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DIVISION 1

PROCEDURAL RULES

731-001-0000
Notice of Proposed Rules

In accordance with ORS 183.341, to provide a reasonable opportunity for interested persons to be notified of proposed actions, prior to the adoption, amendment or repeal of any rule, the Oregon Department of Transportation shall give notice of the proposed adoption, amendment or repeal:

- (1) In the Secretary of State’s Bulletin referred to in ORS 183.360 and in accordance with ORS 183.335.
 - (2) By mailing a copy of the notice to persons on the Oregon Department of Transportation mailing lists for specific interest areas established pursuant to ORS 183.335(7).
 - (3) By mailing a copy of the notice to legislators as provided in ORS 183.335(14).
 - (4) By mailing a copy of the notice to the following:
 - (a) Associated Press;
 - (b) Northwest Labor Press;
 - (c) Associated Oregon Industries;
 - (d) Capitol Press Room; and
 - (e) Statesman-Journal newspaper.
- Stat. Auth.: ORS 183.341 & ORS 184.616
 Stats. Implemented: ORS 183.335 & ORS 183.341
 Hist.: 1 OTC 67, f. & ef. 1-9-76; DOT 2-1990, f. & cert. ef. 2-26-90; DOT 1-1994, f. & cert. ef. 3-17-94; DOT 1-1996, f. & cert. ef. 8-8-96; DOT 1-1998, f. & cert. ef. 1-28-98

731-001-0005
Model Rules of Procedure

Pursuant to ORS 183.341, the Oregon Transportation Commission adopts the following portions of Oregon Administrative Rules Chapter 137 as in effect on March 27, 2000 as the general administrative procedural rules for the Oregon Transportation Commission and the Oregon Department of Transportation: Division 1, Division 2, Division 3 excluding OAR 137-003-0001 through 137-003-0092, Division 4 and Division 5.

[ED. NOTE: The full text of the Attorney General’s Model Rules of Procedure is available from the Attorney General or Department of Transportation.]
 Stat. Auth.: ORS 183.341, ORS 184.616 & ORS 184.619
 Stats. Implemented: ORS 183.341

Hist.: HC 1207, f. & ef. 10-9-69; HC 1245, f. & ef. 2-12-71; HC 1276, f. & 3-3-72, ef. 3-15-72; 1 OTC 1(Temp), f. & ef. 7-18-73; 1 OTC 2, f. & ef. 9-26-73; 1 OTC 3, f. 10-15-73, ef. 11-25-73; 1 OTC 68, f. & ef. 1-23-76; 1 OTC 3-1978, f. & ef. 3-29-78; 1 OTC 3-1980(Temp), f. & ef. 1-16-80; 1 OTC 7-1980, f. & ef. 3-28-80; 1 OTC 4-1981, f. & ef. 11-24-81; 1 OTC 1-1984, f. & ef. 1-6-84; 1 OTC 3-1986, f. & ef. 4-28-86; DOT 1-1988, f. & ef. 8-22-88; DOT 4-1990, f. & cert. ef. 8-14-90; DOT 1-1992, f. & cert. ef. 5-12-92; DOT 2-1994, f. & cert. ef. 3-17-94; DOT 2-1995, f. 11-21-95, cert. ef. 1-1-96; DOT 2-1997, f. & cert. ef. 12-23-97; DOT 2-2000, f. & cert. ef. 6-8-00

731-001-0025
Public Records Access and Fees

All information in the custody of the Director of the Oregon Department of Transportation shall be disclosed or protected from disclosure in accordance with Chapter 192 of the Oregon Revised Statutes.

(1) Requests for records may be verbal, however, the Department of Transportation may require the request to:

- (a) Be in writing;
- (b) Be dated;
- (c) Be signed;
- (d) Adequately describe the records being requested; and
- (e) Indicate the date the records are needed.

(2) A reasonable period of time, as determined by the department, shall be allowed for the records custodian to locate and assemble the requested records.

(3) Unless otherwise provided by statute or other administrative rule, the fees shall be calculated as follows:

- (a) \$0.20 per page for photocopies;
- (b) Actual cost for use of material and equipment for producing copies of non-standard records. “Non-standard” records include, but are not limited to:

- (A) Audio tapes;
- (B) Video tapes;
- (C) Microfilm; and
- (D) Machine readable formats such as computer hard drives, diskettes and magnetic tape.

(c) Costs for labor which includes locating, compiling, editing or otherwise processing information and records. There shall be no charge for the first 30 minutes of staff time. The labor rate assessed thereafter shall be \$15 per hour;

(d) The actual cost for delivery of records such as postage, FAX costs and courier fees; and

(e) \$5 for each true copy certification.

(4) Provisions in this rule do not apply to records available through the Driver and Motor Vehicle Services Branch of the Department of Transportation listed in Oregon Administrative Rule Chapter 735.

Stat. Auth.: ORS 184.616, ORS 192.430 & ORS 192.440
 Stats. Implemented: ORS 192.410 - ORS 192.505
 Hist.: DOT 1-1995, f. & cert. ef. 1-6-95

**Confidentiality of Dispute Resolution by
 Mediation Highway Construction Claims**

731-001-0100
Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Laws 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential unless the substance of such communication is confidential under state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
Stats. Implemented: ORS 36.220 & ORS 36.245
Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0110

Applicability of Mediation Confidentiality Rules

(1) OAR 731-001-0110 to 731-001-0160 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The dispute arises out of the administration of contracts which incorporate the Standard Specifications for Highway Construction adopted by the Department and is at Step 1 or Step 2 in the Claim Review Procedure under the Standard Specifications; and

(d) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(B) A claim, subject to OAR 731-001-0630 to 731-001-710, against the agency under the State Personnel Relations Law;

(C) A pre-litigation contract dispute, unless that dispute involves a highway construction contract dispute that has not advanced beyond Step 2 in the Standard Specifications for Highway Construction;

(D) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(E) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0110 to 731-001-0160 do not apply when the agency is acting as the “mediator” in a matter in which the agency also is a party as defined in ORS 36.234.

(3) Nothing in OAR 731-001-0110 to 731-001-0160 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0110 to 731-001-0160 have the same meaning as given to them in ORS 36.110 and 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an “agreement to mediate.” If the mediator is the employee of and acting on behalf of a state agency then he or she must also sign the “agreement to participate in a confidential mediation.” [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may be confidential and the mediation communications may be disclosed and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

(A) Whether the agency is a party as defined in ORS 36.234; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0100 to 731-001-0160 so long as the parties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0100 and 731-001-0110 to 731-001-0160;

(B) A summary of OAR 731-001-0100 and 731-001-0110 to 731-001-0160; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: Forms referenced in this rule are available from the agency.]

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0120

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0110(1) are confidential and may not be disclosed so long as the communication was between the mediator and a party to the mediation and was not made in the presence of any other party to the mediation.

(1) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) A party to the mediation may disclose confidential mediation communications to a person if the party’s communication with that person is privileged under ORS chapter 40 or other provision of law.

(9) A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(10) An employee of the agency may disclose confidential mediation communications to another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential mediation communication under this section is bound by the same confidentiality requirements as apply to the parties to the mediation.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation

communications or agreements to persons other than the parties to the agreement.

(12) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0130 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0110 to 731-001-0160 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0130

Certain Mediation Communications Not Confidential

For the purposes of OAR 731-001-0120, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, except for those written mediation communications that are:

(a) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(d) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(e) Settlement concepts or proposals, shared with the mediator or other parties.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0140

Applicability of Mediator Disclosure Rules

(1) OAR 731-001-0140, 731-001-0150 and 731-001-0160 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority; and

(b) The mediation does not involve:

(A) Proceedings conducted by the Employment Relations Board under ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000, or in response to a joint request from management and labor for mediation;

(B) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(C) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law, ORS Chapter 240;

(D) A pre-litigation contract dispute, unless that dispute involves a highway construction contract dispute that has not advanced beyond Step 2 in the Standard Specifications for Highway Construction;

(E) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(F) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0140 to 731-001-0160 do not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined in ORS 36.234.

(3) Nothing in OAR 731-001-0140 to 731-001-0160 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0140 to 731-001-0160 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0150

Mediator May Not Disclose Mediation Communications

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0140 and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled by law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements

are exempt from disclosure under ORS 192.410 to 192.505 and may be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0160
 Notice of Disclosure of Mediation Communications**

(1) When a mediation is of a type described in OAR 731-001-0140(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

- (A) Whether the agency is a party; and
 - (B) Whether the mediator is an employee, contractor or agent of the agency.
- (b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0140(1) are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0100 and 731-001-0140 to 731-001-0160;

(B) A summary of OAR 731-001-0100 and 731-001-0140 to 731-001-0160; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**Confidentiality of Dispute Resolution by
 Mediation Environmental Remediation**

**731-001-0170
 Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)**

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Laws 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential unless the substance of such communication is confidential under state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0180
 Applicability of Mediation Confidentiality Rules**

(1) OAR 731-001-0170 to 731-001-0250 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The dispute arises in connection with cost recovery or remediation of Hazardous Material or Waste; and

(d) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(B) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(C) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000;

(D) A collective bargaining negotiation or a dispute over terms of a collective bargaining agreement or a grievance under a collective bargaining agreement, when the agency is represented by the Department of Administrative Services in such a proceeding; or

(E) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0170 to 731-001-0250 do not apply when the agency is acting as the “mediator” in a matter in which the agency also is a party as defined in ORS 36.234.

(3) Nothing in OAR 731-001-0170 to 731-001-0250 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0170 to 731-001-0250 have the same meaning as given to them in ORS 36.110 and 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an “agreement to mediate.” If the mediator is the employee of and acting on behalf of a state agency then he or she must also sign the “agreement to participate in a confidential mediation.” [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may be confidential and the mediation communications may be disclosed and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

- (A) Whether the agency is a party as defined in ORS 36.234; and
- (B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0170 to 731-001-0250 so long as the parties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0170 and 731-001-0180 to 731-001-0250;

(B) A summary of OAR 731-001-0170 and OAR 731-001-0180 to 731-001-0250; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: Forms referenced in this rule are available from the agency.]

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0190

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0180(1) are confidential and may not be disclosed.

(1) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law.

(9) A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(10) An employee of the agency may disclose confidential mediation communications to another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential mediation communication under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation

communications or agreements to persons other than the parties to the agreement.

(12) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0200 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0170 to 731-001-0250 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0200

Certain Mediation Communications Not Confidential

For the purposes of OAR 731-001-0190, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, except for those written mediation communications that are:

(a) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(d) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(e) Settlement concepts or proposals, shared with the mediator or other parties.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

731-001-0210

Limitations on the Admissibility and Disclosure of Mediation Communications in Subsequent Proceedings

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0180(1) are not admissible in any subsequent proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of, a subsequent proceeding or introduced as evidence by the parties or the mediator in any subsequent proceeding. For the purposes of this rule, the term “subsequent proceeding” means any administrative, judicial or arbitration proceeding.

(1) Any statements, memoranda, work products, documents and other materials otherwise subject to discovery that were not prepared specifically for use in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential under state or federal law.

(3) A mediation communication may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(4) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule may be disclosed to the extent necessary to make such a report.

(5) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications, and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(6) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(7) A written mediation communication may be disclosed and may be introduced as evidence in a subsequent proceeding by the party who prepared the communication so long as it does not contain information from another party to the mediation or the mediator, or information that is otherwise confidential under state or federal law.

(8) When the only parties to the mediation are public bodies, mediation communications and mediation agreements in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(9) When the parties to the mediation include a private party and two or more public bodies, mediation communications may be disclosed and may be introduced as evidence in a subsequent proceeding if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(10) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(11) A party may disclose mediation communications or mediation agreements in a subsequent proceeding if all the parties to the mediation agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in a subsequent proceeding.

(12) A mediator may disclose mediation communications or mediation agreements in any subsequent proceeding if all the parties to the mediation and the mediator agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in subsequent proceedings.

(13) Mediation communications described in OAR 731-001-0220 are not confidential.

(14) The terms of any mediation agreement may be disclosed and may be introduced as evidence in a subsequent proceeding.

(15) Nothing in OAR 731-001-0180 to 731-001-0250 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0220

Certain Mediation Communications Discoverable and Admissible

For the purposes of OAR 731-001-0210, the following mediation communications may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding:

(1) Any written communications prepared by or for the agency or its attorney, except for those written mediation communications that are:

(a) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(d) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(e) Settlement concepts or proposals, shared with the mediator or other parties.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public’s health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0230

Applicability of Mediator Disclosure Rules

(1) OAR 731-001-0230 to 731-001-0250 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority; and

(b) The mediation does not involve:

(A) Proceedings conducted by the Employment Relations Board under ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000, or in response to a joint request from management and labor for mediation;

(B) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Man-

agement Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(C) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(D) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000;

(E) A collective bargaining negotiation or a dispute over terms of a collective bargaining agreement or a grievance under a collective bargaining agreement, when the agency is represented by the Department of Administrative Services in such a proceeding; or

(F) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0230 to 731-001-0250 do not apply when the agency is acting as the “mediator” in a matter in which the agency also is a party as defined in ORS 36.234.

(3) Nothing in OAR 731-001-0230 to 731-001-0250 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0230 to 731-001-0250 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0240

Mediator May Not Disclose Mediation Communications

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0230(1) and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled by law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505 and may be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0250

Notice of Disclosure of Mediation Communications

(1) When a mediation is of a type described in OAR 731-001-0230(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

- (A) Whether the agency is a party; and
- (B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0230 are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0170 and 731-001-0230 to 731-001-0250;

(B) A summary of OAR 731-001-0170 and 731-001-0230 to 731-001-0250; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**Confidentiality of Dispute Resolution
 by Mediation Right Of Way**

731-001-0260

Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Laws 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential unless the substance of such communication is confidential under state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0270

Applicability of Mediation Confidentiality Rules

(1) OAR 731-001-0260 to 731-001-0330 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The dispute concerns the acquisition of real property by the Right of Way section of the Department of Transportation; and

(d) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(B) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(C) A pre-litigation contract dispute;

(D) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(E) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0270 to 731-001-0330 do not apply when the agency is acting as the “mediator” in a matter in which the agency also is a party as defined ORS 36.234.

(3) Nothing in OAR 731-001-0270 to 731-001-0330 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0270 to 731-001-0330 have the same meaning as given to them in ORS 36.110 through 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an “agreement to mediate.” If the mediator is the employee of and acting on behalf of a state agency then he or she must also sign the “agreement to participate in a confidential mediation.” [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may be confidential and the mediation communications may be disclosed and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

(A) Whether the agency is a party as defined in ORS 36.234; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0270 to 731-001-0330 so long as the parties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of 731-001-0260 and OAR 731-001-0270 to 731-001-0330;

(B) A summary of 731-001-0260 and OAR 731-001-0270 to 731-001-0330; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: Forms referenced in this rule are available from the agency.]

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0280

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0270(1) are confidential and may not be disclosed.

(1) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) A party to the mediation may disclose confidential mediation communications to a person if the party’s communication with that person is privileged under ORS chapter 40 or other provision of law.

(9) A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(10) An employee of the agency may disclose confidential mediation communications to another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential mediation communication under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(12) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not con-

fidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0290 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0260 to 731-001-0330 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0290

Certain Mediation Communications Not Confidential

For the purposes of OAR 731-001-0280, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, except for those written mediation communications that are:

(a) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(d) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(e) Settlement concepts or proposals, shared with the mediator or other parties.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public’s health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0300

Limitations on the Admissibility and Disclosure of Mediation Communications in Subsequent Proceedings

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0270(1) are not admissible in any subsequent proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of, a subsequent proceeding or introduced as evidence by the parties or the mediator in any subsequent proceeding. For the purposes of this rule, the term “subsequent proceeding” means any administrative, judicial or arbitration proceeding.

(1) Any statements, memoranda, work products, documents and other materials otherwise subject to discovery that were not prepared specifically for use in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential under state or federal law.

(3) A mediation communication may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(4) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule may be disclosed to the extent necessary to make such a report.

(5) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications, and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(6) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(7) A written mediation communication may be disclosed and may be introduced as evidence in a subsequent proceeding by the party who prepared the communication so long as it does not contain information from another party to the mediation or the mediator, or information that is otherwise confidential under state or federal law.

(8) When the only parties to the mediation are public bodies, mediation communications and mediation agreements in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(9) When the parties to the mediation include a private party and two or more public bodies, mediation communications may be disclosed and may be introduced as evidence in a subsequent proceeding if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(10) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(11) A party may disclose mediation communications or mediation agreements in a subsequent proceeding if all the parties to the mediation agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in a subsequent proceeding.

(12) A mediator may disclose mediation communications or mediation agreements in any subsequent proceeding if all the parties to the mediation and the mediator agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in subsequent proceedings.

(13) Mediation communications described in OAR 731-001-0310 are not confidential.

(14) The terms of any mediation agreement may be disclosed and may be introduced as evidence in a subsequent proceeding.

(15) Nothing in OAR 731-001-0270 to 731-001-0340 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0310

Certain Mediation Communications Discoverable and Admissible

For the purposes of OAR 731-001-0300, the following mediation communications may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding:

(1) Any written communications prepared by or for the agency or its attorney, except for those written mediation communications that are:

(a) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(d) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(e) Settlement concepts or proposals, shared with the mediator or other parties.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0320

Applicability of Mediator Disclosure Rules

(1) OAR 731-001-0320, 731-001-0330, and 731-001-0340 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority; and

(b) The mediation does not involve:

(A) Proceedings conducted by the Employment Relations Board under ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000, or in response to a joint request from management and labor for mediation;

(B) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(C) A claim, subject to OAR 731-001-0630 to 731-001-710, against the agency under the State Personnel Relations Law;

(D) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000;

(E) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(F) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0320 to 731-001-0340 do not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined in ORS 36.234.

(3) Nothing in OAR 731-001-0320 to 731-001-0340 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0320 to 731-001-0340 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0330

Mediator May Not Disclose Mediation Communications

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0310 and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled by law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505 and may be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0340

Notice of Disclosure of Mediation Communications

(1) When a mediation is of a type described in OAR 731-001-0320(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency's role in the mediation, including:

(A) Whether the agency is a party; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0320(1) are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0260 and OAR 731-001-0320 to 731-001-0340;

(B) A summary of OAR 731-001-0260 and OAR 731-001-0320 to 731-001-0340; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**Confidentiality of Dispute Resolution
by Mediation Prelitigation**

731-001-0350

Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Laws 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential unless the substance of such communication is confidential under state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0360

Applicability of Mediation Confidentiality Rules

(1) OAR 731-001-0350 to 731-001-0430 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The mediation involves a pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000; and

(d) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(B) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(C) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0350 to 731-001-0430 do not apply when the agency is acting as the “mediator” in a matter in which the agency also is a party as defined in ORS 36.234.

(3) Nothing in OAR 731-001-0360 to 0430 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0360 to 731-001-0430 have the same meaning as given to them in ORS 36.110 and 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an “agreement to mediate.” If the mediator is the employee of and acting on behalf of a state agency then he or she must also sign the “agreement to participate in a confidential mediation.” [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may be confidential and the mediation communications may be disclosed and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

(A) Whether the agency is a party as defined in ORS 36.234; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0360 to 731-001-0430 so long as the parties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0350 and 731-001-0360 to 731-001-0430;

(B) A summary of OAR 731-001-0350 and 731-001-0360 to 731-001-0430; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: Forms referenced in this rule are available from the agency.]

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0370

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0360 are confidential and may not be disclosed.

(1) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report

elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law.

(9) A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(10) An employee of the agency may disclose confidential mediation communications to another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential mediation communication under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(12) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0380 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0360 to 731-001-0430 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0380
 Certain Mediation Communications Not Confidential**

For the purposes of OAR 731-001-0370, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, except for those written mediation communications that are:

(a) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(d) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(e) Settlement concepts or proposals, shared with the mediator or other parties.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0390
 Limitations on the Admissibility and Disclosure of Mediation Communications in Subsequent Proceedings**

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0360(1) are not admissible in any subsequent proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of, a subsequent proceeding or introduced as evidence by the parties or the mediator in any subsequent proceeding. For the purposes of this rule, the term "subsequent proceeding" means any administrative, judicial or arbitration proceeding.

(1) Any statements, memoranda, work products, documents and other materials otherwise subject to discovery that were not prepared specifically for use in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential under state or federal law.

(3) A mediation communication may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(4) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule may be disclosed to the extent necessary to make such a report.

(5) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications, and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation com-

munications or agreements to persons other than the parties to the agreement.

(6) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(7) A written mediation communication may be disclosed and may be introduced as evidence in a subsequent proceeding by the party who prepared the communication so long as it does not contain information from another party to the mediation or the mediator, or information that is otherwise confidential under state or federal law.

(8) When the only parties to the mediation are public bodies, mediation communications and mediation agreements in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(9) When the parties to the mediation include a private party and two or more public bodies, mediation communications may be disclosed and may be introduced as evidence in a subsequent proceeding if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(10) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(11) A party may disclose mediation communications or mediation agreements in a subsequent proceeding if all the parties to the mediation agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in a subsequent proceeding.

(12) A mediator may disclose mediation communications or mediation agreements in any subsequent proceeding if all the parties to the mediation and the mediator agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in subsequent proceedings.

(13) Mediation communications described in OAR 731-001-0400 are not confidential.

(14) The terms of any mediation agreement may be disclosed and may be introduced as evidence in a subsequent proceeding.

(15) Nothing in OAR 731-001-0360 to 731-001-0430 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0400
 Certain Mediation Communications Discoverable and Admissible**

For the purposes of OAR 731-001-0390, the following mediation communications may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding:

(1) Any written communications prepared by or for the agency or its attorney, except for those written mediation communications that are:

(a) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(d) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(e) Settlement concepts or proposals, shared with the mediator or other parties.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0410
 Applicability of Mediator Disclosure Rules**

(1) OAR 731-001-0410, 731-001-0420 and 731-001-0430 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The mediation involves a pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000; and

(c) The mediation does not involve:

(A) Proceedings conducted by the Employment Relations Board under ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000, or in response to a joint request from management and labor for mediation;

(B) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(C) A claim, subject to OAR 731-001-0540 to 731-001-0620 against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(D) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(E) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation under OAR 731-001-0360(1).

(2) OAR 731-001-0410 to 731-001-0430 do not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined in ORS 36.234.

