evaluate, rank and select consultants.

(9) The RFP shall require each consultant's proposal to provide the information required in paragraphs (3)(d)(A) through (E) of this rule for responses to an RFQ (unless the RFP follows an RFQ and such information was previously supplied to the public contracting agency), and may also require each consultant's proposal to contain:

(a) A description of the consultant's proposed project approach, including an estimate of the amount of time that the consultant will need to complete each major task, and a preliminary schedule for performing major elements;

(b) The consultant's compensation requirements;

(c) The availability of any required special resources or equipment; and

(d) The identity of any proposed subconsultants and the portions of the work to be performed by subconsultants.

(10) A pre-qualification or pre-proposal meeting may be held for all interested consultants to discuss the proposed project and the required services. Attendance at such a meeting, if held, may be mandatory.

(11) An RFP consultant selection committee of no fewer than two individuals shall be established to review, score and rank the consultants' responses to the RFP according to such criteria as those listed in section (12) of this rule. If the RFP follows an RFQ, the members of the RFP consultant selection committee may be the same individuals who served on the public contracting agency's RFQ consultant screening and evaluation committee. If considered necessary or desirable, the RFP consultant selection committee may elect to interview consultants. The committee may be composed of members who, collectively, have experience in areas such as architecture, engineering, construction and public contracting. Members may be appointed from highly qualified professional employees of the public contracting agency or other agencies, and if authorized by agency procedure, may include private practitioners or architecture, engineering, or related professions. One public contracting agency member of the committee shall be designated as the chairperson. *Provided, however, that no person or firm shall be eligible for award of a professional consultant contract during the period in which any of the person's or firm's principals, partners or associates are participating as members of the public contracting agency's consultant screening and evaluation committee or as members of its consultant selection committee.*

(12) The RFP consultant selection committee shall review, score and rank all responsive proposals according to criteria which may include, but are not limited to, the following:

(a) Availability and capability to perform the work;

(b) Experience of key staff on comparable project(s);

(c) Demonstrated ability to successfully complete similar projects on time and within budget, including whether there is evidence of satisfactory performance as provide in OAR 137-035-0020(2);

(d) References and recommendations from past clients, public and private;

(e) Consultant's performance history in:

(A) Meeting deadlines;

(B) Submitting accurate estimates;

(C) Producing quality work; and

(D) Meeting financial obligations.

(f) Status and quality of any required licensing or certification;

(g) Consultant's knowledge and understanding of the project as shown in the consultant's:

(A) Approach to the project's staffing and scheduling needs; and

(B) Proposed solutions to any perceived design and constructability problems.

(h) Consultant's compensation requirements;

(i) Results from oral interviews, if conducted;

(j) Design philosophy and project approach; and

(k) Any other criteria that are deemed to be relevant to the project, including, where the nature and budget of the proposed project so warrant, a design competition between competing professional consultants. Each of the evaluation criteria shall be listed in the RFP and shall be of equal weight, or worth the same number of points, unless the RFP provides otherwise and states the weights or points applicable to each criterion.

(13) Contract negotiations with the highest ranked consultant shall be directed toward obtaining written agreement on:

(a) The consultant's tasks and a performance schedule;

(b) A maximum, not-to-exceed contract price which is consistent with the consultant's proposal and fair and reasonable to the public contracting agency, taking into account the estimated value, scope, complexity, and nature of the professional services.

(14) Negotiations may be formally terminated if they fail to result in a contract within a reasonable amount of time. Negotiations will then ensue with the second ranked consultant. This second round of negotiations may be formally terminated if it, too, fails to result in a contract within a reasonable amount of time. Negotiations with the third ranked consultant will then begin promptly. If this third round of negotiations fails to result in a contract within a reasonable amount of time, the solicitation may be formally terminated. Thereafter, the services of a qualified consultant may be obtained, depending upon the circumstances, through the direct appointment procedure provided for in OAR 137-35-040.

(15) Notwithstanding the submission of proposals and the recommendations of the RFP consultant selection committee, a public contracting agency may at any time during the solicitation process or during contract negotiation reject all consultant proposals and cancel the solicitation, without liability therefor, upon a finding by the public contracting agency that there is good cause for rejecting all proposals and that it would be in the public interest to cancel the solicitation. Further, unless consultant compensation is expressly provided for in the solicitation document, under no circumstances shall a public contracting agency which issues an RFP be responsible for any consultant costs and expenses incurred in submitting responses to the solicitation. Except where the solicitation document expressly provides for consultant compensation, all prospective consultants who respond to a public contracting agency's RFP do so solely at the consultant's cost and expense and each RFP shall so provide.

(16) If a project for which a consultant has been selected and awarded a contract becomes inactive, or is materially altered or terminated, whether due to project phasing, insufficient appropriations, or other reasons, the public contracting agency may, if the project is reactivated or continued after material alteration, retain the same consultant to complete the project if the public contracting agency makes written findings that retaining the consultants will:

(a) Not encourage favoritism in the awarding of architectural and engineering personal service contracts or substantially diminish competition for such contracts; and

(b) Will result in substantial cost savings to the public contracting agency.

Stat. Auth.: ORS 279.049(2)

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92

137-035-0070

Protest Procedures

(1) Solicitation protest. Unless a different deadline is specified in the solicitation document, prospective consultants may submit a written protest, or request for change, of particular solicitation provisions, specifications, or contract terms and conditions to the public contracting agency no later than seven calendar days prior to the close of the solicitation. Such protest or request for change shall include the reasons for the protest or request, and any proposed changes to the solicitation provisions, specifications, or contract terms and conditions. No protest against selection of a consultant or award of a consultant contract, because of the content of solicitation provisions, specifications, or contract terms and conditions, shall be considered after the

deadline established for submitting such protest.

(2) Selection protest. Every consultant who submits a proposal in response to an RFP shall be copied with the selection notice sent to the highest ranked consultant. Unless a different deadline is specified in the RFP, a consultant who has submitted a proposal and claims to have been adversely affected or aggrieved by the selection of a competing consultant, shall have seven calendar days after receiving the notice of selection to submit a written protest of the selection to the public contracting agency. To be adversely affected or aggrieved, a protester must claim that the protester was the highest ranked consultant eligible for selection, i.e., the protester must claim that *all* higher ranked consultants were ineligible for selection because their proposals were nonresponse or the consultants nonresponsive. A public contracting agency shall not consider a selection protest submitted after the time period established in this section, unless a different deadline is provided in the RFP.

(3) The head of the public contracting agency, or designee, shall have the authority to settle or resolve a written protest submitted in accordance with sections (1) or (2) of this rule. The head of the public contracting agency, or designee, shall promptly issue a written decision on the protest.

(4) Judicial review of a public contracting agency's disposition of a written protest submitted in accordance with sections (1) or (2) of this rule may be available pursuant to the provisions of ORS 183.484.

Stat. Auth.: ORS 279.049(2)

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92

137-035-0080

Prohibited Fee Provisions, Purchases

(1) Except as otherwise required by law, no consultant contract for architectural or engineering services shall be awarded which contains fee provisions or fee schedules that are based on or limited to:

- (a) Cost-plus-a-percentage-of-cost; or
 - (b) A percentage of construction or project costs.
- (2) Except in:

(a) Cases of emergency as defined in ORS 279.011(4); or

(b) The particular instances noted below, no building materials, supplies or equipment for any building, structure or facility constructed by or for a public contracting agency shall be sold by or purchased from any person or firm employed as a consultant by the agency to provide architectural or engineering services for such building, structure or facility. The prohibition stated in this section shall not apply where a consultant is providing architectural or engineering services under a contract with a public contracting agency to provide:

(A) Construction manager/general contractor; or

(B) Design-build services, or where that portion of the contract relating to the acquisition of building materials, supplies or equipment was awarded pursuant to applicable law governing the award of such contracts.

Stat. Auth.: ORS 279.049(2)

Hist.: JD 17-1992, f. 10-22-92, cert. ef. 11-1-92

DIVISION 40

PUBLIC IMPROVEMENT CONTRACTS

137-040-0000

Application

In addition to the requirements set forth in Division 30 of these rules the following rules apply to public improvement contracts. The requirements in Division 40 are intended to be complementary to those in Division 30, with the rules in Division 40 supplementing the Division 30 requirements, where necessary, to meet the agency's needs when letting and administering contracts for public improvements. In the event of ambiguity or the need for interpretation, the more specific requirements of the rules in Division 40 take precedence on a public improvement contract over the more general requirements of the rules in

Division 30.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84

137-040-0005

Competitive Procurement

General. Public improvement contracts shall be awarded by competitive procurement, except as otherwise allowed or required in ORS 279.015, 279.029(2), 279.053, 279.056 or 279.059(2).

NOTE:

-1- ORS 279.009 specifically exempts public improvement contracts from the requirements of ORS 279.005 and 279.007. The effect is to restrict the agency's choice of selection method for public improvement contracts to the traditional price-driven process known as "competitive bidding", unless the agency has obtained an exemption order through its public contract review authority to use an alternative selection method, as described in ORS 279.015(2) and (5).

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.015 & 279.023

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-040-0010

Public Notice

(1) Trade newspaper advertisement. In addition to the requirements of OAR 137-030-0015(1)-(3) and 137-030-0015(4) as applicable, agency solicitations for public improvements having an estimated cost in excess of \$50,000 shall be advertised in at least one trade newspaper of general state-wide circulation.

(2) Notice of Requirement for Asbestos Abatement License. Pursuant to the requirements of ORS 279.025(2)(j), ORS 468A.760, and OAR 137-030-0015(2)(j), when the agency requests bids or proposals for a public improvement project, it shall first determine whether the project requires a contractor licensed under ORS 468A.720 to work with asbestos or asbestos-containing materials. The agency shall include in the solicitation advertisement a statement whether performance of the contract requires a contractor licensed to do asbestos abatement work under ORS 468A.720. (ORS 468A.720).

(3) Prevailing wage rate notice. If the following conditions apply, the agency shall include in the public notice a statement that bidder or proposers shall comply with the requirements of the prevailing wage laws in ORS 279.348 to 279.365:

(a) The solicitation must be for public works as defined in ORS 279.348(3), which includes construction, reconstruction, major renovation or painting of roads, highways, buildings or structures, and improvements of all types, which are carried on or contracted for by any agency to serve the public interest, but do not include the reconstruction or renovation of privately owned property which is leased by a public agency; or

(b) The solicitation is for a public improvement that is being constructed, reconstructed or renovated for use by a state agency under a lease-purchase agreement or under any other agreement whereby ultimate state ownership is contemplated or expected (ORS 276.017); and

(c) The contract price for the project is estimated to exceed \$10,000; and

(d) The project is not regulated under the Davis-Bacon Act (**40 USC 276a**, et. seq.). (ORS 279.357).

NOTES:

-1- New construction v. reconstruction or renovation on privately owned property. Agencies should take note of the definition of "construction" and "reconstruction" in OAR 839-016-0004(19) and consult with counsel and/or the Bureau of Labor and Industries when attempting to determine whether the exception in ORS 279.348(3) for reconstruction or renovation work on privately owned property applies to a particular project. Although ORS 279.348(3) provides that projects to reconstruct or renovate privately owned property which is leased by a public agency are not "public works" projects, the question often arises whether the project is for new construction, or for reconstruction or renovation. For example, if the project will add square footage to a privately owned building, particularly if the addition results in a change to the building's

footprint or an added story to the structure, the Bureau of Labor and Industries may conclude that the project actually involves “new construction” carried on for the agency, and not reconstruction or renovation. See OAR 839-016-0004(5), an administrative rule of the Bureau of Labor and Industries which defines “public work project” as including “reconstruction” or “major renovation... the primary purpose of which is to serve the public interest *regardless* whether the title thereof is in a public agency...” (emphasis supplied). Note that the definition in rule is somewhat broader than the definition of “public works” in ORS 279.348(3).

-2- Contract price not exceeding \$10,000. Agencies also should exercise care when determining whether the exemption in ORS 279.357(1)(a) for a project having a contract price not exceeding \$10,000 will apply to, or continue to apply for the entire duration of, a particular public improvement project. An administrative rule of the Bureau of Labor and Industries provides that the total contract price “includes all change orders or any other addition to the original contract price.” OAR 839-16-100(2). Thus, if the original contract price was \$9,500, any change orders or additions to the project which caused the total contract price to exceed \$10,000 would result in the entire project being subject to the requirements of ORS 279.348 to 279.365. As an example, a \$9,500 contract to construct a small maintenance shed may, for unforeseen reasons, be increased through change orders to a total sum exceeding \$10,000. In such instance the Bureau of Labor and Industries can be expected to conclude that the prevailing wage rate provisions apply to all of the contract work, and not just the portion of the work which exceeds the \$10,000 threshold. Agencies must also be aware that the exemption for contracts not exceeding \$10,000 cannot be applied to different components of what would otherwise be a single project. As an example, if an agency awards multiple separate contracts, each to a different contractor and none exceeding \$10,000, for separate components of a project (e.g., site preparation and utilities, foundation work, construction of a building shell, roofing, interior finishes, mechanical systems, electrical systems, and landscaping), the Bureau of Labor and Industries can be expected to conclude that the work is all for a single project. In such an instance, the Bureau would likely conclude that the contract price for purposes of the exemption in ORS 279.357(1)(a) is the total sum of all the contracts for the separate components.

-3- Site of work considerations. Agencies should also note the “site of work” provisions in OAR 839-016-0035. It may be that when all project tasks are identified (even those performed at a different site), the contract price will be determined to exceed \$10,000. Although it may be unlikely that a small (under \$10,000) public improvement project will involve significant off-site work, it is certainly possible on larger projects that off-site workers will not be timely identified by the contractor or agency as being entitled to receive compensation in accordance with the prevailing wage rate statutes.

-4- Agencies to specify prevailing rate of wages. Agencies are also cautioned to take note of the requirements in ORS 279.352 and OAR 839-016-0020(2): The statute provides that the “specifications for every contract for a public work shall contain a provision stating the existing prevailing rate of wage” payable “to workers in each trade or occupation required for such public work employed in performance of the contract (emphasis supplied). The administrative rule provides that “statement incorporating the existing prevailing wage rate into the specifications by reference will not satisfy this requirement.” The Bureau of Labor and Industries publishes a booklet every six months, for release to the public without charge each January 1st and July 1st, providing the current prevailing wage rates for the trades and occupations listed in the booklet. The prevailing rates of wage which are in effect at the time the agency’s solicitation is first advertised and issued to the public are the rates which apply throughout performance of the project work, i.e., even if the contract is awarded after the publication and release of a succeeding wage rate booklet, the rates that were in effect when bids or proposals were first solicited will continue to apply until the project is completed.

NOTE: The prevailing wage rate provisions of ORS 279.348 to 279.365 apply regardless whether the public improvement contract was solicited formally or informally. See OAR 839-016-0004(4) which provides that a “public works contract” “means any contract, agreement or understanding, written or oral, into which a Public Agency enters for any public work.” As an example, a state agency that intends to use the

informal procurement method provided for in OAR 125-310-0012 (formerly 125-310-0020) to award a public improvement contract with an estimated contract price between \$10,001 and \$25,000, will need to carefully consider how it will comply with the requirements of ORS 279.348 to 279.365, as well as the performance bonding requirement in ORS 279.029 and the contractor registration requirements of ORS chapter 701. See, e.g., OAR 125-310-0012(2)(f).

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.015 & 279.023

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-040-0015

Bid or Proposal Evaluation and Award

(1) General. A public improvement contract, if awarded, is to be awarded to the lowest, responsive and responsible bidder or the best, responsive and responsible proposer. (See OAR 137-030-0090).

(2) Special requirements. The solicitation documents shall set forth any special requirements and criteria which will be used to determine the lowest, responsive and responsible bidder or best, responsive and responsible proposer. No bid or proposal shall be evaluated for any requirement or criterion that is not disclosed in the solicitation documents or agency regulation.

(3) Bid Evaluation and Award. The evaluation format for competitive bid pricing can be lump sum, unit price or a combination of the two.

(a) Lump sum. If the bid form includes a lump sum base bid, plus additive or deductive alternates, the total bid price, for the purpose of comparing bids, shall be the total sum, computed from adding or deducting alternates, as selected by the agency, selected no additive or deductive alternates for award, bids shall be compared on the basis of lump sum prices, or lump sum base bid prices, as applicable;

(b) Unit price. If the bid includes unit prices and extensions for estimated quantities, the total bid price, for the purpose of comparing bids, will be the total sum computed from multiplying estimated quantities by the unit prices entered on the bid form by the bidder, with due adjustments being made for additive or deductive alternates, if any, selected for award.

Note: In case of a conflict between a unit price and the corresponding extended amount, the unit price shall govern, as provided in OAR 137-030-0075(2)(b).

(c) Combination lump sum and unit price. The agency shall select a combination of factors for purposes of bid evaluation and contract award and use the methods described in subsections (a) and (b) of this rule, to compute and compare bids.

(4) Proposal Evaluation and Award. If an alternate selection method is approved by the agency’s public contract review authority pursuant to ORS 279.015(2) for use in procuring a public improvement, proposals will be evaluated to determine which proposer offers the best solution to the agency in accordance with the evaluation criteria set forth in the solicitation documents and in the agency’s rules. Only the criteria which are set forth in the solicitation documents and in the agency’s rules shall be applied. The solicitation evaluation criteria shall be as objective as possible. Examples of solicitation evaluation criteria include, but are not limited to, cost, quality, relevant experience, service, performance history on other private and public contracts, experience and availability of key personnel, adequacy of equipment and physical plant, financial wherewithal, sources of supply and references. Evaluation factors need not be precise predictors of actual future costs and performance; but, to the extent possible, such evaluation factors shall:

(a) Be reasonable estimates based on information available to the agency;

(b) Treat all proposals equitably;

(c) Recognize that public policy requires acquisitions and public improvements to be accomplished at the least cost. ORS 279.023(1).

(5) Restrictions. Nothing in this section shall be deemed to permit contract award to a proposer offering a higher quality solution than that required in the solicitation documents if such

proposer is not also the best, responsive and responsible proposer as determined under section (4) of this rule.

(6) Negotiations. the agency may negotiate with the apparent best, responsive and responsible proposer, but only to establish the details of contract performance (e.g., to reach agreement on project scheduling or on a final guaranteed maximum price where the agency is procuring the services of a construction manager/general contractor). Negotiations between the agency and the best, responsive and responsible proposer shall not change the material requirements of the solicitation document nor any material contractual terms and conditions.

(7) No assignment or transfer of contract rights. A contractor shall not assign, sell, or transfer rights, nor delegate responsibilities, under a public contract, either in whole or in part, without first obtaining the agency's prior written consent. Such written consent shall not relieve a contractor of any obligations under a public contract, and any transferee shall be considered the agent of the contractor and bound to abide by all provisions of the public contract. Except in the event of a novation, if the agency consents in writing to an assignment, sale, or transfer of the contractor's rights and responsibilities, the contractor shall remain ultimately liable to the agency for complete performance of the public contract as if no such assignment, sale, or transfer had occurred.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.029

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-040-0020

Contract Cancellation, Contractor Termination Procedures

(1) Termination due to circumstances beyond the control of the contractor (ORS 279.324, 279.326, 279.328, 279.330, 279.332):

(a) Reasons for termination. The agency may, in its sole discretion, by a written order or upon written request from the contractor, terminate the contract or a portion thereof if any of the following occur:

(A) The contractor is prevented from completing the work for reasons beyond the control of the agency; or

(B) The contractor is prevented from completing the work for reasons beyond the control of the contractor; or

(C) For any reason considered by the agency to be in the public interest (other than a labor dispute or any third party judicial proceeding relating to the work filed in regards to a labor dispute). These reasons may include, but are not necessarily limited to, nonavailability of materials, phenomena of nature of catastrophic proportions or intensity, executive orders of the President related to national defense, congressional or state acts related to funding; or

(D) Any third party judicial proceeding relating to the work other than a suite or action filed in regards to a labor dispute; and

(E) If the circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the public works.

