

Chapter 731 Department of Transportation

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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 a permanent 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(8).

(3) By mailing a copy of the notice to legislators as provided in ORS 183.335(15).

(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 & 184.616

Stats. Implemented: ORS 183.335 & 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; DOT 4-2003, f. & cert. ef. 12-11-03

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 January 1, 2006 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 office of the Attorney General or the Department of Transportation.]

Stat. Auth.: ORS 183.341, 184.616 & 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; DOT 1-2002, f. & cert. ef. 1-17-02; DOT 2-2004, f. & cert. ef. 2-23-04; DOT 1-2006, f. & cert. ef. 1-24-06

731-001-0025

Public Records Request Requirements and Fees

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

(1) As used in this rule, the following definitions apply:

(a) "Non-Standard" means

(A) Audio tapes;

(B) Video Tapes;

(C) Microfilm, and

(D) Machine readable formats such as computer hard drives, and magnetic tape.

(b) "Certified copies" means, photocopies, that on the date copied, are true and accurate copy of the original record. The Department cannot certify as to any subsequent changes or manipulation of the record.

(c) "Research" means the compilation of information:

(A) That is not readily and immediately available from a single source or a group of related sources; or

(B) That requires a search to locate the requested information.

(2) A request for photocopies, facsimile (fax) copies, electronically distributed (email) copies and certifications of public records that are on file with the Department can be made verbally, in writing, by fax or by email.

(a) The request must:

(A) Include name and address of the person requesting the public record;

(B) Include telephone number of the person requesting the public record; and

(C) Adequately describe the record(s) requested including subject matter, approximate creation date(s) and name(s) of person(s) involved in creation.

(b) The request should:

(A) Be dated;

(B) Be signed by the person requesting the public record; and

(C) Indicate a date by which the records are being requested.

(3) The Department will respond to the request in a reasonable amount of time and acknowledge the request, identify an estimate of the expected cost of meeting the request, and the expected date and location at which the information will be provided. The regular discharge of duties of the Department will be neither interrupted nor interfered with because of time or effort required to respond to the request.

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

(a) \$0.25 per page for photocopies.

(b) The cost of records transmitted by fax is \$5.00 for the first page and \$1.00 for each additional page, limited to a 20-page maximum, not including the cover page.

(c) Actual cost for use of material and equipment for producing copies of non-standard records.

(d) Upon request, copies of public records may also be provided on a 3.5-inch computer disk or compact disk (CD) if the document(s) are stored in the Department's computer system. Disks will be provided at a cost of \$5.00 per disk and may contain as much information as the disk will hold. Due to the threat of computer viruses, the department will not permit requestors to provide disks for electronic reproduction of computer records.

(e) Labor charges that include researching, locating, compiling, editing or otherwise processing information and records:

(A) No charge for the first 15 minutes of staff time.

(B) Beginning with the 16th minute, the charge per total request is \$25.00 per hour or \$6.25 per quarter-hour. A prorated fee is not available for less than a quarter-hour.

(f) The actual cost for delivery of records such as postage and courier fees.

(g) \$5.00 for each true copy certification.

(5) Electronic Records. Copies of requested electronic records may be provided in the format or manner maintained by the Department. The Department will perform all downloading, reproducing, formatting and manipulating of records.

(6) The Department may charge a fee for the cost of time spent by an attorney in reviewing the public records, redacting material from the public records or segregating the public records into exempt and nonexempt records. Records request fees will include actual attorney fees charged to the Department related to the request. The Department will not charge a fee greater than \$25.00 under this section unless the Department first provides the requester with a written notification of the estimated amount of the fee and the requester confirms that the requester wants the Department to proceed with making the public record available.

(7) Pre-payment may be requested by the Department prior to record(s) being provided.

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

(9) A person who believes that there has been an unreasonable denial of a fee waiver or fee reduction may petition the Attorney General or the district attorney in the same manner as a person petitions when inspection of a public record is denied under ORS 192.410 to 192.505. The Attorney General, the district attorney and the court have the same authority in instances when a fee waiver or reduction is denied as it has when inspection of a public record is denied.

Stat. Auth.: ORS 184.616, 184.619, 192.430 & 192.440

Stats. Implemented: ORS 192.410 - 192.505

Hist.: DOT 1-1995, f. & cert. ef. 1-6-95; DOT 2-2006, f. & cert. ef. 1-24-06; DOT 6-2007, f. & cert. ef. 12-24-07

Confidentiality of Dispute Resolution by Mediation

731-001-0720

Confidentiality and Inadmissibility of Mediation Communications

(1) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.

(2) Nothing in this rule affects any confidentiality created by other law. Nothing in this rule relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690. Whether or not they are confidential under this or other rules of the agency, mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(3) This rule applies only to mediations in which the agency is a party or is mediating a dispute as to which the agency has regulatory authority. This rule does 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.

(4) 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), notwithstanding any provisions to the contrary in section (9) of this rule.

(5) Mediations Excluded. Sections (6)–(10) of this rule do not apply to:

(a) Mediation of workplace interpersonal disputes involving the interpersonal relationships between this agency's employees, officials or employees and officials, unless a formal grievance under a labor contract, a tort claim notice or a lawsuit has been filed;

(b) Mediation in which the person acting as the mediator will also act as the hearings officer in a contested case involving some or all of the same matters;

(c) Mediation in which the only parties are public bodies;

(d) Mediation involving two or more public bodies and a private party if the laws, rule or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential; or

(e) Mediation involving 15 or more parties if the agency has designated that another mediation confidentiality rule adopted by the agency may apply to that mediation.

(6) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless:

(a) All the parties to the mediation and the mediator agree in writing to the disclosure; or

(b) The mediation communication may be disclosed or introduced into evidence in a subsequent proceeding as provided in subsections (c)–(d), (j)–(l) or (o)–(p) of section (9) of this rule.

(7) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in sections (8)–(9) of this rule, mediation communications are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration 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.

(8) Written Agreement. Section (7) of this rule does not apply to a mediation unless the parties to the mediation agree in writing, as provided in this section, that the mediation communications in the mediation will be confidential and/or nondisclosable and inadmissible. If the mediator is the employee of and acting on behalf of a state agency, the mediator or an authorized agency representative must also sign the agreement. The parties' agreement to participate in a confidential mediation must be in substantially the following form. This form may be used separately or incorporated into an "agreement to mediate."

Agreement to Participate in a Confidential Mediation

The agency and the parties to the mediation agree to participate in a mediation in which the mediation communications are confidential and/or nondiscoverable and inadmissible to the extent authorized by OAR 731-001-0720(7) and this agreement. This agreement relates to the following mediation:

- a) _____
(Identify the mediation to which this agreement applies)
- b) To the extent authorized by OAR 731-001-0720(7), mediation communications in this mediation are: (check one or more)
- ____ confidential and may not be disclosed to any other person
- ____ not admissible in any subsequent administrative proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent administrative proceeding, or introduced as evidence by the parties or the mediator in any subsequent administrative proceeding
- ____ not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent administrative, judicial or arbitration proceeding, or introduced as evidence by the parties or the mediator in any subsequent administrative, judicial or arbitration proceeding
- c) _____
Name of Agency
- _____
Signature of Agency's authorized representative (when agency Date is a party) or Agency employee acting as the mediator (when Agency is mediating the dispute)
- d) _____
Name of party to the mediation
- _____
Signature of party's authorized representative Date
- e) _____
Name of party to the mediation
- _____
Signature of party's authorized representative Date

(9) Exceptions to confidentiality and inadmissibility:

(a) 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 and may be disclosed or introduced into evidence in a subsequent proceeding;

(b) 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 and may be disclosed or introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential or privileged under state or federal law;

(c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and 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.

(d) 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 and may be disclosed to the extent necessary to make such a report;

(e) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law;

(f) 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. 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;

(g) 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;

(h) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure;

(i) 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;

(j) 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 and 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;

(k) When a mediation is conducted as part of the negotiation of a collective bargaining agreement, the following mediation communications are not confidential and such communications may be introduced into evidence in a subsequent administrative, judicial or arbitration proceeding:

(A) A request for mediation; or

(B) A communication from the Employment Relations Board Conciliation Service establishing the time and place of mediation; or

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

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

(l) To the extent a mediation communication contains information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute;

(m) Written mediation communications prepared by or for the agency or its attorney are not confidential and may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding to the extent the communication does not contain confidential information from the mediator or another party, 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; or

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

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

(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.

(n) A mediation communication made to the agency may be disclosed and may be admitted into evidence to the extent the Oregon Department of Transportation Director 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;

(o) The terms of any mediation agreement are not confidential and may be introduced as evidence in a subsequent proceeding, except to the extent the terms of the agreement are exempt from disclosure under ORS 192.410 to 192.505, a court has ordered the terms to be confidential under ORS 17.095 or state or federal law requires the terms to be confidential;

(p) The mediator may report the disposition of a mediation to the agency at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The agency or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232(4).

(10) When a mediation is subject to section (7) of this rule, the agency will provide to all parties to the mediation and the mediator a copy of this rule or a citation to the rule and an explanation of where a copy of the rule may be obtained. Violation of this provision does not waive confidentiality or inadmissibility.

Stat. Authority: ORS 36.224, 184.616 & 184.619

Stat. Implemented: ORS 36.224, 36.228, 36.230 & 36.232

Hist.: DOT 3-2007, f. & cert. ef. 3-26-07

731-001-0730

Confidentiality and Inadmissibility of Workplace Interpersonal Dispute Mediation Communications

(1) This rule applies to workplace interpersonal disputes, which are disputes involving the interpersonal relationships between this agency's employees, officials or employees and officials. This rule does not apply to disputes involving the negotiation of labor contracts or matters about which a formal grievance under a labor contract, a tort claim notice or a lawsuit has been filed.

(2) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.

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

(4) 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), notwithstanding any provisions to the contrary in section (9) of this rule.

(5) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless:

(a) All the parties to the mediation and the mediator agree in writing to the disclosure; or

(b) The mediation communication may be disclosed or introduced into evidence in a subsequent proceeding as provided in subsections (c) or (h)–(j) of section (7) of this rule.

(6) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in section (7) of this rule, mediation communications in mediations involving workplace interpersonal disputes are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent proceeding, or introduced into evidence by the parties or the mediator in any subsequent proceeding so long as:

(a) The parties to the mediation and the agency have agreed in writing to the confidentiality of the mediation; and

(b) The person agreeing to the confidentiality of the mediation on behalf of the agency:

(A) Is neither a party to the dispute nor the mediator; and

(B) Is designated by the agency to authorize confidentiality for the mediation; and

(C) Is at the same or higher level in the agency than any of the parties to the mediation or who is a person with responsibility for human resources or personnel matters in the agency, unless the agency head or member of the governing board is one of the persons involved in the interpersonal dispute, in which case the Governor or the Governor's designee.

(7) Exceptions to confidentiality and inadmissibility.

(a) 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 and may be disclosed or introduced into evidence in a subsequent proceeding;

(b) 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 and may be disclosed or introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential or privileged under state or federal law;

(c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and 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;

(d) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law;

(e) 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. 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;

(f) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure;

(g) 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;

(h) 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 and 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;

(i) To the extent a mediation communication contains information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute;

(j) The mediator may report the disposition of a mediation to the agency at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The agency or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232(4).