(3) Nothing in OAR 731-001-0410 to 731-001-0430 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0410 to 731-001-0430 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0420
 Mediator May Not Disclose Mediation Communications**

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0410(1) and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be necessary to prosecute or defend the matter. At

the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled by law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505 and may be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0430
 Notice of Disclosure of Mediation Communications**

(1) When a mediation is of a type described in OAR 731-001-0410(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency's role in the mediation, including:

- (A) Whether the agency is a party; and
- (B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0410(1) are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0350 and 731-001-0410 to 731-001-0430;

(B) A summary of OAR 731-001-0350 and 731-001-0410 to 731-001-0430; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**Confidentiality of Dispute Resolution by
 Mediation Collective Bargaining**

**731-001-0440
 Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)**

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Laws 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential unless the substance of such communication is confidential under state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0450
 Applicability of Mediation Confidentiality Rules**

(1) OAR 731-001-0450 to 731-001-0530 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The mediation involves a collective bargaining negotiation or a dispute over terms of a collective bargaining agreement or a grievance under a collective bargaining agreement, when the agency is represented by the Department of Administrative Services in such a proceeding; and

(d) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(B) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000;

(C) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0450 to 731-001-0530 do not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined in ORS 36.234.

(3) Nothing in OAR 731-001-0450 to 731-001-0530 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0450 to 731-001-0530 have the same meaning as given to them in ORS 36.110 and 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an "agreement to mediate." If the mediator is the employee of and acting on behalf of a state agency then he or she must also sign the "agreement to participate in a confidential mediation." [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may be confidential and the mediation communications may be disclosed

and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency's role in the mediation, including:

(A) Whether the agency is a party as defined in ORS 36.234; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0450 to 731-001-0530 so long as the parties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0440 and OAR 731-001-0450 to 731-001-0530;

(B) A summary of OAR 731-001-0440 and OAR 731-001-0450 to 731-001-0530; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: Forms referenced in this rule are available from the agency.]Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
Stats. Implemented: ORS 36.220 & ORS 36.245
Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0460

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0450(1) are confidential and may not be disclosed.

(1) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with

that person is privileged under ORS chapter 40 or other provision of law.

(9) A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(10) An employee of the agency may disclose confidential mediation communications to another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential mediation communication under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(12) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0470 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0450 to 731-001-0530 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
Stats. Implemented: ORS 36.220 & ORS 36.245
Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0470

Certain Mediation Communications Not Confidential

For the purposes of OAR 731-001-0460, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, except for those written mediation communications that are:

(a) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(d) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(e) Settlement concepts or proposals, shared with the mediator or other parties.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0480
 Limitations on the Admissibility and Disclosure of Mediation Communications in Subsequent Proceedings**

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0450(1) are not admissible in any subsequent proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of, a subsequent proceeding or introduced as evidence by the parties or the mediator in any subsequent proceeding. For the purposes of this rule, the term "subsequent proceeding" means any administrative, judicial or arbitration proceeding.

(1) Any statements, memoranda, work products, documents and other materials otherwise subject to discovery that were not prepared specifically for use in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential under state or federal law.

(3) A mediation communication may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(4) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule may be disclosed to the extent necessary to make such a report.

(5) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications, and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(6) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(7) A written mediation communication may be disclosed and may be introduced as evidence in a subsequent proceeding by the party who prepared the communication so long as it does not contain information from another party to the mediation or the mediator, or information that is otherwise confidential under state or federal law.

(8) When the only parties to the mediation are public bodies, mediation communications and mediation agreements in the medi-

ation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(9) When the parties to the mediation include a private party and two or more public bodies, mediation communications may be disclosed and may be introduced as evidence in a subsequent proceeding if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(10) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(11) A party may disclose mediation communications or mediation agreements in a subsequent proceeding if all the parties to the mediation agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in a subsequent proceeding.

(12) A mediator may disclose mediation communications or mediation agreements in any subsequent proceeding if all the parties to the mediation and the mediator agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in subsequent proceedings.

(13) Mediation communications described in OAR 731-001-0480 are not confidential.

(14) The terms of any mediation agreement may be disclosed and may be introduced as evidence in a subsequent proceeding.

(15) Nothing in OAR 731-001-0450 to 731-001-0530 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0490
 Certain Mediation Communications Discoverable and Admissible**

For the purposes of OAR 731-001-0480, the following mediation communications may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding:

(1) Any written communications prepared by or for the agency or its attorney, except for those written mediation communications that are:

(a) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(d) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(e) Settlement concepts or proposals, shared with the mediator or other parties.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute,

other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0500

Applicability of Mediator Disclosure Rules

(1) OAR 731-001-0500 to 731-001-0530 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The mediation involves a collective bargaining negotiation or a dispute over terms of a collective bargaining agreement or a grievance under a collective bargaining agreement, when the agency is represented by the Department of Administrative Services in such a proceeding; and

(c) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(B) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425, or OAR 115-075-0000;

(C) A claim, subject to OAR 731-001-0540 to 731-001-0620 against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0500 to 731-001-0530 do not apply when the agency is acting as the “mediator” in a matter in which the agency also is a party as defined in ORS 36.234.

(3) Nothing in OAR 731-001-0500 to 731-001-0530 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0500 to 731-001-0530 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0510

Mediator May Not Disclose Mediation Communications

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0500 and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled by law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505 and may

be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) A mediator may disclose mediation communications described in OAR 731-001-0520 and such communications may be introduced into evidence in any subsequent proceeding to the extent provided in that rule.

(9) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0520

Mediator May Disclose Certain Mediation Communications

For the purposes of OAR 731-001-0510, a mediator may disclose the following mediation communications and such communications may be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding when the mediation is conducted by the Employment Relations Board under OAR 115-040-0000, ORS 243.712, OAR 115-075-0000, or ORS 662.425 or the mediation is in response to a joint request to the Employment Relations Board for labor and management for mediation services or the mediation is conducted as part of the negotiation of a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement:

(1) A request for mediation;

(2) A communication from the Employment Relations Board Conciliation Service establishing the time and place for mediation;

(3) A final offer submitted by the parties to the mediator pursuant to ORS 243.712; or

(4) A strike notice submitted to the Employment Relations Board.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0530

Notice of Disclosure of Mediation Communications

(1) When a mediation is of a type described in OAR 731-001-0500(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

(A) Whether the agency is a party; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0500(1) are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0440 and 731-001-0500 to 731-001-0530;

(B) A summary of OAR 731-001-0440 and 731-001-0500 to 731-001-0530; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**Confidentiality of Dispute Resolution by
 Mediation Tort Claims**

731-001-0540

Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Law 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential unless the substance of such communication is confidential under state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0550

Applicability of Mediation Confidentiality Rules

(1) OAR 731-001-0550 to 731-001-0620 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The mediation involves a claim against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300; and

(d) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(B) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425, or OAR 115-075-0000;

(C) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation under OAR 731-001-0550.

(2) OAR 731-001-0550 to 731-001-0620 do not apply when the agency is acting as the “mediator” in a matter in which the agency also is a party as defined in ORS 36.234.

(3) Nothing in OAR 731-001-0550 to 731-001-0620 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0550 to 731-001-0620 have the same meaning as given to them in ORS 36.110 and 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an “agreement to mediate.” If the mediator is the employee of

and acting on behalf of a state agency then he or she must also sign the “agreement to participate in a confidential mediation.” [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may be confidential and the mediation communications may be disclosed and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

(A) Whether the agency is a party as defined in ORS 36.234; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0550 to 731-001-0620 so long as the parties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0540 and 731-001-0550 to 731-001-0620;

(B) A summary of OAR 731-001-0540 and 731-001-0550 to 731-001-0620; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: Forms referenced in this rule are available from the agency.]

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0560

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0550 are confidential and may not be disclosed.

(1) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person

who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law.

(9) A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(10) An employee of the agency may disclose confidential mediation communications to another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential mediation communication under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(12) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0570 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0550 to 731-001-0620 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0570

Certain Mediation Communications Not Confidential

For the purposes of OAR 731-001-0560, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, except for those written mediation communications that are:

(a) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(d) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(e) Settlement concepts or proposals, shared with the mediator or other parties.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0580

Limitations on the Admissibility and Disclosure of Mediation Communications in Subsequent Proceedings

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0550(1) are not admissible in any subsequent proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of, a subsequent proceeding or introduced as evidence by the parties or the mediator in any subsequent proceeding. For the purposes of this rule, the term "subsequent proceeding" means any administrative, judicial or arbitration proceeding.

(1) Any statements, memoranda, work products, documents and other materials otherwise subject to discovery that were not prepared specifically for use in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential under state or federal law.

(3) A mediation communication may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(4) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule may be disclosed to the extent necessary to make such a report.

(5) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications, and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(6) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(7) A written mediation communication may be disclosed and may be introduced as evidence in a subsequent proceeding by the party who prepared the communication so long as it does not contain information from another party to the mediation or the mediator, or information that is otherwise confidential under state or federal law.

(8) When the only parties to the mediation are public bodies, mediation communications and mediation agreements in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(9) When the parties to the mediation include a private party and two or more public bodies, mediation communications may be disclosed and may be introduced as evidence in a subsequent proceeding if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(10) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(11) A party may disclose mediation communications or mediation agreements in a subsequent proceeding if all the parties to the mediation agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in a subsequent proceeding.

(12) A mediator may disclose mediation communications or mediation agreements in any subsequent proceeding if all the parties to the mediation and the mediator agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in subsequent proceedings.

(13) Mediation communications described in OAR 731-001-0590 are not confidential.

(14) The terms of any mediation agreement may be disclosed and may be introduced as evidence in a subsequent proceeding.

(15) Nothing in OAR 731-001-0550 to 731-001-0620 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0590
 Certain Mediation Communications Discoverable and Admissible**

For the purposes of OAR 731-001-0580, the following mediation communications may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding:

(1) Any written communications prepared by or for the agency or its attorney, except for those written mediation communications that are:

(a) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(d) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(e) Settlement concepts or proposals, shared with the mediator or other parties.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0600
 Applicability of Mediator Disclosure Rules**

(1) OAR 731-001-0600, 731-001-0610, and 731-001-0620 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The mediation involves a claim against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300; and

(c) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(B) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425, or OAR 115-075-0000;

(C) A collective bargaining negotiation or a dispute over terms of a collective bargaining agreement or a grievance under a collective bargaining agreement, when the agency is represented by the Department of Administrative Services in such a proceeding; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0600 to 731-001-0620 do not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined in ORS 36.234.

(3) Nothing in OAR 731-001-0600 to 731-001-0620 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0600 to 731-001-0620 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0610
 Mediator May Not Disclose Mediation Communications**

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0600 and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled by

law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505 and may be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0620
 Notice of Disclosure of Mediation Communications**

(1) When a mediation is of a type described in OAR 731-001-0600(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

- (A) Whether the agency is a party; and
- (B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0600(1) are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0540 and 731-001-0600 to 731-001-0620;

(B) A summary of OAR 731-001-0540 and 731-001-0600 to 731-001-0620; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**Confidentiality of Dispute Resolution by
 Mediation Employee Disputes**

**731-001-0630
 Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)**

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Laws 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential unless the substance of such communication is confidential under

state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0640
 Applicability of Mediation Confidentiality Rules**

(1) OAR 731-001-0640 to 731-001-0710 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The mediation involves a claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law; and

(d) The mediation does not involve:

(A) Pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425, or OAR 115-075-0000;

(B) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(C) A collective bargaining negotiation or a dispute over terms of a collective bargaining agreement or a grievance under a collective bargaining agreement, when the agency is represented by the Department of Administrative Services in such a proceeding; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation under OAR 731-001-0640(1).

(2) OAR 731-001-0640 to 731-001-0710 do not apply when the agency is acting as the “mediator” in a matter in which the agency also is a party as defined ORS 36.234.

(3) Nothing in OAR 731-001-0640 to 731-001-0710 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0640 to 731-001-0710 have the same meaning as given to them in ORS 36.110 and 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an “agreement to mediate.” If the mediator is the employee of and acting on behalf of a state agency then he or she must also sign the “agreement to participate in a confidential mediation.” [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may be confidential and the mediation communications may be disclosed and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

(A) Whether the agency is a party as defined in ORS 36.234; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0640 to 731-001-0710 so long as the par-

ties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0630 and OAR 731-001-0640 to 731-001-0710;

(B) A summary of OAR 731-001-0630 and OAR 731-001-0640 to 731-001-0710; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: Forms referenced in this rule are available from the agency.]

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0650

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0640(1) are confidential and may not be disclosed.

(1) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law.

(9) A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(10) An employee of the agency may disclose confidential mediation communications to another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential mediation communi-

cation under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(12) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0660 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0640 to 731-001-0710 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0660

Certain Mediation Communications Not Confidential

For the purposes of OAR 731-001-0650, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, except for those written mediation communications that are:

(a) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(d) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(e) Settlement concepts or proposals, shared with the mediator or other parties.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communi-

tion is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0670

Limitations on the Admissibility and Disclosure of Mediation Communications in Subsequent Proceedings

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0640(1) are not admissible in any subsequent proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of, a subsequent proceeding or introduced as evidence by the parties or the mediator in any subsequent proceeding. For the purposes of this rule, the term “subsequent proceeding” means any administrative, judicial or arbitration proceeding.

(1) Any statements, memoranda, work products, documents and other materials otherwise subject to discovery that were not prepared specifically for use in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential under state or federal law.

(3) A mediation communication may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(4) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule may be disclosed to the extent necessary to make such a report.

(5) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications, and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(6) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(7) A written mediation communication may be disclosed and may be introduced as evidence in a subsequent proceeding by the party who prepared the communication so long as it does not contain information from another party to the mediation or the mediator, or information that is otherwise confidential under state or federal law.

(8) When the only parties to the mediation are public bodies, mediation communications and mediation agreements in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(9) When the parties to the mediation include a private party and two or more public bodies, mediation communications may be disclosed and may be introduced as evidence in a subsequent proceeding if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(10) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some

or all of the same matters, the communications in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(11) A party may disclose mediation communications or mediation agreements in a subsequent proceeding if all the parties to the mediation agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in a subsequent proceeding.

(12) A mediator may disclose mediation communications or mediation agreements in any subsequent proceeding if all the parties to the mediation and the mediator agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in subsequent proceedings.

(13) Mediation communications described in OAR 731-001-0680 are not confidential.

(14) The terms of any mediation agreement may be disclosed and may be introduced as evidence in a subsequent proceeding.

(15) Nothing in OAR 731-001-0640 to 731-001-0710 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0680

Certain Mediation Communications Discoverable and Admissible

For the purposes of OAR 731-001-0670, the following mediation communications may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding:

(1) Any written communications prepared by or for the agency or its attorney, except for those written mediation communications that are:

(a) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(d) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(e) Settlement concepts or proposals, shared with the mediator or other parties.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public’s health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0690

Applicability of Mediator Disclosure Rules

(1) OAR 731-001-0690, 731-001-0700, and 731-001-0710 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The mediation involves a claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law; and

(c) The mediation does not involve:

(A) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000;

(B) A claim subject to OAR 731-001-0540 to 731-001-0620 against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(C) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation under OAR 731-001-0640(1).

(2) OAR 731-001-0680 to 731-001-0710 do not apply when the agency is acting as the “mediator” in a matter in which the agency also is a party as defined in ORS 36.234.

(3) Nothing in OAR 731-001-0680 to 731-001-0710 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0680 to 731-001-0710 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0700

Mediator May Not Disclose Mediation Communications

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0640(1) and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled by law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505 and may be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all

of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0710

Notice of Disclosure of Mediation Communications

(1) When a mediation is of a type described in OAR 731-001-0680(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

(A) Whether the agency is a party; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0680(1) are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0630 and 731-001-0680 to 731-001-0710;

(B) A summary of OAR 731-001-0630 and 731-001-0680 to 731-001-0710; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

DIVISION 5

PUBLIC CONTRACT RULES

731-005-0001

Scope

Division 5 and Division 7 rules apply to all Public Improvement Contracts entered into by the Department of Transportation under the authority of 279.712(2)(c). These rules are adopted in place of the Attorney General Model Rules required under ORS 279.049(1) and as allowed by ORS 279.049(5).

Stat. Auth.: ORS 184.616, ORS 185.619 & ORS 279.712(2)(c)

Stats. Implemented: ORS 279.011, ORS 279.015, ORS 279.049(1) & ORS 279.712(2)(c)

Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0005

Definitions

All capitalized terms have the meanings set forth below, unless otherwise defined in the chapter 731, division 005 rules.

(1) **Addendum** or **Addenda**: An addition or deletion to, a material change in, or general interest explanation of the Solicitation Document. Addenda shall be labeled as such and distributed to all interested entities in accordance with these rules.

(2) **Bid**: A competitive Offer, binding on the Bidder and submitted in response to an Invitation to Bid.

(a) **Lump Sum Bid**: A Bid which is the total completed project price.

(b) **Unit Price Bid:** A Bid which provides unit prices based upon estimated quantities.

(3) **Bidder:** An Entity that submits a Bid in response to an Invitation to Bid.

(4) **Closing:** The date and time announced in the Solicitation Document as the deadline for submitting Offers.

(5) **Competitive Range:** The number of Proposers within a given scoring range ODOT will negotiate with if ODOT intends to negotiate in accordance with OAR 731-005-0225. The Competitive Range must be stated in the Solicitation Document, but will be decreased if the number of Proposers that submit Proposals is less than the specified number, or may be increased by ODOT in accordance with OAR 731-005-0225.

(6) **Conduct Disqualification:** A Disqualification pursuant to ORS 279.037.

(7) **Contract:** The Written agreement, resulting from the Solicitation Document that defines the Work to be completed and sets forth the rights and obligations of the parties.

(8) **Contract Amount:** Sum of the amounts computed by multiplying the Bid item quantities by the unit price in the schedule of Contract prices of the Contract as awarded.

(9) **Contract Price:** The total of the awarded Bid or Proposal amount, including any approved alternates, and any fully executed change orders or amendments.

(10) **Contract Review Authority:** The Director of the Oregon Department of Administrative Services (DAS).

(11) **Contractor:** The Entity awarded the Contract in response to the Solicitation Document.

(12) **DAS:** Oregon Department of Administrative Services.

(13) **Days:** Calendar days unless otherwise specified by these rules.

(14) **DBE Disqualification:** A Disqualification pursuant to ORS 200.065, 200.075 or 279.111.

(15) **Descriptive Literature:** The Offeror's materials submitted to provide information concerning the products and/or services available in response to the Solicitation Document.

(16) **Disqualification:** The preclusion of an Entity from contracting with ODOT for a period of time. Disqualification may be a Conduct Disqualification as defined above, Performance Disqualification as defined in OAR 734-010-0080, DBE Disqualification or disqualification for lack of specific demonstrated experience (Special Prequalification). ODOT is authorized to disqualify an Entity in accordance with OAR 731-005-0285.

(17) **Electronic Advertisement:** Electronic advertisement for Offers available over the internet via:

(a) The World Wide Web; or

(b) Telnet, provided ODOT maintains an internet World Wide Web site that describes how an Entity can access the advertisement through the internet via a telnet application. ODOT may maintain the World Wide Web site directly or through any third party service provider.

(18) **Electronic Data Interchange Operating Agreement or EDI Operating Agreement:** A series of standards that provide computer-to-computer exchange of business documents between organizations over telephone lines or computer networks. An EDI document is a document that has been transmitted pursuant to an EDI Operating Agreement.

(19) **Entity:** A natural person capable of being legally bound, sole proprietorship, limited liability company, corporation, partnership, limited liability partnership, limited partnership, profit and non-profit unincorporated association, business trust, two or more persons having a joint or common economic interest, or any other person with legal capacity to contract, or a government or governmental subdivision.

(20) **Facsimile:** A document that has been transmitted to and received by ODOT in a format that is capable of being received via a device commonly known as a Facsimile machine (e.g. a Facsimile Bid). A Facsimile machine allows hard copy documents (Written, typed or drawn material) to be sent over telephone lines and printed in another location.

(21) **Foreign Contractor:** A Contractor that is not domiciled in or registered to do business in the State of Oregon. See OAR 731-005-0325.

(22) **Invitation to Bid or ITB:** A notice to Contractors disseminating information pertaining to bidding of Public Improvement projects including availability of Solicitation Documents.

(23) **ODOT:** The Oregon Department of Transportation.

(24) **Offer:** A Bid or Proposal as applicable.

(25) **Offeror:** A Bidder or Proposer as applicable.

(26) **Opening:** The date, time and place announced in the Solicitation Document for the public Opening of Written sealed Offers.

(27) **Product Sample:** A representative specimen of the item offered by the Offeror in response to the Solicitation Document. Unless otherwise provided in the Solicitation Document, the Product Sample shall be the exact product or a representative portion of that product offered by the Offeror.

(28) **Proposal:** A competitive Offer, binding on the Proposer and submitted in response to a Request for Proposals. See Offer.

(29) **Proposer:** An Entity that submits a Proposal in response to a Request for Proposals. See Offeror.

(30) **Public Improvement:** Projects relating to maintenance or construction of highways, bridges, parks or other transportation facilities by or for ODOT. "Public improvement" does not include emergency Work, minor alteration, ordinary repair or maintenance necessary in order to preserve a Public Improvement.

(31) **Request for Proposals or RFP:** A Solicitation Document calling for Proposals.

(32) **Responsible Offeror** (also, Responsible Bidder or Responsible Proposer, as applicable): Is an Entity that has submitted an Offer and meets the standards set forth in OAR 731-005-0245(1)(c)(H) and that has not been disqualified by ODOT under OAR 731-005-0285.

(33) **Responsive Offer** (also, Responsive Bid or Responsive Proposal, as applicable): An Offer that substantially complies with applicable solicitation procedures and requirements and the Solicitation Document.

(34) **Signed or Signature:** Any mark, word or symbol executed or adopted by an Entity evidencing an intent to be bound.

(35) **Solicitation Document:** Documents which define the procurement of a Public Improvement project including but not limited to Bid or Proposal booklet, plans, Specifications, requirements, provisions and includes all documents incorporated by reference.

(36) **Specification:** Any description of the physical or functional characteristics, or of the nature of a supply, service or construction item, including 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.

(37) **Tie Offers:** Tie Offers shall have the meaning set forth in OAR 731-005-0235.

(38) **Work:** The furnishing of all materials, equipment, labor, and incidentals necessary to successfully complete any individual item or the entire Contract and the successful completion of all duties and obligations imposed by the Contract.