(b) Payment when contract is terminated. When the contract, or any portion thereof, is terminated before completion of all items of work in the contract, payment will be made, based on the contract price, for the actual items of work completed under the contract, or by mutual agreement, for items of work partially completed. No claim for loss of anticipated profits will be allowed;

(c) Responsibility for completed work if contract terminated. Termination of the contract or a portion thereof shall not relieve the contractor of responsibility for the work completed, nor shall it relieve the surety of its obligation for any just claims arising from the work performed.

(2) Termination of the contract or the contractor's performance for default (ORS 279.333):

(a) Declaration of default. The agency may, after giving the contractor surety seven days written notice, and an opportunity to cure deficient performance, terminate the contractor's performance for any reasonable cause, including but not limited to those set forth in subsection (2)(a)(A) to (F) of this rule. Upon

such termination, the agency may immediately take possession of the premises and of all materials, tools and appliances thereon as well as all other materials whether on the premises or not, on which the contractor has received partial payment. The agency may finish the work by whatever method it may deem expedient:

(A) If the contractor should repeatedly refuse or fail to supply an adequate number of skilled workers or proper materials to carry on the work as required by the contract document, or otherwise fail to pursue the work in a timely manner; or

(B) If the contractor should repeatedly fail to make prompt payment to subcontractors or for material or labor, or should disregard laws, ordinances or the instructions of the agency or its representative; or

(C) If the contractor should voluntarily or involuntarily seek protection under the United State Bankruptcy Code and its Debtor in Possession or Trustee for the estate fails to assume the contract within a reasonable time; or

(D) If the contractor should make a general assignment for the benefit of the contractor's creditors; or

(E) If a receiver should be appointed on account of the contractor's insolvency; or

(F) If the contractor is otherwise in material breach of any part of the contract.

(b) Required response to declaration of default. If a default is declared and the contractor's performance terminated, the contractor or the surety shall provide the agency with immediate and peaceful possession of all of the materials, tools and appliances located on the premises, as well as all other materials whether on the premises or not, on which the contractor has received any progress payment. Further, the contractor shall not be entitled to receive any further payment until the work is completed. On the completion of the work, the agency shall determine the total amount of compensation the contractor would have been entitled to receive for the work, under the terms of the contract, had the contractor completed the work. If the difference between this total amount and the sum of all amounts previously paid to the contractor, hereinafter called the "unpaid balance", exceeds the total amount by the expense incurred by the agency in completing the work, including expense for additional managerial and administrative services, such excess will be paid to the contractor, with the consent of the surety. If, instead, the expense incurred by the agency exceeds the unpaid balance, the amount of the excess shall be paid to the agency by the contractor or the surety;

(c) Expense of completion. The expense incurred by the agency shall be as determined and certified by the agency;

(d) Substitution of contractor. As provided in OAR 137-030-0155(4), termination of the contractor and substitution of another contractor to complete the work does not constitute the award of a new public contract and shall not be subject to the provisions of ORS 279.005 to 279.111;

(e) Refusal to perform. In addition to and apart from the above-mentioned right of the agency to terminate the contractor's performance, the contract may be cancelled by the agency for any willful failure or refusal on the part of the contractor and its surety to perform faithfully the contract according to all of its terms and conditions; however, in such event neither the contractor nor the surety shall be relieved from damages or losses suffered by the agency on account of the contractor's breach of contract;

(f) Remedies are cumulative. The agency may, at its discretion, avail itself of any or all of the above rights or remedies and invoke any one of the above rights or remedies without prejudice and without precluding the agency from subsequently invoking any other right or remedy set forth above, elsewhere in the contract, or available at law or in equity.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.326 – 279.333

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-040-0025

Retainage (ORS 279.420, 279.435)

(1) Retainage of five (5) percent. Unless the charter of the agency contains provisions requiring retainage by the agency of

more than five (5) percent of the contract price of the work completed, the amount to be retained from any given progress payment will not exceed five (5) percent of the payment. If the contract work is 50 percent completed and the work is progressing satisfactorily, the agency may, at its discretion, reduce or eliminate the retainage on the remaining progress payments. Any reduction or elimination of retainage shall be allowed only upon written application of the contractor, which application shall include written approval of the contractor's surety; except that when the contract work is 97-1/2 percent completed, the agency may, at its discretion and without application by the contractor, reduce the retained amount to 100 percent of the value of the contract work remaining to be done. If retainage has been reduced or eliminated, the agency reserves the right in protecting its interests to reinstate at any time retainage from further progress payments.

(2) Alternatives to cash retainage. In lieu of cash retainage to be held by the agency, the contractor may select one of the following options:

(a) Deposit of securities:

(A) The contractor may deposit bonds or securities with the agency or in any bank or trust company to be held for the benefit of the agency. In such event, the agency shall reduce the retainage in an amount equal to the value of the bonds and securities. This reduction in retainage will be made in the progress payments made subsequent to the time the contractor deposits the bonds and securities;

(B) The value of the bonds and securities will be determined periodically by the agency, in the manner described in subsection (2)(a)(C) of this rule, and the amount retained on progress payments will be adjusted accordingly. The bonds and securities deposited by the contractor shall be fully assigned to the agency or be payable to the agency on demand and shall be of a character approved by the Director of the Oregon Department of Administrative Services, including but not limited to the following:

(i) Bills, certificates, notes or bonds of the United States;

(ii) Other obligations of the United States or its agencies;

(iii) Obligations of any corporation wholly owned by the Federal Government;

(iv) Indebtedness of the Federal National Mortgage Association;

(v) Time certificates of deposit or savings account passbooks issued by a commercial bank, savings and loan association, or mutual savings bank, duly authorized to do business in Oregon;

(vi) Corporation bonds rated A or better by a recognized rating service;

(vii) General obligation bonds of the State of Oregon or any political subdivision thereof;

(viii) General obligation improvement warrants issued pursuant to ORS 287.502;

(ix) Irrevocable letters of credit from a bank doing business in Oregon.

(C) The value of bonds and securities deposited by the contractor pursuant to this rule shall be calculated as follows:

(i) As to bonds or securities for which the "bid" and "asked" prices are published on a regular basis in the **Wall Street Journal** or in the **New York Times**, the value shall be the average of the "bid" and "asked" prices for the bonds or securities so published on (or most recently prior to) the date value is determined.

(ii) As to bonds or securities for which the "bid" and "asked" prices are not published in the **Wall Street Journal** or the **New York Times**, the value shall be either:

(I) The average "bid" price for the bond or security, on the date value is determined, as established by any two nationally recognized government securities dealers (selected by the agency in its absolute discretion) making a market in such investments; or

(II) The "bid" price published by a nationally recognized pricing service;

(iii) As to certificates of deposit and bankers acceptances, the value shall be the face amount thereof, plus accrued interest.

(D) At the time the agency determines that all requirements for the protection of the agency's interest have been fulfilled, all bonds and securities deposited as above provided will be released

to the contractor.

(b) Deposit in interest-bearing accounts. Upon written request of the contractor, the agency shall deposit any amounts withheld as retainage in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the agency. Earnings on such account shall accrue to the contractor. When the agency is an agency of the State of Oregon, the account shall be established through the State Treasurer;

(c) Deposit of surety bond. The agency may, at its discretion, allow the contractor to deposit a surety bond in a form acceptable to the agency in lieu of all or a portion of funds retained, or to be retained. The contractor shall accept like bonds from subcontractors and suppliers when the agency allows surety bonds for retainage.

(3) Recovery of costs. If the agency incurs additional costs as a result of the exercise of any of the options for retainage described herein, the agency may recover such costs from the contractor by reduction of the final payment. As work on the contract progresses, the agency shall, upon request, inform the contractor of all accrued costs.

NOTES:

-1- When a contractor elects to deposit securities with a bank or trust company in lieu of retainage on public contracts, the securities will be held by the custodian in fully transferable form and under the control of the agency.

-2- Non-negotiable securities so deposited shall have proper instruments attached to enable the agency to effect transfer of title should the contractor be unable to fulfill the contract obligations.

-3- The custodian bank or trust company will issue a safekeeping receipt for the securities to the public agency. The receipt will describe the securities, the par value, the name of the contractor, and project number or other project identification.

-4- Unless otherwise mutually agreed, the value placed upon said securities shall be market value.

-5- Securities deposited in the manner described above will be released by the bank or trust company only upon the written instructions and authorization of the agency.

-6- In lieu of the above, an escrow agreement mutually acceptable to the contractor and the agency and the bank or trust company may be used.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.420 & 279.435

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-040-0030

Progress Payments (ORS 279.435)

(1) Request for progress payments. At a regular time each month, the contractor shall, if required by the contract documents, submit to the agency a request for payment based upon an estimate of the amount of work completed and of the value of such completed work. This request may also include, at the agency's discretion, an estimate of the amount of value of acceptable material to be incorporated in the completed work which has been delivered and acceptably stored. Upon verification and approval of the agency, the sum of these values will be referred to as the "value of completed work". With these estimates as a base, the agency will make a progress payment to the contractor, which shall be equal to:

(a) The value of completed work;

(b) Less those amounts which have been previously paid;

(c) Less other amounts that may be deductible or owing and due to the agency for any cause; and

(d) Less the appropriate amount of retainage.

(2) Progress payments do not mean acceptance of work. Progress payments shall not be construed as an acceptance or approval of any part of the work and shall not relieve the contractor of responsibility for defective workmanship or material.

(3) Estimates for progress payments. The estimates upon which progress payments are based are not represented to be accurate estimates, and all quantities shown therein are subject to correction in the final estimate. If the contractor uses such estimates as a basis for making payments to subcontractors, this is at the contractor's own risk, and the contractor shall bear all loss

that may result.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.435

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-040-0035

Final Inspection (ORS 279.435(7))

(1) Notification of Completion. When the contractor determines that all construction work on the project has been completed, the contractor shall notify the agency in writing. Within 15 days of receiving contractor's notice, the agency shall make an inspection of the project and project records. If, at such inspection, all construction provided for and ordered under the contract is complete and satisfactory to the agency, and all certifications, bills, forms and documents have been submitted properly, such inspection shall constitute the final inspection.

(2) Instructions to complete the work. If, however, at any inspection, the agency finds that any work, in whole or in part, is unsatisfactory, or finds that all certifications, bills, forms and documents have not been submitted properly, the agency shall, within 15 days of receiving contractor's notice, provide instructions to the contractor on outstanding requirements to complete the project. When the contractor determines that it has fully complied with, and executed the instructions, the contractor shall notify the agency in writing. The agency shall make another inspection within 15 days after such notice, or another determination whether all certifications, bills, forms and documents have been submitted properly, and this inspection or determination as the case may be, shall constitute the final inspection or determination, provided construction work has been completed satisfactorily or all required documentation properly submitted. If the work or all documentation have not been completed satisfactorily, this procedure shall be repeated (within 15 days after the agency receives a second, or succeeding, completion notice from the contractor) until it has been completed satisfactorily.

(3) Acknowledgment of acceptance. When the agency finds that all work and all documentation required under the contract have been completed satisfactorily, the agency shall acknowledge acceptance of the work by providing the contractor with written notice of acceptance within 15 days after receiving the contractor's first, second, or succeeding, completion notice, as applicable.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.435

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-040-0040

Final Estimate and Final Payment (ORS 279.435(7))

(1) Submission of final estimate. As soon as practicable after final inspection of the work under the contract, if unit prices were applicable, the agency shall prepare a final estimate of the quantities of the various classes of work performed. Following a determination of the total amount due the contractor, and following final acceptance of the work by the agency, pursuant to the provisions of OAR 137-040-0035, final payment shall be made to the contractor.

(2) Set-off of prior payments. All prior partial estimates and payments shall be subject to correction in the final estimate and payment.

(3) Interest. Beginning 30 days after the date of final acceptance of the project by the agency, the agency shall pay to the contractor interest at the rate established by state statute on the final payment due the contractor.

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.435

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

137-040-0045

Claims For Unpaid Labor or Supplies

(1) Right of action. As provided in ORS 279.526, a person, claiming to have supplied labor or materials for work on a public improvement contract for which the person has not been paid by the prime contractor or any subcontractor, has a right of action on the contractor's bond. This right arises if the person has not been paid in full and has given written notice of a claim pursuant to ORS 279.528, within 120 days of last providing labor or furnishing materials, or within 150 days of providing labor or furnishing materials if the claim is for a required contribution to a fund of any employee benefit plan.

(2) Notice of claim:

(a) To initiate a claim against the contractor's bond, a person shall file a notice of claim in the form and manner attached as **Exhibit 1**. Such notice must be given to the contractor and the agency, if the contract is with a state agency, or the clerk or auditor of the agency which let the contract if the agency is other than a state agency;

(b) Any notice of claim shall include at a minimum the following information:

(A) Name and address of the claimant;

(B) Name of prime contractor;

(C) Title of project and contract date;

(D) Name of the agency;

(E) Name of bonding company (may be obtained from agency);

(F) Name of contractor or subcontractor to whom labor or material supplied.

(3) Response to notice of claim. Upon receipt of such notice of claim, the agency shall:

(a) Send acknowledgment to claimant;

(b) Send copy of notice to prime contractor;

(c) File copy of Notice with bonding (surety) company.

(4) Referral to surety company. If the contract has been completed and all funds disbursed to the prime contractor, all claims shall be referred to the surety company for resolution. The agency shall not arrange for second payments directly to subcontractors or suppliers for work already paid for by the agency.

(5) Discretionary payment of claim. If the contract is still in force, the agency may, in accordance with ORS 279.314, pay a valid claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due to the contractor under the contract.

(6) Liability for claim. If the agency chooses to make such a payment as provided in ORS 279.314, the contractor or the contractor's surety shall not be relieved from obligation with respect to any unpaid claims.

NOTES: Agencies are cautioned to refer claims from unpaid suppliers and laborers to the prime contractor and its surety for investigation and disposition. This approach should minimize or eliminate any need for agencies to determine whether, for purposes of ORS 279.314, a claim is valid. Otherwise, agency personnel may feel pressured to rule on the validity of a claim, without knowing:

-i- The underlying circumstances regarding the labor or materials provided and

-ii- The reason(s) why the prime contractor or a subcontractor has not made payment.

[E D

NOTE: The Exhibit referenced in this rule is not printed in the OAR Compilation. Copies are available from the Department of Justice.]

Stat. Auth.: ORS 279.049(1)

Stats. Implemented: ORS 279.314, 279.526 - 279.542

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90; JD 1-1995, f. & cert. ef. 1-9-95

DIVISION 50

SUPPORT ENFORCEMENT DIVISION

Procedural Rules

137-050-0300

Agency Represented by Officer or Employee

(1) Support Enforcement Division employees are authorized to appear on behalf of the agency in the following types of hearings:

(a) Administrative Child Support Adjudications pursuant to ORS 416.425(1)(a) and 416.427;

(b) Administrative hearings pursuant to ORS 25.610(6)(b) and 293.250(d);

(c) Hearings regarding the suspension of occupational licenses, certificates, or registrations pursuant to ORS 25.765;

(d) Hearings regarding the establishment, modification and enforcement of interstate child support orders pursuant to ORS 110.330 to 110.441.

(2) The Attorney General has separately given Oregon Laws 1987, Chapter 833, §1(7) written consent to officers of employers or representing the agency.

(3) The Agency representative shall not present legal argument in contested cases hearings or give legal advice to an agency:

(a) Legal argument for purposes of the Oregon Laws 1987, Chapter 833, §1(8) limitation include legal argument on:

(A) The jurisdiction of the agency to hear the contested case;

(B) The constitutionality of a statute or a rule or the application of a constitutional requirement to an agency;

(C) The application of court precedent to the facts of the particular contested case proceeding.

(b) "Legal argument" *does not include*, and therefore agency representatives may argue:

(A) The application of the facts to the statutes or rules directly applicable to the issues in the contested case;

(B) Comparison of prior actions of the agency conducting the proceeding;

(C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case;

(D) Objection to the relevancy, materiality or repetitiveness of evidence or the correctness of procedures being followed.

Stat. Auth.: ORS 183.450

Stats. Implemented: ORS 183.450

Hist.: JD 6-1987, f. & ef. 10-16-87; JD 4-1995, f. 2-27-95, cert. ef. 3-1-95

137-050-0320

Definition

ORAR 137-050-0320 to 137-050-0490 constitute the formula for determining child support awards as required by ORS 25.275. For purposes of ORAR 137-050-0320 to 137-050-0490, unless the context requires otherwise:

(1) "Joint Child" means the dependent child who is the son or daughter of both the mother and the father involved in the support proceeding. In those cases where support is sought from only one parent of a child, a joint child is the child for whom support is sought.

(2) "Nonjoint Child" means the legal child of one, but not both of the parents subject to this determination. Specifically excluded from this definition are stepchildren.

(3) "Gross Income" means:

(a) The gross income of the parent calculated pursuant to ORAR 137-050-0340 and 137-050-0350;

(b) The potential income of the parent calculated pursuant to ORAR 137-050-0360 in certain cases where the parent is unemployed or employed on less than a full-time basis;

(c) A combination of gross income and potential income as calculated under subsections (a) and (b) of this section; or

(d) The temporary income of the parent calculated pursuant to ORAR 137-050-0365.

(4) "Adjusted Gross Income" means gross income less the deductions for pre-existing child support obligations as allowed by ORAR 137-050-0400 and the deductions for nonjoint children as allowed by ORAR 137-050-0400 and either the addition or deduction of court ordered spousal support as allowed by ORAR 137-050-0390.

(5) "Basic Child Support Obligation" means the support obligation determined by applying the parent's adjusted gross income, or if there are two parents, their combined adjusted gross

income, to the scale in the manner set out in ORAR 137-050-0490.

(6) "Total Child Support Obligation" means the basic child support obligation determined pursuant to ORAR 137-050-0490 plus the following additions:

(a) Child care costs as allowed by ORAR 137-050-0420; and

(b) Medical expenses as allowed by ORAR 137-050-0430.

Stat. Auth.: ORS 25.275 & 25.280

Stats. Implemented: ORS 25.275 & 25.280

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef.

1-1-91; JD 4-1994, f. 10-4-94, cert. ef. 10-15-94

137-050-0330

Computation of Individual Child Support Obligations

(1) To determine the amount of support owed by a parent, follow the procedure set forth in subsections (a) through (h) of this section:

(a) Determine "gross income" of each parent;

(b) Determine "adjusted gross income" of each parent, and if there are two parents, the combined "adjusted gross income";

(c) If there are two parents, determine the percentage contribution of each parent to the combined adjusted gross income by dividing the combined adjusted gross income into each parent's adjusted gross income;

(d) Determine the "basic child support obligation";

(e) Determine the "total child support obligation";

(f) Determine each parent's child support obligation by multiplying the percentage figure from subsection (c) of this section by the "total child support obligation";

(g) Adjust the child support obligation determined in subsection (f) of this section in consideration of health insurance costs as provided in ORAR 137-050-0410, medical expenses as provided in ORAR 137-050-0430, and child care costs as provided in ORAR 137-050-0420;

(h) Determine whether the shared physical custody rule, ORAR 137-050-0450, or the split custody rule, ORAR 137-050-0460, apply. If they do, then apply them and adjust each parent's child support obligation pursuant to the applicable rule;

(2)(a) The amount of child support to be paid as determined in subsections (1)(a) through (h) of this rule is presumed to be the correct amount. This presumption may be rebutted by a finding that the amount is unjust or inappropriate based upon the criteria set forth in paragraphs (A) through (P) of this subsection. Both the presumed correct amount and the new amount, in variance from the guidelines, shall be recited as part of findings which explain the reason for the variance.