(8) The terms of any agreement arising out of the mediation of a workplace interpersonal dispute are confidential so long as the parties and the agency so agree in writing. Any term of an agreement that requires an expenditure of public funds, other than expenditures of \$1,000 or less for employee training, employee counseling or purchases of equipment that remain the property of the agency, may not be made confidential.

(9) When a mediation is subject to section (6) of this rule, the agency will provide to all parties to the mediation and to the mediator a copy of this rule or an explanation of where a copy of the rule may be obtained. Violation of this provision does not waive confidentiality or inadmissibility.

Stat. Authority: ORS 36.224, 184.616 & 184.619

Stat. Implemented: ORS 36.230(4)

Hist.: DOT 3-2007, f. & cert. ef. 3-26-07

DIVISION 5

PUBLIC CONTRACT RULES HIGHWAY
AND BRIDGE PROJECTS

731-005-0400

Repealed Rules

As required by OR Laws 2003, Chapter 794, Section 334, OARs 731-005-0001 through 731-005-0365 are repealed effective March 1, 2005. The repealed rules will continue to apply to the solicitation of Public Contracts first advertised, but if not advertised then entered into, before March 1, 2005.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065
Stats. Implemented: ORS 279C.300 & Sec. 334 & 336, Ch. 794, OL 2003
Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0410

Effective Date

OAR 731-005-0400 through 731-005-0790 become effective on March 1, 2005 and apply to Public Improvement Contracts first advertised, but if not advertised then entered into, on or after March 1, 2005.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065
Stats. Implemented: ORS 279A.005 & Sec. 335 & 337, Ch. 794, OL 2003
Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0420

Scope

OAR 731-005-0400 through 731-005-0790 apply to all Highway Division Public Improvement Contracts (not exempted by 279C.335) entered into by the Department of Transportation under the authority of ORS 279A.050(3). These rules are adopted in place of the Attorney General Model Rules required under ORS 279A.065(1) and as allowed by ORS 279A.065(5).

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065
Stats. Implemented: ORS 279A & 279C
Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0430

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 that is the total completed project price;

(b) Unit Price Bid: A Bid that 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 731-005-0650. 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 731-005-0650.

(6) Conduct Disqualification: A Disqualification pursuant to ORS 279C.440.

(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 Transportation.

(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 279A.110.

(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 for failure to meet standards listed in OAR 734-010-0290(4), DBE Disqualification or disqualification for lack of specific demonstrated experience (special prequalification as described in OAR 734-010-0230). ODOT is authorized to disqualify an Entity in accordance with OAR 731-005-0710.

(17) Electronic Advertisement: ODOT's Solicitation Document, or other document inviting participation in ODOT's procurements made available over the Internet via:

- (a) The World Wide Web or some other Internet protocol; or
- (b) ODOT's Electronic Procurement System.

(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) Electronic Offer: A response to ODOT's Solicitation Document submitted to ODOT via:

- (a) The World Wide Web or some other Internet protocol; or
- (b) ODOT's Electronic Procurement System.

(20) Electronic Procurement System or Electronic Procurement: An information system that persons may access through the Internet using the World Wide Web or some other Internet protocol or that persons may otherwise remotely access using a computer, that enables persons to send Electronic Offers and ODOT to post Electronic Advertisements, receive Electronic Offers, and conduct other activities related to a procurement.

(21) 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.

(22) 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.

(23) Invitation to Bid or ITB: A notice to Contractors disseminating information pertaining to bidding of Public Improvement projects including availability of Solicitation Documents.

(24) Non-Resident Contractor: A Contractor that is not domiciled in or registered to do business in the State of Oregon. See OAR 731-005-0750.

(25) ODOT: The Oregon Department of Transportation.

(26) Offer: A Bid or Proposal as applicable.

(27) Offeror: A Bidder or Proposer as applicable.

(28) Opening: The date, time and place announced in the Solicitation Document for the public Opening of Written sealed Offers or Electronic Offers.

(29) 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.

(30) Proposal: A competitive Offer, binding on the Proposer and submitted in response to a Request for Proposals. See Offer.

(31) Proposer: An Entity that submits a Proposal in response to a Request for Proposals. See Offeror.

(32) 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.

(33) Request for Proposals or RFP: A Solicitation Document calling for Proposals.

(34) 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 731-005-0670(1)(c)(H) and that has not been disqualified by ODOT under OAR 731-005-0710.

(35) 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.

(36) Signed or Signature: Any mark, word or symbol executed or adopted by an Entity evidencing intent to be bound, which may include electronic or digital signature.

(37) Solicitation Document: Documents that 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.

(38) 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.

(39) Tie Offers: Tie Offers shall have the meaning set forth in OAR 731-005-0660.

(40) 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.

(41) 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279A & 279C

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05; DOT 4-2007, f. & cert. ef. 5-23-07

731-005-0440 Competitive Procurement

(1) Generally. In accordance with ORS 279C.300, ODOT shall procure its Public Improvements by an ITB or RFP except as otherwise allowed or required in ORS 279A.025, 279A.100, 279A.105, 279A.120(2), 279A.125, 279C.335, or 282.210.

(2) Federal Provisions. If federal funds are involved, in accordance with ORS 279A.030, federal laws, rules and regulations shall govern the provisions of these rules in the event of conflict.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279A.065 & 279C.335

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0450 Prequalification of Offeror

(1) Prequalification.

(a) Mandatory Prequalification. ODOT requires mandatory general prequalification of Offerors on forms prescribed by ODOT. 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 734-010-0220 through 734-010-0280.

(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, using products requiring highly specialized skills, or when a mandatory general prequalification is not required. The solicitation documents shall indicate the requirements and time frame for special prequalifications.

(2) Standards for Prequalification. Standards for prequalification are identified in OAR chapter 734 division 10.

(3) Subsection (1)(a) of this rule does not apply to public improvement contracts with a value, estimated by ODOT, of less than \$100,000; however, ODOT may require a special contractor prequalification under subsection (1)(b) even when there is no mandatory prequalification.

Stat. Auth.: ORS 184.616, 184.619, 279A.050, 279A.065 & 279C.430

Stats. Implemented: ORS 279C.430 & 279C.435

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05; DOT 1-2007, f. & cert. ef. 1-24-07; DOT 1-2008(Temp), f. & cert. ef. 1-24-08 thru 7-22-08; DOT 2-2008, f. & cert. ef. 5-19-08

731-005-0460 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.365, 671.530 & 701.055

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0470 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 731-005-0650.

(c) ODOT may permit negotiations under a Request for Proposal pursuant to OAR 731-005-0650 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, Electronic Data Interchange or Electronic Procurement (See OAR 731-005-0500, 731-005-0505 and 731-005-0510 for required provisions for Facsimile, Electronic Data Interchange or Electronic Procurement);

(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 731-007-0260; for timing issues relating to Addenda see OAR 731-005-0580(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 279A.120;

(J) If the Contract resulting from a Solicitation will be a Contract for a Public Work subject to ORS 279C.800 to 279C.870 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 279C.830 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 279A.110. (See OAR 731-005-0670(3)); and

(N) How ODOT will notify Offerors of Addenda and how ODOT will make Addenda available. See OAR 731-005-0580.

(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 that 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 731-005-0650, including the Competitive Range; and

(D) Reference to statutory preference for materials and supplies manufactured from recycled materials under ORS 279A.125.

(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 279C.500 through 279C.870 as follows:

(A) Payment of all Entities furnishing labor or material, contributions to Industrial Accident Fund, liens and withholding taxes (ORS 279C.505);

(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 279C.510, 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 (ORS 279C.510);

(E) Payment of claims by public officers (ORS 279C.515);

(F) Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.515;

(G) Entity's right to file a complaint with the Construction Contractors Board for all Contracts related to a Public Improvement Contract (ORS 279C.515);

(H) Hours of labor in compliance with ORS 279C.520 and 279C.540;

(I) Environmental and natural resources regulations (ORS 279C.525);

(J) Payment for medical care and providing workers' compensation (ORS 279C.530);

(K) Maximum hours and overtime (ORS 279C.540);

(L) Claims for overtime (ORS 279C.545);

(M) Prevailing wage rates (ORS 279C.800 to 279C.870);

(N) Fee paid to BOLI (ORS 279C.825);

(O) Retainage (ORS 279C.550 through 279C.570);

(P) Prompt payment policy (ORS 279C.570);

(Q) Contractor's relations with subcontractors (ORS 279C.580);

(R) Notice of claim (ORS 279C.605);

(S) 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 279A.150 and 279A.155);

(T) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385;

(U) A Contract provision substantially as follows: "All employers, including Contractor, that employ subject workers who work under this Contract in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530);

(V) Contractor's certification that all subcontractors performing Work described in ORS 701.005 (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; and

(W) Price escalation and de-escalation Contract Provision relating to steel materials. As used in this paragraph, "steel material" includes any steel products used for and permanently incorporated in the construction, reconstruction or major renovation of a road or highway. "Escalation and de-escalation" relate to and shall be applied to the raw steel in the steel materials listed in the Contract Provision.

(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 279A.120 to 279A.155;

(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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279A.030, 279A.120, 279C.300, 279C.345, 279C.365, 279C.375, 279C.390, 279C.500 - 279C.870, 305.385, 701.005 & 701.055

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05; DOT 4-2006, f. & cert. ef. 2-16-06; DOT 4-2007, f. & cert. ef. 5-23-07

731-005-0480

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 279C.345.

(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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.345

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0490

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 731-005-0630. 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 731-005-0470 and 731-005-0650, 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 731-005-0470(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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.375, 279C.395 & 279C.440

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0500

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 successful 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, 184.619, 279A.050 & 279A.065
 Stats. Implemented: ORS 279C.365
 Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0505

Electronic Procurement

(1) General. ODOT may utilize Electronic Advertisement of Public Improvement Contracts in accordance with ORS 279C.360, provided that advertisements of such Contracts with an estimated Contract Price in excess of \$125,000 are also published in a trade newspaper of general statewide circulation. ODOT may post notices of intent to award electronically as provided by ORS 279C.410.

(2) Alternative Procedures. In the event that ODOT desires to direct or permit the submission and receipt of Offers for a Public Improvement Contract by electronic means, as allowed under ORS 279C.365, it shall first promulgate supporting procedures substantially in conformance with OAR chapter 731 division 5, taking into account ORS Chapter 279C requirements for Written Bids, opening Bids publicly, Bid security, first-tier subcontractor disclosure and inclusion of prevailing wage rates.

(3) Interpretation. Nothing in this rule shall be construed as prohibiting ODOT from making procurement documents for Public Improvement Contracts available in electronic format as well as in hard copy when Bids are to be submitted only in hard copy.

(4) Electronic Procurement Authorized:

(a) ODOT may conduct all phases of a Procurement, including without limitation the posting of Electronic Advertisements and the receipt of Electronic Offers, by electronic methods if and to the extent ODOT specifies in a Solicitation Document, or any other Written instructions on how to participate in the Procurement;

(b) ODOT shall open an Electronic Offer in accordance with electronic security measures in effect at ODOT at the time of its receipt of the Electronic Offer. Unless ODOT provides procedures for the secure receipt of Electronic Offers, the Person submitting the Electronic Offer assumes the risk of premature disclosure due to submission in unsealed form;

(c) ODOT's use of electronic or digital Signatures shall be consistent with applicable statutes and rules. ODOT may limit the use of electronic methods of conducting a procurement as advantageous to the contracting agency;

(d) If ODOT determines that Bid or Proposal security is or will be required, ODOT shall not authorize Electronic Offers unless it has established methods for receipt of such security.