(39) **Written or Writing:** Conventional paper documents either manuscript or printed, in contrast to spoken words. It includes electronic transmissions if the Solicitation Document or Contract permits.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049

Stats. Implemented: ORS 279.011, ORS 279.015 & ORS 279.049(1)

Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

**731-005-0015
Competitive Procurement**

(1) **Generally.** ODOT shall procure its Public Improvements by an ITB or RFP except as otherwise allowed or required in ORS 279.015(1)(a)-(h), (2), (3), or (4), 279.029(2), 279.053, 279.059(2), 279.095, 279.570, 279.850, or 282.210.

(2) **Federal Provisions.** If federal funds are involved, federal laws, rules and regulations shall govern the provisions of ORS 279.011 to 279.063 and these rules in the event of conflict.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: 279.015(1) & ORS 279.056
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0025

Prequalification of Offeror

(1) **Prequalification.**

(a) **Mandatory Prequalification.** ODOT requires mandatory general prequalification of Offerors on forms prescribed by DAS. Annual prequalification with ODOT is required to bid on any Public Improvement project ODOT may advertise. Prequalification applications must be received by ODOT on the ODOT "Contractor's Prequalification Application" form ten Days prior to Bid Opening. The application must be completed in its entirety or a Bidder's Offer will be rejected. See OAR 734-010-0010 through 734-010-0070.

(b) **Special Prequalification.** ODOT must indicate in the Solicitation Document if it will require a special mandatory prequalification in addition to the general prequalification. Special prequalifications may be used for projects of a particularly complex nature or using products requiring highly specialized skills. The ITB shall indicate the requirements and time frame for special prequalifications.

(2) **Standards for Prequalification.** Standards for prequalification are identified in OAR 734 division 10.

Stat. Auth.: ORS 184.616, ORS 184.619, ORS 279.039 & ORS 279.049
 Stats. Implemented: ORS 279.039, 279.041 & ORS 279.047
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0035

Eligibility to Bid or Propose on Construction or Landscape Contracts

(1) **Construction Contracts.** ODOT shall not consider an Entity's Offer to do Work as a Contractor, as defined in ORS 701.005(2), unless the Entity has a current, valid certificate of registration issued by the Construction Contractors Board. Registration is not a requirement of bidding on federal funded projects.

(2) **Landscape Contracts.** ODOT shall not consider an Entity's Offer to do Work as a landscape Contractor as defined in ORS 671.520(2), unless the Entity has a current, valid landscape Contractor's license issued pursuant to ORS 671.560 by the State Landscape Contractors Board. Registration is not a requirement of bidding on federal funded projects.

(3) **Noncomplying Entities.** ODOT shall deem an Offer received from an Entity that fails to comply with this rule nonresponsive and shall reject the Offer, unless contrary to federal law.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.027(1)(k), ORS 671.530 & ORS 701.055
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0045

Solicitation Methods

(1) **Policy.** It is the policy of the State of Oregon to encourage open and impartial competition in public contracting. ODOT may establish Competition by comparing price, product and service quality, product performance, and an Entity's ability to perform, technical competence and ability to make timely deliveries. ODOT must make every effort to construct Public Improvements at the least cost to ODOT.

(2) **Solicitation Methods.** ODOT may encourage meaningful competition through a variety of solicitation methods. ODOT shall choose the solicitation method that is most likely to encourage Offers representing optimal value to ODOT.

(a) ODOT may use an Invitation to Bid if ODOT believes it will receive optimal value by selecting the lowest priced Offer that meets the technical requirements of ODOT's Specifications.

(b) ODOT may use a Request for Proposal if ODOT believes it will receive optimal value:

(A) By selecting an Offer using both price and non-price related factors; or

(B) By selecting an Offer using both price and non-price related factors and permitting negotiations pursuant to OAR 731-005-0225.

(c) ODOT may permit negotiations under a Request for Proposal pursuant to OAR 731-005-0225 if:

(A) ODOT intends to consider alternative terms and conditions to reduce Agency cost or enhance the value of the product or service requested; or

(B) ODOT finds negotiation is required to effect a successful procurement (e.g. the Specifications are complex and ODOT expects numerous queries as to the proper interpretation of the Specification; the Work requires a high level of technical or managerial competence that cannot be defined adequately in the Specifications; or ODOT believes negotiations are necessary to gauge the Proposer's understanding of complex Specifications).

(3) **Solicitation Documents.** The Solicitation Document shall include the following:

(a) General Information.

(A) Notice of any pre-Offer conference as follows:

(i) The time, date and location of any pre-Offer conference;

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

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

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

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

(D) Instructions and information concerning submission requirements including the address of the office to which Offers must be delivered and any other special information, e.g., whether Offers may be submitted by Facsimile or Electronic Data Interchange (See OAR 731-005-0075 and 731-005-0085 for required provisions for Facsimile or Electronic Data Interchange);

(E) The time, date and place of Opening;

(F) The time and date of Closing after which ODOT will not accept Offers, which time shall be not less than five Days after the date of the last publication of the advertisement. The interval between the date of issuance of the Solicitation Document and a Closing should not be less than 14 Days for an ITB and not less than 30 Days for an RFP unless ODOT finds a shorter interval is in the public's interest. If ODOT is issuing an ITB that may result in a Contract for a Public Improvement with a value in excess of \$75,000, ODOT shall not designate a time of Closing that falls when ODOT is closed to the public or after 12 noon on Friday (see also, OAR 731-007-0050; for timing issues relating to Addenda see OAR 731-005-0155(3));

(G) The form and submission of Offers and any information required therein, including Bid or Proposal security, if any;

(H) The office where the plans and Specifications for the Work or goods may be reviewed;

(I) A statement that each Offeror to an ITB or RFP must identify whether the Bidder or Proposer is a "resident bidder," as defined in ORS 279.029;

(J) If the Contract resulting from a Solicitation will be a Contract for a Public Work subject to ORS 279.348 to 279.380 or the Davis-Bacon Act (40 U.S.C. 276a), a statement that no Offer will be received or considered by ODOT unless the Offer contains a statement by the Offeror as a part of its Offer that "Contractor agrees to be bound by and will comply with the provisions of ORS 279.350 or 40 U.S.C. 276a."

(K) If the Work so requires, a statement that ODOT will not receive or consider an Offer from an Entity when the Entity is not registered with the Construction Contractors Board or is not licensed by the State Landscape Contractors Board as required by ORS 671.530;

(L) Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720;

(M) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279.111. (See OAR 731-005-0245(3)); and

(N) How ODOT will notify Offerors of Addenda and how ODOT will make Addenda available. See OAR 731-005-0155.

(b) Agency Need. The character of the Work or goods ODOT is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements.

(c) Evaluation process.

(A) A statement that ODOT may reject any Offer not in compliance with all prescribed solicitation bidding procedures and requirements and other applicable laws, and that ODOT may reject for good cause any or all Offers upon ODOT's finding that it is in the public interest to do so;

(B) The anticipated solicitation schedule, deadlines, protest process, and evaluation process, if any;

(C) Evaluation criteria, including the relative value applicable to each criterion, that ODOT will use to determine the Responsible Bidder with the lowest Responsive Bid or the Responsible Proposer with the best Responsive Proposal and the evaluation criteria ODOT will use to determine acceptability of any Work or goods to be purchased:

(i) If Contract award is to be based upon low Bid, ODOT shall set forth objective evaluation criteria in the Solicitation Document. Examples of such criteria which may be used in determining low Bid 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 criteria need not be precise predictors of actual future costs. However, to the extent possible, such evaluation factors shall be reasonable estimates based upon information ODOT has available concerning future use;

(ii) If the Solicitation Document is a Request for Proposal, ODOT shall set forth selection criteria in the Solicitation Document. Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment 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 factors shall be reasonable estimates based on information available to ODOT; or

(iii) If the Solicitation Document is a Request For Proposal and ODOT is willing to negotiate terms and conditions of the Contract, ODOT must identify the specific terms and conditions in the Solicitation Document that are subject to negotiation and authorize Offerors to propose certain alternative terms and conditions in lieu of the terms and conditions ODOT has identified as authorized for negotiation. ODOT must describe the evaluation and negotiation process in accordance with OAR 731-005-0225, including the Competitive Range; and

(D) Reference to certain statutory preferences as follows:

(i) Preference for materials and supplies manufactured from recycled materials under ORS 279.570 and recycled oil pursuant to ORS 279.590; and

(ii) Pursuant to ORS 279.555, the state Agency shall also include the following language: "Vendors shall use recyclable products to the maximum extent economically feasible in the performance of the Contract Work set forth in this document."

(d) Terms and conditions. ODOT shall include all Contract terms and conditions, including warranties and bonding requirements, ODOT considers necessary. Without limiting the preceding sentence, ODOT must include all applicable Contract provisions required by ORS 279.310 to 279.650 as follows:

(A) Payment of all Entities furnishing labor or material, contributions to Industrial Accident Fund, liens and withholding taxes (ORS 279.312);

(B) If the Contract is for a Public Improvement, a condition that the Contractor shall demonstrate it has established a drug-testing program for its employees;

(C) If the Contract calls for demolition Work described in ORS 279.313(1), a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;

(D) If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective;

(E) Payment of claims by public officers (ORS 279.314);

(F) Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279.314;

(G) Entity's right to file a complaint with the Construction Contractors Board for all Contracts related to a Public Improvement Contract (ORS 279.314);

(H) Hours of labor in compliance with ORS 279.316 and 279.338;

(I) Environmental and natural resources regulations (ORS 279.318);

(J) 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;

(K) Payment for medical care and attention to employees (ORS 279.320);

(L) Maximum hours and overtime (ORS 279.334);

(M) Claims for overtime (ORS 279.336);

(N) Overtime requirement for local governments (ORS 279.340 and 279.342);

(O) Prevailing wage rates (ORS 279.348 to 279.365);

(P) Fee paid to BOLI (ORS 279.352);

(Q) Retainage (ORS 279.400 to 279.430 and 279.435);

(R) Prompt payment policy (ORS 279.435);

(S) Contractor's relations with subcontractors (ORS 279.445);

(T) Notice of claim (ORS 279.528);

(U) With respect to state Agencies, provisions regarding use of recovered resources and recycled materials and to the extent economically feasible, use of recycled paper and PETE products (ORS 279.545 to 279.555);

(V) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385;

(W) A Contract provision substantially as follows:

"If Contractor is an employer, Contractor is a subject employer under the Oregon Workers Compensation Law and shall comply with ORS 656.017 and shall provide Workers' Compensation coverage for all their "subject workers," as defined under ORS Chapter 656." (ORS 279.320(2)); and

(X) Contractor's certification 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.

(e) If federal funds are involved, the federal laws, rules and regulations applicable to the fund requirements shall govern in the event they conflict with a provision required by ORS 279.545 to 279.746.

(f) Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of, or transfer rights, nor delegate duties under the Contract, either in whole or in part, without ODOT's prior Written consent. Unless otherwise agreed by ODOT in Writing, such consent shall not relieve the Contractor of any obligations under the Contract. Any assignee or transferee shall be considered the agent of the Contractor and be bound to abide by all provisions of the Contract. If ODOT consents in Writing to an assignment, sale, disposal or transfer of the Contractor's rights or delegation of Contractor's duties, the Contractor and its surety, if any, shall remain liable to ODOT for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless ODOT otherwise agrees in Writing.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049

Stats. Implemented: ORS 279.005, ORS 279.007, ORS 279.017, ORS 279.021(1), ORS 279.027, ORS 279.029(2) & (3), ORS 279.033, ORS 279.310 - ORS 279.650, ORS 279.748, ORS 305.385, ORS 701.005 & ORS 701.055

Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0055

Brand Name Products

(1) **Generally.** ODOT’s Solicitation Document shall not expressly or implicitly require any product by brand name or mark, nor shall it require the product of any particular manufacturer or seller, except pursuant to an exemption granted under ORS 279.017(2).

(2) **Equivalents.** ODOT may identify products by brand names so long as the following language: “approved equal,” “or equal,” “approved equivalent,” “or equivalent” or similar language is included in the Solicitation Document. ODOT shall determine, at its sole discretion, whether an Offeror’s alternate product is “equal” or “equivalent.”

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.017(1) & (2)
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0065

Bids or Proposals Are Offers

(1) **Offer and Acceptance.** The Bid or Proposal is the Bidder’s or Proposer’s Offer to enter into a Contract. The Offer is a “Firm Offer,” i.e., the Offer shall be held open by the Offeror for ODOT’s acceptance for the period specified in OAR 731-005-0205. ODOT’s award of the Contract constitutes acceptance of the Offer and binds the Offeror to the Contract.

(2) **Responsive Offer.** ODOT may award a Contract only to a Responsible Offeror with a Responsive Offer.

(3) **Contingent Offers.** Except to the extent the Offeror is authorized to propose certain terms and conditions pursuant to OAR 731-005-0045 and 731-005-0225, a Offeror shall not make its Offer contingent upon ODOT’s acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.

(4) **Offeror’s Acknowledgement.** By signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposal permits proposal of alternative terms under OAR 731-005-0045(2), the Offeror’s Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by ODOT in Writing.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.029, ORS 279.035 & ORS 279.037
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0075

Facsimile Bids and Proposals

(1) **Agency Authorization.** ODOT may authorize Offerors to submit Facsimile Offers. If ODOT determines that Bid or Proposal security is or will be required, ODOT should not authorize Facsimile Offers unless ODOT has another method for receipt of such security. Prior to authorization ODOT must determine whether ODOT’s equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time and establish administrative procedures and controls:

- (a) For receiving, identifying, recording, and safeguarding Facsimile Offers; and
- (b) To ensure timely delivery of Offers to the location of Opening and to preserve the “sealed” requirement of competitive procurement.

(2) **Provisions to Be Included in Solicitation Document.** In addition to all other requirements, if ODOT authorizes a Facsimile Offer, ODOT will include in the Solicitation Document provisions substantially similar to the following:

- (a) A Facsimile Offer, as used in this solicitation, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by ODOT via a Facsimile machine.
- (b) Offerors may submit Facsimile Offers in response to this solicitation. The entire response must arrive at the place and by the time specified in this Solicitation Document.
- (c) Offerors must Sign their Facsimile Offers.
- (d) ODOT reserves the right to award the Contract solely on the Facsimile Offer. However, upon ODOT’s request the apparently suc-

cessful Offeror shall promptly submit its complete original Signed Offer.

(e) The telephone number or numbers to which the Facsimile Offers may be submitted.

(f) ODOT is not responsible for any failure attributable to the transmission or receipt of the Facsimile Offer including, but not limited to the following:

- (A) Receipt of garbled or incomplete documents.
- (B) Availability or condition of the receiving Facsimile machine.
- (C) Incompatibility between the sending and receiving Facsimile machine.
- (D) Delay in transmission or receipt of documents.
- (E) Failure of the Offeror to properly identify the Offer documents.

- (F) Illegibility of Offer documents.
 - (G) Security and confidentiality of data.
- Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.027
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0085

Use of Electronic Data Interchange

(1) **Agency Authorization.** ODOT may authorize Offerors to submit EDI Offers. If ODOT determines that Bid or Proposal security is or will be required, ODOT should not authorize EDI Offers unless ODOT has a method for receipt of such security. Prior to authorizing EDI Offers, ODOT must:

- (a) Establish administrative procedures and controls for receiving, identifying, recording, and safeguarding EDI Offers, to ensure timely delivery of the Offers to the Opening location and to preserve the “sealed” requirement of competitive procurement;
- (b) Determine whether ODOT’s procedures, controls, equipment and personnel are capable of receiving the size and volume of anticipated EDI Offers within a short period of time; and
- (c) Make available to interested vendors an EDI “trading partner” or operating agreement (“EDI Operating Agreement”).

(2) **EDI Operating Agreement.** An EDI Operating Agreement must address the basic legal issues required to formalize an EDI relationship. The EDI Operating Agreement shall include the following:

- (a) Selection of EDI standards and methods of communication;
- (b) Allocation of responsibilities for ensuring that the equipment, software and services are operated and maintained effectively;
- (c) Procedures for making system changes that may impair the ability of the parties to communicate;
- (d) Required security and authentication procedures and services;

- (e) The method for establishing receipt of Offers and for evidencing the Offeror is bound to its Offer;
- (f) The need (if any) for maintaining confidentiality;
- (g) The allocation of liabilities for failure to meet requirements under the EDI Operating Agreement;
- (h) Methods for resolving any disputes under the EDI Operating Agreement; and
- (i) Document backup and replacement procedures.

(3) **Provisions to Be Included in Solicitation.** In addition to all other requirements, if ODOT authorizes an EDI Offer, ODOT will include in the Solicitation Document provisions substantially similar to the following:

- (a) An EDI Offer, as used in this solicitation, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by ODOT in accordance with the EDI Operating Agreement between ODOT and Offeror.
- (b) An Offeror may submit an EDI Offer in response to this solicitation provided the Offeror has an effective EDI Operating Agreement with ODOT. The EDI Offer must arrive at the place and by the time specified in the Solicitation Document.
- (c) An Offeror must Sign its EDI Offer in accordance with the EDI Operating Agreement between ODOT and the Offeror.
- (d) ODOT reserves the right to award the Contract based solely on the EDI Offer. Unless otherwise provided under the EDI Oper-

ating Agreement, the Offeror shall promptly submit conformed Signed documents upon ODOT's request.

(e) Unless otherwise expressly agreed upon under the EDI Operating Agreement, ODOT is not responsible for any failure attributable to the transmission or receipt of the EDI Offer including, but not limited to the following:

- (A) Receipt of garbled or incomplete documents.
 - (B) Availability or condition of the receiving equipment.
 - (C) Incompatibility between the sending and receiving equipment.
 - (D) Delay in transmission or receipt of documents.
 - (E) Failure of the Offeror to properly identify the Offer documents.
 - (F) Illegibility of Offer documents.
 - (G) Security and confidentiality of data.
- Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.027 & ORS 279.049
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0095

Public Notice of Solicitation

(1) **Notice and Distribution Fee.** ODOT shall furnish Notice to a sufficient number of Entities for the purpose of fostering and promoting competition. The Notice shall indicate where, when, how, and for how long the Solicitation Document may be obtained and generally describe the Work. The Notice may contain any other appropriate information. ODOT may charge a fee or require a deposit for the Solicitation Document. ODOT may furnish Notice using any method determined to foster and promote competition, including:

(a) Mail notice of the availability of Solicitation Documents ("Notice") to Entities that have expressed an interest in ODOT's procurements;

(b) Place Notice on the Oregon Department of Administrative Services' electronic procurement system known as the Vendor Information Program ("VIP"); or

(c) Place Notice on ODOT's internet web site.

(2) **Advertising.** ODOT shall advertise every solicitation for Offers, unless the Contract Review Authority has exempted the solicitation from the advertisement requirement.

(a) Unless ODOT publishes by Electronic Advertisement as permitted under subsection (2)(b) of this rule, ODOT shall publish the advertisement for Offers 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 ODOT may determine to be necessary or desirable to foster and promote competition.

(b) ODOT may publish by Electronic Advertisement if:

(A) ODOT has published a notice that it may publish future advertisements for Offers by Electronic Advertisement. ODOT shall publish such notice weekly, for no less than four consecutive weeks, in at least one newspaper of general circulation in the area where the business office of ODOT is located and in as many additional issues and publications as ODOT may determine to be necessary or desirable to provide notice to potential Offerors. ODOT notice shall include the World Wide Web location (i.e. Uniform Resource Locator or URL) where ODOT will publish future Electronic Advertisements or alternatively, to the Web location where ODOT will publish information on accessing the Electronic Advertisement via a telnet application;

(B) ODOT posts in its business office a notice that ODOT will publish advertisements for Offers by Electronic Advertisement. The notice shall include the World Wide Web location (i.e. Uniform Resource Locator or URL) where ODOT publishes Electronic Advertisements or alternatively, to the Web location where ODOT publishes information on accessing the Electronic Advertisement via telnet; and

(C) DAS determines Electronic Advertisement is less expensive than publishing by newspaper under subsection (2)(a) of this rule.

(c) In addition to ODOT's publication required under subsection (2)(a) or (2)(b) of this rule, ODOT shall also publish advertisement for Offers in at least one trade newspaper of general statewide

circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000 (see, OAR 731-040-0045(1)).

(d) All advertisements for Offers shall set forth:

(A) The scheduled Closing, that shall not be less than five Days after the date of the last publication of the advertisement;

(B) The date that Entities must file applications for prequalification if prequalification is a requirement and the class or classes of Work for which Entities must be prequalified;

(C) The nature of the Work to be performed or the goods to be purchased;

(D) The office where the Solicitation Documents may be reviewed;

(E) The name, title and address of ODOT person authorized to receive Offers;

(F) The scheduled Opening; and

(G) If applicable, that the Contract is for a Public Work subject to ORS 279.348 to 279.380 or the Davis-Bacon Act (40 U.S.C. 276(a)).

(3) **Posting Advertisement for Offers.** ODOT shall post a copy of each advertisement for Offers at the principal business office of ODOT. An Offeror may obtain a copy of the advertisement for Offers upon request from Contractor Plans Unit, Transportation Building, 355 Capitol Street NE, Salem, Oregon 97301-3871 or on the Internet at www.odot.state.or.us.

(4) **Minority, Women Emerging Small Business.** ODOT shall provide timely notice of all solicitations to the Advocate for Minority, Women and Emerging Small Business if the estimated Contract Price exceeds \$5,000.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.007, ORS 279.025 & ORS 200.035
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0105

Offer Preparation

(1) **Instructions.** An Offeror shall submit and Sign its Offer in accordance with the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to the Opening in accordance with the requirements for submitting an Offer under the Solicitation Document.

(2) **Forms.** An Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless an Offeror is otherwise instructed in the Solicitation Document.

(3) **Documents.** An Offeror shall provide ODOT with all documents and Descriptive Literature required under the Solicitation Document.

(4) **Facsimile or EDI Submissions.** If the Solicitation Document permitted Facsimile or EDI Offers under OAR 731-005-0045(3)(a)(D), an Offeror may submit its Offer by Facsimile or EDI. ODOT shall not consider Facsimile or EDI Offers unless authorized by the Solicitation Document.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.027
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0115

Offeror Submissions

(1) **Product Samples and Descriptive Literature.** ODOT may require Product Samples or Descriptive Literature if it is necessary or desirable to evaluate the quality, features or characteristics of the offered items. ODOT will dispose of Product Samples, or return or make available for return Product Samples to the Offeror in accordance with the Solicitation Document.