(A) Evidence of the other available resources of the parent;

(B) The reasonable necessities of the parent;

(C) The net income of the parent remaining after withholdings required by law or as a condition of employment;

(D) A parent's ability to borrow;

(E) The number and needs of other dependents of a parent;

(F) The special hardships of a parent including, but not limited to, any medical circumstances and extraordinary visitation transportation costs, if any, of a parent affecting the parent's ability to pay child support;

(G) The needs of the child, including extraordinary child care costs due to special needs;

(H) The desirability of the custodial parent remaining in the home as a full-time parent or working less than full-time to fulfill the role of parent and homemaker;

(I) The tax consequences, if any, to both parents resulting from spousal support awarded and determination of which parent will name the child as a dependent; the formula presumes the custodial parent will have the tax exemption allowed for the child or children;

(J) The financial advantage afforded a parent's household by the income of a spouse or another person, or persons, with whom the parent lives in a relationship similar to husband and wife or domestic partnership;

(K) The financial advantage afforded a parent's household by benefits of employment including, but not limited to, those provided by a family owned corporation or self-employment;

(L) Evidence that a child who is subject to the support order

is not living with either parent or is a "child attending school" as defined in ORS 107.108;

(M) Prior findings in a Judgement, Order, Decree or Settlement Agreement that the existing support award was made in consideration of other property, debt or financial awards;

(N) The net income of the parent remaining after payment of financial obligations mutually incurred;

(O) The tax free or adverse tax effect of a party's income or benefits;

(P) The return of capital.

(b) If the child support presumption is rebutted pursuant to subsection (a) of this section, a written finding or a specific finding on the record must be made that the amount is unjust or inappropriate. That finding must recite the amount that under the guidelines is presumed to be correct, and must include the reason why the order varies from the guidelines amount. A new support amount may be calculated by determining an appropriate dollar value to be attributed to the specific criteria upon which the finding was based and by making an appropriate adjustment in the amounts used in subsections (1)(b) and (d) of this rule.

(3) Although a monetary obligation is computed for each parent, only the non-custodial parent will be ordered to pay support except in shared custody and split custody cases.

Stat. Auth.: ORS 25.275 & 25.280

Stats. Implemented: ORS 25.275 & 25.280

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 3-1992, f. 3-3-92, cert. ef. 5-1-92; JD 7-1993, f. 11-3-93, cert. ef. 11-4-93; JD 4-1994, f. 10-4-94, cert. ef. 10-15-94

137-050-0335

Implementation of Changes to Child Support Guidelines

New rules, repealed rules, and amendments to the rules that constitute the formula for determining child support awards, found at OAR 137-050-0320 through 137-050-0490, shall be applied to the computation of child support obligations on actions initiated after the effective date of these rules.

Stat. Auth.: ORS 25.275 & 25.280

Stats. Implemented: ORS 25.275 & 25.280

Hist.: JD 4-1994, f. 10-4-94, cert. ef. 10-15-94

137-050-0340

Gross Income

(1) Except as excluded below, gross income includes income from any source, including but not limited to salaries, wages, commissions, advances, bonuses, dividends, severance pay, pensions, interest, honoraria, trust income, annuities, return on capital, social security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, and prizes including lottery winnings.

(2) Gross income may be calculated on either an annual or monthly basis.

(3) If the custodial parent of a joint child is a recipient of ADC, the gross income attributed to that parent shall be the amount which could be earned by full-time work (40 hours a week) at the state minimum wage.

(4) Excluded and not counted as income is any child support payment.

Stat. Auth.: ORS 25.275 & 180.340

Stats. Implemented: ORS 25.275

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 4-1994, f. 10-4-94, cert. ef. 10-15-94; JD 1-1996, f. 4-12-96, cert. ef. 5-1-96

137-050-0350

Income from Self-Employment or Operation of a Business

(1) For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, gross income is defined as gross receipts minus costs of goods sold minus ordinary and necessary expenses required for self-employment or business operation. Specifically excluded from ordinary and necessary expenses for purposes of OAR 137-050-0320 to 137-050-0490 are amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other

business expenses determined by the Administrator, Court, or Hearings Officer to be inappropriate for determining gross income for purposes of calculating child support.

(2) Expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business shall be counted as income if they are significant and reduce personal living expenses.

Stat. Auth.: ORS 25.275 & 25.280

Stats. Implemented: ORS 25.275 & 25.280

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91

137-050-0360

Potential Income

(1) If a parent is unemployed, employed on less than a full-time basis or there is no direct evidence of any income, child support shall be calculated based on a determination of potential income. For purposes of this determination, there shall be a rebuttable presumption that a parent can be gainfully employed on a full-time basis.

(2) Determination of potential income shall be made according to one of two methods, as appropriate:

(a) Determine employment potential and probable earnings level based on the parent's recent work history, occupational qualifications, or prevailing job opportunities and earnings levels in the community; or

(b) Notwithstanding any other provision of this section, the amount of potential income attributed to a parent will not be less than full-time work (40 hours a week) at the current state minimum wage.

Stat. Auth.: ORS 25.275 & 25.280

Stats. Implemented: ORS 25.275 & 25.280

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89

137-050-0365

Temporary Income

If a parent subject to this determination is receiving income of a temporary nature, such as, but not limited to, unemployment compensation or worker's compensation, that parent's income for purposes of this determination may be either: potential income pursuant to OAR 137-050-0360; or, if the presumption of that rule is rebutted, the actual amount of the temporary income. The temporary income is defined as income that is not anticipated to continue for more than six months.

Stat. Auth.: ORS 25.275 & 25.280

Stats. Implemented: ORS 25.275 & 25.280

Hist.: JD 4-1994, f. 10-4-94, cert. ef. 10-15-94

137-050-0370

Income Verification

Income statements of the parents shall be verified with documentation of both current and past income where available. Suitable documentation of current earnings includes paystubs, employer statements, the records of the Oregon Employment Division, or receipts and expenses if self-employed. Documentation of current income shall be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period.

Stat. Auth.: ORS 25.275 & 25.280

Stats. Implemented: ORS 25.275 & 25.280

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91

137-050-0390

Spousal Support

When either party pays or receives spousal support, before any other adjustments are made to gross income, the amount of any preexisting or concurrently entered court ordered spousal support shall be deducted from the gross income of the parent obligated to pay such spousal support and added to the adjusted gross income of the parent entitled to receive such spousal support.

Stat. Auth.: ORS 25.275 & 180.340

Stats. Implemented: ORS 25.275

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 1-1996, f. 4-12-96, cert. ef. 5-1-96

137-050-0400

Nonjoint Children

(1) When either or both parents of the joint child subject to this determination are legally responsible for a nonjoint child who resides in that parent's household, or a nonjoint child to whom or on whose behalf a parent owes child support under a court or administrative order, a credit for this obligation shall be calculated pursuant to sections (2) through (6) of this rule. This credit does not apply to custodial parents receiving ADC if that parent's gross income is calculated by using OAR 137-050-0340(3).

(2) Subtract from a parent's gross income the amount of any spousal support a court orders that parent to pay, and add to a parent's gross income any spousal support the parent is entitled to receive as allowed by OAR 137-050-0390.

(3) Determine the number of nonjoint children in the parent's immediate household and the number of nonjoint children to whom the parent has been ordered to pay support by prior court or administrative order. The result is "total nonjoint children."

(4) Using the scale set down in OAR 137-050-0490, determine the basic child support obligation for the nonjoint child(ren) by using the income of the parent for whom the credit is being calculated and adjusting that income for spousal support, if applicable, according to section (2) of this rule, and using the number of "total nonjoint children" as determined in section 3 of this rule.

(5) Subtract from the parent's income derived in section (2) of this rule the amount obtained as the basic child support obligation for the "total nonjoint children" in section (4) of this rule.

(6) A parent's gross income plus or minus any spousal support per OAR 137-050-0390, minus nonjoint child credit per OAR 137-050-0400, is the parent's adjusted gross income for calculation of basic child support under OAR 137-050-0490.

Stat. Auth.: ORS 25.275 & 180.340

Stats. Implemented: ORS 25.275

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94; JD 1-1996, f. 4-12-96, cert. ef. 5-1-96

137-050-0410

Health Insurance

(1) If the assignee or custodial parent has elected to have health insurance included in the order, and it is not a shared or split custody case, the Administrator, Hearings Officer or Court shall follow the procedure set out in subsections (a) and (b) of this section and sections (2) and (3) of this rule. In the case of shared or split custody, proceed to section (5) of this rule.

(a) Determine whether health insurance is available to the obligor on a group basis or through his/her employer or union at reasonable cost. Health insurance is considered reasonable in cost if it is employment related insurance or other group health insurance, regardless of service delivery mechanism unless the group insurance is not accessible to the child or obligee, and the cost to cover the subject child(ren) does not exceed the monthly child support obligation determined under the formula provided by ORS 25.275 and 25.280;

(b) Determine the cost to the obligor of adding the joint child or children to such insurance.

(2) In every case where an obligee or assignee of support rights has elected to have the subject child named as a beneficiary on the health insurance plan available to the obligor through his/her employment or union, or through other group plan, it shall be ordered. When the obligor provides health insurance coverage for the child or children, the amount of the child support order shall be reduced by an amount equal to the obligee's pro rata share of the obligor's out-of-pocket costs of health insurance for the child, which is determined by the obligee's proportionate share of the combined income of the parents. No reduction shall be allowed for the cost attributable to covering the obligor under

such insurance.

(3) When an obligor does not provide health insurance for the subject children and such insurance is provided by an obligee, the obligor's child support obligation shall be increased by an amount which represents the obligor's pro rata share of the obligee's out-of-pocket costs of the health insurance.

(4) When the support obligation of a parent is determined for a child who is not in the custody of the other parent, and assuming that only the income of the parent against whom support is ordered is considered, the entire cost of any insurance for that child provided by the obligated parent shall be deducted from the amount of the support ordered with respect to that parent.

(5) In the case of shared or split custody, either one or both of the parents may provide the health insurance, if available. Refer to the shared custody OAR 137-050-0450 or the split custody OAR 137-050-0460 for instructions on how to allocate these costs.

Stat. Auth.: ORS 25.275 & 25.280

Stats. Implemented: ORS 25.275 & 25.280

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 7-1993, f. 11-3-93, cert. ef. 11-4-93; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94

137-050-0420

Child Care Costs

An amount equal to the annualized monthly child care costs, less the federal and state child care credit payable on behalf of joint children, which are due to employment or job search of either parent, or the physical custodian of the children, shall be added to the basic obligation. Such child care costs shall be reasonable; that is, such costs shall not exceed the level required to provide quality care for the child(ren) from a licensed source. Child care costs required for active job search and child care costs required to allow the custodial parent to obtain training and or education necessary to obtain a job are allowable on the same basis as costs required in connection with employment. In the case of shared custody, follow the instructions in OAR 137-050-0450; and in the case of split custody, follow the instructions in OAR 137-050-0460, regarding the allocation of these costs.

Stat. Auth.: ORS 25.275 & 25.280

Stats. Implemented: ORS 25.275 & 25.280

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 16-1992, f. 10-20-92, cert. ef. 11-2-92; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94

137-050-0430

Medical Expenses

The basic child support obligation may be increased by a reasonable amount which recognizes recurring medical costs incurred on behalf of joint children by the custodial parent. Such an increase is allowable only to the extent that such medical costs are not paid by health or other insurance. Recurring medical costs are defined as those costs which are reasonably expected to occur regularly and periodically in the future based on documented past experience or on substantial evidence of future need.

Stat. Auth.: ORS 25.275 & 25.280

Stats. Implemented: ORS 25.275 & 25.280

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 1-1994, f. 1-26-94, cert. ef. 2-1-94; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94

137-050-0450

Shared Physical Custody

Shared Physical Custody is defined as a situation when by agreement of the parents in writing or by court order one parent has physical custody not more than 65 percent of the time and the other parent has physical custody not less than 35 percent of the time. When the parents are sharing physical custody as defined in this section, the amount of support to be paid shall be calculated as provided in sections (1) through (12) of this rule.

(1) Add together the adjusted gross income of each parent. Adjusted gross income is defined in OAR 137-050-0320(5). The result of this calculation is combined adjusted gross income.

(2) Determine basic child support from the scale set down in

OAR 137-050-0490.

(3) Multiply the basic child support amount by 1.50.

(4) Determine the percentage of overnights the child will be in the physical custody of each parent.

(5) Pro rate the basic child support amount for each parent by multiplying the support amount determined in section (3) of this rule by the percentage of time the child will be in that parent's custody.

(6) Determine: the total out of pocket expenses paid by each parent for health insurance; the total paid by each parent for child care as defined in OAR 137-050-0420; and the total paid by each parent for any recurring medical costs as defined in OAR 137-050-0430.

(7) Add the total costs/expenses paid by each parent determined in section (6) of this rule to the pro rated child support amount determined in section (5) of this rule for that parent.

(8) Determine each parent's percentage contribution to combined adjusted gross income. To calculate this percentage, divide each parent's adjusted gross income by the combined adjusted gross income.

(9) Multiply the income percentage determined in section (8) of this rule and allocated to each parent by the total support and costs/expenses amount calculated in section (7) of this rule and assigned to the other parent. The result of this calculation is two support amounts; each amount reflecting an amount owed by one parent to the other.

(10) The court or administrator may, but need not, net out the obligations obtained in section (9) of this rule by subtracting the smaller obligation from the larger, and require the parent with the larger obligation to pay the difference between the two amounts.

(11) Please note that when calculating shared custody, OAR 137-050-0470 (\$50 minimum) does not apply.

(12) If the parent who is to pay support has physical custody less than 35 percent of the time, a credit may be given against the parent's support obligation upon a showing that the parent has physical custody more than 25 percent of the total overnights and that the parent's direct contribution to the support of the child significantly reduces the cost of support to the other parent.

Stat. Auth.: ORS 25.275 & 180.340

Stats. Implemented: ORS 25.275

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 11-1990(Temp), f. 12-20-90, cert. ef. 1-1-91; JD 2-1991, f. & cert. ef. 3-1-91; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94; JD 5-1994(Temp), f. 10-17-94, cert. ef. 10-18-94; JD 7-1994(Temp), f. & cert. ef. 11-8-94; JD 2-1995, f. 1-31-95, cert. ef. 2-1-95; JD 1-1996, f. 4-12-96, cert. ef. 5-1-96

137-050-0460

Split Custody

(1) Split custody is defined as a situation where there is more than one joint child and in which each parent has physical custody of at least one of the children.

(2) When split custody is involved, the calculation of child support shall be as follows:

(a) Add together the adjusted gross income of each parent. Adjusted gross income is defined in OAR 137-050-0320(5). The result of this calculation is combined adjusted gross income.

(b) Determine the basic child support obligation from the Scale set down in OAR 137-050-0490.

(c) Divide the number of children with each parent by the total number of joint children. Assign to each parent the resulting percentage.

(d) Pro rate the basic child support amount for each parent by multiplying the support amount determined in subsection (b) of this section by the percentage of children determined in subsection (c) of this section for that parent.

(e) Determine: the total out of pocket expenses paid by each parent for health insurance; the total paid by each parent for child care as defined in OAR 137-50-420; and the total paid by each parent for any recurring medical costs as defined in OAR 137-050-0430.

(f) Add the total costs/expenses paid by each parent determined in subsection (e) of this section to the pro rated child support amount determined in subsection (d) of this section for

that parent.

(g) Determine each parent's percentage contribution to combined adjusted gross income. To calculate this percentage, divide each parent's adjusted gross income by combined adjusted gross income.

(h) Multiply the income percentage determined in subsection (g) of this section and allocated to each parent by the total support and costs/expenses amount calculated in subsection (f) of this section and assigned to the other parent. The result of this calculation is two support amounts, each amount reflecting an amount owed by one parent to the other.

(i) The court or administrator may, but need not, net out the obligations obtained in subsection (h) of this section by subtracting the smaller obligation from the larger, and require the parent with the larger obligation to pay the difference between the two amounts.

(j) Please note that when calculating split custody, OAR 137-050-0470 (\$50 minimum) does not apply.

Stat. Auth.: ORS 25.275 & 180.340

Stats. Implemented: ORS 25.275

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94; JD 5-1994(Temp), f. 10-17-94, cert. ef. 10-18-94; JD 7-1994(Temp), f. & cert. ef. 11-8-94; JD 2-1995, f. 1-31-95, cert. ef. 2-1-95; JD 1-1996, f. 4-12-96, cert. ef. 5-1-96

137-050-0470

Minimum Order

Notwithstanding the amount of the gross income of either parent subject to a determination under OAR 137-050-0320 through 137-050-0490, it shall be a rebuttable presumption that the noncustodial parent has an ability to pay at least \$50 per month as child support for the benefit of a joint child or children.

Stat. Auth.: ORS 25.275 & 25.280

Stats. Implemented: ORS 25.275 & 25.280

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91

137-050-0490

The Scale Used in Child Support Determinations

(1) **Table 1** shall be used in any judicial or administrative proceeding to establish or modify a support obligation under ORS Chapters 107, 108, 109, 110, 416, 419(B) & (C) and determinations pursuant to OAR 137-050-0320 through 137-050-0490.

(2) Where one parent has physical custody of a child and support is sought against the other parent, or when the shared or split custody rules apply, the combined adjusted gross income of the parents should be used.

(3) Where a child is not in the custody of one of the parents and a support order is sought against one or each of them individually a parent's adjusted gross income, not the adjusted gross income of both, should be used.

(4) For combined adjusted gross incomes exceeding \$10,000 per month, the presumed basic child support obligations shall be as for parents with combined adjusted gross income of \$10,000 per month. A basic child support obligation in excess of this level may be demonstrated for those reasons set forth in OAR 137-050-0330.

(5) For the seventh child and each additional child thereafter, add to the amount for six children an amount equal to 6.6 percent of the amount for six children.

[ED NOTE: The Exhibit referenced in this rule is not printed in the OAR Compilation. Copies are available from the Department of Justice.]

Stat. Auth.: ORS 25.275 & 25.280

Stats. Implemented: ORS 25.275 & 25.280

Hist.: JD 3-1989, f. 10-2-89, cert. ef. 10-3-89; JD 8-1990, f. 11-21-90, cert. ef. 1-1-91; JD 4-1994, f. 10-4-94 cert. ef. 10-15-94

137-050-0505

Correction of Mistakes in Orders

(1) Clerical mistakes in final orders issued by the administrator pursuant to ORS 416.400 to 416.470 and errors therein arising from oversight or omission may be corrected by the administrator at any time within 60 days of the issuance of the

order. The corrected order shall be clearly marked "Corrected Order" and shall contain notice to the parties of appeal rights as provided by ORS 416.427.

(2) The corrected order shall be served on the parties by regular mail at the address of record established for the proceeding under which the order being corrected was issued, or at any other address which a party has subsequently provided to the Child Support Program.

Stat. Auth.: ORS 416.415 & 416.455

Stats. Implemented: ORS 416.415 & 416.455

Hist.: JD 6-1992, f. 4-1-92, cert. ef. 4-15-92

137-050-0510

Regarding the Initiation of Action Under ORS 416.400 to 416.470 to Establish Paternity When More than One Possible Father Has Been Named

(1) In any action to establish paternity initiated under ORS 416.400 to 416.470, when the mother of the child or children for whom paternity is being established states that the father of the child or children could be more than one man, the Support Enforcement Division (SED) may initiate action against those men who are named by the mother as possible fathers as provided for in this rule.