(5) Rules Governing Electronic Procurements. ODOT shall conduct all portions of an Electronic Procurement in accordance with OAR chapter 731 division 5, unless otherwise set forth in this rule.

(6) Preliminary Matters. As a condition of participation in an electronic Procurement ODOT may require potential Contractors to:

(a) Register with ODOT before the date and time on which ODOT will first accept Offers;

(b) Agree to the terms, conditions, or other requirements of a Solicitation Document; or

(c) Agree to terms and conditions governing the procurement, such as procedures that ODOT may use to attribute, authenticate or verify the accuracy of an Electronic Offer, or the actions that constitute an electronic or digital Signature.

(7) Offer Process. ODOT may specify that persons must submit an Electronic Offer by a particular date and time.

(8) Receipt of Electronic Offers:

(a) If ODOT permits Electronic Offers in the Solicitation Document, the Offeror may submit Electronic Offers in accordance with the Solicitation Document. ODOT shall not consider Facsimile or Electronic Offers unless authorized by the Solicitation Document;

(b) When ODOT conducts an electronic procurement that provides that all Electronic Offers must be submitted by a particular date and time, ODOT shall receive the Electronic Offers in accordance with OAR chapter 731 division 5;

(c) A person may withdraw an Electronic Offer at any time prior to the specified date and time in accordance with solicitation documents.

(9) Failure of the Electronic Procurement System. In the event of a failure of ODOT's Electronic Procurement System that interferes with the ability of Persons to submit Electronic Offers, protest or to otherwise participate in the procurement, the contracting agency may cancel the procurement in accordance with OAR 731-005-0730, or may extend the date and time for receipt of Electronic Offers by providing notice of the extension immediately after the Electronic Procurement System becomes available.

Stat. Auth.: ORS 184.616, 184.691, 279A.065
 Stats. Implemented: ORS 279A.065 & ORS 279C.365
 Hist.: DOT 4-2007, f. & cert. ef. 5-23-07

731-005-0510

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 Operating 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279A.065 & 279C.365

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0520

Notice and Advertising Requirements; Posting

(1) Notice and Distribution Fee. ODOT shall furnish Notice as set forth in subsections (a) through (c) of this section, to a number of entities sufficient 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) Mailing Notice of the availability of Solicitation Documents ("Notice") to Entities that have expressed an interest in ODOT's procurements;

(b) Placing Notice on ODOT's Electronic Procurement System; or

(c) Placing Notice on ODOT's internet web site.

(2) Advertising. Pursuant to ORS 279C.360 and this rule, ODOT shall advertise every Solicitation for competitive Bids or competitive Proposals for a Public Improvement Contract, unless ODOT has exempted the Solicitation from the advertisement requirement as part of a competitive Bidding exemption under ORS 279C.335:

(a) Unless ODOT publishes by Electronic Advertisement as permitted under subsection (b) of this section, 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;

(c) In addition to ODOT's publication required under subsection (a) or (b) of this section, ODOT shall also publish an 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;

(d) All advertisements for Offers shall set forth:

(A) The Public Improvement project;

(B) The scheduled Closing, that shall not be less than five Days after the date of the last publication of the advertisement;

(C) 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;

(D) The nature of the Work to be performed or the goods to be purchased;

(E) The office where the Solicitation Documents may be reviewed;

(F) The name, title and address of ODOT person authorized to receive Offers;

(G) The scheduled Opening; and

(H) If applicable, that the Contract is for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 276(a)).

(3) Minority, Women and 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 200.035 & 279C.360

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05; DOT 4-2007, f. & cert. ef. 5-23-07

731-005-0530

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, EDI or Electronic Submissions. If the Solicitation Document permitted Facsimile, EDI or Electronic Offers under OAR 731-005-0470(3)(a)(D), an Offeror may submit its Offer by Facsimile, EDI or Electronic submissions. ODOT shall not consider Facsimile, EDI or Electronic Offers unless authorized by the Solicitation Document.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.365

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05; DOT 4-2007, f. & cert. ef. 5-23-07

731-005-0540

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 Electronic Offers in the Solicitation Document, the Offeror may submit and identify Facsimile or Electronic 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.365

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05; DOT 4-2007, f. & cert. ef. 5-23-07

731-005-0550

Bid or Proposal Security

(1) Security Amount. If ODOT requires Bid security, it shall be 10% of the Offeror's Bid. If ODOT requires Proposal security, it shall be in an amount that ODOT determines to be reasonably necessary or prudent to protect the interests of ODOT, and such amount shall be stated in the Solicitation Document. ODOT shall not use Bid or Proposal security to discourage competition. ODOT shall clearly state any Bid or Proposal security requirements in its Solicitation Document. The Offeror shall forfeit Bid or Proposal security after Award if the Offeror fails to execute the Contract and promptly return

it with any required performance bond, payment bond and any required proof of insurance. See ORS 279C.365(5) and 279C.385.

(2) Requirement for Bid Security (Optional for Proposals). Unless ODOT has otherwise exempted a solicitation or class of solicitations from Bid security pursuant to ORS 279C.390, ODOT shall require Bid security for its solicitation of Bids for Public Improvements. This requirement applies only to Public Improvement Contracts with a value, estimated by ODOT, of more than \$50,000. See ORS 279C.365(6). ODOT may require Bid security even if it has exempted a class of solicitations from Bid security. ODOT may, at its option, require Proposal security that serves the same function with respect to Proposals that Bid security serves with respect to Bids. See ORS 279C.365(5) and 279C.400(5).

(3) Form of Bid or Proposal Security. ODOT may accept only the following forms of Bid or Proposal Security:

(a) A surety bond from a surety company authorized to do business in the State of Oregon. If a surety bond is submitted, ODOT's standard Bid or Proposal bond form must be used, which is included with the Bid or Proposal booklet. The original bond must be submitted with the surety company's seal affixed, or in the case of an Electronic Offer, an electronic version of the bid bond may be submitted.

(b) An irrevocable letter of credit issued by an insured institution as defined in ORS 706.008; or

(c) A cashier's check or Offeror's certified check made out to the Oregon Department of Transportation.

(4) Return of Security. ODOT shall return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been fully executed and all required bonds and insurance have been provided, 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.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.365, 279C.380, 279C.385, 279C.390, and 279C.400

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05; DOT 4-2007, f. & cert. ef. 5-23-07; DOT 7-2007(Temp), f. & cert. ef. 12-24-07 thru 6-9-08; DOT 3-2008, f. & cert. ef. 5-19-08

731-005-0560

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 731-005-0470(3)(a)(A).

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.365

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0570

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 731-005-0580 or cancel the Solicitation under OAR 731-005-0720.

(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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.305, 279C.345, 279C.365 & 279C.460

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0580

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 731-005-0520(1). The Solicitation Document shall specify how ODOT will provide notice of Addenda and how ODOT will make the Addenda available (see OAR 731-005-0470(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

731-005-0570(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 731-005-0570, 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279A.065 & 279C.395

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0590

Pre-Opening Modification or Withdrawal of Offers

(1) Electronic Offers: Modifications or Withdrawals of Electronic Offers. Offeror may modify or withdraw an offer prior to closing time as instructed in the Solicitation documents. The most recent Offer will be the final Offer.

(2) Paper Offers:

(a) 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 731-005-0530 and 731-005-0540, 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; and

(B) Solicitation Number (or Other Identification as specified in the Solicitation Document).

(b) 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 paragraph (A) of this subsection, 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:

(i) Bid (or Proposal) Withdrawal; and

(ii) 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279A.065, 279C.360, 279C.365, 279C.375 & 279C.395

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05; DOT 4-2007, f. & cert. ef. 5-23-07

731-005-0600

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 Bid or Proposal Price Offer or modification upon receipt, but shall maintain it as confidential and secure until Opening. If ODOT inadvertently opens a Bid or Proposal Price Offer or a modification prior to the Opening, ODOT shall return the Bid or Proposal Price or modification to its secure and confidential state until Opening. ODOT shall document the resealing for the procurement file (e.g. "Contracting Agency inadvertently opened the Offer due to improper identification of the Offer").

(2) Opening and recording. ODOT shall publicly open Bid or Proposal Price Offers including any modifications made to the Offer pursuant to OAR 731-005-0590. To the extent practicable, ODOT shall read aloud the name of each Bidder or Price Proposer, the total of each Bid or Proposal Price, 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 Bids available for public inspection. Proposals are not subject to disclosure until after notice of intent to award is issued as specified in ORS 279C.410. In any event, ODOT may withhold from disclosure 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); 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.365 & 279C.410

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05; DOT 6-2006(Temp), f. 7-31-06, cert. ef. 8-1-06 thru 1-27-07; DOT 2-2007, f. & cert. ef. 1-24-07

731-005-0610

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 731-005-0620 or 731-005-0650.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.365 & 279C.395

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0620

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, 184.619, 279A.050 & 279A.065
 Stats. Implemented: ORS 279C.375 & 279C.395
 Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0630

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, 184.619, 279A.050 & 279A.065
 Stats. Implemented: ORS 279C.375
 Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0640

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, 184.619, 279A.050 & 279A.065
 Stats. Implemented: ORS 279C.375
 Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0650

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 279C.445.

(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 731-005-0470 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 731-005-0470, 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 (a) of this section;

(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 731-005-0690. 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)(H) 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 Propos-

als 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 731-005-0690; 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 731-005-0720.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.300, 279C.335, 279C.365, 279C.375 & 279C.395

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0660

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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279A.120 & 279C.375

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0670

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 279C.430 and ODOT required mandatory prequalification;

(B) Has been Disqualified;

(C) Has been declared ineligible under ORS 279C.860 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 279A.105 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 Chapter 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 731-005-0710 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 279C.440 to 279C.450 and OAR 731-005-0710.

(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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279A.105, 279A.110, 279C.375 & 279C.395

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0680

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 731-005-0720; or

(f) Any other circumstance indicating that awarding the Contract would not be in the public interest.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.395

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0690

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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.375, 279C.385 & 279C.460

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0700

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 731-005-0470 and 731-005-0650.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.300, 279C.305, 279C.335, 279C.365 & 279C.375

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0710

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 279C.440, 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 734-010-0340.

(b) Standards for DBE Disqualification. As provided in ORS 200.065, 200.075 or 279A.110, 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 279A.110, 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 279A.110, 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 200.065, 200.075, 279A.110, 279C.440, 279C.445 & 279C.450

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0720

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. 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.395

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0730

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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.395

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0740

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 OAR 731-005-0470, ODOT's completed evaluation of the initial Proposals and ODOT's completed evaluation of final Proposals.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.430

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0750

Non-Resident Contractor

If the Contract Amount exceeds \$10,000 and the Contractor is a Non-Resident 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279A.120

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0760

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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.365

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0770

Performance Security

(1) Public Improvement Contracts. Unless ODOT waives the required performance and payment bonds under ORS 279C.380(4), or DAS exempts a Contract or classes of Contracts from the required performance bond pursuant to ORS 279C.390, 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, that 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.375 & 279C.390

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0780

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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279A.030, 279C.375 & 279C.440

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-005-0790

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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.365, 279C.375 & 279C.390

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

DIVISION 7

PUBLIC IMPROVEMENT CONTRACTS HIGHWAY AND BRIDGE CONSTRUCTION

731-007-0200

Repealed Rules

As required by OR Laws 2003, Chapter 794, Section 334, OAR 731-007-0010 through 731-007-0190 are repealed effective March 1, 2005. The repealed rules will continue to apply to the solicitation of Public Contracts first advertised, but if not advertised then entered into, before March 1, 2005.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.300 & Sec. 334 & 336, Ch. 794, OL 2003

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0210

Effective Date

OAR 731-007-0200 through 731-007-0400 become effective on March 1, 2005 and apply to Public Contracts first advertised, but if not advertised then entered into, on or after March 1, 2005.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279A.005 & Sec. 335 & 337, Ch. 794, OL 2003

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0220

Application

In addition to the requirements set forth in chapter 731, division 5, and the definitions therein, OAR 731-007-0200 through 731-007-0400 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279A.065

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0230

Competitive Procurement

ODOT shall solicit Bids for Public Improvement Contracts by Invitation to Bid (ITB), except as otherwise allowed or required pursuant to ORS 279A.030, 279A.100, or 279C.335. See OAR 731-007-0340 through 731-007-0400 regarding the use of Alternative Contracting Methods.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.335

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0240

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 OAR 731-005-0460(1) (Construction Contracts).