(2) **Identification of Offers.**

(a) To ensure proper identification and handling, Offers shall be submitted in a sealed envelope appropriately marked or in the envelope provided by ODOT, whichever is applicable. If ODOT permits Facsimile or EDI Offers in the Solicitation Document, the Offeror may submit and identify Facsimile or Electronic Data Interchange Offers in accordance with the Solicitation Document.

(b) ODOT is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.

(3) **Receipt of Offers.** The Offeror is responsible for ensuring ODOT receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.027
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0125

Bid or Proposal Security

(1) **Security Amount.** If ODOT requires Bid or Proposal security, it shall be 10% of the Offeror’s Bid or Proposal. ODOT shall not use Bid or Proposal security to discourage competition. ODOT shall expressly provide for any Bid or Proposal security in its Solicitation Document.

(2) **Public Improvement Contracts.** Unless ODOT has otherwise exempted a solicitation or class of solicitations from Bid or Proposal security pursuant to ORS 279.033, ODOT shall require Bid or Proposal security for its solicitation of Offers for Public Improvements. ODOT may require Bid or Proposal security even if it has exempted a class of solicitations from Bid or Proposal security.

(3) **Form of Bid or Proposal Security.** Accompany each Proposal with a guaranty in the amount of 10% of the total amount of the Proposal. The guaranty shall be either a surety bond or security in the form of a cashier’s check or certified check made payable to the “Oregon Department of Transportation.” If a surety bond is submitted, use ODOT’s standard Proposal bond form, which is included with the Proposal booklet. Submit the original of the bond with the surety company’s seal affixed.

(a) Acceptable surety companies are limited to those authorized to do business in the State of Oregon.

(b) ODOT shall return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been executed and a performance bond provided (if such performance bond is required), or after all Offers have been rejected. ODOT may return the Bid or Proposal security of unsuccessful Offerors prior to award if the return does not prejudice Contract award and the security of at least the Bidders with the three lowest Bids, or the Proposers with the three highest scoring Proposals, is retained pending execution of a Contract.

(c) The Offeror shall forfeit Bid or Proposal security after award if the Offeror fails to Sign the Contract promptly and properly.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.027(4), ORS 279.031, ORS 279.033 & ORS 279.722
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0135

Pre-Offer Conferences

(1) **Purpose.** ODOT may hold pre-Offer conferences with prospective Offerors prior to Closing, to explain the procurement requirements, obtain information, or to conduct site inspections.

(2) **Required Attendance.** ODOT may require attendance at the pre-Offer conference as a condition for making an Offer.

(3) **Scheduled Time.** If ODOT holds a pre-Offer conference, it shall be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to allow Offerors to consider information provided at that conference.

(4) **Statements Not Binding.** Statements made by ODOT’s representative at the pre-Offer conference do not change the Solicitation Document unless ODOT confirms such statements with a Written Addendum to the Solicitation Document.

(5) **Agency Announcement.** ODOT must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with OAR 731-005-0045(3)(a)(A).

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.007 & ORS 279.027
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0145

Solicitation Protest; Request for Change; Request for Clarification

(1) **Protest.**

(a) **Delivery.** An Offeror may protest Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest to ODOT not less than 10 Days prior to Closing.

(b) **Content of Protest.**

(A) An Offeror’s Written protest shall include:

(i) A detailed statement of the legal and factual grounds for the protest;

(ii) A description of the resulting prejudice to the Offeror; and

(iii) A statement of the desired changes to the Contract terms and conditions, including Specifications.

(B) An Offeror shall mark its protest as follows:

(i) **Solicitation Specification or Contract Provision Protest;** and

(ii) **Solicitation Document Number (or Other Identification as specified in the Solicitation Document).**

(2) **Request for Change.**

(a) **Delivery.** An Offeror may request in Writing a change to the Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver the Written request for change to ODOT not less than 10 Days prior to Closing;

(b) **Content of Request or Change.**

(A) An Offeror’s Written request for change shall include a statement of the requested changes to the Contract terms and conditions, including Specifications together with the reason for the requested change.

(B) An Offeror shall mark its request for change as follows:

(i) **Solicitation Specification or Contract Provision Request for Change;** and

(ii) **Solicitation Document Number (or Other Identification as specified in the Solicitation Document).**

(3) **Agency response.** ODOT is not required to consider an Offeror’s request for change or protest after the deadline established for submitting such request or protest. ODOT shall provide notice to the applicable Entity if it entirely rejects a protest. If ODOT agrees with the Entity’s request or protest, in whole or in part, ODOT shall either issue an Addendum reflecting its determination under OAR 731-005-0155 or cancel the Solicitation under OAR 731-005-0295.

(4) **Extension of Closing.** If ODOT receives a Written request for change or protest from an Offeror in accordance with this rule, ODOT may extend Closing if ODOT determines an extension is necessary to consider the request or protest and to issue an Addendum, if any, to the Solicitation Document.

(5) **Clarification.** Prior to the deadline for submitting a Written request for change or protest, an Offeror may request that ODOT clarify any provision of the Solicitation Document. ODOT’s clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on ODOT unless ODOT amends the Solicitation Document by Addendum.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.017, ORS 279.023, ORS 279.027 & ORS 279.067
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0155

Addenda to a Solicitation Document

(1) **Issuance; Receipt.** ODOT may change a Solicitation Document only by Written Addenda.

(2) **Notice and Distribution.** ODOT shall notify prospective Offerors of Addenda consistent with the standards of Notice set forth in OAR 731-005-0095(1). The Solicitation Document shall specify how ODOT will provide notice of Addenda and how ODOT will make the Addenda available (see OAR 731-005-0045(3)(a)(N)). For example, “Agency will not mail notice of Addenda, but will publish notice of any Addenda on Agency’s WEB site. Addenda may be downloaded off ODOT’s WEB site. Offerors should check ODOT’s WEB site weekly until the week of Closing and daily the week of the Closing.”

(3) **Timelines; Extensions.** ODOT shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. ODOT should extend the Closing if ODOT determines prospective Offerors need additional time

to review and respond to Addenda. Except to the extent required by public interest, ODOT shall not issue Addenda less than 48 hours before the Closing unless the Addendum also extends the Closing.

(4) **Request for Change or Protest.** Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum as provided in OAR 731-005-0145(2) through (5), within 24 hours following issuance of the Addendum, or up to the last day allowed to submit a request for change or protest under OAR 731-005-0145, whichever date is later. ODOT shall consider only an Offeror's request for change or protest to the Addendum; ODOT shall not consider a request for change or protest to matters not added or modified by the Addendum.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.035 & ORS 279.049
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0165

Pre-Opening Modification or Withdrawal of Offers

(1) **Modifications.** An Offeror may modify its Offer in Writing prior to the Closing. An Offeror shall prepare and submit any modification to its Offer to ODOT in accordance with OAR 731-005-0105 and 731-005-0115, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:

- (a) **Bid (or Proposal) Modification;**
- (b) **Solicitation Number (or Other Identification as specified in the Solicitation Document).**

(2) **Withdrawals:**

(a) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, including the Offeror's Bid or Proposal document number if one has been assigned, Signed by an individual who is authorized to sign the Offer, delivered to the location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by ODOT prior to the Closing. Proof of authorization to sign the Offer must accompany the withdrawal request. The Offeror or authorized representative of the Offeror may also withdraw its Offer in person prior to the Closing, upon presentation of appropriate identification and satisfactory evidence of authority.

(b) ODOT may release an unopened Offer, withdrawn under subsection (2)(a) of this rule, to the Offeror or its authorized representative, after voiding any date and time stamp mark.

(c) The Offeror shall mark the Written request to withdraw an Offer as follows:

- (A) **Bid (or Proposal) Withdrawal;**
- (B) **Solicitation Number (or Other Identification as specified in the Solicitation Document).**

(3) **Documentation.** ODOT shall include all documents relating to the modification or withdrawal of Offers in the appropriate solicitation file.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.025(2), ORS 279.027, ORS 279.049, ORS 279.029(6)(a) & ORS 279.035
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0175

Receipt, Opening, and Recording of Offers

(1) **Receipt.** ODOT shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. ODOT shall not open the Offer or modification, but shall store it in a secure place until Opening. If ODOT inadvertently opens an Offer or a modification prior to the Opening, ODOT shall reseal and store the opened Offer or modification for Opening. ODOT shall document the resealing for the solicitation file (e.g. "Agency inadvertently opened the Offer due to improper identification of the Offer").

(2) **Opening and recording.** ODOT shall publicly open Offers including any modifications made to the Offer pursuant to OAR 731-005-0165. In the case of Invitations to Bid, to the extent practicable, ODOT shall read aloud the name of each Bidder, the total of each Bid, and such other information as ODOT considers appropriate. In the case of Requests for Proposals, if the Solicitation Document so provides, ODOT will not read Offers aloud.

(3) **Availability.** After Opening, ODOT shall make the Offers available for public inspection except for those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.501(2); ORS 646.461 to 646.475. To the extent ODOT determines such designation is not in accordance with applicable law, ODOT shall make those portions available for public inspection. The Offeror shall separate information designated as confidential from other non-confidential information at the time of submitting its Offer. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and shall be publicly available regardless of an Offeror's designation to the contrary.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.027 & ORS 279.035
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0185

Late Offers, Late Withdrawals and Late Modifications

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. ODOT shall not consider late Offers, withdrawals or modifications except as permitted in OAR 731-005-0195 or 731-005-0225.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.027 & ORS 279.035
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0195

Mistakes

(1) **General.** To protect the integrity of the competitive solicitation process and to assure fair treatment of Offerors, ODOT shall carefully consider whether to permit waiver, correction or withdrawal for certain mistakes.

(2) **Agency Treatment of Mistakes.** ODOT shall not allow an Offeror to correct or withdraw an Offer for an error in judgment. If ODOT discovers certain mistakes in an Offer after Opening, but before award of the Contract, ODOT may take the following action:

(a) ODOT may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:

- (A) Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;
- (B) Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and

(b) ODOT may correct a clerical error if the intended Offer and the error are evident on the face of the Offer, or other documents submitted with the Offer, and the Offeror confirms ODOT's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example, a missing unit price may be established by dividing the total price for the units by the quantity of units for that item or a missing, or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). In the event of a discrepancy, unit prices shall prevail over extended prices.

(c) ODOT may permit an Offeror to withdraw an Offer based on other errors only if the Offeror shows by clear and convincing evidence to the satisfaction of ODOT:

- (A) The nature of the error on the face of the Offer or documents submitted with the Offer, pursuant to the solicitation requirements; and
- (B) That the error is not a judgment error, minor informality or clerical error.

(3) **Rejection for Mistakes.** ODOT shall reject any Offer in which a mistake is evident on the face of the Offer and the intended correct Offer is not evident or cannot be substantiated from documents submitted with the Offer, pursuant to solicitation requirements.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.029 & ORS 279.035
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0205

Time for Agency Acceptance

An Offeror's Offer is a Firm Offer, irrevocable, valid and binding on the Offeror for not less than 30 Days from Closing unless otherwise specified in the Solicitation Document.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.029(1)
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0215

Extension of Time for Acceptance of Offer

ODOT may request, orally or in Writing, that Offerors extend, in Writing, the time during which ODOT may consider their Offer(s). If an Offeror agrees to such extension, the Offer shall continue as a Firm Offer, irrevocable, valid and binding on the Offeror for the agreed-upon extension period.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.029(1)
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0225

Offer Evaluation and Award

(1) **General.** If awarded, ODOT shall award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer submitting the best, Responsive Proposal. ODOT may award by item, groups of items or the entire Offer provided such award is consistent with the Solicitation Document and in the public interest.

(2) **Agency Evaluation.** ODOT shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law. ODOT shall not evaluate an Offer using any other requirement or criterion.

(3) **Offeror Submissions.**

(a) ODOT may require an Offeror to submit product samples, descriptive literature, technical data, or other material and may also require any of the following prior to award:

(A) Demonstration, inspection or testing of a product prior to award for characteristics such 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 to Specifications.

(b) ODOT shall evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. ODOT shall reject an Offer providing any product that does not meet the Solicitation Document requirements. ODOT's rejection of an Offer because it offers non-conforming Work or goods is not Disqualification and is not appealable under ORS 279.043.

(4) **Evaluation of Bids.** ODOT shall use only objective criteria to evaluate Bids as set forth in the ITB. ODOT shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid. In determining the lowest Responsive Bid, ODOT shall add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides unless prohibited by federal requirements. ODOT shall not negotiate scope of Work or other terms or conditions under an Invitation to Bid process.

(5) **Evaluation of Proposals.**

(a) ODOT shall only evaluate Proposals in accordance with criteria set forth in the RFP and applicable law. ODOT shall evaluate Proposals to determine the Responsible Proposer submitting the best Responsive Proposal. ODOT may seek information from a Proposer only to clarify the Proposer's Proposal. Such clarification shall not vary, contradict or supplement the Proposal. ODOT shall not seek clarification of a nonresponsive Proposal. A Proposer must submit Written and Signed clarifications and such clarifications become part of the Proposer's Proposal. Unless ODOT permitted negotiation in

accordance with OAR 731-005-0045 in its Request for Proposals, ODOT may only negotiate:

(A) The statement of Work, including schedule, and

(B) The Contract Price as it is affected by negotiating the statement of Work.

(b) If ODOT permitted negotiation in the Request for Proposals in accordance with OAR 731-005-0045, ODOT shall evaluate Proposals and may negotiate as follows:

(A) If the Solicitation Document provided that negotiation may occur at Agency's discretion, ODOT may forego negotiations and evaluate all Proposals in accordance with subsection (5)(a) of this rule;

(B) Unless the solicitation is canceled, after the Opening ODOT will evaluate all Proposals in accordance with the evaluation criteria. After evaluation of all Proposals in accordance with the criteria set forth in the Request for Proposals, ODOT will determine the Proposers in the Competitive Range. ODOT may increase the Competitive Range if ODOT's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number greater than the initial Competitive Range;

(C) ODOT shall establish a negotiation team tailored for the solicitation. ODOT's team may include but is not limited to legal, technical and negotiating personnel;

(D) In addition to the statement of Work, including schedule, and the Contract Price as it is affected by negotiating the statement of Work, ODOT shall only negotiate other terms and conditions expressly authorized for negotiation under the Request for Proposals. A Proposer shall only submit alternative terms and conditions to the terms and conditions ODOT expressly authorized for negotiation under the Request for Proposal;

(E) ODOT shall provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not within the Competitive Range may protest ODOT's evaluation and determination of the Competitive Range in accordance with OAR 731-005-0265. All Proposals are open for public inspection subject to the Oregon Public Records Law;

(F) After the protest period provided in accordance with paragraph (5)(b)(E) of this rule expires, or after ODOT has provided a final response to any protest, whichever date is later, ODOT may begin negotiating with Proposers in the Competitive Range. ODOT's negotiation team shall not favor any particular Proposer. ODOT may negotiate Contract Price, designated terms and conditions and the statement of Work, including schedule. However, ODOT may only negotiate Contract Price to the extent the Proposer would not be excluded from the Competitive Range based on ODOT's evaluation criteria set forth in the Solicitation Document. ODOT may only negotiate an alternative term or condition submitted by a Proposer if the alternative term or condition is reasonably related to the term or condition ODOT authorized as negotiable. ODOT shall not negotiate any other terms or conditions set forth in the Request for Proposals;

(G) ODOT may evaluate Offers negotiated with Proposers in the Competitive Range at any time during the negotiation process to determine if ODOT will:

(i) Continue negotiating with a particular Proposer;

(ii) Terminate negotiations with a particular Proposer and continue negotiating with other Proposers in the Competitive Range; or

(iii) Conclude negotiations with all remaining Proposers in the Competitive Range in accordance with paragraph (5)(b)(G) of this rule.

(H) ODOT may terminate negotiations with a Proposer in the Competitive Range at any time. If ODOT does not cancel the solicitation at the conclusion of ODOT's negotiation with all remaining Proposers in the Competitive Range, ODOT shall score the Proposals in the Competitive Range based upon the evaluation criteria in the Request for Proposals;

(I) ODOT shall provide Written notice of intent to award the Contract to all Proposers in the Competitive Range. An unsuccessful Proposer may protest ODOT's evaluation and determination of the Competitive Range in accordance with OAR 731-005-0265; and

(J) Nothing in section (5) of this rule shall restrict or prohibit ODOT from canceling the solicitation at any time in accordance with OAR 731-005-0295.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.005, ORS 279.007, ORS 279.015, ORS 279.027, ORS 279.029 & ORS 279.035
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0235

Tie Offers

(1) **Definition.** Tie Offers are low tie Responsive Bids from Responsible Bidders or high tie Responsive Proposals from Responsible Proposers that are identical in price, fitness, availability and quality.

(2) **Award.** If awarded, ODOT shall award the Contract based on the following order of precedence:

(a) For projects not involving federal funds ODOT shall prefer the Offer of the Offeror whose principal offices or headquarters are located in Oregon;

(b) If a Tie Offer remains after ODOT applies subsection (a) of this section, ODOT shall award the Contract by drawing lots among any tied Oregon Offerors if no federal funds are a part of the project. Such Offerors shall be given notice and an opportunity to be present when the lots are drawn; or

(c) If a Tie Offer remains after ODOT applies subsection (b) of this section and none of the tied Offerors are located in Oregon or the project has federal funding, ODOT shall award the Contract by drawing lots among any tied Offerors. Such Offerors shall be given notice and an opportunity to be present when the lots are drawn.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.021 & ORS 279.029
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0245

Rejection of an Offer

(1) **Rejection of an Offer.**

(a) ODOT may reject any Offer upon finding that to accept the Offer may impair the integrity of the procurement process or that rejecting the Offer is in the public interest.

(b) ODOT shall reject an Offer upon ODOT's finding that the Offer:

(A) Is contingent upon ODOT's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;

(B) Takes exception to terms and conditions (including Specifications);

(C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of Solicitation Document or in contravention of applicable law;

(D) Offers Work or goods that fail to meet the Specifications of the Solicitation Document;

(E) Is late;

(F) Is not in substantial compliance with the Solicitation Documents; or

(G) Is not in substantial compliance with all prescribed public solicitation procedures.

(c) ODOT shall reject an Offer upon ODOT's finding that the Offeror:

(A) Has not been prequalified under ORS 279.039 and ODOT required mandatory prequalification;

(B) Has been Disqualified;

(C) Has been declared ineligible under ORS 279.361 by the Commissioner of Bureau of Labor and Industries has declared and the Contract is for a Public Work;

(D) Is listed as not qualified by the Construction Contractors Board;

(E) Has not met the requirements of ORS 279.059(1) or 279.059(2) if required by the Solicitation Document;

(F) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;

(G) Has failed to provide the certification required under section (3) of this rule; or

(H) Is nonresponsible. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. ODOT uses a prequalification process as described in OAR 734 Division 10 to determine if a Contractor is responsible. Before awarding a Contract, ODOT must have information that indicates that the Offeror meets the applicable standards of responsibility. To be a Responsible Offeror, ODOT must determine that the Offeror:

(i) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to demonstrate the capability of the Offeror to meet all contractual responsibilities;

(ii) Has a satisfactory record of Contract performance. ODOT should carefully scrutinize an Offeror's record of Contract performance if the Offeror is or recently has been materially deficient in Contract performance. In reviewing the Offeror's performance, ODOT should determine whether the Offeror's deficient performance was expressly excused under the terms of Contract, or whether the Offeror took appropriate corrective action. ODOT may review the Offeror's performance on both private and public Contracts in determining the Offeror's record of Contract performance. ODOT shall make its basis for determining an Offeror nonresponsible under this paragraph part of the solicitation file;

(iii) Has a satisfactory record of integrity. An Offeror may lack integrity if ODOT determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to ODOT. ODOT may find an Offeror nonresponsible based on the lack of integrity of any Entity having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Entity). The standards for Conduct Disqualification under OAR 731-005-0285 may be used to determine an Offeror's integrity. ODOT shall make its basis for determining that an Offeror is nonresponsible under this paragraph part of the solicitation file;

(iv) Is qualified legally to Contract with ODOT; and

(v) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by ODOT concerning responsibility, ODOT shall base the determination of responsibility upon any available information, or may find the Offeror nonresponsible.

(2) **Form of Business Entity.** For purposes of this rule, ODOT may investigate any Entity submitting an Offer. The investigation may include that Entity's officers, directors, owners, affiliates, or any other Entity acquiring ownership of the Entity to determine application of this rule or to apply the disqualification provisions of ORS 279.037 to 279.045 and OAR 731-005-0285.

(3) **Certification of Non-Discrimination.** The Offeror shall certify and deliver to ODOT Written certification, as part of the Offer, that the Offeror has not discriminated against minority, women or emerging small business enterprises in obtaining any required subcontracts.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.029, ORS 279.035, ORS 279.059 & ORS 279.111
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0255

Rejection of All Offers

(1) **Rejection.** ODOT may reject all Offers for good cause upon ODOT's Written finding it is in the public interest to do so. ODOT shall notify all Offerors of the rejection of all Offers, along with the good cause justification and finding.

(2) **Criteria.** ODOT may reject all Offers upon a Written finding that:

(a) The content of or an error in the Solicitation Document, or the solicitation process unnecessarily restricted competition for the Contract;

(b) The price, quality or performance presented by the Offerors is too costly or of insufficient quality to justify acceptance of the Offer;

(c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;

(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 Solicitation Document;

(e) ODOT cancels the solicitation in accordance with OAR 731-005-0295; or

(f) Any other circumstance indicating that awarding the Contract would not be in the public interest.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.035
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0265

Protest of Contractor Selection, Contract Award

(1) **Purpose.** An adversely affected Offeror must exhaust all avenues of administrative review and relief before seeking judicial review of ODOT's Contractor selection or Contract award decision.

(2) **Notice of Intent to Award.** Unless otherwise provided in the Solicitation Document, ODOT shall provide notice of the intent to award on the ODOT web site. ODOT's award shall not be final until the later of the following:

(a) Three working days after the date of the notice, unless the Solicitation Document provided a different period for protest; or

(b) ODOT provides a Written response to all timely-filed protests that denies the protest and affirms the award.

(3) **Notice of Competitive Range.** Unless otherwise provided in the RFP, ODOT shall provide Written notice to all Proposers of ODOT's determination of the Proposers included in the Competitive Range. ODOT's notice of the Proposers included in the Competitive Range shall not be final until the later of the following:

(a) Ten Days after the date of the notice, unless otherwise provided therein; or

(b) Until ODOT provides a Written response to all timely-filed protests that denies the protest and affirms the notice of the Proposers included in the Competitive Range.