(2) If mother is able to name one of the possible fathers as the most likely father based upon the date of conception, the physical characteristics the child shares with that man, or other factors, and information sufficient to effect personal service upon that man is apparently available, the Support Enforcement Division may initiate action against that man only.

(3) If mother cannot identify one of the men who may be the father as the most likely father, the Support Enforcement Division may gather additional information, including information from the mother and from any physician or other licensed health care provider of obstetrical care to mother, which may assist the mother in identifying the most likely father.

(4) If mother remains unable to identify one of the possible fathers as the most likely father, the Support Enforcement Division may initiate legal action against any one or more possible fathers, as named by mother, upon whom SED can apparently effect personal service based on the information it has available.

(5) The Support Enforcement Division shall provide notice to any possible father described in this rule and served in an action to establish paternity that the mother of the child for whom the Division seeks to establish paternity has named another man or men as a possible father unless that other man (or men) has been excluded by blood tests.

(6) The Support Enforcement Division will enter no order establishing paternity with respect to a man who has not been named by mother as the most likely father unless the provisions of either subsection (a) or (b) of this section apply:

(a) The man has been subjected to blood tests which have not excluded him as a possible father of the child in question; or

(b) All other men named by mother as possible fathers have been excluded as possible fathers by blood tests.

(7) Notwithstanding any other provision of this rule, its requirements do not apply when there is conclusive presumption of paternity pursuant to ORS 109.070 or when one of the possible fathers is entitled to reasonable notice under ORS 109.096.

Stat. Auth.: ORS 416.430

Stats. Implemented: ORS 416.430

Hist.: JD 4-1991 (Temp), f. 9-9-91, cert. ef. 10-1-91; JD 10-1991, f. 12-4-91, cert. ef. 1-1-92

137-050-0540

Hearings Officer Order Regarding Arrears — ORS 416.429

(1) If a parent objects to the enforcement of an order under ORS 416.429 on the basis that the amount of arrearage is incorrect, a hearings officer may determine the correct amount of the arrearage, if any, and issue an order enforcing both the newly determined arrearage and the current support obligation.

(2) The amount of arrearages as stated on the Notice of Intent to Enforce an Order issued under ORS 416.429 shall be presumed

to accurately state the arrearages. The presumption may be rebutted by evidence of errors in calculation, by a showing that payments were made for which credits were not appropriately recorded, or any other evidence which demonstrates that the arrearage amount sought is incorrect.

(3) The hearings officer may enter an order providing for the enforcement of current support only, pending further proceedings to determine the correct amount of arrears.

Stat. Auth.: ORS 416.429

Stats. Implemented: ORS 416.429

Hist.: JD 13-1991, f. 12-30-91, cert. ef. 12-31-91

137-050-0550

Modification of a Support Order to Zero

(1) The Support Enforcement Division may, upon its own initiative, or upon the request of a party, initiate the necessary action to modify a child support obligation to zero when one of the conditions listed in subsections (a) and (b) of this section apply:

(a) The child or children for whose benefit the support was ordered no longer are in the physical custody of the obligee;

(b) The family is reconciled (that is, the obligor, obligee and child or children live together as an intact family).

(2) No order modifying a support obligation to zero shall be taken ex parte.

(3) Nothing in this rule prohibits the modification to zero of any order for the reason that the obligor receives cash public assistance payments as provided for in ORS 25.245.

Stat. Auth.: ORS 25.080(4)(e)

Stats. Implemented: ORS 25.080(4)(e)

Hist.: JD 13-1991, f. 12-30-91, cert. ef. 12-31-91

137-050-0570

Immediate Enforcement of Arrears, Including State Debt

(1) The Administrator may take action to enforce and collect upon a child support order entered pursuant to ORS 416.400 to 416.470, including arrearages, from the date of issuance of the order.

(2) "Action to enforce and collect" as used in this rule and in ORS 416.415(9), 416.427(4) and 416.429(5) includes, but is not limited to income withholding as provided for by ORS 25.050, 25.310, 25.460 to 25.530, 416.445 and 419.513.

(3) "Arrearages", as used in this rule and in ORS 416.415(9) and 416.427(4) includes any amounts owed as state debt and ordered pursuant to ORS 416.415(8)(c), 416.427, or 416.430 and filed under ORS 416.440.

(4) For purposes of action to enforce and collect it shall be immaterial whether or not "arrearages" exist because they represent payments which were due on a monthly basis and not made, or because they were entered in a lump sum amount as state debt.

Stat. Auth.: ORS 416.415(9)

Stats. Implemented: ORS 416.415(9)

Hist.: JD 4-1992, f. 3-5-92, cert. ef. 3-16-92

137-050-0580

Establishing an Order for State Debt

(1) Whenever the Support Enforcement Division of the Department of Justice issues a notice and finding of financial responsibility, and if the Department of Human Resources is paying or has paid public assistance to or for the benefit of a child for whom child support is sought, the Administrator shall set state debt, for purposes of the statement required by ORS 416.415(2)(c), in accordance with the provisions of sections (2) through (4) of this rule.

(2) The amount of state debt stated in the notice shall be calculated by multiplying the number of months the Department of Human Resources has paid public assistance for the child or children for whom support is sought, times the amount of future monthly child support contained in the statement required by ORS 416.415(2)(b). There is no limit to the number of months of public assistance for which a state debt judgment may be sought.

(3) In determining the amount of state debt pursuant to this

rule, it shall be immaterial that the amount of assistance paid in a particular month for the benefit of the child or the child and caretaker was less than the amount of monthly support contained in the statement required by ORS 416.415(2)(b), provided that the amount of state debt does not exceed that pro-rata percentage of total assistance paid to the family, including the caretaker, which the children of the parent for whom the determination is being made represent as a percentage of all the children in the family who received assistance, and not reimbursed.

(4) SED may issue a Notice and Finding of Financial Responsibility which contemplates the establishment of a state debt judgment only. That is, it shall be sufficient for the issuance of such notice only that DHR has at some time in the past made a payment of public assistance as defined in ORS 416.410(1). Nothing in this rule requires that the establishment of state debt also requires the concurrent establishment of an order for current child support.

(5) The Administrator adopts the attached work sheet for the calculation of state debt under this rule. A completed copy of the worksheet adopted by this rule, or a copy of a worksheet substantially similar to the worksheet adopted by this rule, shall be attached to each order for state debt entered under the provisions of ORS Chapter 416.

Stat. Auth.: ORS 416.410

Stats. Implemented: ORS 416.410

Hist.: JD 12-1992, f. 5-14-92, cert. ef. 7-1-92; JD 19-1992, f. 11-13-92, cert. ef. 1-15-93

137-050-0590

Reopening of Paternity Cases

(1) When a party claims that a man established as the father of a child, or ordered to pay child support for a child, is in fact not the biological father of the child, the Support Enforcement Division may open or reopen the issue of paternity when all of the provisions of subsections (a) through (e) of this section apply:

(a) The Support Enforcement Division initiated the action which established paternity or ordered support;

(b) All parties have been contacted and agree to the reopening of the issue and to parentage testing;

(c) Parentage (genetic) tests have not been conducted;

(d) The order is one year old or less;

(e) Neither party asserts that the conclusive presumption of paternity created by ORS 109.070 applies.

(2) An order establishing paternity or ordering support will not be vacated, dismissed or set aside under this rule unless parentage tests exclude the man in question as the father of the child. Except for cases described in section (3) of this rule, SED shall not submit for the court's approval any order granting relief which requires repayment to the debtor of money paid by that debtor under the order.

(3)(a) Notwithstanding the provisions of sections (1) and (2) of this rule, the Support Enforcement Division may reopen the issue of paternity when, in its judgment, facts indicate that jurisdiction was not properly established, correct procedures were not followed or fraud was committed by one of the parties. In such an event, the issue of paternity may be reopened without regard to the age of the order. In such an event, the provisions of subsections (b) and (c) of this section apply;

(b) All parties must be given notice of SED's intent to reopen the issue at least 14 days before the issue is reopened. If notice is given and all parties consent to the reopening, the Support Enforcement Division may cause parentage tests to be conducted;

(c) If a party fails to respond or objects to the reopening, then both parties must be served with a motion to set aside the order, such motion to be supported by an affidavit setting forth the reasons.

(4) No order granting relief under this rule shall be effective without the approval of the circuit court under the authority of ORS 416.465 or ORCP 71.

Stat. Auth.: ORS 416.465

Stats. Implemented: ORS 416.465

Hist.: JD 15-1992, f. 8-20-92, cert. ef. 10-1-92

137-050-0595

Form Prescribed by the Administrator for Modification — ORS 416.425

(1) Any form of motion to modify a support order under ORS 416.425 shall be deemed to be approved by the Administrator as to form if it complies with the criteria set forth in subsections (a) through (c) of this section, or has been provided by the Administrator under section (2) of this rule:

(a) The motion shall be in writing and include the appropriate caption and case number;

(b) The motion shall set out the reasons for the modification;

(c) The motion shall state the telephone number and address of the moving party.

(2) The Administrator shall provide, upon request, a blank form of a motion to modify, which indicates on its face that it has been approved by the administrator, e.g., "SED Approved Form".

(3) Nothing in this rule requires the exclusive use of any particular form of motion to modify in a proceeding under ORS 416.425, provided however that the form used complies with the criteria set forth in section (1) of this rule, or has been provided by the Administrator under section (2) of this rule.

Stat. Auth.: ORS 416.425

Stats. Implemented: ORS 416.425

Hist.: JD 7-1992, f. 4-1-92, cert. ef. 4-15-92

137-050-0660

Effective Date of Modification Under ORS 416.425

(1) In any proceeding to modify a support order under ORS 416.425, the modification may be effective on or at any time after the date the motion to modify was filed. The date of filing is the date the motion to modify was prepared, if the motion is prepared by the Administrator. If the motion is prepared by a person or entity other than the Administrator, the date of filing is the date the motion is served upon the Administrator as required in ORS 415.425.

(2) For purposes of this rule "Administrator" means the Administrator of the Support Enforcement Division, an Oregon district attorney, or the administrator's or district attorney's authorized representative.

Stat. Auth.: ORS 416.425

Stats. Implemented: ORS 416.425

Hist.: JD 8-1992, f. 4-3-92, cert. ef. 5-1-92

137-050-0610

Paternity Establishment Procedures

(1) In any case referred by the Department of Human Resources (whether because of an assignment of support rights or by application for IV-D services) to establish paternity of a child, the provisions of sections (1) to (8) of this rule apply when the Support Enforcement Division of the Department of Justice is the entity which provides the paternity establishment services pursuant to ORS 25.080.

(2) When the case referred involves a child who is not yet born, the Support Enforcement Division will take no action to establish paternity or to provide locate services until such time as the child is born.

(3)(a) In all cases in which a child was conceived in Oregon, the Support Enforcement Division will initiate legal proceedings to establish paternity under ORS Chapter 416;

(b) "Past Support" for the child, as defined in ORS 109.155, and not owed to the state, cannot currently be requested using ORS Chapter 416;

(c) Notwithstanding the provisions of subsection (b), "state debt", as defined in ORS 416.410, shall be established as provided by ORS Chapter 416 and OAR 137-050-0580.

(4) In all cases in which a party alleges facts, which if true, conclusively establish paternity under ORS 109.070, and if a man other than the man who is alleged to be conclusively presumed as the legal father has been named by a party as a possible biological father of the child in question, the Support Enforcement Division will certify the case to the appropriate circuit court for a determination of whether the conclusive presumption found in ORS 109.070 applies.

(5) In all cases in which the mother states that more than one man could be the natural father of the child and parentage tests have excluded a man as the father of the child, the provisions of subsections (a) and (b) of this section apply:

(a) If there is only one remaining untested possible natural father, that man is constructively included as the father by virtue of the other man's exclusion as the father;

(b) If there are more than one remaining untested possible natural fathers, the Support Enforcement Division will initiate action against each man, either simultaneously or one at a time, to attempt to obtain parentage tests which either exclude or include the man.

(6) In all cases in which the mother states that more than one man could be the natural father of the child and parentage tests have included a man as the father of the child at a cumulative paternity index of at least 99, any other untested possible father(s) will be considered to be constructively excluded by virtue of the first man's inclusion.

(7)(a) The Support Enforcement Division will initially pay the costs of parentage tests, and will seek reimbursement of those costs, but may agree to waive the costs;

(b) If an alleged father fails to appear as ordered for parentage tests, but the mother and child have appeared for blood drawing, reimbursement will be sought from the alleged father for the costs incurred;

(c) The maximum amount allowed to be entered as a parentage test judgment against a party is the amount SED agrees to pay a parentage testing laboratory under contract;

(d) A judgment for blood test costs reimbursement will not be sought in any case in which any of the provisions of paragraphs (A) through (D) of this subsection apply:

(A) Against any person excluded as a possible father of a subject child;

(B) In any case in which the mother stated that more than one man could be the father of the child, and has been unable to name a most likely alleged father, and the man tested has not objected to the entry of an order establishing paternity;

(C) In any case in which the alleged father has applied for IV-D services and requested paternity establishment in accordance with OAR 137-050-0560;

(D) Against any person found to be the legal father for costs attributable to the testing of blood for other alleged fathers in any case in which the mother states that more than one man could be the father of the child.

(8) The Support Enforcement Division may dismiss or terminate a proceeding to establish paternity after notice to the parties that the case is being considered for dismissal or termination and that comments or objections should be made within ten days. Cases being considered for dismissal or termination must be forwarded for approval to the Administration office of the Support Enforcement Division, together with the complete case file, a memo explaining the facts of the case and why it should be dismissed or terminated, along with any comments received from the parties. However, approval of the dismissal or termination may be made by the Support Enforcement Division branch office if any of the provisions of subsections (a) through (e) of this section apply:

(a) No form of public assistance is being provided and the obligee or applicant for services requests dismissal or termination;

(b) Contact with the mother or applicant for services has been lost;

(c) One or more of the parties is deceased;

(d) The mother or applicant for services is uncooperative and no form of public assistance is being provided;

(e) The obligee is uncooperative and sanctions have been applied to or requested for the public assistance grant.

Stat. Auth.: ORS 25.080, 416.415 & 416.430

Stats. Implemented: ORS 25.080, 416.415 & 416.430

Hist.: JD 5-1993, f. 9-10-93, cert. ef. 10-1-93

137-050-0625

Order Establishing Paternity for Failure to Comply with Order for Parentage Test

(1) In an action to establish paternity initiated pursuant to ORS 416.415, the Administrator may serve simultaneously with the Notice and Finding of Financial Responsibility and administrative order for parentage tests.

(2) An administrative order for parentage tests may require either the mother of the child(ren) in question or a person who is a possible father of the child(ren) to file a denial of paternity in order to receive a parentage test, or it may provide for the drawing of blood prior to the party filing a responsive answer to the allegation of paternity.

(3) The administrator shall enter an order establishing paternity based upon a party's failure to appear for parentage testing, provided that all parties have been served with a Notice and Finding of Financial Responsibility and with an order requiring parentage tests if:

(a) The mother of the subject child(ren) has named the male party who failed to appear for parentage tests in a sworn statement as a possible father of the child(ren) in question; or

(b) A male party has claimed in a sworn statement to be the father of the child(ren) in question and the mother and her child(ren) have failed to appear for such tests.

(4) An order establishing paternity based on a failure to submit to parentage tests may be entered:

(a) Whether or not a responsive answer has been filed; and

(b) Whether or not corroboration exists to support a sworn statement of a party naming a male party as a father or possible father of the child(ren) in question, provided that the male party has either:

(A) Been named in a sworn statement by the mother as a possible father of the child; or

(B) Has named himself in a sworn statement as the father of the child.

Stat. Auth.: ORS 109.252

Stats. Implemented: ORS 109.252

Hist.: JD 3-1993, f. & cert. ef. 7-27-93

137-050-0630

Methods of Employer Reporting

(1) Employers subject to the reporting requirements of Chapter 381, Oregon Laws, 1995 and other employers who choose to report voluntarily may transmit the information required by that Act by any one of the methods specified in subsections (a) through (e) of this section.

(a) By mailing to the Support Enforcement Division, Employer Reporting Program, Suite 175, 1495 Edgewater NW, Salem, OR 97304, a completed copy of a form created for this purpose by the Support Enforcement Division.

(b) By mailing to the Support Enforcement Division at the address specified in subsection (a) of this section any document or computer printout, or

copy thereof, created or selected by the employer which carries the name and social security number of the employee and the name, address and state employer identification number of the employer. For purposes of this rule the state employer identification number of the employer means the employer's Oregon Tax Identification Number.

(c) By facsimile transmission ("FAX") of any document authorized by this rule to the Support Enforcement Division of the Department of Justice at telephone number 1-800-360-3330 or 1-503-986-6161.

(d) By mailing a magnetic tape or diskette, formatted as specified by the Support Enforcement Division, to the Support Enforcement Division, Employer Reporting Program, 1495 Edgewater NW, Suite 175, Salem, OR 97304.

(e) By any other method approved by the Support Enforcement Division.

(2) The Support Enforcement Division will provide reporting forms and pre-addressed, postage paid labels or envelopes to employers who request them to report by any of the reporting methods specified in subsections (1)(a) through (e) of this rule.

(a) An employer may make the request in writing addressed to Support Enforcement Division, Employer Reporting Program, Suite 175, 1495 Edgewater, NW, Salem, OR 97304.

(b) An employer may make the request by telephone to number 503-378-6766.

(c) An employer may make the request by facsimile ("FAX") transmission to number 1-800-360-3330 or 1-503-986-6161.

(3) Nothing in this rule authorizes the employer to report any information to the Support Enforcement Division which is not required by Chapter 381, Oregon Laws, 1995.

(4) Nothing in this rule authorizes the employer to report the required information in a manner that does not protect the confidentiality of the information transmitted. For instance, a postcard that does not physically conceal the transmitted information would not protect the confidentiality of the information and is, therefore, not authorized by this rule.

(5) The Support Enforcement Division shall provide, by mail, to affected employers the information the employer will need to comply with this rule.

Stat. Auth.: ORS 180.340

Stats. Implemented: Chapter 381, Oregon Laws 1995

Hist.: JD 9-1993, f. 11-3-93, cert. ef. 11-4-93; JD 9-1995, f. & cert. ef. 10-27-95

DIVISION 76

COMPENSATION FOR VICTIMS OF CRIME

Crime Victims' Compensation Program

137-076-0000

Authority for Rules

These rules are adopted under the Department of Justice's authority contained in ORS 147.205(3).

Stat. Auth.: ORS 147.205(3)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0005

Scope of Rules

These rules implement ORS 147.005 through 147.365 related to the compensation of crime victims.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0010

Definitions

As used in ORS 147.005 through 147.365, unless the context requires otherwise:

(1) "Program" means the Crime Victims' Compensation Program.

(2) "Administrator" or "Program Director" means the Administrator or Program Director of the Crime Victims' Compensation Program as designated by the Attorney General of the State of Oregon.

(3) "Failure to Cooperate" means any act or omission by a victim that prejudices a law enforcement agency in the timely investigation of a crime or which causes the agency to abandon its investigation, or which prejudices a prosecuting official in a timely prosecution of the crime or causes or contributes to a decision by the official to abandon prosecution.

(4) "Good Cause for Failure to Cooperate" exists when the victim receives express or implied threats that cooperation will result in death or serious physical injury to the victim or another person.

(5) "Good Cause for Failure to Notify the Appropriate Law Enforcement Officials within 72 Hours After the Perpetration of the Crime" means physical or mental trauma causing an inability to report the crime as required.

(6) "Substantially Attributable to the Victim's Wrongful Act" means directly or indirectly attributable to an intentional and unlawful act from which there can be a reasonable inference that, had the act not been committed, the crime complained of likely would not have occurred.