(2) Solicitation Document statement of required certification or licensing. See OAR 731-005-0470(3)(a)(K).

(3) Solicitation Document terms and conditions:

- (a) Demonstration of drug testing program. See OAR 731-005-0470(3)(d)(B).
 - (b) Liability for late payment. See OAR 731-005-0470(3)(d)(F).
 - (c) Right to file complaints with Construction Contractors Board. See OAR 731-005-0470(3)(d)(G).
 - (d) Environmental and natural resources regulations. See OAR 731-005-0470(3)(d)(I).
 - (e) Prevailing wage rates. See OAR 731-005-0470(3)(d)(M).
 - (f) Fee paid to BOLI. See OAR 731-005-0470(3)(d)(N).
 - (g) Retainage. See OAR 731-005-0470(3)(d)(O).
 - (h) Prompt payment policy. See OAR 731-005-0470(3)(d)(P).
 - (i) Contractor's relations with subcontractors. See OAR 731-005-0470(3)(d)(Q).
 - (j) Certification of compliance with tax laws. See OAR 731-005-0470(3)(d)(T).
 - (k) Advertising of solicitation in trade newspaper. See OAR 731-005-0520(2)(c).
 - (l) Bid or Proposal security. See OAR 731-005-0550(2).
 - (m) Deadline for delivering request for change or protest of Specification or Contract terms and conditions. See OAR 731-005-0570(1)(a).
 - (n) Rejection of individual Bids or Proposals. See OAR 731-005-0670.
 - (o) Standards for DBE Disqualification. See OAR 731-005-0710(1)(b)(B)(i) and (iii).
 - (p) Performance security. See OAR 731-005-0770(1).
- Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065
 Stats. Implemented: ORS 279A.065
 Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0250

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 731-005-0650, and Rules for Alternative Contracting Methods at OAR 731-007-0360 to 731-007-0400.
 - (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 731-005-0620(2)(b).
 - (3) Proposal Evaluation Criteria. If DAS has exempted the procurement of a Public Improvement from the competitive bidding requirements of ORS 279C.335(1), and has authorized ODOT to use an Alternative Contracting Method under ORS 279C.335(3), ODOT shall set forth the evaluation criteria in the Solicitation Documents if they differ from those in division 5 (or the Specifications). See OAR 731-007-0390, ORS 279C.335(2) and (3).
- Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065
 Stats. Implemented: ORS 279A.065 & 279C.335
 Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0260

Disclosure and Substitution of First-Tier Subcontractors

- (1) Required Disclosure. Within two working hours of the Bid Closing on an ITB for a Public Improvement having a Bid price exceeding \$100,000, a Bidder shall submit to ODOT a disclosure form as described by this rule. 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 labor and 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) \$350,000 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 immediately thereafter publicly open the bids;
 - (b) Set the Bid Opening at the time and place identified in the ITB; and
 - (c) Consider for Contract award only those Bids for which the required disclosure has been submitted by the announced deadline on forms prescribed by the Agency.
 - (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:
 - (A) "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 \$100,000 (see ORS 279C.370). 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) \$350,000 regardless of the percentage, you must disclose the following information about that subcontract within two (2) working hours of Bid Closing:
 - (aa) The subcontractor's name;
 - (bb) The category of work the subcontractor will be performing; and
 - (cc) The dollar value of the subcontract.
 - (B) 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 THE BID(S) OF A BIDDER WHO, IF REQUIRED TO SUBMIT THIS DISCLOSURE FORM, FAILS TO SUBMIT THE DISCLOSURE FORM WITH THE REQUESTED INFORMATION BY THE STATED DEADLINE. (See OAR 731-007-0270).**
- (4) To determine disclosure requirements, ODOT recommends that you disclose subcontract information for any subcontractor as follows:
 - (a) 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).
 - (b) 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) \$350,000, 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).
 - (5) For determination of compliance with the disclosure requirements, ODOT will use the total Bid amount submitted by the contractor as verified by ODOT."
 - (6) Submission. A Bidder shall submit the disclosure form required by this rule within two working hours of Bid Closing in the manner specified by the ITB.
 - (7) Late Submission. Compliance with the disclosure and submittal requirements of ORS 279C.370 and this rule is a matter of Responsiveness. Bids that 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.

(8) Substitution. Substitution of affected first-tier subcontractors shall be made only in accordance with ORS 279C.585. 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.370 & 279C.585

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0270

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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.650 - 279C.670

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0280

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, 184.619, 279A.050 & 279A.065

Stats Implemented: ORS 279C.315

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0290

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.

(4) 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.560, 279C.570 & 701.420

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0300

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, that 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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.570

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0310

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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.570

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0320

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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.570

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0330

Agency Payment for Unpaid Labor or Supplies

(1) Contract incomplete. If the Contract is still in force, ODOT may, in accordance with ORS 279C.515(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, 184.619, 279A.050 & 279A.065

Stats. Implemented: ORS 279C.515

Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0335

Agency Payment for Steel Escalation

(1) The purpose of this rule is to carry out the provisions of Section 2, Chapter 557, Oregon Laws 2005, as authorized by Section 2, subsection (5).

(2) A Contractor's request for an adjustment of payment under the provisions of this rule must be received by the Department of Transportation (ODOT) prior to January 2, 2010.

(3) This rule applies only to ODOT Public Improvement Contracts executed on or after April 1, 2003 and before October 1, 2005, and that are not eliminated by section (4) of this rule.

(4) This rule does not apply to Public Improvement Contracts that meet all of the following:

(a) The Project is included in the Statewide Transportation Improvement Program;

(b) The Project is partially funded by the Federal Highway Administration; and

(c) The Project is classified as "Local Agency." Such projects are not typically on the State or Federal highway system and all or nearly all matching funds are provided by the Local Agency. The final decision of the applicability of the classification of a project as "Local Agency" will be at the sole discretion of ODOT.

(5) Process:

(a) A Contractor must initiate the request for an adjustment of payment in the format required by ODOT on Form 734-2615. The request must be received by ODOT prior to January 2, 2010.

(b) The Contractor must demonstrate with written contemporaneous documentation that the market price of a steel material charged to the Contractor, on the date the steel material was delivered to the Contractor, was more than 10 percent above the market price of the steel material on the Contractor's original bid quote. The Contractor must demonstrate that the steel material was required either as a contract pay item or as incidental to a contract pay item. The steel material shall have been purchased by and delivered to the Contractor after the original bid quote was made. Materials salvaged by the Contractor would not be eligible for this reimbursement.

(A) The Contractor must itemize and include a total of the amount requested. Example: Invoice Value of Steel – (1.10 X Bid Quote Value of Steel) = Escalation Example: \$125 – (1.10 X \$100) = \$15.

(B) The Contractor must certify under penalty of law for perjury or false swearing that the request is a true statement of the actual costs incurred in the request.

(C) The Contractor must send the request to the ODOT Project Manager.

(D) The Contractor is obligated to respond to a request from ODOT for additional clarification or information. Failure by the Contractor to provide a response in writing within 14 calendar days of receipt of the Project Manager's request is deemed to have waived its right to further review and the request for steel escalation will not be considered preserved.

(c) The Project Manager will, within 45 days of receiving the contractor's request, consider, investigate, and evaluate the Contractor's request and provide a written response to the Contractor. The Project Manager will use the expertise of a statewide central position assigned to review adjustments of payment for steel escalation to provide consistency in ODOT's evaluation and decision on the Contractor's request. The request will be reviewed in its entirety for compliance with Oregon Laws 2005, Ch 557, Section 2 and this rule. During its review, ODOT will verify that the request correlates with an increased cost of steel to ensure the increase is due to an industry wide market price increase of steel and the increase is not unique to this request. The Project Manager's written response to the Contractor's request will either:

(A) Request additional written information or documentation to substantiate the Contractor's request if the Project Manager determines it is needed. The Contractor shall either:

(i) Provide the requested written information to the Project Manager or meet with the Project Manager within 14 calendar days

of receiving the request, or as otherwise agreed to by the parties, to present the additional information or documentation, or make other arrangements with the Project Manager to supply that information. Upon receipt of the information, the Project Manager will respond as provided in subsection (c) of this section.

(ii) Provide the Project Manager a written statement that it cannot supply the required information and request the Project Manager issue a decision without the information. Upon receipt of the written statement, the Project Manager will respond as provided in subsection (c) of this section.

(B) Provide the Contractor with the Project Manager's decision. The Project Manager's decision either will agree to the Contractor's request or will deny in full or part the Contractor's request.

(d) The Contractor, within 14 calendar days of receiving the Project Manager's decision, shall do one of the following:

(A) Provide the Project Manager a written acceptance of the decision. See subsection (f) of this section if payment is due.

(B) Provide the Project Manager with a written rejection of the decision. See subsection (e) of this section for resolution process for denials.

(e) Resolution process for Contractor rejection of Project Manager's decision. If the Contractor rejects the Project Manager's decision in section (5)(c)(B) of this rule, the Contractor may request that the Project Manager's decision be escalated to the claim review process established in the Contract with ODOT. The Contractor must notify the ODOT Project Manager within 14 calendar days of issuance of the Project Manager's decision and request the issue be escalated. The Contractor is deemed to have waived its right to further review and the request for steel escalation will not be considered preserved if the Contractor fails to provide the written notice within 14 days of issuance of the Project Managers decision.

(f) Payment. Upon execution of a Change Order ODOT will include such payment on the next scheduled monthly payment for active projects or will issue payment on inactive or closed projects within 30 calendar days. Late payment interest will apply for the number of days above the 45 calendar days allowed in subsection (c) of this section or if ODOT does not make payment within 30 calendar days after the Change Order is executed. The request for adjustment will be considered a claim for payment on the day it is escalated by the Contractor under subsection (e) of this section. Interest, if applicable, will be included in accordance with ORS 279C.

Stat. Auth.: ORS 184.616, 184.619 & Sec. 2, Ch. 557, OL 2005
Stats. Implemented: Sec. 2, Ch. 557, OL 2005
Hist.: DOT 7-2005(Temp), f. & cert. ef. 11-17-05 thru 5-15-06; DOT 4-2006, f. & cert. ef. 2-16-06

Alternative Contracting Methods

731-007-0340

Purpose

These rules are intended to provide guidance regarding the use of Alternative Contracting Methods for Public Improvement Contracts, as referenced in ORS 279C.335(3)(a). Those methods include, but are not limited to, Design/Build and A plus B forms of contracting.