(4) **Right to Protest Award.**

(a) An adversely affected Offeror may submit to ODOT a Written protest of ODOT's Notice of Intent to Award Bid within three working days after issuance of the Notice of Intent to Award Bid, unless a different protest period is provided under the Solicitation Document.

(b) The Offeror's protest must specify the grounds upon which the protest is based.

(c) An Offeror is adversely affected only if the Offeror is one of the three apparent low Bidders on an Invitation to Bid or three highest scoring Proposers in the case of an RFP.

(d) ODOT shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document.

(5) **Right to Protest Competitive Range.**

(a) An adversely affected Proposer may submit to ODOT a Written protest of ODOT's decision to exclude the Proposer from the Competitive Range within seven Days after issuance of the notice of the Competitive Range, unless a different protest period is provided under the Solicitation Document.

(b) The Proposer's protest shall be in Writing and must specify the grounds upon which the protest is based.

(c) A Proposer is adversely affected only if the Proposer is responsible and submitted a Responsive Proposal and is eligible for inclusion in the Competitive Range i.e., the protesting Proposer must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Proposers are removed from consideration, and that those ineligible Proposers are ineligible for inclusion in the Competitive Range because:

(A) Their Proposals were not responsive; or

(B) ODOT committed a substantial violation of a provision in the RFP or of an applicable procurement statute or administrative rule, and

the protesting Proposer was unfairly evaluated and would have, but for such substantial violation, been included in Competitive Range.

(d) ODOT shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest ODOT's decision to not increase the Competitive Range above the Competitive Range set forth in the RFP.

(6) **Authority to Resolve Protests.** The ODOT Executive Deputy Director, or designee, has the authority to settle or resolve a Written protest submitted in accordance with the requirements of this rule.

(7) **Decision.** If a protest is not settled, the ODOT Executive Deputy Director or designee, shall promptly issue a Written decision on the protest. Judicial review of this decision will be available if provided by statute.

(8) **Contract Execution.** The successful Offeror shall promptly execute the Contract after the award is final. ODOT shall execute the Contract only after it has obtained all applicable required documents and approvals.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.029, ORS 279.031 & ORS 279.067.
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0275

Negotiation with Bidders

(1) **Bids.** ODOT shall not negotiate with any Bidder prior to award of Contract. After award of the Contract, ODOT and Contractor may only modify the Contract as specified in the Contract.

(2) **Requests for Proposals.** ODOT may only negotiate with Proposers in accordance with OAR 731-005-0045 and 731-005-0225.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.005, ORS 279.015, ORS 279.023, ORS 279.027 & ORS 279.029
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0285

Disqualification of an Entity

(1) **Authority.** ODOT may disqualify an Entity from consideration of award of ODOT's Contracts after providing the Entity with notice and a reasonable opportunity to be heard in accordance with section (3) of this rule.

(a) **Standards for Conduct Disqualification.** As provided in ORS 279.037, ODOT may disqualify an Entity for:

(A) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private Contract or subcontract, or in the performance of such Contract or subcontract;

(B) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the Entity's responsibility as a Contractor;

(C) Conviction under state or federal antitrust statutes; or

(D) Violation of a Contract provision that is regarded by ODOT to be so serious as to justify Disqualification under OAR 734-010-0130.

(b) **Standards for DBE Disqualification.** As provided in ORS 200.065, 200.075 or 279.111, ODOT may disqualify an Entity's right to submit an Offer or to participate in a Contract (e.g. subcontractors) as follows:

(A) For a DBE Disqualification under ORS 200.065, ODOT may disqualify an Entity upon finding that:

(i) The Entity fraudulently obtained or retained or attempted to obtain or retain or aided another person to fraudulently obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise;

(ii) The Entity knowingly made a false claim that any person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a Contract or subcontract or other benefit; or

(iii) The Entity has been disqualified by another Agency pursuant to ORS 200.065.

(B) For a DBE Disqualification under ORS 200.075, ODOT may disqualify an Entity upon finding that:

(i) The Entity has entered into an agreement representing that a disadvantaged, minority, women, or emerging small business enterprise, certified pursuant to ORS 200.055 (“Certified Enterprise”), will perform or supply materials under a Public Improvement Contract without the knowledge and consent of the Certified Enterprise;

(ii) The Entity exercises management and decision-making control over the internal operations, as defined by ORS 200.075(1)(b), of any Certified Enterprise;

(iii) The Entity uses a disadvantaged, minority, women or emerging small business enterprise to perform services under a Contract or to provide supplies under a Public Improvement Contract to meet an established DBE/MBE/WBE/ESB goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the Contract; or

(iv) If an Entity is Disqualified for a DBE Disqualification under ORS 200.075, ODOT shall not permit such Entity to participate in ODOT’s Contracts.

(C) For a DBE Disqualification under ORS 279.111, ODOT may disqualify an Entity if ODOT finds that the Entity discriminated against minority, women, or emerging small business enterprises in awarding a subcontract under a prior Contract with ODOT.

(2) **Notice of Intent to Disqualify.** ODOT shall notify the Entity in Writing of a proposed Disqualification personally or by registered or certified mail, return receipt requested. This notice shall:

(a) State that ODOT intends to disqualify the Entity;

(b) Set forth the reasons for the Disqualification;

(c) Include a statement of the Entity’s right to a hearing if requested in Writing within the time stated in the notice and that if ODOT does not receive the Entity’s Written request for a hearing within the time stated, the Entity shall have waived its right to a hearing;

(d) Include a statement of the authority and jurisdiction under which the hearing will be held;

(e) Include a reference to the particular sections of the statutes and rules involved;

(f) State the proposed Disqualification period; and

(g) State that the Entity may be represented by legal counsel.

(3) **Hearing.** ODOT shall schedule a hearing upon ODOT receipt of the Entity’s timely request. ODOT shall notify the Entity of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing prior to hearing.

(4) **Notice of Disqualification.** ODOT will notify the Entity in Writing of its Disqualification, personally or by registered or certified mail, return receipt requested. The notice shall contain:

(a) The effective date and period of Disqualification;

(b) The grounds for Disqualification; and

(c) A statement of the Entity’s appeal rights and applicable appeal deadlines. For a Conduct Disqualification or a DBE Disqualification under ORS 279.111, the Disqualified Entity must notify ODOT in Writing within three business days after receipt of ODOT’s notice of Disqualification if the Entity intends to appeal ODOT’s decision.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049

Stats. Implemented: ORS 200.065, ORS 200.075, ORS 279.037, ORS 279.043, ORS 279.045 & ORS 279.111

Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0295

Cancellation of Solicitation

(1) **Cancellation in the Public Interest.** ODOT may cancel a Solicitation for good cause if ODOT finds that cancellation is in the public interest. ODOT’s reasons for cancellation shall be made part of the solicitation file.

(2) **Notice of Cancellation.** If ODOT cancels a solicitation prior to Opening, ODOT shall provide notice of cancellation in accordance with OAR 731-005-0015(1). Such notice of cancellation shall:

(a) Identify the Solicitation; and

(b) If appropriate, explain that an opportunity will be given to compete on any re-solicitation.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049

Stats. Implemented: ORS 279.035

Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0305

Disposition of Offers if Solicitation Canceled

(1) **Prior to Opening.** If ODOT cancels a Solicitation prior to Opening, ODOT will return each Offer it received to the Offeror unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, ODOT will open the Offer to determine the source and then return it to the Offeror.

(2) **After Opening.** If ODOT rejects all Offers, ODOT will retain all such Offers as part of ODOT’s solicitation file.

(3) **Cancellation of Award.** Without liability to ODOT, ODOT may cancel award of Contract at any time before the Contract agreement is executed by all parties to the Contract, upon finding it is in the public interest to do so.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049

Stats. Implemented: ORS 279.035

Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0315

Documentation of Award

(1) **Basis of Award.** After award, ODOT shall make a record showing the basis for determining the successful Offeror part of ODOT’s solicitation file.

(2) **Contents of Award Record.** ODOT’s record shall include:

(a) Bids.

(A) Completed Bid tabulation sheet; and

(B) Written justification for any rejection of lower Bids.

(b) Proposals.

(A) The completed evaluation of the Proposals;

(B) Written justification for any rejection of higher scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and

(C) If ODOT permitted negotiations in accordance with 731-005-0045, ODOT’s completed evaluation of the initial Proposals and ODOT’s completed evaluation of final Proposals.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049

Stats. Implemented: ORS 279.039

Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0325

Foreign Contractor

If the Contract Amount 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 Contract Amount, terms of payment, Contract duration and such other information as the Department of Revenue may require before final payment can be made on the Contract. A copy of the report shall be forwarded to ODOT. ODOT, upon awarding the Contract, shall satisfy itself that the above requirements have been complied with before it issues final payment on the Contract.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049

Stats. Implemented: ORS 279.021

Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0335

Availability of Award Decisions

(1) **Contract Documents.** To the extent required, ODOT shall deliver to the successful Offeror, a Signed purchase order, price agreement, or other Contract document(s), as applicable.

(2) **Notification to Unsuccessful Offerors.** An Entity may obtain tabulations of awarded Bids or evaluation summaries of Proposals for a nominal charge, in person or by submitting to ODOT a Written request accompanied by payment. Such request shall provide the Solicitation Document number and enclose a self-addressed, stamped envelope. In addition, tabulations of Bids and Proposals awarded are available on-line through the ODOT web page.

(3) **Availability of Solicitation Files.** ODOT shall make completed solicitation files available for public review at ODOT.

(4) **Copies from Solicitation Files.** Any Entity may obtain copies of material from solicitation files upon payment of a reasonable copying charge.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.027
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0345

Performance Security

(1) **Public Improvement Contracts.** Unless ODOT waives the required performance and payment bonds under ORS 279.029(5), or DAS exempts a Contract or classes of Contracts from the required performance bond pursuant to ORS 279.033, the Contractor shall execute and deliver to ODOT a performance bond and a payment bond.

(2) **Requirement for Surety Bond.** The Contractor shall use ODOT's standard forms, which are bound in the Contract booklet. The amount of each bond shall be equal to the Contract Amount. The surety company's authorized attorney in fact shall sign the performance bond and the payment bond. The surety company's seal shall be affixed to each bond. A power of attorney for the attorney in fact shall be attached to the bonds in the Contract booklet. Include performance/payment bond number. Bonds cannot be canceled by the Contractor or the surety, nor can they be released by ODOT due to possible claims.

(3) **Time for Submission.** The apparent successful Offeror must furnish the performance/payment security as required by the Solicitation Document. If the Offeror fails to furnish the security as requested, ODOT may reject the Offer and award the Contract to the Responsible Bidder with the next lowest Responsive Bid or the Responsible Proposer with the next highest-scoring Responsive Proposal, and, at ODOT's discretion, the Offeror shall forfeit its Bid or Proposal security.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.029(4) & (5) & ORS 279.033
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0355

Records Maintenance; Right to Audit Records

(1) **Records Maintenance; Access.** Contractors and subcontractors shall maintain all fiscal records relating to Contracts in accordance with generally accepted accounting principles. In addition, Contractors and subcontractors shall maintain all 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 Contract (the books, fiscal records and all other records, hereafter referred to as "Records") accessible to ODOT at reasonable times and places, whether or not litigation has been filed as to such claims.

(2) **Inspection and Audit.** ODOT may, at reasonable times and places, have access to and an opportunity to inspect, examine, copy, and audit the Records of any Entity that has submitted cost or pricing data according to the terms of a Contract to the extent that the Records relate to such cost or pricing data. If the Entity must provide cost or pricing data under a Contract, the Entity shall maintain such Records that relate to the 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.** ODOT, and its authorized representatives, shall be entitled to inspect, examine, copy, and audit any Contractor's or subcontractor's Records, as provided in section (1) of this rule. The Contractor and subcontractor shall maintain the Records and keep the Records accessible and available at reasonable times and places for a minimum period of three years from the date of final payment under the Contract or subcontract, as applicable, or until the conclusion of any audit, controversy or litigation arising out of or related to the Contract, whichever date is later, unless a shorter period is otherwise authorized in Writing.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.029(1), ORS 279.037 & ORS 279.056
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-005-0365

Termination of Contract

Termination of the Contract shall not relieve the Contractor of responsibility for completed portions of the Work, or the Contractor's surety from the obligations arising from the Work performed. The Solicitation Document shall describe the terms and conditions of termination.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.027(3), ORS 279.029(4) & ORS 279.033
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

DIVISION 7

PUBLIC IMPROVEMENT CONTRACTS

731-007-0010

Application

In addition to the requirements set forth in Chapter 731, Division 5, and the definitions therein, the following rules apply to Public Improvement Contracts. In the event of conflict or ambiguity, the more specific requirements of the rules in Division 7 take precedence over the more general requirements of the Division 5 rules.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.049
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-007-0020

Competitive Procurement

ODOT shall solicit Bids for Public Improvement Contracts by Invitation to Bid (ITB), except as otherwise allowed or required pursuant to ORS 279.015, 279.053, or 279.056. See OAR 731-007-0130 to 731-007-0190 regarding the use of Alternative Contracting Methods.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.015
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-007-0030

Mandatory Provisions

In addition to the Bidder qualification, selection, rejection, and Disqualification criteria applicable to all public Contracts, certain criteria apply specifically to Public Improvement Contracts. Likewise, in addition to provisions required in all solicitations for public Contracts and resulting Contracts, certain provisions must be included in Public Improvement solicitations and resulting Contracts. Those criteria and mandatory provisions are contained in Division 5, and are referenced in this rule for convenience:

- (1) Eligibility to bid or propose. See 731-005-00035(1) (Construction Contracts).
- (2) Solicitation Document statement of required certification or licensing. See 731-005-0045(3)(a)(K).
- (3) Solicitation Document terms and conditions:
 - (a) Demonstration of drug testing program. See 731-005-0045(3)(d)(B).
 - (b) Liability for late payment. See 731-005-0045(3)(d)(F).
 - (c) Right to file complaints with Construction Contractors Board. See 731-005-0045(3)(d)(G).
 - (d) Environmental and natural resources regulations. See 731-005-0045(3)(d)(I).
 - (e) Prevailing wage rates. See 731-005-0045(3)(d)(O).
 - (f) Fee paid to BOLI. See 731-005-0045(3)(d)(P).
 - (g) Retainage. See 731-005-0045(3)(d)(Q).
 - (h) Prompt payment policy. See 731-005-0045(3)(d)(R).
 - (i) Contractor's relations with subcontractors. See 731-005-0045(3)(d)(S).
 - (j) Certification of compliance with tax laws. See 731-005-0045(3)(d)(V).
 - (4) Advertising of solicitation in trade newspaper. See 731-005-0095(2)(c).
 - (5) Bid or Proposal security. See 731-005-0125(2).

(6) Deadline for delivering request for change or protest of Specification or Contract terms and conditions. See 731-005-0145(1)(a).

(7) Rejection of individual Bids or Proposals. See 731-005-0245(2)(f).

(8) Standards for DBE Disqualification. See 731-005-0285(1)(b)(B)(i) and (iii).

(9) Performance security. See 731-005-0345(1).

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049

Stats. Implemented: ORS 279.049

Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-007-0040

Bid or Proposal Evaluation Criteria

(1) **General.** A Public Improvement Contract, if awarded, shall be awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal, provided that such Entity is not listed by the Construction Contractors Board as disqualified to hold a Contract for a Public Improvement. See OAR 731-005-0225, and Rules for Alternative Contracting Methods at OAR 731-007-0150 to 731-007-0190.

(2) **Bid Evaluation Criteria.** Invitations to Bid may solicit lump-sum Offers, unit-price Offers, or a combination of the two:

(a) If the ITB requires a lump-sum Bid, without additive or deductive alternates, or if ODOT elects not to award additive or deductive alternates, Bids shall be compared on the basis of lump-sum prices, or lump-sum base Bid prices, as applicable. If the ITB calls for a lump-sum base Bid, plus additive or deductive alternates, the Solicitation Documents shall provide the criteria for selection; and

(b) If the Bid includes unit pricing for estimated quantities, the total Bid price shall be calculated by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by ODOT, for the purpose of comparing Bids. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price shall govern. See OAR 731-005-0195(2)(b).

(3) **Proposal Evaluation Criteria.** If DAS has exempted the procurement of a Public Improvement from the competitive bidding requirements of ORS 279.015(1), and has authorized ODOT to use an Alternative Contracting Method under ORS 279.015(6), ODOT shall set forth the evaluation criteria in the Solicitation Documents if they differ from those in Division 5 (or the Specifications). See OAR 731-007-0180, ORS 279.015(2) and 279.015(6).

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049

Stats. Implemented: ORS 279.015 & ORS 279.049

Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-007-0050

Disclosure and Substitution of First-Tier Subcontractors

(1) **Required Disclosure.** Within four working hours of the Bid Closing on an ITB for a Public Improvement having a Bid price exceeding \$75,000, a Bidder shall submit to ODOT a disclosure form as described by this rule. Noon to 1:00 PM is not considered a working hour. The disclosure form shall identify any first-tier subcontractors (those Entities that would be contracting directly with the prime Contractor) that will be furnishing labor or materials on the Contract, if awarded, whose subcontract value would be equal to or greater than:

(a) Five percent of the total Contract Bid, but at least \$15,000; or

(b) \$500,000 regardless of the percentage of the total Bid.

(2) **Disclosure Deadline and Bid Opening.** For each Bid Proposal or ITB to which this rule applies, ODOT shall:

(a) Receive bids until the time identified as Closing time and at the location described in the ITB; and

(b) Set the Bid Opening at the time and place identified in the ITB.

(3) **Bidder Instructions and Disclosure Form.** For the purposes of this rule, ODOT in its solicitation shall:

(a) Prescribe the disclosure form that must be utilized; and

(b) Provide instructions in a notice substantially similar to the following:

“Instructions for First-Tier Subcontractor Disclosure

Bidders are required to disclose information about certain first-tier subcontractors when the Contract value for a Public Improvement is greater than \$75,000 (see ORS 279.027). Specifically, when the Bid of a first-tier subcontractor is greater than or equal to: (i) 5% of the project Bid, but at least \$15,000, or (ii) \$500,000 regardless of the percentage, you must disclose the following information about that subcontract within four (4) working hours of Bid Closing:

a) The subcontractor’s name and address,

b) The subcontractor’s Construction Contractors Board registration number, if one is required, and

c) The subcontract dollar value.

If you will not be using any subcontractors that are subject to the above disclosure requirements, you are required to indicate “NONE” on the accompanying form.

ODOT MUST REJECT A BID IF THE BIDDER FAILS TO SUBMIT THE DISCLOSURE FORM WITH THIS INFORMATION BY THE STATED DEADLINE. (See OAR 731-007-0050).

To determine disclosure requirements, ODOT recommends that you disclose subcontract information for any subcontractor as follows:

1) Determine the lowest possible Bid. That will be the base Bid amount less all alternate deductive Bid amounts (exclusive of any options that can only be exercised after Bid award).

2) Provide the required disclosure information for any first-tier subcontractor whose potential Contract services (i.e., subcontractor’s base Bid amount plus all alternate additive Bid amounts, exclusive of any options that can only be exercised after Contract award) are greater than or equal to: (i) 5% of the lowest Bid amount, but at least \$15,000, or (ii) \$500,000, regardless of the percentage. Total all possible Work for each subcontractor in making this determination (e.g., if a subcontractor will provide \$15,000 worth of services on the base Bid and \$40,000 on an additive alternate, then the potential amount of subcontractor’s services is \$55,000. Assuming that \$55,000 exceeds 5% of the lowest Bid, provide the disclosure for both the \$15,000 services and the \$40,000 services).

For determination of compliance with the disclosure requirements, ODOT will use the total Bid amount submitted by the contractor as verified by ODOT.”

(4) **Submission.** A Bidder shall submit the disclosure form required by this rule within four working hours of Bid Closing in the manner specified by the ITB.

(5) **Late Submission.** Compliance with the disclosure and submittal requirements of ORS 279.027(2) and this rule is a matter of Responsiveness. Bids which are submitted by Bid Closing, but for which the separate disclosure submittal has not been made by the specified deadline, are not Responsive and shall not be considered for Contract award.

(6) **Substitution.** Substitution of affected first-tier subcontractors shall be made only in accordance with ORS 279.322. ODOT does not have a statutory role or duty to review, approve or resolve disputes concerning such substitutions. However, ODOT is not precluded from making related inquiries or investigating complaints in order to enforce Contract provisions that require compliance generally with laws, rules and regulations.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049

Stats. Implemented: ORS 279.027 & ORS 279.322

Hist.: DOT 1-2000(Temp.), f. 1-19-00, cert. ef. 2-1-2000 thru 7-29-00; DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00, Renumbered from 731-005-0020

731-007-0060

Contract Suspension; Termination Procedures

(1) **Suspension of Work.** In the event ODOT suspends performance of Work for any reason considered by ODOT to be in the public interest other than a labor dispute, the Contractor shall be entitled to a reasonable extension of Contract time, and to reasonable compensation for costs, including a reasonable allowance for related overhead, incurred by the Contractor as a result of the suspension.

(2) **Termination of Contract by mutual agreement for reasons other than default.**

(a) The parties may agree to terminate the Contract or a divisible portion thereof if:

(A) ODOT suspends Work under the Contract for any reason considered to be in the public interest (other than a labor dispute or any judicial proceeding relating to the Work filed to resolve a labor dispute); and

(B) Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the Work.

(b) When a Contract, or any divisible portion thereof, is terminated pursuant to section (2) of this rule, ODOT shall pay the Contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination. ODOT shall also pay for all Work completed, based on the Contract Price. Unless the Work completed is subject to unit or itemized pricing under the Contract, payment shall be calculated based on percent of Contract completed. No claim for loss of anticipated profits will be allowed.

(3) **Public interest termination by ODOT.** ODOT will include in its Contracts, terms detailing the circumstances under which the Contractor shall be entitled to compensation as a matter of right in the event ODOT unilaterally terminates the Contract for any reason considered by ODOT to be in the public interest.

(4) **Responsibility for completed Work.** Termination of the Contract or a divisible portion thereof pursuant to this rule shall not relieve either the Contractor or its surety of liability for claims arising out of the Work performed.