(7) "Wrongful Act" includes but is not limited to participating, either directly or indirectly, in the cultivation,

purchase, sale, manufacture or possession of a controlled substance as defined by ORS 475.991 to 475.995 and 167.225.

(8) "Substantial Provocation" means a voluntary act from which there can be a reasonable inference that, had the act not occurred, the crime likely would not have occurred.

(9) "Contribution" means a voluntary action by the victim which, directly or indirectly, produced the victim's injury. In determining whether contribution exists, the Department may consider all relevant circumstances of the behavior of the victim that may have contributed to the victim's injury or death, including but not limited to gestures, words, prior conduct and the use of alcohol or controlled substances.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 1-1987(Temp), f. & ef. 1-8-87; JD 2-1992, f. & cert. ef. 3-2-92; JD 18-1992, f. 10-30-92, cert. ef. 11-2-92

137-076-0015

Authority of Administrator and Program Director

Any orders issued by the Administrator or Program Director of the Program in carrying out the Department of Justice's authority to administer ORS Chapter 147 and the rules adopted pursuant thereto are considered orders of the Department of Justice and Attorney General of the State of Oregon.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0020

Definition of Reasonable Expenses

(1) As used in this rule, "necessary services" are those services necessary for the treatment of physical and/or psychological injury suffered by the victim as a direct result of a crime.

(2) For purposes of ORS 147.035, reasonable hospital expenses shall be limited to expenses for necessary services provided by licensed hospitals and by other health care facilities licensed to provide services that may otherwise be supplied by hospitals.

(3) For purposes of ORS 147.035, reasonable medical expense shall be limited to ambulance expenses and expenses for necessary services provided by persons licensed under ORS Chapters 677 and 679. Medical treatment provided by any other medical provider is not reimbursable unless at the time treatment began it was approved by and provided under the supervision of a physician licensed under ORS Chapters 677 and 679, and further that the other medical provider is licensed under the provisions governing that provider's profession.

(4) For purposes of ORS 147.035, reasonable psychiatric, psychological or counseling expenses are limited to expenses for necessary services provided by psychiatrists or physicians licensed under ORS Chapter 677, or psychologists, licensed clinical social workers, licensed professional counselors, or licensed marriage and family therapists licensed under ORS Chapter 675.

(5) For purposes of ORS 147.035, compensable rehabilitation expenses shall be limited to expenses for necessary services to provide physical rehabilitation or vocational training.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92; JD 18-1992, f. 10-30-92, cert. ef. 11-2-92

137-076-0025

Lost Earnings Compensation

(1) Net lost earnings shall be computed on the basis of the victim's actual documented net earnings determined as of the date of the compensable injury. Dependency benefits shall be computed on the basis of the deceased victim's documented net earnings at the time of death. Possible future earnings shall not be considered as a basis for lost earnings compensation.

(2) Lost earnings compensation shall accrue only during the period of medical disability as confirmed by a medical practitioner licensed under ORS Chapters 677 and 679.

(3) Where a replacement person is hired to fulfill the duties of an injured victim and the cost of this replacement person is a direct financial cost to the victim, such documented replacement cost shall be used as the basis for lost earnings compensation, but in no instance shall the compensation exceed the maximum weekly amount of \$200 or an aggregate of \$10,000.

(4) Loss of support compensation shall be based on the victim's documented net earnings at the time of death. The net amount shall be divided by the number of dependents, including the victim. The result shall be based on the number of survivors, not to exceed the maximum weekly amount of \$200.

(5) Loss of support compensation shall include the documented loss of child support. Loss of child support shall be based on the amount of child support received by the child at the time of the victim's death.

(6) Dependency compensation benefits shall be paid to dependent children under 18, dependent spouse of a deceased victim until remarriage, and any relative who was a financial dependent of the deceased victim at the time of the death of the victim.

(7) Where a deceased victim and surviving spouse both have income at the time of the criminal occurrence resulting in the death of one spouse, the independent income of each spouse shall be used to determine dependency benefits.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0030

Time Within Which a Claim Must be Filed or Good Cause Shown for an Extension of the Time Within Which a Claim Must be Filed

(1) A claim shall be filed in the office of the Program, Oregon Department of Justice, either in person or by mail, and shall be deemed filed when received by the Department.

(2) "Good cause for failure to file a claim within six months of the date of the crime" shall include lack of knowledge of the Program, failure of an investigating officer to provide information as provided for in ORS 147.365, or mental or physical trauma sustained by the victim rendering the victim incapable of filing the claim in a timely fashion.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0032

Abandonment of Claim

If an applicant fails to respond within 60 days to inquiries and communications by the Program, the Program shall send a notice by certified mail, return receipt requested, to the applicant's last known address informing the applicant that the claim will be closed as abandoned. If the applicant does not respond within 30 days of the mailing of the letter, the claim shall be closed. Upon an applicant's request, the claim may be reopened for good cause within one year from the date the claim is closed.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 2-1992, f. & cert. ef. 3-2-92

137-076-0034

Closure of Claim

An applicant may request that the claim be withdrawn or closed without a decision. This request must be in writing. The claim cannot thereafter be reopened.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 2-1992, f. & cert. ef. 3-2-92

137-076-0040

Payment of Benefits

(1) Lost earnings compensation benefits or dependency benefits shall be computed as a daily amount and paid monthly based on a five-day week, Monday through Friday.

(2) In no instance shall lump sum compensation awards be made unless the total of the lump sum award has already been accrued.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0045

Emergency Award

In the event an emergency award or overpayment is made and it is later determined that the claim is not compensable or that there has been an overpayment, the Department of Justice shall have a right to commence a civil action for the recovery of such monies.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0050

Payment of Dependency Awards for Minors

In the event that a dependency compensation award is allowed to a minor child that is residing with a natural parent who is also the spouse of the deceased victim and entitled to a dependency award, the award for the minor child shall be paid directly to the surviving spouse.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0055

Fraudulent Information

Any claimant who intentionally misrepresents information upon which the Program materially relies to determine or pay benefits shall forfeit the right to compensation and the claim shall be denied with prejudice.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0060

Third Party Claims

If the Program, after investigation and payment of benefits, determines that another party, other than the assailant, may have legal responsibility for the injuries sustained by the victim, the Program may, in its discretion, bring an action against said party for the recovery of the amount of monies that the Program has expended on behalf of the victim. In the event such an action is brought, the victim shall be joined as a complaining party and any recovery made that is in excess of the amount of benefits that the Program has awarded to the victim shall accrue to the victim.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

137-076-0065

Negotiated Settlements

If the victim is successful in a claim or legal action against the assailant or another party and is able to recover monetary damages, the Program shall be subrogated for the full amount of payments made by the Program. However, the Program may, at its sole discretion, waive all or part of its recovery, if it is determined to be in the best interests of the Program and the victim.

Stat. Auth.: ORS 147.205(3)

Hist.: JD 4-1983, f. & ef. 9-1-83; JD 2-1992, f. & cert. ef. 3-2-92

DIVISION 78

CRIME VICTIMS/WITNESS ASSISTANCE PROGRAMS

137-078-0000

Purpose

ORS 147.259 and 147.265 ("the Act" herein) provides authority to the Attorney General or the designee thereof to approve for funding those victim/witness assistance attorneys maintained and administered by district or city attorneys that in the determination of the Attorney General or designee will provide certain comprehensive services. OAR 137-078-0005 through 137-078-0050 provide procedures and criteria under which such approval determinations are made.

Stat. Auth.: ORS Ch. 147

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0005

Designee

The designee of the Attorney General under the Act is the Administrator of the Office of Special Compensation Programs of the Oregon Department of Justice.

Stat. Auth.: ORS Ch. 147

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0010

Duration of Approval

(1) Programs will continue approved for funding indefinitely subject to the availability of assessment revenues, OAR 137-078-0050 and this rule:

(a) The program Director shall, at the time of submission of the annual report under OAR 137-78-045, state whether or not the approved program will continue in operation for the fiscal year ending June 30;

(b) Any deletion of a specific service from an approved program requires a new approval, based upon a new program application, for continued funding. The addition of services to an approved program does not require a new approval or new program application for continued funding.

(2) Programs temporarily approved for funding will receive funding for up to a 12-month period, with an end date of June 30. A new program application must be submitted each year for temporary approval in order to continue funding.

Stat. Auth.: ORS Ch. 147

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0015

Operational Status and Funding

(1) A program to be approved shall be in operation at the time application for approval is made or shall be able to begin operation of a victim/witness assistance program within 30 days after granting of approval.

(2) A program approved for funding will be eligible to receive returned monies collected during the month in which approval was granted and for subsequent months.

Stat. Auth.: ORS Ch. 147

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0020

Temporary Approval

(1) Temporary approval may be obtained when it is demonstrated in the application that it would not be practical at the then current time for the district or city attorney to establish a program that provides each of the comprehensive service categories specified under OAR 137-078-0030(1) through (11), and if it is demonstrated that OAR 137-078-0030(1), (3), (10) and (11) will be accomplished as well any three of OAR 137-078-0030(4), (5), (6), (7), (8) and (9).

(2) Applications for temporary approval shall contain a time table for implementing those additional service categories under rule 137-078-0030 that cannot be provided at the beginning of the funding period.

(3) Temporary approvals shall carry the condition that continued approval is contingent upon implementation of the time table for additional services, and that temporary approval for subsequent years will be contingent upon the addition of services to satisfy at least one more service category each year until all service categories under OAR 137-078-0030 are satisfied by the program.

Stat. Auth.: ORS Ch. 147

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0025

Application Process

The application for program approval shall be made upon a form supplied by the Oregon Department of Justice, Office of Special Compensation Programs, and shall include the following information:

(1) Face Sheet — The program title, program director,

financial officer and signature of the district or city attorney shall be included on the face sheet.

(2) Program Narrative — The program narrative is the applicant's detailed statement about the program. The following information shall be included:

(a) An introduction giving a brief description of the county or city which the victim/witness assistance program will serve. The description shall include:

(A) Crime victimization rates in the county/city, including crimes against persons and property crimes;

(B) County/city population; and

(C) Number of courts.

(b) A description or list of existing community resources and how these resources will interact with the victim/witness assistance program;

(c) The objectives of the program as to each of the program services to be provided and an implementation plan specifying the specific services that will be provided to meet those objectives. Specific services to be provided shall be consistent with those set forth under the service categories in OAR 137-78-030.

(3) Appendix — Items which serve to further clarify the narrative, but are too long to be contained in the text, are included in the Appendix portion of the application.

Stat. Auth.: ORS Ch. 147

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0030

Program Content

The Victim/Witness Assistance Program shall provide comprehensive services to victims and witnesses of all types of crime, with particular emphasis on serious crimes against persons and property, and shall not restrict services only to victims or witnesses of a particular type of crime. The comprehensive service categories provided shall be as follows:

(1) Service Category: Case Status/Progress Information: **“Inform Victims and witnesses of their case status and progress”**:

(a) Service Definition: To provide a procedure for systematic notification to victims and witnesses of crime which are the subject of prosecution, and family members of all deceased victims the subject of criminal prosecutions, of any significant developments in the proceeding in which they are involved, including informing such victims and witnesses and family members of deceased victims of the final disposition of the case;

(b) Specific Service:

(A) Notify victims of felony* crimes and families of deceased victims, the subject of such crimes, of:

NOTE: * May not be applicable to city attorneys.

(i) The date of the arraignment of the defendant;

(ii) The charges upon which the defendant was arraigned;

(iii) A tentative trial date when it becomes known; and

(iv) Hearing dates and cancellations.

(B) Notify victims of felony* crimes and witnesses thereto and families of deceased victims, the subject of such crimes, of the final disposition of the case in which they are involved;

NOTE: * May not be applicable to city attorneys.

(C) Notify victims of misdemeanor crimes of the final disposition of the case in which they are involved.

(2) Service Category: Advocate Duties: **“Perform advocate duties for victims within the criminal justice system”**: Service Definition: (The services identified in sections (3), (4), (5), (7), (8) and (11) of this rule, are the services to be performed under this category.)

(3) Service Category: Assistance in Recovering Property and Obtaining Restitution or Compensation for Expenses: **“Assist victims in recovering property damaged or stolen and obtaining restitution or compensation for medical and other expenses incurred as a result of the criminal act”**:

(a) Service Definition: To provide a procedure for systematic assistance to victims of crimes which are the subject of prosecution and family members of all deceased victims the subject of criminal prosecution in recovering damaged or stolen property and in obtaining restitution or compensation for medical

or other expenses incurred as a result of the criminal act;

(b) Specific Service:

(A) Identify/contact victims of crime who have sustained monetary losses and obtain from them verification of those losses (estimates of damage, salary verification, etc.);

(B) Make available to the courts itemized and verified lists of losses incurred by the victims of crime;

(C) Assist victims when it is necessary for them to attend a restitution hearing;

(D) Assist victims who inform the program of non-receipt of restitution payments;

(E) Refer victims to those criminal justice system authorities responsible for the return of property damaged or stolen;

(F) Intercede on behalf of victims with those criminal justice authorities responsible for the return of property in order to obtain the early release of victims' property.

(4) Service Category: Preparation of Victims for Court Hearings: **"Prepare victims for impending court hearings by informing them of procedures involved"**:

(a) Service Definition: To provide a procedure for systematic notification to victims of crime of the procedures involved in pending court hearings;

(b) Specific Service: Prepare crime victims, either by written or verbal communication, by explaining to them the various court stages through which a case progresses (preliminary hearing, grand jury, trial, etc.).

(5) Service Category: Accompanying Victims to Hearings: **"Accompany victims to court hearings"**

(a) Service Definition: To provide, when deemed necessary or when requested, accompaniment of victims to court hearings;

(b) Specific Service:

(A) Upon request or when deemed necessary by the program staff, arrange for program person to accompany victims and witnesses to the courtroom;

(B) When deemed necessary by program staff, the program person to remain with victims or witnesses throughout their court appearances.

(6) Service Category: Involving Victims in Decision-Making Process: **"Involve victims when possible in the decision-making process in the criminal justice system"**

(a) Service Definition: To provide a procedure for systematic inclusion of victims' input into the decision-making process, both at the prosecutorial and the judicial level;

(b) Specific Service:

(A) In whatever ways appropriate, involve the crime victims in the sentencing process, including appearances at sentencing hearings, making the court aware of the victim's presence, and facilitating the victim's involvement in the preparation of presentence reports and the "Victim Impact Statement";

(B) Involve the victims in the plea negotiation process when appropriate.

(7) Service Category: Assistance in Obtaining Return of Property Held as Evidence: **"Assist victims in obtaining the return of property held as evidence"**:

(a) Service Definition: To provide a procedure for systematic assistance to victims and witnesses of crimes which are the subject of prosecution and all family members of all deceased victims the subject of criminal prosecution to obtain the return of property held as evidence;

(b) Specific Service:

(A) Refer victims and witnesses to those criminal justice system authorities responsible for the return of property held as evidence;

(B) Intercede on behalf of victims and witnesses with those criminal justice authorities responsible for the return of property in order to obtain the early release of victims' or witnesses' property;

(C) Direct participation in and administration of a system to facilitate the early release of victims' or witnesses' property (i.e., by use of photographs).

(8) Service Category: Victims' and Witnesses' Logistical Problems: **"Assisting victims with personal logistical problems related to court appearances"**:

(a) Service Definition: To provide a procedure for systematic assistance to victims and witnesses having personal problems militating against appearances in court in order to meet such court appearances;

(b) Specific Service:

(A) Arrange for the provision of temporary child care when appropriate;

(B) Upon request, arrange for transportation of victims/-witnesses when deemed necessary for their participation in the criminal justice proceedings;

(C) When requested, intercede with an employer on the victims'/witnesses' behalf where the need for court appearance has caused, or will cause, an employed person to lost time from work and possibly jeopardize his/her employment.

(9) Service Category: Community Resource Development: **"Developing community resources to assist victims of crime"**:

(a) Service Definition: To develop a procedure for systematically providing victims and witnesses of crime with information as to, and referrals to, existing community resources responsive to their needs;

(b) Specific Service:

(A) Maintain a comprehensive, up-to-date directory of existing agencies with individuals within the community which provide relevant services to citizens, such as financial counseling, shelter and food. This directory shall include the general eligibility requirements, services offered, hours of operation, location, telephone number, and a contact name;

(B) When deemed necessary, refer victims and witnesses, and particularly families of deceased victims, directly to appropriate community service resources in order to meet immediate and long-term needs of these individuals. Follow-up on referrals to ensure that the victim's/witness' needs have been met.

(10) Service Category: Orientation to Crime Victim Compensation Benefits: **"Assist victims of crimes in the preparation and presentation of claims against the Criminal Injuries Compensation Account"**:

(a) Service Definition: To provide a procedure for systematic notification of victims and relatives of deceased victims of compensable crimes under ORS 147.005 to 147.365 of the existence of the Crime Victim Compensation Program in the Oregon Department of Justice, including explaining to such victims and relatives of the benefits available through Crime Victim Compensation, how to apply for benefits and assisting, when requested, those demonstrating inability to do so independently, in gathering information and completing applications in order to perfect a claim;

(b) Specific Service:

(A) Notification of the existence of the Crime Victim Compensation Program and explanation of available benefits and how to apply shall be accomplished by providing such victims and relatives with an informational brochure and an application form;

(B) When requested, the program shall have program persons available to assist such victims and relatives, not able to do so independently, in gathering information and completing their applications in order to perfect a claim for compensation under ORS 147.005 to 147.365.

(11) Service Category: Encouragement and Facilitation of Testimony: **"Generally encourage and facilitate testimony by victims of and witnesses to criminal conduct"**:

(a) Service Definitions: To develop procedures that systematically ensure that the interests, needs, and welfare of victims and witnesses are attended to, toward the end that they are encouraged to testify in all proceedings to which they are called;

(b) Specific Service:

(A) Orient personnel of the criminal justice system, who will or may have contact with victims or witnesses, to the needs of victims or witnesses in general and in special circumstances, the needs of particular victims and/or witnesses;

(B) Provide a safe waiting area separated from the defendant, defendant's family, friends and witnesses;

(C) Notify the appropriate law enforcement agency if protection of the victim or witness is requested or deemed necessary by staff;

(D) When deemed necessary, advise the proper authorities of the need for a "no contact" condition of release and/or sentence;

(E) In those cases where tampering with and/or harassment of a victim or witness appears provable, to act to ensure that proper charges are filed and given priority;

(F) When hearings are cancelled, act to ensure that victims and/or witnesses who have been requested or subpoenaed to attend are notified not to appear.

Stat. Auth.: ORS Ch. 147

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0035

Maintenance and Retention of Records

The program shall maintain accurate, complete, orderly, and separate records. All records and documents must be adequately stored and protected from fire and other damage. All record books, documents, and records related to the program must be accessible to the Administrator of the Special Compensation Programs or his designee for inspection and audit. All records must be retained for at least three years after submitting the annual report or the date ending the program period, whichever is later.

Stat. Auth.: ORS Ch. 147

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0040

Fiscal and Contracting Requirements

(1) Subsidiary record documentations, source documents, e.g., invoices, time and payroll records, and indirect cost computations are the instruments which bring about the actual expenditure of funds. All ledger account entries must be supported by secondary or intermediate records in the original source documentation. Unless commonly accepted accounting standards and practices have been followed, audits may result in non-renewal of program approval.

(2) Penalty assessment funds returned to a district or city attorney under the provisions of the Act may not be used for expenditures that a district or city attorney's office would incur if it did not have a victim/witness assistance program. The monies returned are to be exclusively used for the operation of the victim/witness program.