Stat. Auth.: ORS 184.616, 184.619, 279A.050 & 279A.065
Stats. Implemented: ORS 279A.065 & 279C.335
Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0350

Definitions

In addition to those definitions at OAR 731-005-0430, the following definitions shall apply to OARs 731-007-0340 to 731-007-0400, 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, 184.619, 279A.050 & 279A.065
Stats. Implemented: ORS 279A.065 & 279C.335
Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0360

Use of Alternative Contracting Methods

(1) Competitive Bidding Exemptions. ORS Chapter 279C 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 279C.335 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 731-007-0370 regarding required findings.

(2) Post-Project Evaluation. ORS 279C.355 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 279C.355 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, 184.619, 279A.050 & 279A.065
Stats. Implemented: ORS 279A.065, 279C.335 & 279C.355
Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0370

Findings

(1) When findings are required under ORS 279C.335(2) and 279C.335(3)(b) to exempt a Contract or class of Contracts from competitive bidding requirements, the "substantial cost savings" criterion at ORS 279C.335(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 279C.330 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 279C.355 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 279C.335(2)(a) that it is “unlikely” that the exemption will “encourage favoritism” or “substantially diminish 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, 184.619, 279A.050 & 279A.065
Stats. Implemented: ORS 279A.065 & 279C.335
Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0380

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, 184.619, 279A.050 & 279A.065
Stats. Implemented: ORS 279A.065 & 279C.335
Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0390

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 279C 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 279C.305(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 731-005-0470(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, 184.619, 279A.050 & 279A.065
Stats. Implemented: ORS 279A.065, 279C.305 & 279C.335
Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

731-007-0400 Design/Build

(1) General. The Design/Build form of contracting, as defined in OAR 731-007-0350(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 731-007-0360 on “Use of Alternative Contracting Methods.”

(3) Selection. Design/Build selection criteria may include those factors set forth in OAR 731-007-0390(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 279C.110 for State Agencies is not applicable. See ORS 279C.100(5) and 279C.110(2)(a).

(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 279C.375(3)(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, 184.619, 279A.050 & 279A.065
Stats. Implemented: ORS 279A.065, 279C.100-110 & 279C.335
Hist.: DOT 2-2005, f. 2-16-05, cert. ef. 3-1-05

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 & 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 & 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 & 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 & 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 & 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 & 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 & 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 compre-

hensive 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, 184.619 & 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 & 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 & 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 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 & 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 & 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 & 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 & 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 731-015-0035.

(3) This section shall not apply to the adoption of temporary rules or programs.

Stat. Auth.: ORS 184 & 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: Publications referenced are available from the agency.]
Stat. Auth.: ORS 184.616, 184.619 & 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

Weighing 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, manufactures 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, 184.619 & 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 and for the creation and operation of the Oregon Transportation Infrastructure Bank.

Stat. Auth.: ORS 184.616, 184.619, 367.015 & 367.020
Stats. Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350
Hist.: DOT 1-1997, f. & cert. ef. 1-17-97; DOT 7-2004, f. & cert. ef. 11-17-04

731-030-0020

Statutory Authority

Oregon Revised Statutes (ORS) 367.010 to 367.060 provide authority for the Department to operate the Oregon Transportation Infrastructure Fund.

Stat. Auth.: ORS 184.616, 184.619, 367.015 & 367.020
Stats. Implemented: ORS 367.010 & US Code, PL 104-59, Sect. 350
Hist.: DOT 1-1997, f. & cert. ef. 1-17-97; DOT 7-2004, f. & cert. ef. 11-17-04

731-030-0030

Definitions

For the purposes of OAR 731-030-0010 through 731-030-0160, the following definitions apply, unless the context clearly indicates otherwise:

(1) "Applicant" means an Agency, a Municipality or any other entity authorized by law to obtain an Infrastructure Loan or Infrastructure Assistance.

(2) "Application" means the form, prescribed by the Department, and all supplemental attachments, exhibits or other supporting papers that the Applicant completes and provides to the Oregon Transportation Infrastructure Bank.

(3) "Agency," as defined in ORS 367.010(1), means any department, agency or commission of the State of Oregon.

(4) "Agreement" means a legally binding contract between the Department and a Recipient that sets out the terms and conditions under which the Department is providing an Infrastructure Loan or Infrastructure Assistance.

(5) "Bond," as defined in ORS 367.010(2), means an evidence of indebtedness including, but not limited to, a bond, a note, an

obligation, a loan agreement, a financing lease, a financing agreement or other similar instrument or agreement.

(6) “Bond Counsel” means a law firm having knowledge and expertise in the field of municipal law and whose opinions are generally accepted by purchasers of municipal bonds.

(7) “Bond Debt Service,” as defined in ORS 367.010(3), means payment of:

(a) Principal, interest, premium, if any, or purchase price of a Bond;

(b) Amounts due to a Credit Enhancement provider authorized by ORS Chapter 367;

(c) Amounts necessary to fund bond debt service reserves; and

(d) Amounts due under an Agreement for exchange of interest rates if designated by the State Treasurer or the Department.

(8) “Chief Financial Officer” means the fiscal officer designated under ORS 184.637 who is also the Manager of ODOT Financial Services or designated staff.

(9) “Collateral” means real or personal property subject to a pledge, lien or security interest, and includes any property included in the definition of collateral in ORS 79.0102(1).

(10) “Commission” means the Oregon Transportation Commission.

(11) “Credit Enhancement,” as defined in ORS 367.010(4), means a letter of credit, line of credit, bond insurance policy, stand-by purchase agreement, surety bond or other device or facility used to enhance the creditworthiness, liquidity or marketability of a Bond.

(12) “Debt Service Reserve” means any moneys reserved for debt service for, or used to secure payment of, Infrastructure Bonds. A Debt Service Reserve may be held in a segregated account in the Infrastructure Fund or by a trustee.

(13) “Department” or “ODOT” means the Oregon Department of Transportation.

(14) “Director” means the director of the Department.

(15) “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.

(16) “Infrastructure Assistance,” as defined in ORS 367.010(6), means any use of moneys in the Oregon Transportation Infrastructure Fund, other than an Infrastructure Loan, to provide financial assistance for Transportation Projects. The term includes, but is not limited to, use of moneys in the Infrastructure Fund to finance leases, fund reserves, make grants, pay issuance costs or provide Credit Enhancement or other security for Bonds issued by a public entity to finance Transportation Projects.

(17) “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.

(18) “Infrastructure Bonds,” as defined in ORS 367.010(7), means bonds authorized by ORS 367.030, 367.555 to 367.600 or 367.605 to 367.670 that are issued to fund Infrastructure Loans and the proceeds of which are deposited in the Infrastructure Fund.

(19) “Infrastructure Fund,” as defined in ORS 367.010(8), means the Oregon Transportation Infrastructure Fund.

(20) “Infrastructure Loan,” as defined in ORS 367.010(9), means a loan of moneys in the Infrastructure Fund to finance a Transportation Project.

(21) “Municipality,” as defined in ORS 367.010(10), means a city, county, road district, school district, special district, metropolitan service district, the Port of Portland, or an intergovernmental entity organized under ORS 190.010.

(22) “Oregon Transportation Infrastructure Bank” or “OTIB” means the program authorized by Section 350 of the National Highway System Designation Act of 1995, 23 U.S.C. 101 note, Public Law 104-59, and a cooperative agreement between the U.S. Department of Transportation and the Department dated August 26, 1996.

(23) “Oregon Transportation Infrastructure Fund” means the fund established in ORS 367.015.

(24) “Recipient” means an Applicant that has received an Infrastructure Loan or Infrastructure Assistance or a combination thereof.

(25) “Region” means one of the geographic areas established by the Department to administer transportation programs.

(26) “Region Manager” means the administrative head of a Region or designated staff.

(27) “Staff” means Department staff assigned by the Chief Financial Officer to manage the day-to-day operations of the OTIB and the Infrastructure Fund.

(28) “Statewide Transportation Improvement Program” or “STIP” means the State’s transportation preservation and capital improvement program and includes any project scheduling and funding documents related thereto.

(29) “Transportation Project,” as defined in ORS 367.010(11), means any project or undertaking that facilitates any mode of transportation within this State. Transportation Projects include, but are not limited to, projects for highway, transit, rail and aviation capital infrastructure, bicycle and pedestrian paths, bridges and ways, and other projects that facilitate the transportation of materials, animals or people.

Stat. Auth.: ORS 184.616, 184.619, 367.015 & 367.020

Stats. Implemented: ORS 367.010 - 367.060 & United States Code, Public Law 104-59, Section 350

Hist.: DOT 1-1997, f. & cert. ef. 1-17-97; DOT 7-2004, f. & cert. ef. 11-17-04

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 Infrastructure, and encourage innovative financing techniques in order to further Oregon’s livability and economic competitiveness. In accomplishing this purpose, all Transportation Projects funded by the Infrastructure Fund will be required to satisfy all appropriate federal, state and local planning and programming requirements.

(2) To achieve the objectives of the Oregon Transportation Infrastructure Fund, the Department has established the Oregon Transportation Infrastructure Bank.

Stat. Auth.: ORS 184.616, 184.619, 367.015 & 367.020

Stats. Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

Hist.: DOT 1-1997, f. & cert. ef. 1-17-97; DOT 7-2004, f. & cert. ef. 11-17-04

731-030-0050

Administration of Funds

(1) Authority for the day-to-day operations and management of the OTIB and the management of the Infrastructure Fund is delegated to the Chief Financial Officer.

(2) The Department may expend funds from the Infrastructure Fund to make Infrastructure Loans.

(3) The Department may expend funds from the Infrastructure Fund to provide Infrastructure Assistance.

(4) The Department may expend funds from the Infrastructure Fund to pay the Department’s or another public entity’s costs for Transportation Projects.

(5) The Department may expend funds from the Infrastructure Fund to establish a Debt Service Reserve to support the credit extensions to a Recipient or otherwise to ensure repayment of loan guarantees, and to reduce the interest rate paid on loans and Bonds.

(6) The Department may expend moneys from the Fund to pay the Bond Debt Service for Infrastructure Bonds and pay the costs of issuance and other costs related to Infrastructure Bonds. Such expenditures may include the payment of all costs associated with the issuance of Infrastructure Bonds including but not limited to Bond Counsel and Financial Advisor fees, underwriter fees and discounts, trustee or paying agent fees, credit enhancement fees, and printing and publishing, and other costs.

Stat. Auth.: ORS 184.616, 184.619, 367.015 & 367.020

Stats. Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

Hist.: DOT 1-1997, f. & cert. ef. 1-17-97; DOT 7-2004, f. & cert. ef. 11-17-04

731-030-0080

Applicant’s Handbook

(1) The Department will make available guidelines that address application procedures, Applicant eligibility, Application evaluation criteria as set forth in OAR 731-030-0100(1), types of Infrastructure

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Loans and Infrastructure Assistance available, financing rates, terms and limits and other applicable information.

(2) The Department may revise the guidelines as needed.

(3) The guidelines may be made available to Applicants in electronic or printed formats.

Stat. Auth.: ORS 184.616, 184.619, 367.015 & 367.020

Stats. Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

Hist.: DOT 1-1997, f. & cert. ef. 1-17-97; DOT 7-2004, f. & cert. ef. 11-17-04

731-030-0090

Application Procedures

An Applicant may submit an Application for an Infrastructure Loan or Infrastructure Assistance at any time subject to deadlines, if any, established by the Department.