(5) Remedies cumulative. ODOT may, at its discretion, avail itself of any or all rights or remedies set forth in Division 7 rules, in the Contract, or available at law or in equity.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.324, ORS 279.326, ORS 279.328, ORS 279.330, ORS 279.332 & ORS 279.333
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-007-0070

Waiver of Delay Damages Against Public Policy

Any clause in a Public Improvement Contract purporting to waive, release, or extinguish the rights of a Contractor to damages resulting from ODOT's unreasonable delay in performing the Contract is void and unenforceable, as against public policy. However, Contract provisions requiring notice of delay, providing for alternative dispute resolution such as arbitration or mediation, providing other procedures for settling Contract disputes, or providing for reasonable liquidated damages, are enforceable.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats Implemented: ORS 279.063
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-007-0080

Retainage

(1) **Withholding of Retainage.** ODOT may retain payment but shall not retain an amount in excess of 5 percent of the Contract Price for Work completed. If the Contractor has performed at least 50 percent of the Contract Work and is progressing satisfactorily or if all Work on a subcontract is complete, upon the Contractor's submission of Written application containing the surety's Written approval, ODOT may, in its discretion, reduce or eliminate retainage on any remaining progress payments. ODOT shall respond in Writing to all such applications within a reasonable time. When the Contract Work is 97-1/2 percent completed, ODOT may, at its discretion and without application by the Contractor, reduce the retained amount to 100 percent of the value of the remaining unperformed Contract Work. ODOT may at any time reinstate retainage. Retainage shall be included in the final payment of the Contract Price.

(2) **Deposit in interest-bearing accounts.** ODOT shall deposit cash retainage in an interest-bearing account through the State Treasurer, for the benefit of ODOT. Earnings on such account shall accrue to the Contractor.

(3) **Alternatives to cash retainage.** In lieu of cash retainage to be held by ODOT, the Contractor may substitute one of the following:

- (a) Deposit of securities:
- (A) The Contractor may deposit bonds or securities with ODOT or in any bank or trust company to be held for the benefit of ODOT. In such event, ODOT shall reduce the retainage by an amount equal to the value of the bonds and securities, and reimburse the excess to the Contractor.

(B) Bonds and securities deposited or acquired in lieu of retainage shall be of a character approved by the Oregon Department of Administrative Services, including but not limited to:

- (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.

(C) Upon ODOT's determination that all requirements for the protection of ODOT's interests have been fulfilled, it shall release to the Contractor all bonds and securities deposited in lieu of retainage.

(b) Deposit of surety bond: ODOT, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to ODOT in lieu of all or a portion of funds retained or to be retained. ODOT requires that the first \$10,000 of retainage be held as cash, before the retainage bond takes effect. A Contractor depositing such a bond shall accept surety bonds from its subcontractors and suppliers in lieu of retainage. In such cases, retainage shall be reduced by an amount equal to the value of the bond, and the excess shall be reimbursed.

(3) **Recovery of costs.** ODOT may recover from the Contractor all costs incurred in the proper handling of cash retainage and securities, by reduction of the final payment.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.420, ORS 279.435 & ORS 701.420
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-007-0090

Contractor Progress Payments

(1) **Progress payments.** Each month ODOT shall make a progress payment based upon an estimated percentage of the Contract Work completed. Progress payments will not be made for less than \$1,000 in any given month unless requested by the Contractor. At ODOT's discretion, this request may also include the value of material to be incorporated in the completed Work, which has been delivered to the premises and appropriately stored. The sum of these estimates is referred to as the "value of completed Work." With these estimates as a base, ODOT will make a progress payment to the Contractor, which shall be equal to the value of completed Work:

- (a) Less those amounts that have been previously paid;
- (b) Less other amounts that may be deductible or owing and due to ODOT for any cause; and
- (c) 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.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.435
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-007-0100

Interest

(1) **Prompt payment policy.** ODOT shall pay promptly all payments due and owing to the Contractor on Contracts for Public Improvements.

(2) **Interest on progress payments.** Late payment interest shall begin to accrue on payments due and owing on the earlier of 30 Days after receipt of invoice or 15 Days after Agency approval of payment (the "Progress Payment Due Date"). The interest rate shall equal three times the discount rate on 90-day commercial paper in effect on the Progress Payment Due Date at the Federal Reserve Bank in the Federal Reserve district that includes Oregon, up to a maximum rate of 30 percent.

(3) **Interest on final payment.** Final payment on the Contract Price, including retainage, shall be due and owing no later than 30 Days after Contract completion and acceptance of the Work. Late-payment interest on such final payment shall thereafter accrue at the rate of one and one-half percent per month until paid.

(4) **Settlement or judgment interest.** In the event of a dispute as to compensation due a Contractor for Work performed, upon settlement or judgment in favor of the Contractor, interest on the amount of the settlement or judgment shall be added to, and not made part of, the settlement or judgment. Such interest, at two times the

discount rate but not to exceed 30% on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District that includes Oregon on the date and accruing from the later of:

- (a) The Due Date of any Progress Payment received under the Contract for the period in which such Work was performed; or
- (b) Thirty Days after the date on which the claim for payment under dispute was presented to ODOT by the Contractor in Writing or in accordance with applicable provisions of the Contract.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.435
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-007-0110

Final Inspection

(1) **Notification of Completion; inspection.** The Contractor shall notify ODOT in Writing when the Contractor considers the on-site Contract Work completed. Within 15 Days of receiving the Contractor’s notice, ODOT will inspect the project and project records, and will either accept the Work or notify the Contractor of remaining Work to be performed.

(2) **Acknowledgment of acceptance.** When ODOT finds that all Work required under the Contract, both on-site and administrative, has been completed satisfactorily, ODOT shall acknowledge acceptance of the Work in Writing.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.435(7)
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-007-0120

Agency Payment for Unpaid Labor or Supplies

(1) **Contract incomplete.** If the Contract is still in force, ODOT may, in accordance with ORS 279.314(1), pay a valid claim to the Entity furnishing the labor or services, and charge the amount against payments due or to become due to the Contractor under the Contract. Under terms of the Contract it is the Contractor’s responsibility to make payment on any such claims. The Contractor and the Contractor’s surety shall not be relieved from liability for unpaid claims.

(2) **Contract completed.** If the Contract has been completed and all funds disbursed to the prime Contractor, all claims shall be referred to the Contractor’s surety for resolution. ODOT shall not make payments to subcontractors or suppliers for Work already paid for by ODOT.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.314
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

Alternative Contracting Methods

731-007-0130

Purpose

These rules are intended to provide guidance regarding the use of Alternative Contracting Methods for Public Improvement Contracts, as referenced in ORS 279.015(6)(a). Those methods include, but are not limited to, Design/Build and A plus B forms of contracting.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.015 & ORS 279.049
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-007-0140

Definitions

In addition to those definitions at OAR 731-005-0005, the following definitions shall apply to Oregon Administrative Rules 731-007-0130 to 731-007-0190, unless the context requires otherwise:

(1) **Alternative Contracting Methods:** Innovative techniques for obtaining Public Improvement Contracts, utilizing processes other than the traditional method of design-bid-build with award based solely on price (in which a final design is issued with formal Bid documents, construction services are obtained by sealed Bid awarded to the lowest Responsive, Responsible Bidder, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design/Build and Cost Plus Time forms of contracting, which are specifically addressed in these rules.

(2) **Design/Build:** A form of contracting that results in the construction Contractor providing or obtaining specified design services, participates on the project team with ODOT, and manages both design and construction. In this form of Contract, a single Entity provides ODOT with all of the services necessary to both design and construct the project.

(3) **Cost Plus Time:** A Bid process (also known as A plus B) where time is assigned a monetary value and is Bid along with the Work and materials.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.015 & ORS 279.049
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-007-0150

Use of Alternative Contracting Methods

(1) **Competitive Bidding Exemptions.** ORS Chapter 279 requires a competitive bidding process for Public Improvement Contracts unless a statutory exception applies, a class of Contracts has been exempted or an individual Contract has been exempted in accordance with ORS 279.015 and any applicable DAS rules. Alternative Contracting Methods are therefore an exception to the prescribed public contracting practices in Oregon, and their use must be justified in accordance with the public contracting law and these rules. See OAR 731-007-0160 regarding required findings.

(2) **Post-Project Evaluation.** ORS 279.103 requires that ODOT prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 for which the competitive bidding process was not used. The purpose of this evaluation is to determine whether it was actually in ODOT’s best interest to use an Alternative Contracting Method. The evaluation must be delivered to the DAS Director within 30 Days of the date ODOT “accepts” the Public Improvement project, which event is typically defined in the Contract. In the absence of such definition, acceptance of the project occurs on the latter of the date of final payment or the date of final completion of the Work. ORS 279.103 describes the timing and content of this evaluation, with three required elements:

- (a) Financial information, consisting of cost estimates, any guaranteed maximum price, changes and actual costs;
- (b) A narrative description of successes and failures during design, engineering and construction; and
- (c) An objective assessment of the use of the Alternative Contracting Method as compared to the exemption findings.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.015, ORS 279.049 & ORS 279.103
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

731-007-0160

Findings

(1) When findings are required under ORS 279.015(6)(b) and 279.015(2) to exempt a Contract or class of Contracts from competitive bidding requirements, the “substantial cost savings” criterion at ORS 279.015(2)(b) requires consideration of the type, cost, amount of the Contract, number of Entities available to bid, and “such other factors as may be deemed appropriate.”

(2) Likewise, the statutory definition of “findings” at ORS 279.011(5) means the justification for ODOT’s conclusion that includes, but is not limited to, information regarding eight identified areas.

(3) Accordingly, when the Contract or class of Contracts under consideration for an exemption contemplates the use of Alternative Contracting Methods, the “substantial cost savings” requirement may be addressed by a combination of:

- (a) Specified findings that address the factors and other information specifically identified by statute; and
- (b) Additional findings that address industry practices, surveys, trends, past experiences, evaluations of completed projects required by ORS 279.103 and related information regarding the expected benefits and drawbacks of particular Alternative Contracting Methods. To the extent practicable, such findings should relate back to the specific characteristics of the project or projects at issue in the exemption request.

(4) The criteria at ORS 279.015(2)(a) that it is “unlikely” that the exemption will “encourage favoritism” or “substantially dimin-

ish competition” may be addressed in contemplating the use of Alternative Contracting Methods by specifying the manner in which an RFP process will be utilized, that the procurement will be formally advertised, that competition will be obtained, and that award will be made based upon identified selection criteria.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.015(2), ORS 279.015(6) & ORS 279.049
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

**731-007-0170
 Pricing Mechanisms**

(1) A Request for Proposals may result in a lump sum Contract Price, as in the case of competitive bidding. Alternatively, a cost reimbursement Contract may be negotiated.

(2) Economic incentives or disincentives may be included to reflect stated ODOT purposes related to time of completion, safety or other public contracting objectives, including total least cost mechanisms such as life cycle costing.

(3) When cost reimbursement Contracts are utilized, ODOT shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.015(6) & ORS 279.049
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

**731-007-0180
 RFP Process**

ODOT may utilize the RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS Chapter 279 and OAR Chapter 731 Division 5.

(1) **Proposal Evaluation.** Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. Proposal evaluation shall be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors shall:

(a) Be reasonable estimates based on information available to ODOT;

(b) Treat all Proposals equitably; and

(c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to ODOT. See ORS 279.023(1).

(2) **Evaluation Factors.**

(a) In basic negotiated construction contracting, where the only reason for an RFP is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that affect cost or quality.

(b) In Design/Build contracting, in addition to subsection (a) of this section, those factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, the ability to respond to the technical complexity or unique character of the project, project management including coordination and integration of multiple disciplines, the time required to commence and complete the improvement, design/builder team experience and related matters that affect cost or quality.

(3) **Contract Negotiations.** Contract terms may be negotiated to the extent allowed by the RFP and these rules, provided that the general Work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See OAR 731-005-0045(3). Terms that may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that affect cost or quality. Negotiations must always be in keeping with the least cost policy for public improvements.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.015(6), ORS 279.023 & ORS 279.049
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

**731-007-0190
 Design/Build**

(1) **General.** The Design/Build form of contracting, as defined in OAR 731-007-0140(2), has technical complexities that are not readily apparent. ODOT shall only utilize this contracting method with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the Design/Build process ODOT must be able to reasonably expect the following types of benefits:

(a) Obtaining, through a Design/Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control, and required documentation as a fully integrated function with a single point of Contractor responsibility;

(b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;

(c) Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing Contract claims;

(d) Shortening project duration as construction activity (early submittals, mobilization, subcontracting and advance Work) commences prior to completion of a final design, or where a design solution is still required (as in complex or phased projects); and

(e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.

(2) **Authority.** Agencies shall utilize the Design/Build form of contracting only in accordance with the requirements of Division 7 rules. See particularly OAR 731-007-0150 on “Use of Alternative Contracting Methods.”

(3) **Selection.** Design/Build selection criteria may include those factors set forth in OAR 731-007-0180(2).

(4) **Qualification Based Selection (QBS).** Inapplicable. Because the value of construction services predominates the Design/Build form of contracting, and ODOT is not issuing a personal service Contract, the QBS process mandated by ORS 279.057 for State Agencies is not applicable. See ORS 279.057(1) and 279.057(6).

(5) **Licensing.** Where the Design/Build Contractor is not a licensed or registered design professional, the Design/Build process contemplates that state licensing and registration requirements related to architectural and engineering services may be fulfilled by design professionals who are employees, subcontractors, joint venturers or in other lawful business relationships with the Design/Build Contractor. Under this approach, Design/Build Contractors are not required to fulfill design licensing or registration requirements at the time of submitting Proposals, but shall specifically identify the licensed design professionals by individual or firm names.

(6) **Performance Security.** ORS 279.029(4)(b) provides that for Design/Build Contracts the surety’s obligation on performance bonds, or the Bidder’s obligation on cashier’s or certified checks accepted in lieu thereof, includes the preparation and completion of design and related professional services specified in the Contract. This additional obligation, beyond performance of construction services, extends only to the provision of professional services and related design revisions, corrective Work and associated costs prior to final completion of the Contract (or for such longer time as may be defined in the Contract). The obligation is not intended to be a substitute for professional liability insurance, and does not include errors and omissions or latent defects coverage.

(7) **Contract Requirements.** ODOT shall conform its Design/Build contracting practices to all of the following requirements:

(a) Design Services. The level or type of design services required must be clearly defined within the Solicitation Documents and Contract, along with a description of the level or type of design services previously performed for the project. The services to be performed shall be clearly designated as either design Specifications

or performance standards, and performance measurements must be identified.

(b) Professional Liability. The Contract shall clearly identify the liability of design professionals with respect to the Design/Build Contractor and ODOT, as well as requirements for professional liability insurance.

(c) Risk Allocation. The Contract shall clearly identify the extent to which ODOT requires an express indemnification from the Design/Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty Work claims.

(d) Warranties. The Contract shall clearly identify any express warranties made to ODOT regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.

(e) Incentives. The Contract shall clearly identify any economic incentives and disincentives, the specific criteria that apply and their relationship to other financial elements of the Contract.

(f) Honoraria. If allowed by the RFP, honoraria or stipends may be provided for early design submittals from qualified finalists during the solicitation process on the basis that ODOT is benefited from such deliverables.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 279.049
 Stats. Implemented: ORS 279.015(6), ORS 279.049 & ORS 279.057
 Hist.: DOT 3-2000, f. 7-14-00, cert. ef. 7-29-00

DIVISION 10

SELECTION AND HIRING OF CONSULTANTS

731-010-0030

Personal Services Contracting

The Department of Transportation adopts OAR 125-065-0029 through 125-065-0110 (effective April 21, 2000), the Department of Administrative Services rules, Consultant Selection Procedures: Architect, Engineer and Related Professional Consultants. The Model Rules adopted by the Attorney General under ORS 279.249 (OAR 137-035) shall not apply to the Department of Transportation.

Stat. Auth.: ORS 184.616 & ORS 279.051
 Stats. Implemented: ORS 279.051 & ORS 291.021
 Hist.: DOT 3-1994, f. & cert. ef. 11-22-94; DOT 1-2000(Temp.), f. 1-19-00, cert. ef. 2-12-00 thru 6-29-00; administrative correction 9-16-00; DOT 5-2000, f. & cert. ef. 12-19-00

DIVISION 15

COORDINATION RULES

731-015-0005

Purpose

The purpose of this division is to establish the procedures used by the Department of Transportation to implement the provisions of its State Agency Coordination Program which assure that Department land use programs are carried out in compliance with the statewide planning goals and in a manner compatible with acknowledged comprehensive plans, as required by ORS 197.180 and OAR 660, Divisions 30 and 31.

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0015

Definitions

For the purposes of OAR 731-015-0005 through 731-015-0135:

(1) "Accessory Facility" means a facility which assists the Department in administering, managing, maintaining and operating a transportation facility. Examples include office buildings, weigh stations, maintenance yards, equipment repair shops and quarries.

(2) "Affected City or County" means a city or county that has comprehensive planning authority over a site or area which is directly impacted by a proposed Commission or Department action.

(3) "Affected State and Federal Agencies" means state and federal agencies identified in the Department's state agency coordination program.

(4) "Class 1 Projects" means projects meeting federal criteria for Class 1 Projects under the National Environmental Policy Act (NEPA) and federal agency regulations which carry out NEPA requirements.

(5) "Class 2 Projects" means projects meeting federal criteria for Class 2 Projects under NEPA and federal agency regulations which carry out NEPA requirements.

(6) "Class 3 Projects" means projects meeting federal criteria for Class 3 Projects under NEPA and federal agency regulations which carry out NEPA requirements.

(7) "Commission" means the Transportation Commission.

(8) "Department" means the Department of Transportation.

(9) "DLCD" means the Department of Land Conservation and Development.

(10) "Facility Plan" means a plan for a transportation facility such as a highway corridor plan and an airport master plan.

(11) "Metropolitan Planning Organization" means the organization designated by the Governor to coordinate transportation planning in an urbanized area of the state.

(12) "Modal Systems Plan" means a plan for a statewide system of one or more transportation modes that includes identification of system needs, classification of facilities, and establishment of policies.

(13) "New Transportation Facility" means a transportation facility that does not currently exist. It does not mean the realignment or expansion of an existing transportation facility.

(14) "Transportation Facility" means a facility and all of its parts which are used for conveying and managing the transportation of people and goods. It includes all associated structures and alterations that are necessary to protect public safety and mitigate the environmental effects of a transportation facility.

(15) "Transportation Policy Plan" means the policy plan for the state transportation system encompassing all modes of transportation.

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0025

Applicability

The provisions of OAR 731-015-0005 through 731-015-0135 apply the following programs and activities:

- (1) Adoption of the Transportation Policy Plan.
- (2) Adoption of modal systems plans.
- (3) Adoption of transportation facility plans.
- (4) Adoption of project plans for Class 1 and Class 3 projects.
- (5) Adoption of project plans for Class 2 projects which would involve any of the activities listed OAR 731-015-0035.

(6) Carrying out operations, maintenance and modernization activities, except for repair of damaged highways as authorized by ORS 366.445, which would involve any of the activities listed OAR 731-015-0035.

(7) Issuing any of the following permits or licenses:

- (a) Road Approach Permits;
- (b) Airport Site Approval and License;
- (c) Sign Permits;
- (d) Permits for Utility Use of Right of Way.
- (8) Renewing permits or licenses in the following circumstances:

(a) Proposed expansion of a licensed airport to permit service to a larger class of aircraft;

(b) Proposed enlargement of a sign.

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0035

Activities Which Significantly Affect Land Use

The following activities undertaken by the Department significantly affect land use:

(1) Enlarging an existing transportation facility to increase the level of transportation service provided, relocating an existing transportation facility, or constructing a new transportation facility.

(2) Constructing a new accessory facility, enlarging an existing accessory facility, or significantly changing the use of an existing accessory facility.

(3) Changing the size of land parcels through the sale of property.

(4) Altering land or structures in a way that significantly affects resources or areas protected by the statewide planning goals or acknowledged comprehensive plans. Examples include:

(a) Placing or disposing of materials in wetlands, waterways or floodplains;

(b) Structurally stabilizing shore lands by placing riprap or by other means;

(c) Draining wetlands by ditching or by other means;

(d) Demolishing or altering a historic bridge or other historic structure;

(e) Removing riparian vegetation.

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0045

Coordination Procedures for Adopting the Final Transportation Policy Plan

(1) Except in the case of minor amendments, the Department shall involve DLCD, metropolitan planning organizations, and interested cities, counties, state and federal agencies, special districts, and other interested parties in the development or amendment of the transportation policy plan. This involvement may take the form of mailings, meetings, or other means that the Department determines are appropriate for the circumstances. The Department shall hold at least one public meeting on the plan prior to adoption.

(2) The Department shall evaluate and write draft findings of compliance with all applicable statewide planning goals.

(3) The Department shall present to the Transportation Commission the draft plan and findings of compliance with all applicable statewide planning goals.

(4) The Transportation Commission shall adopt findings of compliance with all applicable statewide planning goals when it adopts the final transportation policy plan.

(5) The Department shall provide copies of the adopted final transportation policy plan and findings to DLCD, the metropolitan planning organizations, and others who request to receive a copy.

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0055

Coordination Procedures for Adopting Final Modal Systems Plans

(1) Except in the case of minor amendments, the Department shall involve DLCD, metropolitan planning organizations, and interested cities, counties, state and federal agencies, special districts and other parties in the development or amendment of a modal systems plan. This involvement may take the form of mailings, meeting, or other means that the Department determines are appropriate for the circumstances. The Department shall hold at least one public meeting on the plan prior to adoption.

(2) The Department shall evaluate and write draft findings of compliance with all applicable statewide planning goals.

(3) If the draft plan identifies new facilities which would affect identifiable geographic areas, the Department shall meet with the planning representatives of affected cities, counties and metropolitan planning organization to identify compatibility issues and the means of resolving them. These may include:

(a) Changing the draft plan to eliminate the conflicts;

(b) Working with the affected local governments to amend their comprehensive plans to eliminate the conflicts; or

(c) Identifying the new facilities as proposals which are contingent on the resolution of the conflicts prior to the completion of the transportation planning program for the proposed new facilities.

(4) The Department shall present to the Transportation Commission the draft plan, findings of compatibility for new facilities affecting identifiable geographic areas, and findings of compliance with all applicable statewide planning goals.

(5) The Transportation Commission, when it adopts a final modal systems plan, shall adopt findings of compatibility for new facilities affecting identifiable geographic areas and findings of compliance with all applicable statewide planning goals.