(3) Programs are required to be prudent in the acquisition of equipment. Careful screening should take place before purchasing equipment to be sure that the property is needed and the need cannot be met with the equipment already in the possession of the program funds for the purchase of new equipment required for a program that is already available for use within the county or city will be considered unnecessary purchases.

(4)(a) Professional services may be performed under contract by individuals and organizations, when such services are not readily available within the program and are clearly consistent with the intent of the Act. Employees on the program's payroll are not included;

(b) Under the Act, city and district attorneys are required to administer the victims/witness assistance program. This is understood as serving the objective of incorporating these programs as an integral function of the prosecutor's office, to the end that there is an efficient and coordinated merger between the interests of serving the needs of the victim/witness and the prosecution of crime. Accordingly, no contract may be entered into which will allow the program to be administered independently of the control and policy direction of the city or district attorney whose program is the subject of the contracted service. Any contract must:

(A) Detail those specific services identified in the approved program that are to be carried out by the contractor;

(B) Provide for coordination of the contractor's functions with those of the prosecutor's office, including as appropriate to the services to be performed, for the contractor's access to the prosecutor's records and personnel, and for the exchange of such communications between the prosecutor's office and the contractor as are necessary to the the ongoing performance of the contractor's services and to the prosecutorial function;

(C) Provide that ultimate program control and policy

direction not addressed in the agreement shall be retained as the responsibility of the prosecutor and that he or she shall provide timely consideration and written determination thereof; and

(D) Provide a procedure for routine review by the city or district attorney of the contractor's performance, facilitated by quarterly activity reports to be made by the contractor to the prosecutor outlining the activities and accomplishments during the report period, any problems in operation or implementation of the contracted services, and any critical observations relative to the program's operation.

Stat. Auth.: ORS Ch. 147

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 5-1983(Temp), f. & ef. 9-9-83

137-078-0045

Annual Report

The Program Director shall each year of funding submit an annual report to the Administrator of the Special Compensation Programs. The report shall be made upon a form supplied by the Department of Justice. The report shall be submitted within 30 days of receiving the forms and instructions, but not later than August 31 of the funding year. The report shall include the following information. Face Sheet — The program title, program director, period of report, signature of person reporting, and signature of the district or city attorney certifying the truth and accuracy of the report. The sheet shall also contain the verification of continued operation specified in OAR 137-078-0010(1).

(2) Program Narrative - A description of the implementation and operation of each service provided by the victim/witness assistance program during the report period. The following subject areas shall be included:

(a) Activities and accomplishments completed during the report period in terms of meeting of objectives set forth in the approved program plan. Copies of any brochures or pamphlets, policies, procedures, guidelines or rules that have been developed for administration of the program, as well as controls for professional services, shall be attached;

(b) Personnel and staffing, which will include the number of positions (full-time and part-time) and volunteers;

(c) Problems in operation or implementation of service in the program and critical observations, if any.

(3) Data Statistical information on services provided as specified in the form supplied by the Department of Justice.

(4) Financial Report - A summary of revenues and expenditures of the program in line item detail, including but not limited to the following expenditure categories:

(a) Personnel services - Salaries;

(b) Personnel services - Benefits;

(c) Operating expenses, such as rent, telephone, supplies, postage, utilities, etc.;

(d) Equipment acquisitions;

(e) Contractual services (see OAR 137-078-0040(4));

(f) Additionally, a copy of the city's or county's annual financial report, accompanied by an independent auditor's report, shall be submitted to the Administrator of the Special Compensation Programs as soon as is practical upon completion of the entity's annual audit.

Stat. Auth.: ORS Ch. 147

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

137-078-0050

Disapproval of Program for Funding — Discontinuance of Funding

(1) The Administrator of the Special Compensation Program may disapprove any program for funding that does not comply with the Act or these rules. Similarly, he may discontinue approval of funding for these reasons or for the program's failure to comply with the approved program. Prior to any disapproval or discontinuance of funding, the Administrator of the Special Compensation Programs will contact the district or city attorney in an effort to assist in development of an approvable program or in correcting any deviation from requirements. In the case of discontinuance of funding, 30-days advance notice will be provided by the Administrator of the Special Compensation

Programs to the district or city attorney.

(2) A district or city attorney may request reconsideration of any decision resulting in the disapproval of a victim/witness assistance program for funding or in the discontinuance of funding. The process is as follows:

(a) The district or city attorney shall first request reconsideration in writing to the Administrator of the Special Compensation Programs, detailing his reasons for disagreement with the Department's decision. The Administrator will reconsider any decision for which request for reconsideration is received, and will notify the district or city attorney within a reasonable period of time in writing of the reconsideration decision;

(b) Any district or city attorney who requests review by the Administrator and who disagrees with the reconsideration decision may appeal to the Deputy Attorney General. Requests for the Deputy Attorney General's review shall be in writing. The Deputy Attorney General's decision will be in writing and will be final.

Stat. Auth.: ORS Ch. 147

Hist.: JD 5-1983(Temp), f. & ef. 9-9-83; JD 1-1984, f. & ef. 3-5-84

DIVISION 80

CRIME VICTIM'S COMPENSATION

137-080-0005

Definitions

As used in these rules:

(1) "Administrator" means the administrator of the office of Special Compensation Programs of the Oregon State Department of Justice.

(2) "Contract" means a contract by a person or legal entity with any individual charged with or convicted of committing a compensable crime in the State of Oregon or found guilty except for insanity with regard to such a crime, or with a representative or assignee of that individual, for the payment of money in return for the right to reenact such crime, or to describe the individual's thoughts, opinions or emotions regarding the crime, in a motion picture, book, magazine, article, tape recording, phonograph record, radio or television presentation or live entertainment of any kind.

(3) "Compensable Crime" has the meaning under ORS 147.005.

(4) "Department" means the Department of Justice of the State of Oregon.

(5) "Dependent" has the meaning under ORS 147.005.

(6) "Escrow Account" means an account established by the Department with the State Treasurer dedicated for the purpose of Oregon Laws 1985 Chapter 552, Section 3.

(7) "Judgment" means a money judgment received in a civil action for damages suffered as a result of a compensable crime.

(8) "Victim" has the meaning under ORS 147.005.

Stat. Auth.: ORS Ch. 147

Hist.: JD 3-1985(Temp), f. & ef. 9-20-85; JD 1-1986, f. & ef. 1-15-86

137-080-0010

Determining Contracts

(1) Upon receipt of information concerning a contract, or a judgment or restitution order which may be subject to the provisions of Section 3, Chapter 552, Oregon Laws 1985 the administrator shall promptly investigate as necessary and determine whether the subject contract, judgment or restitution order falls within the provisions of said statute. Upon completion of such investigation, the administrator shall issue in writing a proposed determination and/or order with regard to the contract or matter in question.

(2) Written notice of the proposed determination and/or order shall be served in the same manner as service of a summons under the Oregon Rules of Civil Procedure (ORCP) on the contracting party or parties, the person charged with, convicted, or found guilty, except for insanity of the crime, and any known victims or dependents of deceased victims of the crime, and by certified

mail, return receipt requested on such other persons or legal entities as the administrator may determine have an interest in the contract or subject matter of the proposed determination and/or order. Such notice shall contain the following statement:

"This proposed determination and/or order will become final within 30 days of the date of service of this notice unless a hearing is requested in writing by an interested party. If you disagree with the proposed determination and/or order, you have the right to a hearing before the Department of Justice prior to a final determination in this matter. A request for a hearing must be made in writing addressed to: Administrator, Special Compensation Programs, Oregon State Department of Justice, 100 Justice Building, Salem, Oregon 97310. The request must state the reason for your disagreement with the proposed determination and/or order, and your interest in this matter."

(3) If a hearing is not requested within the time allowed, the proposed determination and/or order shall become the final decision of the Department.

(4) Upon receipt of a request for a hearing, the administrator shall conduct or shall appoint a hearing officer to conduct a hearing on the matter.

(5) The party requesting the hearing and all persons or entities mentioned in section (2) of this rule shall be notified in writing of the time, place and purpose of the hearing and informed of the rights of a party under ORS 183.413. A copy of the request for hearing shall also be provided. The notice shall be mailed certified mail, return receipt requested, not less than ten days before the date of the hearing.

(6) Hearings shall be conducted as a contested case in accordance with ORS Chapter 183 and the Attorney General's Model Rules of Procedure.

(7) Whenever the administrator determines that a substantial danger exists that moneys paid or owing to a person charged with or convicted of a crime pursuant to a contract which may be subject to the provisions of Section 3, Chapter 552, Oregon Laws 1985 Chapter 552, may be concealed, wasted, converted, assigned, encumbered, disposed of, or removed from the state, prior to a final decision of the Department on the applicability of the statute to the contract; or where a necessary party to the determination cannot be served with notice of the Department's proposed determination and order despite diligent efforts to do so; the administrator may issue an emergency determination on behalf of the Department providing for the turning over of such moneys to the Department, pending the outcome of a hearing where requested and a final decision by the Department.

Stat. Auth.: ORS Ch. 147

Hist.: JD 3-1985(Temp), f. & ef. 9-20-85; JD 1-1986, f. & ef. 1-15-86

137-080-0015

Notice of Establishment of an Escrow Account

In the case where a victim of crime is deceased, the notice to be published by the Department for five years from the establishment of an escrow account, under Section 3, Chapter 552, Oregon Laws 1985, shall advise dependents of such victims of the escrow moneys' availability to satisfy judgments for damages suffered as a result of the crime.

Stat. Auth.: ORS Ch. 147

Hist.: JD 3-1985(Temp), f. & ef. 9-20-85; JD 1-1986, f. & ef. 1-15-86

137-080-0020

Disbursement of Moneys in the Escrow Account

(1) Moneys in the escrow account established under Section 3, Chapter 552, Oregon Laws 1985 will be disbursed by the Department to pay:

(a) Restitution orders under ORS 137.103 to 137.109; and

(b) Judgments as defined in section (1) of this rule.

(2) Payments will not be made from the escrow account on the basis of a judgment until either the amounts of all unsatisfied judgments are determined, or it is determined that the payment for an unsatisfied judgment will not diminish the escrow account so that other potential victim claims could not be satisfied. Escrow accounts having insufficient funds to meet all judgments

presented by victims or dependents of deceased victims shall be prorated on the basis of the amounts of the unsatisfied judgments or partially satisfied judgments.

Stat. Auth.: ORS Ch. 147

Hist.: JD 3-1985(Temp), f. & ef. 9-20-85; JD 1-1986, f. & ef. 1-15-86

137-080-0025

Notice of Action for Damages by Beneficiary of an Escrow Account

If any person or the representative of any person who has received an award from the Department under ORS Chapter 147 or any victim or dependent of a deceased victim or their representative who may because of a resulting judgment become the beneficiary of an escrow account established under Section 3, Chapter 552, Oregon Laws 1985 brings an action for damages against the person or persons criminally liable for injury or death giving rise to an award or to the establishment of an escrow account, he or she shall give written notice to the Department of the commencement of such action at the time such action is commenced. Such notice shall be served personally or by certified mail, return receipt requested, upon the administrator of the Department's Office of Special Compensation Programs. Such persons shall keep the administrator timely apprised in writing of any subsequent settlements, judgments, or other disposition of such actions.

Stat. Auth.: ORS Ch. 147

Hist.: JD 3-1985(Temp), f. & ef. 9-20-85; JD 1-1986, f. & ef. 1-15-86

137-080-0030

Contracts with Convicted Persons to Tell Story of Crime

(1) Contracts described in Section 3(1), Chapter 552, Oregon Laws 1985 include any such contract under which payment is due, on or after September 20, 1985, to an individual charged with or convicted of committing a compensable crime (as defined in ORS 147.005) in this state, or who is found guilty, except for insanity, with regard to such a crime, or who is the representative or assignee of any such individual. A copy of such contracts shall promptly be submitted to the Department by any person or entity contracting with an individual, representative or assignee described above.

(2) Monies payable to the Department pursuant to Section 3(1), Chapter 552, Oregon Laws 1985, for deposit into escrow include any monies which would otherwise, under the terms of a contract described in section (1) of this rule, be paid to the accused or convicted individual, the individual found guilty except for insanity, or the representative or assignee of such individuals, on or after September 20, 1985.

(3) Earnings, payments to and profits of the author and publisher under the contract are not subject to payment to the Department for deposit into escrow unless the author or publisher is also the accused or convicted individual, the individual found guilty but for insanity, or that individual's representative or assignee.

Stat. Auth.: ORS Ch. 147

Hist.: JD 4-1985, f. & ef. 11-22-85

DIVISION 90

CRIMINAL INTELLIGENCE UNIT

137-090-0000

Purpose

The purpose of these rules is to provide standards, policies and procedures for the operation of the Criminal Intelligence Unit (CIU) of the Organized Crime Section.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0010

Authority

The Criminal Intelligence unit operates under the authority of ORS 180.610(2), (3) and (4).

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0020

Abbreviations

(1) CIU: Criminal Intelligence Unit.

(2) CIUS: Criminal Intelligence unit Supervisor.

(3) CJD: Criminal Justice Division.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0030

Criminal Intelligence Unit Mission

The mission of the Criminal Intelligence Unit is to provide the Department of Justice and Oregon law enforcement agencies with a statewide criminal information base and analyses which meets their needs to protect the public and suppress criminal activity.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0040

Public Access

(1) The Criminal Intelligence Unit will comply with the the Oregon Public Records law in responding to requests by members of the public for file information to the extent that the law allows and to the degree the materials requested are not classified according to defined restrictions on dissemination.

(2) The Criminal Intelligence Unit will comply with the "Third Agency Rule" which is explained as follows: Reports and other investigative material and information received by the Criminal Intelligence Unit shall remain the property of the originating agency, but may, subject to consideration of official need, be retained by the Criminal Intelligence Unit. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies on a right-to-know, need-to-know basis. This policy also applies to individuals, groups or organizations requesting specific records or material under the Freedom of Information Act or Oregon Public Records Law.

(3) The originating agency shall determine whether the investigative report, material or other information may be released to the requestor, or whether the requestor should be referred to that agency for disposition of the case. In any case, the decision by the originating agency shall not be contested by the Criminal Intelligence Unit.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0050

Definition of Reasonable Grounds

As used in these rules, reasonable grounds means reasonable suspicion. Reasonable suspicion is suspicion that is reasonable under the totality of the circumstances. It is less than probable cause and more than mere suspicion.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0060

Definition of Criminal Intelligence File

A criminal intelligence file consists of stored information on the activities and associations of:

(1) Individuals who:

(a) Based upon reasonable suspicion are suspected of being or having been involved in the actual or attempted planning, organizing, threatening, financing, or commission of criminal acts; or

(b) Based upon reasonable suspicion are suspected of being or having been involved in criminal activities with known or suspected crime figures.

(2) Organizations, businesses, and groups which:

(a) Based upon reasonable suspicion are suspected of being

or having been involved in the actual or attempted planning, organizing, threatening, financing, or commission of criminal acts; or

(b) Based upon reasonable suspicion are suspected of being or having been illegally operated, controlled, financed, or infiltrated by known or suspected crime figures.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0070

File Content

Only information meeting the CIU's criteria for file input will be stored in the criminal intelligence files. No information will be collected or maintained about the political, religious, racial, or social views, sexual orientation, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is, or may be, involved in criminal conduct.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0080

File Categories

All information to be retained in the criminal intelligence files must meet the stated guidelines for file definition and content. Information will only be retained in one of three file categories as set forth below:

(1) Working File:

(a) The working file is the receiving phase of newly acquired raw data. The CIU staff review the new materials for its acceptability to the CIU's criminal intelligence system.

(b) Retention Period: The retention period is thirty working days during which effort is made to determine the value of the raw data and its acceptability to the CIU's criminal intelligence system.

(2) Temporary File:

(a) The temporary file includes individuals, groups, businesses, and organizations which have *not* been positively identified by one or more distinguishing characteristics, or whose criminal involvement is questionable;

(b) Individuals, groups, and organizations are given temporary file status *only* in the following situations:

(A) The subject is unidentifiable because there are no physical descriptors, identification numbers, or distinguishing characteristics available; and

(B) The subject's involvement in criminal or gang activities is questionable; and

(C) The subject has a history of criminal or gang conduct, and the circumstances afford him an opportunity to again become active; and/or

(D) The reliability of the information source and/or the validity of the information content cannot be determined at the time of receipt; and

(E) The information appears to be significant and merits temporary storage.

(c) Retention Period: The retention period is one year during which time effort is made to secure additional data verification. If the information still remains in the temporary file at the end of one year with no update information added, and no information is available, the information is purged and destroyed.

(3) Permanent File:

(a) This file includes individuals, groups, businesses, and organizations which have been positively identified by one or more distinguishing characteristics and criminal involvement;

(b) Retention Period: The retention period is five years after which the information is evaluated for its file acceptability.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0090

Information Input

Information to be stored in the CIU's criminal intelligence file must first undergo a review for relevancy and an evaluation for source reliability and information validity prior to filing:

(1) Relevancy Review: Incoming information is reviewed by the CIUS to determine its relevancy to the CIU's mission.

(2) Source Reliability: The term, **source**, relates to the individual, group, or organization providing the information to the CIU. Source reliability will be determined according to the criteria set forth in **Table 1**.

(3) Information Validity: The term, **information**, relates to written, oral, and/or pictorial materials provided to the CIU by the individual, group, or organization. Information validity will be determined according to the criteria set forth in **Table 2**.

TABLE 1
Source Reliability

Class - Level - Description

A - Reliable - Source's reliability is unquestioned or has been well tested in the past.

B - Usually Reliable - Source's reliability can usually be relied upon as factual. The majority of past information provided has proven to be reliable.

C - Unreliable - Source's reliability cannot be relied upon as factual or is sporadic at best.

D - Unknown - Source's reliability cannot be judged. His authenticity of trustworthiness has not been determined by either experience or investigation.

TABLE 2
Information Validity

Class - Level - Description

1 - Confirmed - The information has been corroborated.

2 - Probable - The information is consistent with past accounts.

3 - Doubtful - The information is inconsistent with past accounts.

4 - Cannot Be Judged - The information cannot be evaluated

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0100

Information Classification

(1) General: In order to protect sources, investigations and individual rights to privacy, information retained in the CIU's criminal intelligence file is classified to indicate the degree to which it must be kept secure. Many documents received by the CIU have classifications assigned to them by the senders. In such cases, CIU personnel must take care to review and to assign levels of security classification not below that given by senders. The classification of criminal intelligence information is subject to continual change. The passage of time, the conclusion of investigations, and other factors may affect the security classification assigned to particular documents. Documents within the intelligence files should be reviewed on an ongoing basis to ascertain whether a higher or lesser degree of document security is required and to insure that information is released only when and if appropriate.

(2) Classification: Criminal intelligence information is classified according to the following system:

(a) Sensitive:

(A) The classification, sensitive, is assigned by the CIUS in consultation with the Chief Counsel, Attorney-in-Charge of the Organized Crime Section or the Chief Investigator and is given only to documents which relate to:

(i) Information pertaining to significant law enforcement cases currently under investigation;

(ii) Public Corruption;

(iii) Informant identification information;

(iv) Criminal intelligence reports which require strict dissemination and release criteria;

(v) Documents which have been designated sensitive by another law enforcement agency;

(vi) A document bearing this classification cannot be disseminated without the approval of the Chief Counsel, Attorney-in-Charge of the Organized Crime Section or the Chief Investigator.

(b) Confidential:

(A) The classification, confidential, is assigned by the CIUS and is given to the following documents:

(i) Criminal intelligence reports which are not designated sensitive;

(ii) Information obtained through intelligence unit channels which is not classified sensitive and is for law enforcement intelligence use only;

(iii) Documents which describe ongoing investigatory projects and open investigations;

(iv) Documents which describe law enforcement strategies and techniques;

(v) Documents which have been designated confidential by another law enforcement agency.