Stat. Auth.: ORS 184.616, 184.619, 367.015 & 367.020

Stats. Implemented: ORS 367.010 - 367.060 & United States Code, Public Law 104-59, Section 350

Hist.: DOT 1-1997, f. & cert. ef. 1-17-97; DOT 7-2004, f. & cert. ef. 11-17-04

731-030-0100

Application Evaluation Procedures

(1) The Department will establish specific information and uniform evaluation criteria that will be used to qualify and evaluate the Application and to ascertain the credit strength of the Applicant. The evaluation will include an examination of Application information to determine the extent that an Applicant and the proposed Transportation Project comply with these requirements or standards:

(a) The Transportation Project must conform to the local transportation plan and to state land use laws and satisfy all appropriate federal, state and local planning and programming requirements.

(b) The Transportation Project must meet any appropriate design standards.

(c) The Transportation Project will be constructed on a faster time schedule than conventional funding would allow. Or OTIB funding will complete the required project financing and allow the Transportation Project to proceed to construction.

(d) The Transportation Project will further the goal of safety in transportation.

(e) The Transportation Project will help manage traffic growth and improve livability.

(f) The Application must identify a revenue stream adequate to repay an Infrastructure Loan or meet the terms of any Infrastructure Assistance to be provided.

(g) The Transportation Project will attract new or less conventional capital to transportation infrastructure funding.

(h) The Infrastructure Loan, if any, has a term acceptable to the Department. A Transportation Project financed with a shorter term Infrastructure Loan will score higher than one financed with a longer term Infrastructure Loan.

(i) The Transportation Project will support the community's economic development.

(j) The Transportation Project will enhance the quality of life in the community.

(2) The Department will assign the Application to a Region, the Department's Public Transit Division or others as appropriate for evaluation of technical, engineering and planning criteria. The designated assignee will:

(a) Evaluate each project or proposal according to the Application evaluation criteria established by the Department in OAR 731-030-0100(1); and

(b) Recommend approval or disapproval of each project or proposal.

(3) The Region Manager, the Public Transit Division Administrator or other designated party will notify the Staff of the results of the evaluations.

(4) Staff will evaluate the economic and financial criteria and seek assistance from other subject matter experts where appropriate.

Stat. Auth.: ORS 184.616, 184.619, 367.015 & 367.020

Stats. Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

Hist.: DOT 1-1997, f. & cert. ef. 1-17-97; DOT 7-2004, f. & cert. ef. 11-17-04

731-030-0110

Approval Procedures

(1) Staff will combine the results of the evaluations completed under OAR 731-030-0100 into a combined score.

(2) Upon completion of its scoring, Staff will forward the Application and related evaluations to the Chief Financial Officer with a recommendation for action on the request based on an analysis of such factors as the combined score, statewide equity, the availability of funds, and OTIB cash flow. Staff may request additional information from an Applicant or others to assist in making a recommendation. A recommendation, or any related approval, may include proposed modifications to an Applicant's request for financial assistance.

(3) To make a recommendation for approval, the Staff must find that:

(a) The Applicant and the Transportation Project qualify for assistance from the Infrastructure Fund according to the criteria established under OAR 731-030-0100(1).

(b) The proposed Transportation Project is feasible and a reasonable risk from practical and economic standpoints and any Infrastructure Loan has a reasonable prospect of repayment according to its terms.

(c) The Applicant's financial resources and management capability appear to be adequate to assure the successful completion and operation of the Transportation Project.

(d) The Applicant can provide good and sufficient Collateral when appropriate to mitigate risk to the Infrastructure Fund.

(4) After review and consideration of the Staff recommendation, and subject to the availability of moneys in the Infrastructure Fund, the Chief Financial Officer may:

(a) For Infrastructure Loan or Infrastructure Assistance requests for less than \$1 million that will finance projects that have been included in the STIP:

(A) Approve the request;

(B) Deny the request; or

(C) Forward a recommendation for action to the Commission.

(b) For all other requests:

(A) Deny the request; or

(B) Forward a recommendation for action to the Commission.

(c) For each request approved or denied, the Chief Financial Officer will forward a summary of the request to the Commission.

(5) The Commission will consider the recommendation by the Chief Financial Officer on any request forwarded to it for action and may:

(a) Approve the request; or

(b) Deny the request.

Stat. Auth.: ORS 184.616, 184.619, 367.015 & 367.020

Stats. Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

Hist.: DOT 1-1997, f. & cert. ef. 1-17-97; DOT 7-2004, f. & cert. ef. 11-17-04

731-030-0120

Project Agreements, Interest Rates and Charges

(1) For all requests approved under OAR 731-030-0110, the Department will make Infrastructure Loans or provide Infrastructure Assistance from the Infrastructure Fund by entering into an Agreement with the Recipient.

(2) Notwithstanding any provisions of a Staff recommendation under OAR 731-030-0110(2), the Chief Financial Officer will make the final determination of the amount, type, interest rate, amounts and types of Collateral, schedule of payments, and other terms and conditions of financing awarded to an Applicant and such further provisions necessary or appropriate to insure expenditure of the funds for the purposes set forth in the approved Application. Such determination shall not be contrary to any provisions of an approval under OAR 731-030-0110(5)(a). In most cases for Agencies and Municipalities, interest rates will approximate tax exempt rates for similar obligations. In determining the interest rate for an Infrastructure Loan, the Chief Financial Officer may set the rate to reflect the evaluation of the Transportation Project and the effect of the rate upon the Applicant's ability to finance the Transportation Project.

(3) The Chief Financial Officer will set forth in each Agreement any fees or charges.

(4) The Chief Financial Officer will consider the financial status of the Infrastructure Fund and may delay final award of funds to any Recipient 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) Eligible uses of moneys obtained from or through the assistance of the Infrastructure Fund include, but are not limited to, the cost of acquiring, designing, contracting, building and installing any Transportation Project.

(6) A Recipient may request a modification or amendment to an executed Agreement. The request must be made in writing to the Chief Financial Officer for consideration by the Department. The Recipient will be responsible for all costs related to any modification or amendment of the Agreement.

Stat. Auth.: ORS 184.616, 184.619, 367.015 & 367.020

Stats. Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

Hist.: DOT 1-1997, f. & cert. ef. 1-17-97; DOT 7-2004, f. & cert. ef. 11-17-04

731-030-0130

Accounting, Reporting and Auditing Requirements

(1) The Department will maintain an accounting system for the Infrastructure Fund that complies with generally accepted accounting principles and practices.

(2) Recipients must separately account for all moneys received from the Infrastructure Fund 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 will compile an annual report on the OTIB and make it available to Recipients no later than 90 days after the end of the Federal fiscal year. The report will identify that year's Recipients, the amounts, terms and conditions of Infrastructure Loans and Infrastructure Assistance and project categories.

(4) The Department, in cooperation with the Secretary of State, will conduct or cause to be conducted an annual independent financial and compliance audit of the OTIB's operations. This audit may be conducted in accordance with the Single Audit Act of 1984. This audit must be completed within one year of the end of the state fiscal year.

(5) Recipients must observe the requirements of state law for retaining and disposing of records.

Stat. Auth.: ORS 184.616, 184.619, 367.015, 367.020

Stats. Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

Hist.: DOT 1-1997, f. & cert. ef. 1-17-97; DOT 7-2004, f. & cert. ef. 11-17-04

731-030-0150

Waivers

The Chief Financial Officer may waive non-statutory requirements of OAR 731-030-0010 to 731-030-0160 if such a waiver would serve to further the goals and objectives of the OTIB or the Infrastructure Fund.

Stat. Auth.: ORS 184.616, 184.619, 367.015 & 367.020

Stats. Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

Hist.: DOT 1-1997, f. & cert. ef. 1-17-97; DOT 7-2004, f. & cert. ef. 11-17-04

731-030-0160

Protests

(1) If the Chief Financial Officer denies an Application for an Infrastructure Loan or Infrastructure Assistance, the Applicant may protest the decision to the Director. The protest must be in writing and must be filed within 30 calendar days of notification of the denial. The Director will notify the Applicant of the Director's decision within 30 days of the receipt of the protest.

(2) If the Director affirms the denial of the Application, the Applicant may protest the Director's decision to the Commission. The protest to the Commission must be in writing and must be filed within 30 calendar days of notification of the Director's decision. The Commission will consider the protest at the earliest practical regular meeting of the Commission. The Applicant may appear before the Commission to present additional factual information in support of the Application. The Commission's decision will not be subject to any further administrative review.

(3) A Commission decision to decline an Application as described in OAR 731-030-0110(5) will not be subject to further administrative review.

Stat. Auth.: ORS 184.616, 184.619, 367.015 & 367.020

Stats. Implemented: ORS 367.010 - 367.060 & US Code, PL 104-59, Sect. 350

Hist.: DOT 1-1997, f. & cert. ef. 1-17-97; DOT 7-2004, f. & cert. ef. 11-17-04

DIVISION 35

STANDARDS TO DETERMINE PROJECT ELIGIBILITY AND APPLICATION PROCEDURES FOR GRANTS OR LOANS UNDER THE MULTIMODAL TRANSPORTATION FUND PROGRAM

731-035-0010

Purpose

ORS 367.080 to 367.086 creates the Multimodal Transportation Fund, allowing for the issuance of lottery bonds for the purpose of financing grants and loans to fund Transportation Projects that involve air, marine, rail or public transit. The purpose of division 35 rules is to establish the Multimodal Transportation Fund Program.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 816, OL 2005

Stats. Implemented: Ch. 816, OL 2005

Hist.: DOT 8-2005(Temp), f. 11-17-05, cert. ef. 11-21-05 thru 5-19-06; DOT 3-2006, f. & cert. ef. 1-24-06; DOT 5-2007, f. & cert. ef. 11-15-07

731-035-0020

Definitions

For the purposes of division 35 rules, the following terms have the following definitions, unless the context clearly indicates otherwise:

(1) "Agreement" means a legally binding contract between the Department (or Oregon Department of Aviation) and Recipient that contains the terms and conditions under which the Department is providing funds from the Multimodal Transportation Fund for an Approved Project.

(2) "Applicant" means a Person or Public Body that applies for funds from the Multimodal Transportation Fund.

(3) "Approved Project" means a Project that the Commission has selected to receive funding through either a grant or loan from the Multimodal Transportation Fund.

(4) "Area Commissions on Transportation" means advisory bodies chartered by the Oregon Transportation Commission (OTC) through the Policy on Formation and Operation of Area Commissions on Transportation (ACTs) approved by the OTC on June 18, 2003.

(5) "Aviation" is defined in ORS 836.005(5).

(6) "Collateral" means real or personal property subject to a pledge, lien or security interest, and includes any property included in the definition of collateral in ORS 79.0102(1), and with respect to a Public Body, any real or personal property as defined in ORS 288.594.

(7) "Commission" means the Oregon Transportation Commission.

(8) "Department" means the Oregon Department of Transportation.

(9) "Director" means the Director of the Oregon Department of Transportation.

(10) "Economic and Community Development Department" means the department defined in ORS 285A.070.

(11) "Freight Advisory Committee" means the committee created in ORS 366.212.

(12) "Person" has the meaning given in ORS 174.100(5), limited to those Persons that are registered with the Oregon Secretary of State to conduct business within the State of Oregon.

(13) "Program" means the Multimodal Transportation Fund Program established by division 35 rules to administer the Multimodal Transportation Fund.