(6) The Department shall provide copies of the adopted final modal systems plan and findings to DLCD, the metropolitan planning organizations, and others who request to receive a copy.

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0065

Coordination Procedures for Adopting Final Facility Plans

(1) Except in the case of minor amendments, the Department shall involve DLCD and affected metropolitan planning organizations, cities, counties, state and federal agencies, special districts and other interested parties in the development or amendment of a facility plan. This involvement may take the form of mailings, meetings or other means that the Department determines are appropriate for the circumstances. The Department shall hold at least one public meeting on the plan prior to adoption.

(2) The Department shall provide a draft of the proposed facility plan to planning representatives of all affected cities, counties and metropolitan planning organization and shall request that they identify any specific plan requirements which apply, any general plan requirements which apply and whether the draft facility plan is compatible with the acknowledged comprehensive plan. If no reply is received from an affected city, county or metropolitan planning organization within 30 days of the Department's request for a compatibility determination, the Department shall deem that the draft plan is compatible with that jurisdiction's acknowledged comprehensive plan. The Department may extend the reply time if requested to do so by an affected city, county or metropolitan planning organization.

(3) If any statewide goal or comprehensive plan conflicts are identified, the Department shall meet with the local government planning representatives to discuss ways to resolve the conflicts. These may include:

(a) Changing the draft facility plan to eliminate the conflicts;

(b) Working with the local governments to amend the local comprehensive plans to eliminate the conflicts; or

(c) Identifying the conflicts in the draft facility plan and including policies that commit the Department to resolving the conflicts prior to the conclusion of the transportation planning program for the affected portions of the transportation facility.

(4) The Department shall evaluate and write draft findings of compatibility with acknowledged comprehensive plans of affected cities and counties, findings of compliance with any statewide planning goals which specifically apply as determined by OAR 660-030-0065(3)(d), and findings of compliance with all provisions of other statewide planning goals that can be clearly defined if the comprehensive plan of an affected city or county contains no conditions specifically applicable or any general provisions, purposes or objectives that would be substantially affected by the facility plan.

(5) The Department shall present to the Transportation Commission the draft plan, findings of compatibility with the acknowledged comprehensive plans of affecting cities and counties and findings of compliance with applicable statewide planning goals.

(6) The Transportation Commission shall adopt findings of compatibility with the acknowledged comprehensive plans of affected cities and counties and findings of compliance with applicable statewide planning goals when it adopts the final facility plan.

(7) The Department shall provide copies of the adopted final facility plan and findings to DLCD, to affected metropolitan planning organizations, cities, counties, state and federal agencies, special districts and to others who request to receive a copy.

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0075

Coordination Procedures for Adopting Plans for Class 1 and 3 Projects

(1) The Department shall involve affected cities, counties, metropolitan planning organizations, state and federal agencies, special districts and other interested parties in the development of project plans. The Department shall include planning officials of the affected cities, counties and metropolitan planning organization on the project technical advisory committee.

(2) Goal compliance and plan compatibility shall be analyzed in conjunction with the development of the Draft Environmental Impact Statement or Environmental Assessment. The environmental analysis shall identify and address relevant land use requirements in sufficient detail to support subsequent land use decisions necessary to authorize the project.

(3) Except as otherwise set forth in section (4) of this rule, the Department shall rely on affected cities and counties to make all plan amendments and zone changes necessary to achieve compliance with the statewide planning goals and compatibility with local comprehensive plans after completion of the Draft Environmental Impact Statement or Environmental Assessment and before completion of the Final Environmental Impact Statement or Revised Environmental Assessment. These shall include the adoption of general and specific plan provisions necessary to address applicable statewide planning goals.

(4) The Department may complete a Final Environmental Impact Statement or Revised Environmental Assessment before the affected cities and counties make necessary plan amendments and zone changes in the following case:

(a) The Final Environmental Impact Statement or Revised Environmental Assessment identifies that the project be constructed in phases; and

(b) The Department finds:

(A) There is an immediate need to construct one or more phases of the project. Immediate need may include, but is not limited to, the facility to be improved or replaced currently exceeds or is expected to exceed within five years the level of service identified in the Oregon Highway Plan; and

(B) The project phase to be constructed meets a transportation need independent of the overall project, is consistent with the purpose and need of the overall project as identified in the FEIS, and will benefit the surrounding transportation system even if no further phases of the project are granted land use approval.

(5) If a Final Environmental Impact Statement or Revised Environmental Assessment is completed pursuant to section (4) of this rule, all necessary plan amendments and zone changes associated with the particular phase of the project to be constructed shall be made by the city or county prior to constructing that phase of the project.

(6) If compatibility with a city or county comprehensive plan cannot be achieved, the Department may modify one or more project alternatives to achieve compatibility or discontinue the project.

(7) The Commission or its designee shall adopt findings of compatibility with the acknowledged comprehensive plans of affected cities and counties when it grants design approval for the project. Notice of the decision shall be mailed out to all interested parties.

(8) The Department shall obtain all other land use approvals and planning permits prior to construction of the project.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 197.180
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90; DOT 3-1998, f. & cert. ef. 12-18-98

731-015-0085

Coordination Procedures for Adopting Plans for Class 2 Projects Determined to Significantly Affect Land Use

The procedures in this section shall be followed when the Department determines that a Class 2 project would significantly affect land use in accordance with OAR 731-015-0035.

(1) Planning officials of affected cities and counties shall be contacted at the start of project planning to identify any possible compliance or compatibility conflicts and ways to avoiding conflicts.

(2) The Department shall attempt to avoid any identified compliance or compatibility conflicts as it develops its plans.

(3) Planning officials of affected cities and counties shall be requested to review preliminary final plans to identify whether any local land use approvals are needed and whether any of the acknowledged comprehensive plan's general provisions would be substantially affected. If no local planning approvals are required and if the plan's general provisions would not be substantially affected the Department shall conclude that the project is compatible. If no comments are received from an affected local jurisdiction within 15 days of the Department's request for a compatibility determination, the Department shall deem that the preliminary project plans are compatible with the acknowledged comprehensive plan for that jurisdiction. The Department may extend the reply time if requested to do so by an affected city or county.

(4) If any local planning approvals are required the Department shall either modify its project plans so as to not require approvals, or shall apply for the necessary approvals.

(5) If the affected city or county does not grant approval, the Department may:

(a) Modify the project plans so as to not require approval;

(b) Discontinue further work on the project; or

(c) Appeal the city or county decision.

(6) The Department shall obtain local planning approvals prior to construction of the project.

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0095

Coordination Procedures for Constructing or Improving Buildings in Salem Area

The Department shall satisfy its goal compliance and plan compatibility responsibilities for constructing or improving buildings in areas subject to the jurisdiction of the Capitol Planning Commission by adhering to the Capitol Planning Commission's land use coordination rules in OAR Chapter 110, Division 10, and the procedure contained in the Capitol Planning Commission's certified State Agency Coordination Program.

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0105

Coordination Procedures for Operations, Maintenance and Modernization Activities

The procedures in this section shall be followed when the Department determines that an operations, maintenance or modernization activity would significantly affect land use in accordance with OAR 731-015-0035 unless compliance with the statewide planning goals and compatibility with acknowledged comprehensive plans has been established through application of OAR 731-015-0075 or OAR 731-015-0085.

(1) The Department shall consult planning officials of the affected city or county to determine whether any local land use approvals are required to carry out the proposed activity.

(2) If any local planning approvals are required, the Department shall either modify the proposed activity so as to not require approval, or shall apply for the necessary approvals.

(3) If the approvals are not granted the Department may:

(a) Modify the proposed activity so as to not require permits;

(b) Not do the proposed activity; or

(c) Appeal the local decision.

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0110

Coordination Procedures for the Disposal of Surplus Right of Way

(1) The Department shall apply LCDC Goal 17 implementation requirement number 6 as well as applicable statutes when determining whether to declare right of way as surplus.

(2) The Department shall notify potential buyers of their responsibility to establish compliance and compatibility.

(3) The Department shall obtain a written statement from a planning official of the affected city or county that all land use planning approvals have been obtained or that the planned sale complies with the acknowledged comprehensive plan but no local land use approvals are needed.

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0115

Permit Program Procedures

(1) The Department shall notify applicants for permits or licenses or renewals of permits or licenses listed in OAR 731-015-0025 of their responsibility to demonstrate compliance and compatibility.

(2) The Department shall not issue a permit unless certification of compatibility is demonstrated by the applicant. The Department may deny, condition or further restrict a permit that is compatible as necessary to carry out applicable Department rules and statutes.

(3) Certification shall be documentation that all local land use planning approvals have been obtained or a written statement by a planning official of the affected city or county that the application complies with the acknowledged comprehensive plan but no local land use approvals are needed.

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0125

Referral of Compatibility Disputes to the Land Conservation and Development Commission

If a compatibility conflict persists after pursuing the compatibility procedures listed in OAR 731-015-0045 through 731-015-0115, the Department shall request that the Land Conservation and Development Commission make a compatibility determination in accordance with OAR 660-030-0070(7) through (12).

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0135

Statewide Goal Compliance and Acknowledged Plan Compatibility for New or Amended Rules and Programs Significantly Affecting Land Use

(1) The Commission and Department shall follow the procedures in OAR 660-030-0075 to assure that new or amended rules and programs comply with the requirements of ORS 197.180 and OAR chapter 660, division 30.

(2) The Department shall determine whether new or amended rules and programs affect land use pursuant to OAR 660-030-0005(2) and OAR 731-015-0035.

(3) This section shall not apply to the adoption of temporary rules or programs.

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

DIVISION 20

METHODS OF ESTABLISHING GROSS WEIGHTS OF TRUCKS

731-020-0000

Purpose and Scope

Establishing methods of determining gross weights for the Oregon Vehicle Code.

[Publications: The publications referenced to in this rule is available from the agency.]
 Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 801.055
 Stats. Implemented: ORS 801.055
 Hist.: DOT 2-1992(Temp), f. & cert. ef. 9-1-92; DOT 3-1992, f. & cert. ef. 11-25-92

731-020-0010

Weighting of Vehicles

(1) For the purpose of determining any gross weight, actual scale weights shall govern. In the absence of information as to scale weights or of convenient facilities for ascertaining scale weights, the weights furnished by dealers, manufacturers or their agents, as to the weights of vehicles and parts of vehicles, and bills of lading or cargo manifests as to weights of loads, may be accepted as the weights thereof, but such weights shall be subject at all times to verification by actual weights subsequently ascertained.

(2) For any of the purposes of the Oregon Vehicle Code, any gross weight may be measured and determined as follows:

(a) The gross weight of any wheel may be ascertained by placing a portable wheel weigher underneath the wheel and raising it off the surface of the ground, or by placing any wheel on a platform scale in a position so that the other wheels of the vehicle do not bear upon the platform of the scale;

(b) The gross axle weight of any axle may be ascertained by placing a portable wheel weigher underneath the outer wheels at both ends of the axle and raising all the wheels of the axle off the surface of the ground so as to weigh the entire axle at one time, or otherwise in the usual manner of the use of weighing devices, or may be ascertained by placing all the wheels of any axle on a platform scale in a position so that the other wheels of the vehicle do not bear upon the platform of the scale;

(c) The gross weight of any tandem axles and the gross weight of any group of axles shall be the sum of the gross axle weights of all the axles comprising the tandem axles or the group of axles, or may be ascertained by placing all the wheels of the tandem axles or the group of axles on a platform scale in a position so that the other wheels of the vehicle or combination of vehicles do not bear upon the platform of the scale. If it is not practical to place only the wheels of the tandem axles or groups of axles in a position so that other wheels of the vehicle or combination of vehicles do not bear upon the platform of the scale, other wheels of the vehicle or combination of vehicles may be placed on the platform of the scale and the gross weight of the tandem axles or the gross weight of the group of axles shall be determined by subtracting from the gross weight of all the wheels upon the platform of the scale the gross weight of the wheels not comprising the tandem axles or the groups of axles;

(d) The gross weight of any vehicle or combination of vehicles shall be the sum of the gross axle weights of all the axles of the vehicle or combination of vehicles, or may be ascertained by placing all the wheels of a vehicle or combination of vehicles on a platform scale.

[Publications: Publications referenced are available from the agency.]
 Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 801.055
 Stats. Implemented: ORS 801.055
 Hist.: DOT 2-1992(Temp), f. & cert. ef. 9-1-92; DOT 3-1992, f. & cert. ef. 11-25-92

DIVISION 30

OREGON TRANSPORTATION INFRASTRUCTURE FUND

731-030-0010

Purpose of the Rules

OAR 731-030-0010 to 731-030-0160 establish the procedures and requirements for the administration of the Oregon Transportation Infrastructure Fund.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 367.383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 184.190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 367.383 & United States Code, Public Law 104-59, Section 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0020

Statutory Authority

Oregon Revised Statutes provide authority for the Department to operate the Oregon Transportation Infrastructure Fund. This authority is located in a number of statutes:

(1) Receive and account for federal funds. Oregon Revised Statutes (ORS) 184.617 and 366.705 to ORS 366.735 provide very broad statutory authority to receive federal funds in almost any form.

(2) Highway Account. Statutory authority permitting the Department to establish a separate account within the State Highway Fund for the Oregon Transportation Infrastructure Fund is provided pursuant to ORS 184.636, 184.638, 366.505, and 366.735.

(3) Intergovernmental Agreements. According to the provisions of ORS 366.770 and 366.775, the Department may enter into intergovernmental agreements with local jurisdictions "upon terms and conditions mutually agreed to" for highway related projects. There is also broad authority to enter into intergovernmental agreements generally in ORS Chapter 190. Thus the Department may loan funds, charge interest, and provide financial assistance. Under ORS 367.655 and 367.700 to ORS 367.750, the Department may incur bond indebtedness and loan moneys to cities and counties.

(4) Other Accounts. ORS 184.636 to ORS 184.638, ORS 184.733, and ORS 366.505 provide authority for the Department to establish accounts to administer its highway and transit programs.

(5) Transit Account. ORS 184.733 establishes an account in the State Treasury, separate and distinct from the General Fund, known as the Department of Transportation Public Transportation Development Fund. This account is appropriated continuously to the Department and is for developing and improving public transportation systems. All interest accruing to the funds in that account is captured and retained in the account:

(a) ORS 184.689(9) empowers the Department to assist local government, private and nonprofit operators of passenger transportation systems. The Department may assist in such activities as, planning, experimentation, financing, design, construction, acquisition, lease, preservation, improvement, operation and maintenance of public transportation systems. The assistance may include loans, grants, or the provision of equipment or facilities; and

(b) ORS 184.730 and ORS 184.733 provide sufficient authority for loans to any "public transportation entity." These include any city, county, transportation district, mass transit district, metropolitan service district or private nonprofit corporation operating a public transportation system. In addition, the Department may make agreements with public and private employers to operate transportation development programs. The Department may loan from its Public Development Transportation Fund to public and to some private entities.

(6) Repayment Account. Pursuant to ORS 366.505 and Public Law 104-59, Section 350, repayments from loans shall reside in the state highway fund unless the Chief Financial Officer designates another fund.

(7) Toll Roads. ORS Chapter 383 provides broad authority for the Department to enter into agreements with public entities, public/private partnerships and private entities to fund toll roads and bridges.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0030

Definitions

- (1) "Applicant" means an Agency or a Municipality.
- (2) "Agency" means any department, agency or commission of the State of Oregon, including the Department.
- (3) "Advisory Committee" means a committee appointed by the Region Manager and comprised of local government and other community representatives in addition to Department staff.
- (4) "Bond Counsel" means a legal firm hired to advise the Department regarding the legal and tax aspects of the sale of Infrastructure Bonds.
- (5) "Chief Financial Officer" means the fiscal officer defined in ORS 184.637 and ORS 184.638 who is also the Manager of the Financial Services Branch of the Department or designated staff.
- (6) "Commission" means the Oregon Transportation Commission.

(7) "Debt Service Reserve" means unobligated moneys from the Infrastructure Fund set aside in an account in the Infrastructure Fund, to be used as debt service for Infrastructure Bonds, in the event that debt service is not met by Recipients.

(8) "Department" means the Oregon Department of Transportation.

(9) "Director" means the Director of the Oregon Department of Transportation.

(10) "Financial Advisor" means a consultant providing the Department with information and advice relative to the structure, timing, marketing, pricing, terms and bond ratings for the sale of Infrastructure Bonds.

(11) "Highway Account" means an account within the State Highway Fund defined in ORS 366.505 which receives federal and state money for use by the Infrastructure Fund.

(12) "Infrastructure Assistance" means Infrastructure Loans and Other Assistance.;

(13) "Infrastructure" means any construction project, facility, property or program that provides the foundation or basic framework by which an entity provides transportation services to the public.

(14) "Infrastructure Bonds" means bonds authorized by ORS 367.226 to 367.242, 367.370 to 367.430, 367.550 to 367.600, or 367.605 to 367.670 which are issued to fund Infrastructure Assistance and are deposited in the Highway Account.

(15) "Infrastructure Fund" means the Oregon Transportation Infrastructure Fund, which consists of the Highway Account, the Transit Account, the Repayment Account and such other accounts as the Chief Financial Officer deems necessary to administer the Program.

(16) "Infrastructure Loan" means a loan of amounts in the Infrastructure Fund to finance a Transportation Project. The loan may be in the form of a lease purchase or similar agreement.

(17) "Lease" means any contract or other agreement by which one conveys real estate, equipment, or facilities for a specified term and for a specified rent. Lease may refer to a lease purchase agreement.

(18) "Municipality" means any of the following located in the State of Oregon: A city, county, road district, school district, special district, metropolitan service district, urban renewal agency, the Port of Portland, a port authority, any similar entity, and an intergovernmental corporation organized under ORS 190.010.

(19) "Other Assistance" means any use of amounts in the Infrastructure Fund to provide financial assistance for Transportation Projects other than an Infrastructure Loan. Other Assistance includes, but is not limited to, use of amounts in the Infrastructure Fund to fund leases, pay issuance costs or provide credit enhancement or other security for bonds, leases or loans obtained by municipalities or other entities to fund Transportation Projects.

(20) "Program" means the program authorized by United States Code, Public Law 104-59, Section 350 under which the United States Secretary of Transportation designated Oregon as a state infrastructure bank pilot state, which program was approved and adopted by the Commission.

(21) "Project Agreement" means a legally binding contract between the Department and Recipient that sets out the terms and conditions for award of Infrastructure Loans or Other Assistance.

(22) "Public Transportation Entity" means an entity defined in Oregon Revised Statutes 184.675(7).

(23) "Recipient" means an Applicant that has received an Infrastructure Loan or Other Assistance.

(24) "Region" means one of the geographic areas established by the Department to administer transportation programs.

(25) "Region Manager" means the administrative head of a Region or designated staff.

(26) "Repayment Account" means an account within the State Highway Fund which receives loan payments, fees and other charges due from any and all Infrastructure Assistance.

(27) "Staff" means Department staff assigned by the Chief Financial Officer to provide Infrastructure Loans and Other Assistance.

(28) "State Tollway Account" means the account established in Oregon Revised Statutes 383.009.

(29) "Transit Account" means an account within the Transportation Development Fund defined in ORS 184.733 which receives federal and state funds for use by the Infrastructure Fund.

(30) "Transportation Project" means any project or undertaking which facilitates any mode of transportation within the State. Transportation projects include, but are not limited to, highway, transit, bicycle and pedestrian paths, bridges and ways, and other facilities which facilitate the transportation of materials, animals or people.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0040

Purpose of the Oregon Transportation Infrastructure Fund

(1) The purpose of the Oregon Transportation Infrastructure Fund is to fund transportation solutions, leverage additional funds into transportation, and encourage innovative financing techniques in order to further Oregon's livability and economic competitiveness. The Oregon program is one of ten state pilot projects authorized under United States Code, Public Law 104-59, Section 350. The Fund is part of a national effort to demonstrate state infrastructure banks can increase funding available for transportation projects.

(2) The program arises out of the need to improve, rehabilitate and renovate transportation facilities. This need increases while federal, state and local financial resources are constant or declining. Federal grants for transportation are not growing. State and local sources of transportation funding have not kept pace with the growth in needed infrastructure. Similar financial constraints affect both state facilities and facilities owned by counties, cities, transit providers and special districts.

(3) The mission of the Infrastructure Fund is to provide loans and other financial assistance to improve transportation infrastructure in the state. To accomplish this mission, the Department shall operate the Infrastructure Fund as a self-sustaining, growth oriented fund. It shall also ensure projects satisfy all appropriate federal, state and local planning and programming requirements.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0050

Administration of Funds

(1) The Chief Financial Officer shall conduct the activities necessary to manage the Infrastructure Fund.

(2) The Commission capitalizes the Infrastructure Fund with available federal and state money it wishes to designate for this purpose and with the sale of Infrastructure Bonds. Interest earnings on fund balances and loan repayments also contribute to capital.

(3) Moneys in the Infrastructure Fund may include moneys transferred from the State Highway Fund, from federal funds identified in Public Law 104-59, Section 350, (a) (2) through (a) (4), from funds otherwise available to the Commission for transit capital purposes, from funds contributed by local transit providers, as well as from any federal, state or other grants or donations.

(4) The Department may expend funds from the Infrastructure Fund to make Infrastructure Loans.

(5) The Department may expend funds from the Infrastructure Fund to provide Other Assistance.

(6) The first expenditure of federal funds from either the Highway Account or the Transit Account shall be for projects eligible for Federal aid under Title 23 or Title 49 of the United States Code. These projects shall meet all federal contracting requirements. Any exception to these requirements shall be by agreement with appropriate federal and state officials.

(7) The Department may expend funds from the Infrastructure Fund to establish a Debt Service Reserve to support the credit pledges of a Recipient and to reduce the interest rate paid on loans.

(8) The Department may expend moneys from the Fund to support the sale of Infrastructure Bonds. Such expenditures may include the payment of all costs associated with the issuance of an Infrastructure Bond including but not limited to Bond Counsel and Financial Advisor fees, underwriter fees and discounts, printing and publishing, and other costs as deemed necessary to secure the sale of an Infrastructure Bond.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0060

Pilot Stage and Infrastructure Bonds

(1) During the first six months from the effective date of OAR 731-030-0010 to 731-030-0160, the Department shall:

- (a) Make Infrastructure Loans;
- (b) Provide Other Assistance only to fund Leases; and
- (c) Not issue Infrastructure Bonds.