(B) A document bearing this classification can be released with the approval of the CIUS.

(c) Restricted:

(A) The classification, restricted, is assigned by the CIUS and is given to documents of general use in the CIU such as reports that at an earlier date were classified sensitive or confidential and the need for high level security no longer exists or non-confidential information prepared for/by law enforcement agencies;

(B) A document bearing this classification can be released for general law enforcement use with the approval of the CIUS.

(d) Unclassified: The classification, unclassified, is assigned by the CIUS and is used to identify documents of a public nature. Examples of unclassified materials include non-news related information to which, in its original form, the general public had direct access (i.e., birth and death certificates, corporation papers, etc.) and news media information such as newspapers, magazine and periodical clippings dealing with specified criminal categories;

(e) Classification Hand Stamp: The hand stamp shown in **Table 3** is the approved classification marking device. Any document intended for storage in the CIU's file must bear this hand stamp or have the appropriate level of classification stated on the document in some other manner -- hand written or typed.

TABLE 3
Classification Hand Stamp

Sensitive	Confidential	Restricted	Unclassified
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Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0110

Information Contributions

To the extent possible, all criminal intelligence maintained in CIU files must display the names and phone numbers of persons and agencies providing the information. When anonymity is requested by a contributor, a contributor code number may be used. All contributor code numbers will be provided and retained by the CIUS. When a contributor's name identification is difficult to obtain, it will suffice to describe the contributor in general terms. All information obtained from the public domain will be identified by document name, date and page number. In addition to identifying the source, the manner in which the source obtained the information is described.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0120

Quality Control

Information stored in the CIU's criminal intelligence file will undergo a review by the CIUS for compliance with the law and

with the standards, policies, and procedures of this chapter before its entry into the file.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0130

Dissemination

Criminal intelligence information is provided to CIU personnel and to personnel of criminal justice agencies only on a right-to-know authority and need-to-know responsibility.

(1) Definitions:

(a) Right-to-know: Requester agency has official capacity and statutory authority to the information being requested;

(b) Need-to-know: Requested information is pertinent and necessary to the requester agency in initiating, furthering, or completing an investigation.

(2) Control:

(a) It is the policy of the Organized Crime Section to account for date, nature and purpose of all disclosures of criminal intelligence by the CIU. The accounting includes names, title, and agency of the person or agency to whom the disclosure is made, what was disclosed and the name of the person making the disclosure;

(b) The audit form (CJD Form 29) will be completed every time a document is removed from the file section. This accounting includes the sharing of information with intelligence personnel outside the CIU to include the Criminal Justice Division's staff members;

(c) It is the responsibility of the receiving Investigator, Criminal Intelligence Investigator, or other staff member, to complete the audit form prior to the document's return to file;

(d) Audit forms are attached to all stored documents. All disclosures, oral and written, are logged and the records of the disclosures are retained for the life of disclosed documents.

(3) Unauthorized Access: The person requesting and receiving file documents is solely responsible for their security and for their return to the file section. Any person possessing the disseminated file documents other than the original requester, except as provided in section (4) of this rule, is deemed to have unauthorized access.

(4) Unauthorized Dissemination: No CJD employee requesting and receiving CIU file documents will allow access to these documents by other individuals except at meetings or during shared project assignments in which the subject of the documents is being used and all the participants in these meetings and/or projects meet the dissemination criteria of this chapter.

(5) Dissemination Table: **Table 4** sets forth the classification level, dissemination criteria and release authority for information stored in CIU files:

TABLE 4
File Dissemination

Classification Level - Dissemination Criteria - Release Authority

Sensitive - Restricted to law enforcement having a specific need-to-know, right-to-know - Chief Counsel, AIC of OC Section or Chief Investigator

Confidential - Same as for Sensitive - Same as Sensitive plus CIUS

Restricted - Same as for Sensitive - Same as Sensitive plus CIUS

Unclassified - Not restricted - Same as Sensitive plus CIUS

[Publication: The Publication(s) referred to or incorporated by reference in this rule are available from the Department of Justice.]

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0140

Security

Because security and protection of the materials in the criminal intelligence file is of utmost importance, the following procedures shall be observed:

(1) Policy: All CIU employees shall be thoroughly familiar

with access and dissemination policies of this chapter.

(2) Access: Direct access to the CIU's criminal intelligence files is limited to CIU file section employees and the CIUS.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0150

File Review and Inspection

(1) Review Authority: All information in the criminal intelligence file is subject to review at any time by the Chief Counsel, Attorney-in-Charge of the Organized Crime Section, Chief Investigator, Deputy Attorney General and Attorney General.

(2) CIUS Document Review: By July 1 of each year, the CIUS shall review a representative random sample of the materials in the file to determine the need for document classification change in accordance with this chapter.

(3) CIUS Operational Inspection: By July 1 of each year, the CIUS will inspect all aspects of the intelligence file operation. This inspection shall include, but not be limited to, the following:

(a) Parameters of Review: Review the CIU rules to insure they are in accordance with current law and accurately reflect the standards, policies and procedures of CJD. Check recently submitted documents to insure they meet CIU criteria. Review indexing for compliance with established CIU procedures. Check completed source document for accuracy — AKAs, monikers, categories, sequence numbers, and other requirements. Review the audit forms to ensure they are properly maintained and completed appropriately;

(b) Review Procedures: The CIU staff shall select at random five source documents from each major crime category. Staff will review these documents to ensure that all materials meet file criteria. The out cards will be examined to ascertain that no file document is out of file for longer than the time prescribed by this chapter. Staff will ensure that purge forms are in place and complete. Staff will study all materials not meeting the criteria and will take immediate corrective action;

(c) Criminal Intelligence Unit Supervisor's Report: The CIUS shall compose a written report of the findings of this review and shall submit the report to the Chief Counsel through the Chief Investigator and Attorney-in-Charge of the Organized Crime Section. The report will describe the general condition of the files and any corrective measures taken.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0160

Purging

All information in the Criminal Intelligence file is eventually removed and destroyed. Its removal and destruction is in accordance with the following purge and destruction criteria:

(1) Purging Constraints: All file material selected for purging and destruction will only be removed and destroyed when it meets the requirements of these rules.

(2) Purge Criteria: Information is only purged when it is:

- (a) No longer useful;
- (b) No longer relevant;
- (c) Invalid;
- (d) Inaccurate;
- (e) Outdated;
- (f) Unverifiable; or
- (g) Inconsistent with mission.

(3) Purging Process: The first step for determining which documents in file require purging begins with their selection according to purge criteria as described in section (2) of this rule.

(4) Process for Retention: When the CIUS wishes to retain information which has been recommended for purge, he/she must substantiate his/her reasons for retention to the Chief Investigator. Final decision on retention is made by the Attorney-in-Charge of the Organized Crime Section. In matters of great exception, the final decision will be made by the Chief Counsel of the Criminal Justice Division.

(5) Retention Period: Any information ordered retained will

be placed in the permanent section of the central file for a new retention period of five years from date of re-entry.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0170

Destruction

Material purged from the criminal intelligence file shall be destroyed under the supervision of the CIUS. Destruction will be accomplished by shredding consistent with statutes and rules relating to destruction of public records.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0180

File Integrity Officer

The CIUS will be CIU's File Integrity Officer. In this capacity, the CIUS is responsible for the contents of *all* intelligence files in the CIU and for their compliance to these rules.

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0190

File Room Requirements

(1) Supervision: The CIU file room shall be occupied by one or more CIU staff members during normal work hours, when practical. The files and door are to be locked when a CIU staff member is not present.

(2) Entry "Key": Keys for file room entry are issued by the CIUS. Keys are issued to named individuals only and are not to be loaned to persons not authorized to possess them unless prior approval is received from the CIUS. Only assigned CIU personnel are authorized to possess keys

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0200

File Index Number System

(1) General Information:

(a) The CIU's criminal intelligence files are indexed according to a modified Dewey Decimal System. In the CIU's system, file categories and sub-categories are separated by decimal points;

(b) File categories are created or deleted at the request of CIU personnel as needs arise for more crime topic areas. The list of authorized crime topics is always in a state of change. A request for a change in the index system is first brought to the attention of the CIUS through the use of the memorandum. If approved by the CIUS, the index system is altered to reflect the change and an updated file index list is distributed to all CIU personnel possessing copies of file guidelines.

(2) Crime Topic:

(a) Crime topics are those authorized for collection, storage, and dissemination according to the mission of the CIU. The crime topics list is classified *confidential* and is not to be duplicated or released outside the CIU. The list is for official staff use only;

(b) The crime topics list is not to be removed from the CIU file room without the approval of the CIUS.

(3) Use of Index Numbers: The file category, *general*, is only used when there is insufficient data available to indicate a more specific index selection. Spread of Index Numbers. The index system is displayed as several independent groupings of numbers separated by decimal points. The following defines the various groupings.

(a) Group 1 (Mission): Index numbers in the first position represent the subject of the file. As examples are the following: 10. Political Corruption; 20. Major Financial Crimes; 30. Traditional Organized Crime; 40. Emerging Criminal Gangs and Street Gangs; 50. General;

(b) Group 2 (Crime): Index numbers in the second position represent crime the subject is involved in;

(c) Group 3 (Geographic Assignment): Index numbers in the

third position represent geographic areas;

(d) Group 4 (File Position): Index numbers in this last group represent the document's position in the file. The numbers are assigned chronologically.

TABLE 5
Index Number Example

Index - Subject - Description

10. - Traditional Organized Crime -Mission
10.10. - Assault - Crime
10.10.10. - Marion - Geographic Area
10.10.10.129. - Document number - Position in File

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0210

Forms

The CIU will only use forms developed, tested, and approved for use by the Criminal Justice Division. Only the forms described below are authorized for use in the CIU file system.

(1) Criminal Intelligence Report (IR) (CJD Form 35).

(a) The Criminal Intelligence Report form is the CIU's standard collection document pertaining to criminal intelligence. It is designed to provide both collection and a more efficient way to analyze and disseminate what the CIU handles in the way of information;

(b) The IR is used by investigators and CJD staff alike as they collect criminal information in person, by mail, phone, and through access to public and controlled information;

(c) The IR is designed to collect information on *one event only*. It should never be used to report on several events at the same time such as a stakeout observation combined with information about a later meeting in which the stakeout findings were discussed;

(d) IR Preparation Guide: As a guide for the use of the IR, the following applies:

- (A) Record one event per IR
- (B) Write in the first person
- (C) State and evaluate your sources;
- (D) Forward the IR promptly.

(2) Out Card (CJD Form 27):

(a) The out card is a document designed to replace source materials which have been removed from the file. Its primary purpose is to note the location of the removed file material and to identify who acquired the information and on what date;

(b) Out card use is the responsibility of personnel of the CIU file section. They not only complete the card when file material has been removed but they also use the card during daily quality control inspections when searching the file for missing documents and overdue "returns." Control: A criminal intelligence file document may be removed from the file by CIU personnel for up to *ten working days*. The starting date of the ten-day period is noted on the OUT card. When the ten days is passed and the source document has not been returned to the file, a memo from the CIUS is generated to the possessor of the document. (CJD Form 28). Should there be a strong need to retain the document for more than ten days, the possessor must request the extension in writing to the CIUS.

(3) Cover Sheet (CJD Form 29)

(a) The cover sheet is the CIU's file jacket for all individual file documents. Attached beneath this jacket are newspaper clippings, intelligence reports, investigative documents, and all other materials maintained by the file section. The cover sheet is the initial responsibility of personnel who desire a particular item of information to be filed. The cover sheet is attached to an item by a single staple located in the upper left-hand corner of its face. Each individual document stored in the central file has its own cover sheet;

(b) The *face* of the cover sheet displays key information for the later processing of the attached item of information. The

information on its face includes: index numbers; identification of its maker; source and content ratings; level of classification; sources; synopsis; and quality control signatures. The *back* of the cover sheet contains the audit form.

(4) Audit Form (CJD Form 29). The back side of the cover sheet contains the audit form. The audit form records all activity regarding the perusal and/or use of the attached item of information. *Every time* a filed item of information is removed from the file for review purposes, the audit form is filled out to record the following:

(a) Date, The date of removal from the file;

(b) Agency/Individual, To whom the item of information was released;

(c) Purpose, A brief statement as to how the item of information is to be use;

(d) Information, The page number and the paragraph(s) that were utilized;

(e) Staff, The CIU staff member who made the release.

(5) Document Retrieval Form (CJD Form 31) .

(a) Routine Request. This is the normal request form personnel use when they wish items of information from the CIU File Section. It is completed first by the requesting Investigator or staff and then routed directly to the CIUS. The CIUS retrieves the documents and routes them to the requestor;

(b) Expedite Request. Should the requestor require expeditious handling, the requestor must secure the initials and time notation from the requestor's supervisor. Upon a supervisor's special request, the document retrieval will receive priority handling;

(c) Control. The Document Retrieval Form is also used to monitor items of information that have been released to unit personnel. It serves as additional proof of the location of items and how long they have been out of file. The used forms are studied later by the CIUS to evaluate the use of the supervisor's usage of priority service requests.

(6) Purged and Destroyed (CJD Form 32).

(a) It is the policy of the CJD that all items of information contained in the CIU files will one day be purged and destroyed. Purging is an ongoing effort, thus creating daily voids of items of information in the file. The "Purged and Destroyed" form is designed to replace documents so that all voids are accounted for;

(b) When an item of information has been identified as possibly meeting purge and destroy criteria, it is removed from the file and attached to the "Purged and Destroyed" form. The item is then routed to the Chief Investigator for initial review and decision. The Chief Investigator reviews the item of information and makes the initial decision regarding its retention or destruction. The item is then routed to the Attorney-in-Charge of the Organized Crime Section for final review and approval;

(c) Once approved for destruction, CIU staff will separate the item of information from the "Purged and Destroyed" form and delete all evidence of the persons, organizations, and groups that might have been named in the item. When the files are clear of the purged document, the "Purged and Destroyed" form is inserted in the place of the removed item of information;

(d) Control: This form insures that document voids in the files due to purging and destruction are properly identified. As a control, the form collects two or more initials and dates which further proves that the decision to remove and destroy was made based on need, relevancy, and/or for some other bona fide reason.

(7) Document Sequence Log (CJD Form 33). This form is used to record the entry of each document into the CIU files. It is always the top document in the file and is completed by the CIUS or CIU file room employees when the document is put in the file.

[Publication: The Publication(s) referred to or incorporated by reference in this rule are available from the Department of Justice.]

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

137-090-0220

Statement of Understanding (CJD Form 34)

All Criminal Justice Division employees who are assigned to the Criminal Intelligence Unit shall read these rules and sign an

understanding of such.

[Publication: The Publication(s) referred to or incorporated by reference in this rule are available from the Department of Justice.]

Stat. Auth.: ORS Ch. 180

Hist.: JD 2-1989, f. & cert. ef. 9-13-89

DIVISION 95

ATTORNEY GENERAL'S MODEL GUIDELINES FOR PROSECUTION OF ENVIRONMENTAL CRIMES

137-095-0010

Background and Purpose of Guidelines for Prosecution of Environmental Crimes

The 1993 legislature adopted Senate Bill 912 (codified as ORS 468.920- 468.963), which establishes criminal penalties for certain violations of environmental laws. Section 19 of Senate Bill 912, ORS 468.961, provides that the district attorney of each county shall adopt written guidelines for filing felony criminal charges under Senate Bill 912. It also requires the Attorney General to adopt model guidelines that district attorneys may adopt as their written guidelines. These model guidelines address each of the factors listed in ORS 468.961(2).

Stat. Auth.: ORS 468.961

Hist. JD 3-1994, f. & cert. ef. 6-16-94

137-095-0020

General Principles for Prosecutors to Consider

(1)(a) Each of the acts that Senate Bill 912 makes a felony also violates a civil regulatory statute or administrative rule. For most violations, administrative remedies and civil penalties are an appropriate and adequate response. For some violations, however, criminal sanctions are necessary adequately to punish offenders and to deter similar conduct in the future by the violator or others. For still other violations, both civil/ administrative and criminal remedies may be appropriate;

(b) These guidelines are intended to assist prosecutors in deciding when to file criminal charges. Prosecutors are encouraged to coordinate with local, state and federal regulatory agencies in making those decisions. Frequently, those agencies may be able to provide the prosecutor with the most accurate information about the degree of harm caused by a violation, the violator's past record of compliance or noncompliance with the law, the appropriate regulatory agency's past handling of similar violations, and other information pertinent to the decision to file or not to file criminal charges.

(2) For purposes of these guidelines the term "person" includes corporations. The term "prosecutor" includes district attorneys and the Attorney General.

(3)(a) The decision to prosecute or not to prosecute a particular violation of environmental laws is a matter of prosecutorial discretion to be exercised in light of the specific circumstances of each case. The guidelines are intended to promote consistency by making sure that all prosecutors consider the same factors before initiating a prosecution under Senate Bill 912. The intent of the guidelines is to guide the prosecutor's exercise of discretion, however, not to replace it with a formula;

(b) The statute requires prosecutors to consider and apply the guidelines before initiating a prosecution, but the weight to be given each factor is a matter of prosecutorial discretion to be determined on a case-by-case basis. The prosecutor's certification in accordance with ORS 468.961(4) establishes conclusively that the prosecutor has applied the guidelines as required by statute and that the criminal charges are being filed in accordance with the guidelines.

(4) The factors listed in ORS 468.961(2) are nonexclusive. In appropriate cases, prosecutors should also consider additional factors, such as:

(a) The probable efficacy and enforceability of civil penalties and remedial orders;

(b) The impact of criminal prosecution on civil regulatory objectives, including prompt remediation of pollution and its

effects;

(c) The likelihood that a prosecution will result in a conviction;

(d) The probable sentence if a conviction is obtained; and

(e) The cost of a prosecution, the resources available to the prosecutor, and the severity of the offense compared to other offenses that would not be prosecuted if the prosecutor uses available resources to prosecute an offense under Senate Bill 912.

Stat. Auth.: ORS 468.961

Hist. JD 3-1994, f. & cert. ef. 6-16-94

137-095-0030

Specific Factors for Prosecutors to Consider and Apply

The following guidelines address each of the factors listed in ORS 468.961(2). Each subsection lists the statutory factor, followed by a suggestion of how the prosecutor might weigh that factor in deciding whether or not to file criminal charges in a particular case.

(1) The complexity and clarity of the statute or regulation violated. The more complex the regulation or regulatory scheme, the greater is the likelihood that a person could violate a statute or regulation despite making a good faith effort to comply with the law. The prosecutor may also consider whether the violation is so egregious that, despite the complexity of the statute or regulation, the person should have known that the person's action was unlawful or the person's conduct was nonetheless reckless as to the consequences for human health or the environment.

(2) The extent to which the person was or should have been aware of the requirement violated. This factor is a corollary to section (1) of this rule. The following questions are examples of the type of questions that may aid the prosecutor in applying this factor. To answer these questions, prosecutors are encouraged to confer with the appropriate regulatory agency (e.g., Department of Environmental Quality):

(a) Is it clear on the face of the regulation that the regulation applies to the person and the activity in question? If not, is applicability determined by agency guidance or policy that is distributed to the persons or entities subject to the regulation? Has the agency clearly defined the conduct that would violate the regulation?

(b) Is the applicable statute or regulation readily available to the person? Is its applicability based on a new interpretation of existing statutes or rules?

(c) Does the person engage in a heavily regulated occupation or industry, subject to substantial environmental regulation of the media at issue, so that knowledge of environmental requirements at issue should be an elementary part of doing business?