(14) "Program Funds" means the money appropriated by the Legislature to the Multimodal Transportation Fund. These funds may be used as either grants or loans to eligible projects.

(15) "Public Body" is defined in ORS 174.109.

(16) "Public Transit Advisory Committee" means a committee appointed by the Director and approved by the Commission to advise the Department on issues, policies and programs related to public transportation in Oregon.

(17) "Rail Advisory Committee" means a committee appointed by the Director and approved by the Commission to advise the Department on issues, policies and programs that affect rail freight and rail passenger facilities and services in Oregon.

(18) “Recipient” means an Applicant that enters into Agreement with the Department to receive funds from the Multimodal Transportation Fund.

(19) “Recipient’s Total Project Costs” means the funds received from the Multimodal Transportation Fund program plus the required 20 percent matching funds under Oregon Administrative Rule 731-035-0070(3)(a)(B), if applicable.

(20) “State Aviation Board” means the board created in ORS 835.102.

(21) “Transportation Project” or “Project” is defined in ORS 367.010(11). A Multimodal Transportation Fund Program Project must involve one or more of the following modes of transportation: air, marine, rail or public transit. The term includes, but is not limited to, a project for capital infrastructure and other projects that facilitate the transportation of materials, animals or people.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 816, OL 2005

Stats. Implemented: Ch. 816, OL 2005

Hist.: DOT 8-2005(Temp), f. 11-17-05, cert. ef. 11-21-05 thru 5-19-06; DOT 3-2006, f. & cert. ef. 1-24-06; DOT 5-2007, f. & cert. ef. 11-15-07

731-035-0030

Application Submission Periods

(1) The Department will announce periods for submitting applications for funding from the Multimodal Transportation Fund.

(2) Project applications will be reviewed for compliance with the requirements in OAR 731-035-0040 and as prescribed in 731-035-0050.

(3) Applications not funded may be resubmitted during subsequent application submission periods announced by the Department.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 816, OL 2005

Stats. Implemented: Ch. 816, OL 2005

Hist.: DOT 8-2005(Temp), f. 11-17-05, cert. ef. 11-21-05 thru 5-19-06; DOT 3-2006, f. & cert. ef. 1-24-06

731-035-0040

Application Requirements

Applicants interested in receiving funds from the Multimodal Transportation Fund must submit a written application to the Department. The application must be in a format prescribed by the Department and contain or be accompanied by such information as the Department may require, including the expected results from the proposed Project for each of the considerations as prescribed in 731-035-0060, documented desire for and support of the Project from the businesses and entities to be served by the Project, and documentation to validate the Project schedule and costs.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 816, OL 2005

Stats. Implemented: Ch. 816, OL 2005

Hist.: DOT 8-2005(Temp), f. 11-17-05, cert. ef. 11-21-05 thru 5-19-06; DOT 3-2006, f. & cert. ef. 1-24-06; DOT 5-2007, f. & cert. ef. 11-15-07

731-035-0050

Application Review

(1) The Department will review applications received to determine whether the application is complete, and the Applicant and the Project are eligible for Program Funds.

(2) Applicants that meet all of the following criteria are eligible:

(a) The Applicant is a Public Body or Person within the state of Oregon.

(b) The Applicant, if applicable, is current on all state and local taxes, fees and assessments.

(c) The Applicant has sufficient management and financial capacity to complete the Project including without limitation the ability to contribute 20 percent of the eligible grant Project cost.

(3) Projects that meet all of the following criteria are eligible:

(a) The project is a Transportation Project.

(b) The Project will assist in developing a multimodal transportation system that supports state and local government efforts to attract new businesses to Oregon or that keeps and encourages expansion of existing businesses.

(c) The Project is eligible for funding with lottery bond proceeds under the Oregon Constitution and laws of the State of Oregon.

(d) The Project will not require or rely upon continuing subsidies from the Department for ongoing operations.

(e) The Project is not a public road or other project that is eligible for funding from revenues described in section 3a, Article IX of the Oregon Constitution, i.e. the State Highway Trust Fund.

(f) The Project is feasible, including the estimated cost of the Project, the expected results from the proposed Project for each of the considerations as prescribed in 731-035-0060, the Project schedule, and all applicable and required permits may be obtained within the Project schedule.

(4) If an Applicant or Project is not eligible for Program Funds, the Department will, within 15 days of determination:

(a) Specify the additional information the Applicant must provide to establish eligibility; or

(b) Notify the Applicant that the application request is ineligible.

(5) The Department may deem an application ineligible if the Applicant fails to meet eligibility requirements of subsection (2 and 3) of this rule, or fails to provide requested information in writing by the date required by the Department, or if the application contains false or misleading information.

(6) The Director will consider protests of the eligibility determination for the Program. Only the Applicant may protest. Protests must be submitted in writing to the Director within 30 days of the event or action that is being protested. The Director’s decision is final.

(7) The Department will make all eligible applications available for review, as applicable under OAR 731-035-0060, to the State Aviation Board, the Freight Advisory Committee, the Public Transit Advisory Committee, the Rail Advisory Committee, the Economic and Community Development Department and any other transportation stakeholder and advocate entities identified by the Commission to provide recommendations on Project funding including the Area Commissions on Transportation.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 816, OL 2005

Stats. Implemented: Ch. 816, OL 2005

Hist.: DOT 8-2005(Temp), f. 11-17-05, cert. ef. 11-21-05 thru 5-19-06; DOT 3-2006, f. & cert. ef. 1-24-06; DOT 5-2007, f. & cert. ef. 11-15-07

731-035-0060

Project Selection

(1) The Commission will select Projects to be funded through either a grant or loan with moneys in the Multimodal Transportation Fund.

(2) Prior to selecting Projects to be funded with moneys in the Multimodal Transportation Fund, the Commission shall solicit recommendations from:

(a) The State Aviation Board for Aviation Transportation Projects.

(b) The Freight Advisory Committee for freight Transportation Projects.

(c) The Public Transit Advisory Committee for public transit Transportation Projects.

(d) The Rail Advisory Committee for rail Transportation Projects.

(e) The Economic and Community Development Department for marine transportation projects.

(3) Prior to selecting Projects to be funded with moneys in the Multimodal Transportation Fund, the Commission may solicit recommendations from transportation stakeholder and advocate entities not otherwise specified in section 2 of this rule including the Area Commissions on Transportation.

(4) On behalf of the Commission, the Department shall solicit recommendations from the committees and entities in section 2 of this rule before soliciting recommendations from entities in section 3 of this rule. The Department shall provide the recommendations from the committees and entities in section 2 of this rule to the entities in section 3 of this rule.

(5) The Director, in consultation with committees and entities in section 2 of this rule and the Area Commissions on Transportation, shall appoint a Final Review Committee that includes representatives from each of the committees and entities in section 2 and section 3 of this rule. Following the receipt of recommendations from the entities in section 3 of this rule, and prior to selecting Projects

to be funded with moneys in the Multimodal Transportation Fund the Commission shall solicit a Final Recommendation Report from the Final Review Committee. The Department shall provide the Final Review Committee a list of recommendations from all committees and entities in section 2 and section 3 of this rule. The list shall include the evaluation results and recommendations from each of the committees and entities in sections 2 and 3 of this rule. The Final Review Committee shall provide the Commission its Final Recommendation Report of projects to be funded with moneys in the Multimodal Transportation Fund listing in priority order eligible Projects together with a reasonable number of alternate Projects in priority order.

(6) The Department shall determine the organizational guidance for the committees' and entities' processes and protocols.

(7) The committees and entities in sections 2, 3 and 5 of this rule shall follow the organizational guidance determined by the Department in section 6 of this rule.

(8) The Commission will consider all of the following in its determination of eligible Projects to approve for receipt of funds from the Multimodal Transportation Fund:

(a) Whether a proposed Project reduces transportation costs for Oregon businesses or improves access to jobs and sources of labor.

(b) Whether a proposed transportation project results in an economic benefit to this state.

(c) Whether a proposed Project is a critical link connecting elements of Oregon's transportation system that will measurably improve utilization and efficiency of the system.

(d) How much of the cost of a proposed Project can be borne by the Applicant for the grant or loan from any source other than the Multimodal Transportation Fund.

(e) Whether a Project is ready for construction, or if the Project does not involve construction, whether the Project is ready for implementation.

(f) Whether a Project leverages other investment and public benefits from the state, other government units, or private business.

(g) Whether the Applicant proposes to contribute more than the minimum 20 percent of the eligible grant Project costs established in OAR 731-035-0070(3).

(h) Whether the Applicant is applying for a loan rather than a grant.

(9) To award funds that become available due to an approved Project that is withdrawn or is sanctioned as prescribed in 731-035-0080(5), the Commission shall select the highest priority Project that is appropriate for the funds available from the Final Recommendation Report created in section 5 of this rule.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 816, OL 2005

Stats. Implemented: Ch. 816, OL 2005

Hist.: DOT 8-2005(Temp), f. 11-17-05, cert. ef. 11-21-05 thru 5-19-06; DOT 3-2006, f. & cert. ef. 1-24-06; DOT 5-2007, f. & cert. ef. 11-15-07

731-035-0070

Grant and Loan Awards and Match

(1) At least 10 percent of the total net proceeds of the lottery bonds will be allocated to each of the five regions as specified in Enrolled House Bill 2278 (2007 Regular Session). The regions consist of the following counties:

(a) Region one consists of Clackamas, Columbia, Hood River, Multnomah and Washington Counties;

(b) Region two consists of Benton, Clatsop, Lane, Lincoln, Linn, Marion, Polk, Tillamook and Yamhill Counties;

(c) Region three consists of Coos, Curry, Douglas, Jackson and Josephine Counties;

(d) Region four consists of Crook, Deschutes, Gilliam, Jefferson, Klamath, Lake, Sherman, Wasco and Wheeler Counties; and

(e) Region five consists of Baker, Grant, Harney, Malheur, Morrow, Umatilla, Union and Wallowa Counties.

(2) Applicants may use a combination of grant and loan funds to finance a Project.

(3) Grants and loans will be awarded only when there are sufficient funds available in the Multimodal Transportation Fund to cover the costs of the loans and grants.

(a) Grants:

(A) Awards must not exceed 80 percent of the total eligible Project costs.

(B) Applicant matching funds must be provided by the Applicant in the form of monetary outlay for elements necessary for implementation of the Project, including land, excavation, permits, engineering, payroll, special equipment purchase or rental, and cover at least 20 percent of the eligible Project costs.

(b) Loans:

(A) Loans may be for any portion of project costs, up to the full amount of the project.

(B) With the exception of the two percent payment described in section 2, subsection 2, of Chapter 859, Oregon Laws 2007 (which also applies to grants), the Department will not charge fees for processing or administering a loan to a Recipient.

(C) Loans from the Multimodal Transportation Fund may be interest free if repaid according to the terms and conditions of the Agreement between the Department and Recipient.

(D) Prior to entering into a loan Agreement, the Department will determine if an application meets reasonable underwriting standards of credit-worthiness, including whether:

(i) The Project is feasible and a reasonable risk from practical and economic standpoints.

(ii) The loan has a reasonable prospect of repayment according to its terms.

(iii) The Applicant's fiscal, managerial and operational capacity is adequate to assure the successful completion and operation of the Project.

(iv) The Applicant will provide good and sufficient Collateral to mitigate risk to the Multimodal Transportation Fund.