(2) After the first six months, the Department shall:

- (a) Make Infrastructure Loans;
- (b) Offer such Other Assistance as the Chief Financial Officer deems appropriate; and

(c) Request the State Treasurer to issue Infrastructure Bonds only if, in the judgment of the Chief Financial Officer, the demand for Infrastructure Assistance surpasses federal and state funds designated to the bank and only upon the Commission's approval.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0070

Eligible Applicants

(1) The Department shall accept applications for Infrastructure Loans or Other Assistance from any Agency or Municipality.

(2) Private entities shall not be eligible applicants except for Public Transportation Entities and except for private entities applying through the State Tollway Account.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0080

Applicant's Handbook

(1) The Department has prepared a handbook for Applicants. The handbook addresses application procedures, Applicant eligibility, project evaluation, types of Infrastructure Assistance available, financing rates, terms and limits and other applicable information. It is called the Applicant's Handbook Oregon Transportation Infrastructure Bank.

(2) The Chief Financial Officer may revise the Applicant's Handbook as needed or judged helpful.

(3) The materials in the Applicant's Handbook are hereby adopted by reference.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0090

Application Procedures

(1) An eligible Applicant may submit an application for Infrastructure Assistance at any time.

(2) The Department may establish a cut off date for the first round of applications. Grouping all initial applications from across the state is done to allow fair competition by all applicants for available funds.

(3) The Department may establish additional rounds of applications, if the Chief Financial Officer deems it appropriate to do so.

(4) All applications received before an established cut-off date shall be evaluated as part of the same process on published criteria by a Region and by Staff.

(5) Applications received after an established cut-off date shall be evaluated within approximately 60 days of receipt on published criteria by a Region and by Staff.

(6) The Department shall set forth in the Applicant's Handbook specific information required to qualify and evaluate the project and to ascertain the credit strength of the Applicant.

(7) The Department shall assign the application to a Region for evaluation of technical and engineering criteria and to Staff for evaluation of financial and economic criteria.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

**731-030-0100
 Region Advisory Committees**

(1) Each Region Manager shall appoint an advisory committee comprised of local government and other community representatives in addition to Department staff. The responsibility of the advisory committee is to evaluate applications on technical, engineering and planning criteria, rank applications when more than one is being considered, and to recommend to the Regional Manager approval or disapproval of each application. Appointments of local government and citizen representatives shall be made in cooperation with local governments. The Region Manager may utilize an existing committee for this purpose, provided the requirements of this section are met.

(2) To be qualified to serve on the Advisory Committee a person must be an elected or appointed official of an Agency or Municipality with responsibilities for transportation, or be representative of the community recognized for interest and expertise in transportation, or be a member of the Department's staff appointed to the Advisory Committee by the Region Manager.

(3) The Advisory Committee shall adhere to the Oregon Public Meetings Laws at all meetings and shall have at least three voting members. No more than one-third of voting members may be Department staff.

(4) The Advisory Committee shall consider all the projects within the Region which are qualified for an Infrastructure Loan or Other Assistance.

(5) The Advisory Committee shall appropriately consider transportation policy and modes when evaluating applications.

(6) The voting members of the Advisory Committee shall:

(a) Evaluate each project or proposal according to the criteria published by the Department and assigned by the Department for evaluation to the Region;

(b) Recommend approval or disapproval of each project or proposal; and

(c) Where more than one project is evaluated, recommend how the projects or proposals should rank.

(7) The Region Manager shall decide the final evaluation and ranking of all projects in the Region, taking into consideration the advisory committee's recommendation.

(8) The Region Manager shall notify the Staff of the make up of the Advisory Committee and shall inform Staff of the results of evaluations and rankings in a format developed or approved for this purpose. The intent is that a uniform method of evaluation and reporting be used for all advisory committees statewide.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 - U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

**731-030-0110
 Evaluation Procedures**

(1) Staff shall develop criteria with uniform benchmarks for statewide use. Conformity to land use and transportation planning laws and rules will be one of the essential criteria.

(2) Staff shall assign particular technical, engineering and planning criteria to the Region for evaluation.

(3) Staff shall evaluate the economic and financial criteria for each project, seeking assistance from the Oregon Economic Development Department and the Department of Environmental Quality or from other subject matter experts where appropriate.

(4) Staff shall combine evaluations into a combined score. The combined score may change the order of projects from the order established by a Region.

(5) Staff shall recommend to the Chief Financial Officer which projects to fund based on an analysis of such factors as the combined score, statewide equity, the availability of funds, and Program cash flow. Staff may request additional information from an Applicant or the Region to assist in making a recommendation.

(6) The Chief Financial Officer shall determine which projects best meet the project selection criteria and recommend those projects to the Commission.

(7) The Commission shall approve or make the final selection of projects.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

**731-030-0120
 Project Agreements, Interest Rates and Charges**

(1) The Department shall give Infrastructure Assistance from the Infrastructure Fund by entering into a Project Agreement with the Recipient.

(2) The Chief Financial Officer shall determine the amount, type, interest rate, and terms of financing awarded to an Applicant for a Transportation Project. In most cases for Agencies and Municipalities, interest rates will approximate tax exempt rates for similar obligations. In determining interest rates, the Chief Financial Officer may adjust the rate to reflect the evaluation of the Infrastructure Project and the effect of the rate upon the Applicant's ability to fund the project.

(3) The Chief Financial Officer shall set forth in each Project Agreement any fees or charges necessary to recover Department costs.

(4) The Chief Financial Officer shall consider the financial status of the Infrastructure Fund and may delay final award of funds to any Transportation Project until sufficient funds are available. The Department reserves the right to investigate and recommend other sources of funds for all or part of a proposed Transportation Project.

(5) Loans made to a Transportation Project can only be drawn as needed to pay for eligible costs. The time between draw down and disbursement of funds shall be as brief as is administratively feasible.

(6) Eligible costs include the cost of acquiring, designing, contracting, building and installing any Transportation Project. Other costs may be included in a Project Agreement if mutually agreed. When federal money is used and where appropriate, the requirements of federal law and rules regarding reimbursable costs will be followed.

(7) Project Agreements shall generally not include grants. Infrastructure Loans may be made in coordination with grants from funds otherwise available to the Department. The Department and Recipient jointly may determine the order in which the Recipient shall spend grant funds and loan funds.

(8) The Department shall provide each Recipient with information which guides local record keeping and Transportation Project reporting activities.

(9) If the Department determines that all the loaned funds are not needed to complete a Transportation Project, the Department may accept early repayment from the Recipient and discharge the Recipient.

ient's obligation. The Department shall consider the financial impact of early repayment upon the Infrastructure Fund and may assess the Recipient a charge designed to offset any loss to the Infrastructure Fund from the early repayment.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

**731-030-0130
 Accounting, Reporting and Auditing Requirements**

(1) The Department shall maintain an accounting system for the Infrastructure Fund that separately accounts for administrative costs, loans, and assistance. The Infrastructure Fund shall be managed so as to comply with generally accepted accounting principles and practices.

(2) Recipients shall separately account for all Infrastructure Assistance moneys in project accounts in accordance with generally accepted accounting standards. The Department reserves the right to audit, monitor or otherwise review all project records.

(3) The Department shall compile a report on the Program and distribute the report to Recipients no later than 90 days after the end of the Federal fiscal year. The report shall identify Recipients, the amounts of Infrastructure Assistance, Infrastructure Assistance interest and repayment terms and project categories. The report shall include a statement on how well the Department has met its goals for the program and the financial condition of the Highway Account and the Transit Account.

(4) Recipients shall provide information required for this report in formats designed by Staff.

(5) The Department, in cooperation with the Secretary of State, shall conduct or cause to be conducted an annual independent financial and compliance audit of its operations. This audit may be conducted in accordance with the Single Audit Act of 1984. This audit shall be completed within one year of the end of the state fiscal year.

(6) The Department and Recipients shall observe the requirements of state law for retaining and disposing of records except that the Department shall retain all official project files until all Infrastructure Assistance has been repaid and necessary audits have been performed.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

**731-030-0140
 Sanctions**

(1) The Department may invoke sanctions against a Recipient that fails to comply with the terms and conditions in the Project Agreement. Sanctions shall not be imposed by the Department until the Recipient has been notified in writing of deficiencies and has been given a reasonable time to respond and correct the deficiencies noted. The following circumstances may warrant sanctions:

(a) Recipient action or lack of action causes the Department to fail to take appropriate corrective action or submit a compliance plan to the Federal Highway Administration or the Federal Transit Administration within 60 days of a Federal notice of non-compliance;

(b) State or Federal statutory requirements have not been met;

(c) Transportation Project activities have not begun or progressed as committed in the Project Agreement;

(d) Failure to comply with local or state land use or transportation planning laws or rules;

(e) Any third party agreements relating to the Transportation Project are not legally binding within six months of the award of Infrastructure Assistance;

(f) There is a significant deviation from the Project Agreement;

(g) The Department finds that significant corrective actions are necessary to protect the integrity of the Transportation Project funds,

and those corrective actions are not, or will not be, met within a reasonable time; or

(h) A Recipient defaults on Infrastructure Assistance payments.

(2) The Department may impose one or more of the following sanctions:

(a) Withhold from future payments all unexpended Department funds or an amount equal to the amount under dispute until corrective action is taken or until the Recipient provides an acceptable plan;

(b) Bar a Recipient from applying for future Infrastructure Assistance;

(c) Revoke an existing award of Infrastructure Assistance;

(d) Require return of unexpended Infrastructure Assistance funds;

(e) Require repayment of expended Infrastructure Assistance funds;

(f) Bar a Recipient from eligibility for Department grant programs;

(g) Step in and take over administration of a Transportation Project;

(h) Withhold other state funds such as an entity's apportionment of State Highway Fund revenues due under Oregon Revised Statutes 366.524; or

(i) Other remedies that may be incorporated into Project Agreements.

(3) The remedies in this rule are cumulative, are not exclusive, and are in addition to any other rights and remedies provided by law or under the Project Agreement.

(4) The Recipient shall be responsible for taking all action necessary to enforce the terms of the Project Agreement against any private participant that fails to comply with the Project Agreement, and to recover on behalf of the Department any liabilities that may arise as the result of the breach of such Project Agreement by a private participant. Nothing in this paragraph shall restrict the Department's right to enforce independently the terms of any Project Agreement or to recover any sums that may become due as the result of a breach of such Project Agreement.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

**731-030-0150
 Waivers**

The Chief Financial Officer may waive non-statutory requirements of this Program if it is demonstrated such a waiver would serve to further the goals and objectives of the Program.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

**731-030-0160
 Appeals**

Appeals of local government decisions regarding a Transportation Project application must be made to the appropriate local governing entity, for example to the county, city or special district making the decision.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

DIVISION 40

TOLLWAY PROJECTS

731-040-0010

Purpose

OAR 731-040-0010 through 731-040-0080 describe the process for initiating, evaluating, authorizing and administering tollway projects proposed by private entities; and local, regional or state government. They include requirements for submitting project proposals; guidelines for considering financial and other issues; and requirements for consistency with other local, state and federal policies and processes. OAR 731-040-0010 through 731-040-0080 shall be cited as the Tollway Project Rules.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015
 Stats. Implemented: ORS 383
 Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0020

Definitions

As used in OAR 731-040-0020 through 731-040-0080:

(1) "Agreement" means a memorandum of agreement executed by the Oregon Department of Transportation with any private entity or governmental agency to implement the purpose of ORS Chapter 383 or the Tollway Project Rules.

(2) "Department" means the Oregon Department of Transportation.

(3) "Environmental impacts and assessment" means the assessment of impacts on the environment and any proposed mitigation of impacts, consistent, at a minimum, with state/federal rules, regulations and standards.

(4) "Financial and institutional capacity" means the current and projected financial, personnel and other institutional resources available to a private entity or local or regional government necessary to finance and administer a proposed project.

(5) "Justification" means a concise statement that, at a minimum, describes why the proposed facility is needed, the specific problems that will be resolved, specific benefits expected to accrue to the general public, and expected impacts on existing/planned transportation facilities near the proposed facility.

(6) "Liability-creating events" means events that create potential liability for the Department, particularly events where the determination of who is liable could be disputable. Examples include, but are not limited to, accidents due to material or design defects or construction-related events.

(7) "Local and statewide economic impacts" means estimated impacts on employment, retail sales, tax revenues and other economic indicators for the state and local jurisdictions in which the proposed project is located.

(8) "Minimum STIP requirements" means requirements imposed by the Department and local or regional governments through the Statewide Transportation Improvement Program (STIP) as defined in section (15) of this rule.

(9) "MPO" means any metropolitan planning agency in Oregon designated by the state or federal government as responsible for transportation planning and coordination within its jurisdiction.

(10) "Perfected security agreement" means an agreement giving the Department a clear and senior claim on a security in the event of default or other condition identified in the agreement.

(11) "Private entity" means any nongovernmental entity, including a corporation, partnership, company or other legal entity or any natural person.

(12) "Reasonable rate of return on investment" means a percentage rate calculated in an agreement that establishes an annual average profit rate. This rate will be negotiated between the Department and any other party to the agreement and calculated pursuant to OAR 731-040-0070(4), as well as any other procedures developed by the Department to implement the Tollway Project Rules.

(13) "Regional decision-making body" means any MPO, Council of Governments or other regional body recognized by the State of Oregon as having authority to make binding regional decisions regarding transportation and land use planning.

(14) "RTP" means a Regional Transportation Plan adopted by Metro or any other MPO.

(15) "STIP" means the Statewide Transportation Improvement Program as adopted and implemented by the Department and the Oregon Transportation Commission (OTC). Rules and procedures

for implementing the STIP are found in the STIP Development Manual adopted by the Department.

(16) "Tollway Account" means a separate account within the State Highway Fund as defined in ORS 383.009.

(17) "TSP" means any adopted regional, county or local Transportation System Plan.

(18) "Unit of government" means any department or agency of the state, or any agency, office or department thereof, and any city, county, district, port or other public corporation organized and existing under statutory law or under a voter-approved charter.

[Publications: The publications referenced to in this rule is available from the agency.]

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015
 Stats. Implemented: ORS 383
 Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0030

Initiation by Public and Private Entities, Initial Review and Administrative Fee

(1) A unit of government may propose a tollway project at any time. In addition to information required for the STIP process, local governments shall provide information on the following:

- (a) Estimated local funding contributions;
- (b) Estimated portion of costs to be covered by toll revenues;
- (c) Proposed sources of additional funding;
- (d) Justification for project to be constructed as tollway;
- (e) Proposed ownership and financing arrangements; and
- (f) Financial and institutional capacity to meet proposed responsibilities for finance, operation, maintenance and administration.

(2) Department staff may assist units of government in obtaining information required for proposals.

(3) Private entities may propose tollway projects at any time. Proposals shall be submitted to the Department regional manager for the region in which the majority of the proposed project, measured in lane-miles, is located.

(a) If a proposed project is already included in the STIP development program or a local transportation system improvement plan, the proposer shall submit the following information:

- (A) Qualifications and experience in previous similar projects;
- (B) Size and form of proposed financial commitment, if any, from the government sector and private sources;
- (C) Financial and institutional capacity to meet proposed responsibilities for finance, operation, maintenance and administration;

(D) Proposed form, extent and duration of government participation; and

(E) Time schedule for completion.

(b) If a proposed project is not already included in the STIP development program or any local or regional transportation system plan (TSP), the proposer shall submit the information required in subsection (a) of this section, as well as information required by local, regional or state transportation planning agencies needed for the STIP process.

(c) Private entities shall agree to cooperate with the Department and local or regional governments in their review and evaluation of proposals through the STIP process.

(4) Department staff shall review proposals submitted by units of government or private entities.

(a) The Department shall review proposals submitted by units of government to determine if the proposing agency has adequately demonstrated it can meet its proposed responsibilities for financing, operating, maintaining and administering the project. Upon making such a determination, the Department shall do the following:

(A) If the project is in the STIP development program, the Department shall proceed to further detailed review pursuant to OAR 731-040-0040; or

(B) If the project is not already in the STIP development program, Department staff shall determine whether the project could meet minimum STIP requirements. If the Department makes such a determination, it shall proceed to further detailed review pursuant to OAR 731-040-0040.

(b) The Department shall review proposals submitted by private entities to determine if the proposer has demonstrated the experience and capacity to build, operate or maintain the proposed facility and the project. Upon making such a determination, the Department shall do the following:

(A) If the project is in the STIP development program, the Department shall proceed to further detailed review pursuant to OAR 731-040-0040; or

(B) If the project is not already in the STIP development program, Department staff shall determine whether the project could meet minimum STIP requirements. If the Department makes such a determination, it shall proceed to further detailed review pursuant to OAR 731-040-0040.

(c) Proposals submitted for further review pursuant to subsections (a) and (b) of this section also shall be forwarded for review by the Department to local or regional governments for cities, counties and regions in which the project is located.

(5) The Department shall charge the private entity the following fees for reviewing any project proposed by the private entity to a local, regional or state government or other public agency:

(a) For initial review pursuant to subsection (3)(b) of this rule, the administrative fee shall be \$5,000; and

(b) For projects that are approved for detailed consideration and evaluation, the additional fee for review pursuant to OAR 731-040-0040, shall be \$40,000.

(6) Review fees will be deposited in the State Tollway Account and used to cover the cost of reviewing proposals.

(7) The Department may utilize a competitive process in soliciting or evaluating proposals from private entities.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0040

Evaluation

(1) Projects not already included in the STIP construction program shall be evaluated for inclusion in the STIP construction program by the Department or the appropriate MPO or other recognized regional decision making body. After the Department has made a determination, pursuant to OAR 731-040-0030, that a project is feasible and the proposer can meet its proposed responsibilities for financing, operating, maintaining and administering the proposed project, the proposer shall submit additional information to be used in the STIP evaluation process, including:

(a) Engineering information related to alignment, cross-section, access points and other related factors;

(b) Right-of-way needs;

(c) Detailed finance plan and cost information;

(d) Environmental impacts and assessment, including local and statewide economic impacts; and

(e) Consistency with applicable federal, state and local plans and policies, including:

(A) Local and regional TSPs;

(B) Local and regional land use and comprehensive plans; and

(C) All other plans and policies referenced in STIP consistency requirements.

(2) Evaluation criteria and procedures shall be the same as those used for other STIP construction, TSP or RTP projects or other regional transportation decision-making processes, except as follows:

(a) Until formally incorporated in existing processes, criteria and procedures also must include:

(A) Consideration of local and statewide economic impacts;

(B) Comparison of traffic congestion and economic conditions in communities served by competing tollways financed in part by state funds; and

(C) Other provisions set forth in the Tollway Project Rules.

(b) Unless already included in the evaluation process, availability of funds from toll revenues or other sources of funding not budgeted through the STIP process shall be considered in ranking projects. Given a financially constrained STIP, the availability of toll or other local revenues shall improve a project's ranking to the extent

that they enhance other elements of the state transportation system or the system as a whole.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0050

Authorization

Approval by the Oregon Transportation Commission through the STIP process shall constitute authorization of a tollway project.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0060

Administration of Projects

(1) Once a tollway project is authorized, the Department may enter into an agreement with a local or regional government or private entity to design, build, operate, maintain or administer a tollway project. Arrangements include those specified in ORS Chapter 383.

(2) Before entering into such an agreement, the designated government agency or private entity must demonstrate the financial and legal capacity to meet its responsibilities for financing, operating, maintaining or administering tollway projects.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0070

Use of Public Funds, Risk to the State and Rate-of-Return

(1) In general, public funds should be considered for use in tollway projects only when a project will provide significant, beneficial effects beyond the immediate users of the facility, such as environmental benefits, significant improvements in the performance of other portions of the state roadway network, or demonstration value. In determining how to most appropriately use public resources, the Department may:

(a) Use public money in a manner consistent with the use of such moneys in non-tollway projects;

(b) Use public funds to underwrite studies and other costs associated with public planning processes such as for environmental studies;

(c) Contribute moneys dedicated to special facilities, such as structures of a tollway project that serve non-economic, but socially-desirable goals (e.g., facilities for handicapped vehicles and interchange modifications that improve performance of another roadway); and

(d) Consider the provision of further revenue guarantees.

(2) Financial risk to the state is affected by:

(a) Amount of equity the State commits to the project;

(b) Degree of leverage (debt-finance) of the project, generally, and the use of publicly-issued bonds to finance the facility, specifically;

(c) Degree to which the state highway system is dependent on the project; and

(d) Other factors, including:

(A) Level of liability-creating events assumed by the state during construction and operation;

(B) Accuracy of traffic demand forecasts, cost studies, and other analyses; and

(C) Financial stability of the private partner in the facility.

(3) To reduce financial risk to the state, the Department may consider the following procedures:

(a) Obtain independent investment banking analysis of the transaction and contract terms;

(b) Acquire appropriate guarantees, perfected security interests, and other protections from the actions of partners;

(c) Obtain ownership and/or control interests in the facility as necessary to balance the assumption of liability with the ability to control that liability; and

(d) If assuming liability, exert control over that liability by participating on boards or committees of the entity building and/or operating the facility.

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(4) The state shall negotiate a reasonable maximum rate of return on private investment (ROI) with any private entity participating in building, operating or maintaining a tollway, based on the following considerations:

(a) The ROI should be equivalent to the rate of return available on alternative investments of like risk, duration, and tax treatment in the private marketplace; and

(b) The ROI should be properly computed recognizing the financial structure of the total financing, including:

(A) The type of debt used;

(B) The value of the State's contribution to equity (e.g. rights-of-way);

(C) The role of implicit or explicit financial guarantees and contingencies; and

(D) The structure of ownership and control over the facility's life.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

Public Notice/Involvement Requirements

(1) The Department or local or regional decision-making bodies shall provide opportunities for public notice and involvement in accordance with existing requirements for the STIP or similar local or regional transportation planning processes.

(2) In conducting public outreach efforts, agency personnel shall specify that tolls will be collected to finance the project and make efforts to inform and involve those most affected by tolling.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

DIVISION 50

HIGHWAY PROJECTS

Definition of District Highway

For purposes of chapter 669, Oregon Laws 2001 (HB 2142), “District Highway” means a state facility of county-wide significance that functions largely as a county and city arterial or collector.

Stat. Auth.: ORS 184.616, ORS 184.619 & Sec. 2, Ch. 669, OL 2001

Stat. Implemented: Sec. 2, Ch. 669, OL 2001

Hist.: DOT 1-2001, f. 9-24-01, cert. ef. 10-6-01 thru 4-3-02