(d) Is the occupation or industry one in which hiring environmental consultants is commonplace or regulatory agencies offer technical assistance or published guidance?

(e) Do specific circumstances show that the person knew or clearly should have known that the conduct violated the law?

(3) The existence and effectiveness of the person's program to promote compliance with environmental regulations. The existence of a bona fide effective compliance program suggests that the violation more likely is isolated and that the person has means in place to prevent future violations or detect future violations before they result in substantial harm to human beings or the environment. The existence of an effective compliance program, however, does not negate the possibility that a person has knowingly violated the law or caused substantial harm.

(4) The magnitude and probability of the actual or potential harm to humans or to the environment. The greater the magnitude, probability and foreseeability of harm, the greater is the need for criminal sanctions. In considering the magnitude of harm, the prosecutor should consider the toxicity of the pollutant or regulated substance, and whether the harm is long-lasting or can be remedied promptly. If the person's conduct created a great risk of substantial harm, the fact that little or no harm actually occurred may carry little weight in deciding whether or not to prosecute. The appropriate regulatory agency can provide technical assistance to the prosecutor in evaluating the magnitude, probability and foreseeability of harm.

(5) The need for public sanctions to protect human health and the environment or to deter others from committing similar violations:

(a) A person's persistent and willful violation of environmental laws may mean that incarceration is necessary to protect human health and the environment from the person's criminal activity;

(b) If the requirement that has been violated applies to many citizens or businesses, its enforcement may also deter others from violating that requirement or similar requirements. In addition, the prosecution may create general deterrence against violations of other environmental laws in addition to the specific statute or regulation that was violated in the particular case. Prosecutors should also consider whether more consistent or stringent civil/administrative remedies would be sufficient to deter violations.

(6) The person's history of repeated violations of environmental laws after having been given notice of those violations:

(a) Repeated violations after notice imply intentional criminal conduct, which makes criminal sanctions more appropriate. Repeated violations also support an inference that prior civil/administrative remedies, if invoked, were insufficient to deter misconduct, making criminal sanctions appropriate under the same rationale as described under section (5) of this rule;

(b) By contrast, past determinations by the appropriate regulatory agency that a similar violation did not warrant substantial civil/administrative sanctions may suggest that criminal sanctions are inappropriate, under the rationale described in section (9) of this rule. Regulatory agencies can provide the prosecutor with information about the person's previous violations, the person's subsequent compliance efforts, past agency contacts with the person, and past agency enforcement actions.

(7) The person's false statements, concealment of misconduct or tampering with monitoring or pollution control equipment. Knowingly false statements, concealment and tampering imply intentional misconduct, making criminal sanctions more appropriate. In addition, because the regulatory scheme for many environmental laws relies heavily on self-reporting, false statements, concealment and tampering undermine the integrity of the regulatory system. Where the deviation from reporting requirements is unintentional, however, civil and administrative remedies usually should provide an adequate sanction.

(8) The person's cooperation with regulatory authorities, including voluntary disclosure and prompt subsequent efforts to comply with applicable regulations and to remedy harm caused by the violations:

(a) Voluntary disclosure and prompt efforts to remove violations and remedy harm suggest that criminal prosecution probably is not necessary for public retribution or deterrence of future violations by the same person;

(b) Voluntary disclosure and remediation may also reduce the likelihood that a prosecution would succeed. ORS 468.959(4) provides an affirmative defense for a defendant who:

(A) Did not cause or create the condition or occurrence constituting the offense;

(B) Reported the violation promptly to the appropriate regulatory agency; and

(C) Took reasonable steps to correct the violation. Similar conditions apply to the affirmative defenses of "upset" and "bypass," defined in ORS 468.959(2). If admissible evidence establishes an affirmative defense, criminal prosecution is neither appropriate nor fruitful.

(9) The appropriate regulatory agency's current and past policy and practice regarding the enforcement of the applicable environmental law. If the regulatory agency having jurisdiction has determined that a violation is not serious enough to merit civil or administrative enforcement under current agency policy, criminal sanctions usually would be disproportionate to the severity of the violation. In addition, fairness suggests that regulated persons should have notice that their misconduct will be subject to sanctions; a regulatory practice of nonenforcement of

the law in question usually would be at odds with fair notice of criminal liability.

(10) The person's good faith effort to comply with the law to the extent practicable. Although it is not conclusive, a person's good faith effort to comply with the law is a factor that weighs against criminal prosecution. In some instances, a given regulation may be so strict that full compliance or compliance 100 percent of the time is virtually impossible. An operator's view of what is practicable, however, does not substitute for legal requirements, and the decision as to what constitutes a good faith effort to comply with the law for purposes of this factor rests with the prosecutor. In appropriate cases, that decision may be influenced by section 17 of Senate Bill 912, which provides affirmative defenses called "upset" and "bypass" to recognize that certain temporary violations of environmental laws do not entail fault for which sanctions should be imposed.

Stat. Auth.: ORS 468.961

Hist. JD 3-1994, f. & cert. ef. 6-16-94

DIVISION 100

SATISFACTION OF JUDGMENTS

137-100-0005

Definitions

For purposes of these rules the following definitions apply:

(1) "Court Clerk" — The trial court administrator or trial court clerk of the district or circuit court in which the original judgment was entered and shall include any person to whom the duties of that office lawfully are delegated. ORS 8.185 et seq.

(2) "County Clerk" — The clerk or clerks of the county or counties in which a judgment is recorded in the County Clerk Lien Records. ORS 205.010 et seq.

(3) "Defendant" — The person named in the district or circuit court judgment as the "defendant" who is ordered by that judgment to pay a monetary obligation.

(4) "Interested Person" — A person or entity who has an interest affected by the money judgment entered in the criminal proceeding.

(5) "Issuer of Satisfactions" — The State of Oregon is the judgment creditor in a criminal matter in which a money judgment is ordered. "Issuer of Satisfactions" refers to the person, agency or entity or entities authorized by the Attorney General to issue a partial or full satisfaction of judgment after payment of the monetary amounts assessed in the money judgment portion of a criminal judgment. ORS 137.452.

(6) "Judgment Docket" — The record where the clerk of the circuit or district court docket the money judgment portions of a criminal judgment.

(7) "Money Judgment" — The portion of a judgment issued by a district or circuit court in a criminal proceeding requiring the defendant to pay a sum of money as a criminal fine, forfeiture, compensatory fine, restitution, unitary assessment, costs, forfeited bail, reward reimbursement, county assessment and any other monetary obligation. ORS 137.071.

(8) "Payment" — Payment shall mean receipt of cash or actual deposit of funds in the Trial Court Administrator/Trial Court Clerk's account. When payment is by check, draft or other negotiable instrument, such payment is not considered final until the negotiable instrument is accepted and paid.

(9) "Prosecuting Agency" — The office or agency, such as the District Attorney, the City Attorney or the Attorney General, which prosecuted the original criminal action in the district or circuit court as identified in the judgment.

(10) "Satisfaction of Judgment" — A document appropriate for filing in the court clerk records or County Clerk Lien Records issued by the Issuer of Satisfactions as provided by these rules which legally releases the judgment lien from the property in which the named defendant had or has an interest. A partial satisfaction of judgment may be issued when less than the full amount of the monetary obligation has been paid. ORS 137.452.

Stat. Auth.: ORS 137.452

Chapter 137 Department of Justice
OREGON ADMINISTRATIVE RULES 1997 COMPILATION

Hist.: JD 7-1990(Temp), f. & cert. ef. 8-20-90; JD 10-1990, f. & cert. ef. 12-13-90; JD 12-1991, f. & cert. ef. 12-23-91

137-100-0010

Appointment of Issuer of Satisfaction

The Attorney General hereby appoints the following as the Issuer of Satisfaction for purposes of issuing a satisfaction of judgment to a criminal defendant or an interested person as authorized by ORS 137.452(1)(a):

(1) The primary Issuer of Satisfaction shall be the District Attorney or Deputy District Attorney in the county in which the original judgment was entered;

(2) If the District Attorney declines to participate as an Issuer of Satisfaction to a defendant or defendants or an interested person, the Department of Justice may issue the satisfaction of judgment upon presentation by the defendant or interested person of the appropriate documentation, as set out in these rules, if the defendant or interested person is entitled thereto. A District Attorney who declines to participate in a particular instance should refer the defendant, the interested person or the request for issuance of a satisfaction of judgment to the Department of Justice in Salem.

Stat. Auth.: ORS 137.452

Hist.: JD 7-1990(Temp), f. & cert. ef. 8-20-90; JD 10-1990, f. & cert. ef. 12-13-90; JD 12-1991, f. & cert. ef. 12-23-91

137-100-0020

Request for Satisfaction

(1) A defendant or interested person who has fully or partially paid a money judgment imposed in a criminal proceeding may obtain a full or partial satisfaction of judgment from the Issuer of Satisfaction upon written request. The request for issuance of a satisfaction of judgment shall contain the following information:

(a) The name of the defendant as stated on the judgment;

(b) The address of the defendant or interested person applying for the satisfaction;

(c) The telephone number of the defendant or interested person;

(d) The designation of the court in which the original judgment was entered whether district or circuit court;

(e) The county in which the court is located;

(f) The case number;

(g) The date of docketing in the judgment docket;

(h) The total amount of the money judgment;

(i) The date of any prior partial satisfactions of judgment issued and the amount satisfied with copies of all partial satisfactions; and

(j) A copy of the criminal judgment in which the monetary obligation is set forth must be attached to the request form;

(k) A certified copy of the court clerk's record of payment must be attached to the request form.

(2) Request for Satisfaction of Judgment Form: An approved request form is required which provides all of the above information. **Exhibit 1**. The Issuer of Satisfaction shall determine if the information submitted substantially complies with the rules. If the information submitted is incomplete, additional information may be requested. The decision of the Issuer of Satisfaction as to substantial compliance with these rules shall be final.

(3) Full Satisfaction of Judgment: A satisfaction of judgment may be obtained by the defendant or an interested person from the Issuer of Satisfaction for payments made to the state after payment in full of the money judgment. The defendant or interested person shall provide the Issuer of Satisfaction with the following documents:

(a) A completed Request for Satisfaction of Judgment form; and

(b) A certified copy of the court clerk's record of payment (generally contained within the accounts receivable ledger). The court clerk's record of payment must contain the name of the defendant and identify the case number.

(4) Partial Satisfaction of Judgment: A partial satisfaction of

judgment may be obtained by the defendant of an interested person when less than the full amount of the money judgment has been paid. The defendant or interested person shall provide the Issuer of Satisfaction with the following:

(a) A completed Request for Satisfaction of Judgment form;

(b) A certified copy of the court clerk's record of payment (generally contained in the accounts receivable ledger) which verifies the dates and amounts of the payments received on the judgment from the date of the entry of judgment or from the date of the issuance of any prior satisfaction to the date of the request; and

(c) Copies of all prior satisfactions issued. The defendant or interested person shall attach a copy or copies of any partial satisfaction(s) previously entered to the Request for Satisfaction of Judgment form. Any document which verifies payment of a monetary obligation must contain the name of the defendant and identify the case number.

(5) Issuance of Satisfaction After Payment: Upon receipt of the Request for Satisfaction of Judgment accompanied by a certified copy of the court clerk's payment record verifying payment and any other documents required by these rules, the Issuer of Satisfaction shall issue a satisfaction of judgment equal to the total verified amount of payment received and file the satisfaction with the court clerk of the court in the county in which the original judgment was entered. Refer to the Satisfaction of Judgment sample form, **Exhibit 2** and Partial Satisfaction of Judgment sample form, **Exhibit 3**.

(6) Filing of Satisfaction of Judgment: The Issuer of Satisfaction shall mail or deliver the satisfaction of judgment to the defendant or interested person and the court clerk's office where the original money judgment was filed. If a certified copy of the judgment was filed in the County Clerk Lien Records, a certified copy of the satisfaction of judgment shall be mailed or delivered by the Issuer of Satisfaction to the county clerk's office of the county in which the original money judgment was issued. The Issuer of Satisfaction shall also deliver to the defendant or interested person an executed Satisfaction of Judgment for every county where a certified copy of the judgment or a lien record abstract has been recorded. Verification of the docketing of the satisfaction of judgment shall be forwarded by the Issuer of Satisfaction to the defendant or interested person at the address stated on the Request for Satisfaction of Judgment by first class mail, postage prepaid.

(7) No Independent Verification Required: The Issuer of Satisfaction shall not be required to obtain the certified payment record from the court clerk, obtain additional documentation or verify payment of the money judgment. The Issuer of Satisfaction shall refuse the defendant's or interested person's request if the documentation presented contains obvious or apparent irregularities or any procedural or substantive basis exists for which a satisfaction should be denied. The decision of the Issuer of Satisfaction to deny a satisfaction on procedural or substantive grounds is final.

(8) No Compromise by Issuer: The Issuer of Satisfaction issuing a satisfaction of judgment shall not be authorized to compromise or make any agreement or stipulation for satisfaction of the money judgment. A judgment may be satisfied by less than the full amount only if the defendant or interested person provides the Issuer of Satisfaction with a subsequent court order amending the original judgment or a certified copy of a commutation order of the Governor, and, if any amounts remain payable, a certified payment record from the court clerk evidencing payments received in satisfaction of the amended judgment. If any monetary obligations are deemed judgments for the payment of money under ORS 82.010 and not subject to the court's statutory authority to modify such payments, then interest may accrue on such obligations. Unless the payment of interest is specifically ordered by the court, the Issuer of Satisfaction has absolute discretion to waive any interest due on a monetary obligation in a criminal money judgment. The decision of the Issuer of Satisfaction on waiver of interest is final. Unless stated otherwise in the satisfaction, it shall be presumed that the judgment did not accrue interest or that interest has been waived by the Issuer.

(9) Matters for Which Satisfactions are not Authorized:

(a) The Issuer of Satisfactions is not authorized to issue any satisfaction where the monetary obligation runs to any party other than the state;

(b) The Issuer of Satisfactions is not authorized to issue satisfactions for any part of the judgment other than a money judgment.

(10) Court Proceedings to Determine Payment: If the defendant or interested person files a motion to obtain a satisfaction of judgment, the pro-secuting agency shall appear and respond as the judgment creditor. ORS 18.410. Upon request of the defendant or interested person accompanied by the order of the court and the documents required herein, the Issuer of Satisfactions shall issue the satisfaction of judgment and file such satisfaction of judgment in the county in which the original judgment is entered and provide the defendant or interested person with an executed Satisfaction of Judgment for every county where a certified copy of the judgment or lien record abstract has been recorded.

(11) Notice to Defendant of Authorized Issuer: Upon request, the prosecuting agency shall inform a defendant against whom a money judgment has been entered or an interested person of the identity and address of the Issuer of Satisfactions authorized to issue a satisfaction of judgment in the county in which the original judgment was entered.

NOTES:

-1- (1) and (2) Judgment Liens. When a judgment has been docketed in the judgment docket of the circuit court, it becomes a lien upon the real property of the defendant in the county where the judgment is originally docketed. ORS 18.320 and 46.276. After a money judgment has been docketed in the circuit court judgment docket by the clerk, a certified copy of the judgment or a lien record abstract may be filed by the judgment creditor in the County Clerk Lien Records in any other county in which the defendant owns real property. ORS 18.320. The lien is effective against real property owned or acquired by the defendant for ten years and may be renewed for an additional ten year period. ORS 18.360.

-2- (3) and (4) Payment of Judgment. Payments on monetary judgments due to the state are made generally to the clerk. ORS 137.017. A satisfaction of judgment may issue under these rules only for payments made to the court clerk or a state agency or public officer. Entry and docketing of a criminal money judgment has the same effect as a judgment in a civil action. ORS 137.180(4).

-3- (5) and (6) Issuance and Filing of Satisfaction of Judgment. The legislative history of ORS 137.452 evidences an intent that the Attorney General, or his designee, should serve a position analogous to that of the attorney for a civil judgment creditor in issuing satisfactions of judgments in criminal cases in which a money judgment has been entered. A civil judgment creditor has the duty to file the satisfaction of judgment with the court clerk. ORS 18.350. Therefore, the Issuer of Satisfaction is obligated to file the satisfaction.

-4- (7) No Independent Verification. The District Attorney has the duty to enforce criminal money judgments. ORS 8.680. The issuance of a satisfaction of judgment is a documentary task indicating performance has been completed. The Issuer of Satisfactions does not enforce the terms of criminal judgments.

-5- Once the District Attorney elects to participate in issuing a satisfaction in a particular case or cases, the District Attorney is the Issuer of Satisfactions and any decision is final. By contrast, if the District Attorney declines to participate at the outset, then the defendant is referred to the Attorney General or if the District Attorney forwards the request to the Attorney General then the Attorney General, in that instance, is the Issuer of Satisfactions, whose decision is final. The Attorney General does not provide another layer of review for satisfactions denied by District Attorneys.

-6- (8) No Compromise by Issuer. The Issuer of Satisfactions is acting as the attorney for the judgment creditor in the issuance of a satisfaction of judgment. The attorney for the judgment creditor cannot accept anything other than money to satisfy a judgment except by special authority. *Barr v. Rader*, 31 Or 225, 49 P 962 (1897). A civil judgment creditor is entitled to compromise and accept less than the full sum set forth in the judgment and may have good economic reasons for doing so. See, *Dickinson v. Fletcher*, 181 Or 316, 182 P2d 371 (1947). A

criminal money judgment for restitution is not a final judgment and therefore interest on a judgment for the payment of money as provided in ORS 82.010 is not applicable. *State v. Dickenson*, 68 Or App 283, 680 P2d 1028 (1984). A court may modify a restitution order. ORS 137.540(6). A defendant may petition the court for remission of the payment of costs or any unpaid portion thereof. ORS 161.655(4). If the defendant defaults in the payment of a fine or restitution and is not in contempt, the court may reduce or revoke the fine or order of restitution in whole or part. ORS 161.685(5). There is no specific statutory authority for the court to modify other monetary obligations imposed by the court, unless such payments are encompassed within probation terms. ORS 137.540(6). The court has statutory authority to reduce or remit fines, restitution or costs. ORS 161.665(4) and 161.685(5). Otherwise, a criminal money judgment may be modified only by the Governor. ORS 144.640 et seq. The Issuer of Satisfactions is not authorized to release a lien against a specific parcel of real estate. ORS 137.452. Absent statutory authority the Issuer of Satisfactions may not grant a release. See, 31 Op Attorney General 108 (1962-64). The entry of a satisfaction of judgment is prima facie evidence of a discharge of the obligation. ORS 137.452(5); *Dose v. Bank of Woodburn*, 58 Or 529, 115 P2d 286 (1911).

-7- (9) Matters for Which Satisfactions are not Authorized. ORS 137.452(4)(a) and (b). A money judgment in a criminal action is a judgment in favor of the state and may be enforced only by the state. ORS 137.180(4).

-8- (10) Court Proceeding to Determine Payment. It is the duty of the state in criminal cases to release judgment liens after payment in full has been made. A judgment debtor or interested person may petition to have the court determine the sufficiency of the payments made or determine the outstanding balance due for a money judgment. ORS 18.410. If a hearing is necessary to determine the sufficiency of payment, the prosecuting agency has access to the records needed to verify the dates and amounts of payment. Therefore, the prosecuting agency should reply to the defendant's or interested person's motion. Thereafter, the Issuer of Satisfactions shall issue the satisfaction in accordance with the court's order.

[ED. NOTE: The Exhibits referenced in this rule are not printed in the OAR Compilation. Copies are available from the Department of Justice.]

Stat. Auth.: ORS 137.452

Hist.: JD 7-1990(Temp), f. & cert. ef. 8-20-90; JD 10-1990, f. & cert. ef. 12-13-90; JD 12-1991, f. & cert. ef. 12-23-91