Stat. Auth.: ORS 184.616, 184.619 & Ch. 816, OL 2005

Stats. Implemented: Ch. 816, OL 2005

Hist.: DOT 8-2005(Temp), f. 11-17-05, cert. ef. 11-21-05 thru 5-19-06; DOT 3-2006, f. & cert. ef. 1-24-06; DOT 5-2007, f. & cert. ef. 11-15-07

731-035-0080

Project Administration

(1) The Department will administer all non-aviation Projects.

(2) The Department and an Applicant of an Approved Project will execute an Agreement prior to the disbursal of Program Funds for an Approved Project. The Agreement is effective on the date all required signatures are obtained or at such later date as specified in the Agreement.

(3) The Agreement will contain provisions and requirements, including but not limited to:

(a) Documentation of the projected costs for an Approved Project must be submitted to the Department prior to the disbursal of Program Funds.

(b) Only Project costs incurred on or after the effective date of the Agreement are eligible for grant or loan funds.

(c) Disbursal of Program Funds for grants and loans will be paid on a reimbursement basis and will not exceed one disbursal per month. The Director or the OTC may make exceptions to the reimbursement basis if the Department finds that the applicant would have difficulty meeting this requirement.

(d) Upon request, a Recipient must provide the Department with a copy of documents, studies, reports and materials developed during the Project, including a written report on the activities or results of the Project and any other information that may be reasonably requested by the Department.

(e) Recipients must separately account for all moneys received from the Multimodal Transportation Fund in Project accounts in accordance with Generally Accepted Accounting Principles.

(f) Any Program Funds disbursed but not used for an Approved Project must be returned to the Department.

(g) Amendments to Agreements are required to change an Approved Project's cost, scope, objectives or timeframe.

(h) Recipients must covenant, represent and agree to use Project funds in a manner that will not adversely affect the tax-exempt status of any bonds issued under the Program.

(i) Recipients shall pay two percent of the Recipient's Total Project Costs to the Department within 90 days of the Agreement

effective date. The required payment of two percent of the Recipient's Total Project Costs is a reimbursable program cost.

(4) The Department may invoke sanctions against a Recipient that fails to comply with the requirements governing the Program. The Department will not impose sanctions until the Recipient has been notified in writing of such failure to comply with the Program requirements as specified in this Rule and has been given a reasonable time to respond and correct the deficiencies noted. The following circumstances may warrant sanctions:

(a) Work on the Approved Project has not been substantially initiated within six months of the effective date of the Agreement;

(b) State statutory requirements have not been met;

(c) There is a significant deviation from the terms and conditions of the Agreement; or

(d) The Department finds that significant corrective actions are necessary to protect the integrity of the Program Funds for the Approved Project, and those corrective actions are not, or will not be, made within a reasonable time.

(5) The Department may impose one or more of the following sanctions:

(a) Revoke an existing award.

(b) Withhold unexpended Program Funds.

(c) Require return of unexpended Program Funds or repayment of expended Program Funds.

(d) Bar the Applicant from applying for future assistance.

(e) Other remedies that may be incorporated into grant and loan Agreements.

(6) The remedies set forth in this rule are cumulative, are not exclusive, and are in addition to any other rights and remedies provided by law or under the agreement.

(7) The Director will consider protests of the funding and Project administration decisions for the Program. Only the Applicant or Recipient may protest. Protests must be submitted in writing to the Director within 30 days of the event or action that is being protested. The Director's decision is final. Jurisdiction for review of the Director's decision is in the circuit court for Marion County pursuant to ORS 183.484.

(8) The Director 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 184.616, 184.619 & Ch. 816, OL 2005

Stats. Implemented: Ch. 816, OL 2005

Hist.: DOT 8-2005(Temp), f. 11-17-05, cert. ef. 11-21-05 thru 5-19-06; DOT 3-2006, f. & cert. ef. 1-24-06; DOT 5-2007, f. & cert. ef. 11-15-07

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, 184.619 & 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 referenced are available from the agency.]

Stat. Auth.: ORS 184.616, 184.619 & 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, 184.619 & 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, 184.619 & 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, 184.619 & 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, 184.619 & 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.

(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, 184.619 & 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0080

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, 184.619 & 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

DIVISION 50

HIGHWAY PROJECTS

731-050-0010

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, 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; DOT 3-2001, f. & cert. ef. 12-14-01

731-050-0020

Definition of "Ready for Construction"

For purposes of Section 57, Chapter 618, Oregon Laws 2003 (HB 2041), "Ready for Construction" means that priority will be given to modernization projects, that as of the effective date of this rule:

(1) Have completed plans, specifications and cost estimates (PS&E); and

(2) In the event use of federal funds are likely in any aspect of the project, have been approved for construction by the Federal Highway Administration (FHWA).

Stat. Auth.: ORS 184.616, 184.619 & Sec. 57, Ch. 618, OL 2003

Stat. Implemented: Sec. 57, Ch. 618, OL 2003

Hist.: DOT 3-2004, f. & cert. ef. 6-24-04

DIVISION 60

COMMERCIAL PRODUCTS DEVELOPMENT PROGRAM

731-060-0000

Purpose

ORS 184.631 requires the Department of Transportation to establish a public-private partnership research and development program. The purpose of division 60 rules is to provide procedures, standards, and criteria for establishment and operation of this program, hereby named the Oregon Department of Transportation Commercial Products Research and Development Program.

Stat. Auth.: ORS 184.616, 184.619 & 184.631

Stat. Implemented: ORS 184.631

Hist.: DOT 4-2004, f. & cert. ef. 8-20-04

731-060-0010

Definitions

For the purposes of division 60 rules, the following definitions apply, unless the context clearly indicates otherwise:

(1) "Applicant" means any person, enterprise or organization applying for product research or development assistance from the Oregon Department of Transportation.

(2) "Applied Research or Development Project" means any research or development activity selected and funded by the Oregon Department of Transportation Commercial Products Research and Development Program.

(3) "Board" means Oregon Department of Transportation Commercial Products Research and Development Board.

(4) "Program" means the Oregon Department of Transportation Commercial Products Research and Development Program, which is the public-private partnership research and development program required by ORS 184.631.

(5) "ODOT" means Oregon Department of Transportation.

(6) “Recipient” means any person, enterprise or organization currently receiving assistance from the Program.

(7) “Subject Technology” means the property, product or invention for which research or development assistance is being sought.

Stat. Auth.: ORS 184.616, 184.619 & 184.631

Stat. Implemented: ORS 184.631

Hist.: DOT 4-2004, f. & cert. ef. 8-20-04

731-060-0020

Oregon Department of Transportation Commercial Products Research and Development Board

(1) The Director of the Oregon Department of Transportation will appoint members to the ODOT Commercial Products Research and Development Board, designating one of those appointees as the Board Chair.

(2) The Board will consist of three representatives from the Oregon University System, three representatives from the private sector and one representative from the Oregon Economic and Community Development Department.

(3) The Board is responsible for the following:

(a) Adopting and maintaining a procedures manual for the ongoing operation of the Program and oversight of projects;

(b) Adopting application policies, forms, schedules and procedures;

(c) Making funding recommendations to the ODOT Research Program Manager;

(d) Screening proposals for eligibility;

(e) Making project award recommendations to the ODOT Research Program Manager; and

(f) Recommending to the ODOT Research Program Manager, individuals for appointment to project steering committees.

(4) The Board may appoint one or more advisory committees to assist in the evaluation of project proposals.

Stat. Auth.: ORS 184.616, 184.619 & 184.631

Stat. Implemented: ORS 184.631

Hist.: DOT 4-2004, f. & cert. ef. 8-20-04

731-060-0030

Solicitation

(1) Project applications will be solicited on a cyclical basis, biennially, annually or more frequently, depending on availability of funding.

(2) For each biennium, the frequency of solicitations will be determined by the ODOT Research Program Manager.

(3) A public notice of ODOT’s intent to solicit project applications will be published, specifying a deadline for submissions of applications that is at least 30 days after the public notice appears.

(4) The Board will select a range of public media, sufficient to assure broad knowledge of the Program, through which the public notice will appear.

Stat. Auth.: ORS 184.616, 184.619 & 184.631

Stat. Implemented: ORS 184.631

Hist.: DOT 4-2004, f. & cert. ef. 8-20-04

731-060-0040

Eligibility

(1) To be eligible for funding, through the Program:

(a) The Subject Technology must show the potential to reduce the cost of maintenance and preservation, extend the useful life of the state’s highways or improve highway safety, as specified in ORS 184.631;

(b) The Subject Technology must meet all requirements of state and Federal laws applicable to the source of funds;

(c) The Applicant must agree to abide by all laws and regulations pertaining to the Applied Research or Development Project;

(d) The Applicant must agree to provide to the Board or assist the Board in obtaining information requested by the Board for the purpose of evaluating the Applicant’s abilities to successfully commercialize the Subject Technology; and

(e) To receive assistance, the Applicant must follow the application procedures specified by the Board.

(2) The Board may establish additional criteria for eligibility.

Stat. Auth.: ORS 184.616, 184.619 & 184.631

Stat. Implemented: ORS 184.631

Hist.: DOT 4-2004, f. & cert. ef. 8-20-04

731-060-0050

Selection Criteria

Eligible projects will be evaluated by the Board, based on the potential of the Subject Technology to reduce the cost of maintenance and preservation or extend the useful life of the state’s highways or improve highway safety; and based on the following criteria:

(1) Potential of the Subject Technology to produce future revenue for the state of Oregon;

(2) The technical merit of the proposed research;

(3) The ability of the Applicant to successfully commercialize the Subject Technology;

(4) Proof of ownership or of authority to develop the Subject Technology provided by the Applicant;

(5) The rationale, provided by the Applicant, for use of public rather than private funds; and

(6) Other criteria that may be identified by the Board.

Stat. Auth.: ORS 184.616, 184.619 & 184.631

Stat. Implemented: ORS 184.631

Hist.: DOT 4-2004, f. & cert. ef. 8-20-04

731-060-0060

Project Steering Committee

(1) For each Applied Research or Development Project that is selected to go forward, the ODOT Research Program Manager, based on recommendations of the Board, will appoint members to a Project Steering Committee.

(2) The Project Steering Committee will include the following members:

(a) One representative for the Recipient;

(b) One representative from ODOT;

(c) One representative from the Oregon University System; and

(d) Other members at the discretion of the ODOT Research Program Manager.

(3) The Project Steering Committee will periodically review the progress of the Applied Research or Development Project and report the findings of this review to the ODOT Research Program Manager.

(4) The Recipient must provide quarterly progress reports to the Project Steering Committee on the Applied Research or Development Project receiving ODOT funds.

(5) The Recipient must provide annual progress reports to the Project Steering Committee on the Recipient’s efforts related to the development and marketing of the Subject Technology.

Stat. Auth.: ORS 184.616, 184.619 & 184.631

Stat. Implemented: ORS 184.631

Hist.: DOT 4-2004, f. & cert. ef. 8-20-04

731-060-0070

Project Approval, Allocation of Resources and Disbursement of Funds

(1) The ODOT Research Program Manager is the sole judge of the suitability and eligibility of an Applied Research or Development Project, and Project approval, allocation of resources and disbursement of funds will be in the sole discretion of the ODOT Research Program Manager.

(2) The ODOT Research Program Manager may suspend approval of new Applied Research or Development Projects, conditional on spending limitations or other circumstances.

(3) If the ODOT Research Program Manager approves funding for an Applied Research or Development Project, ODOT will pay the Recipient, based on the terms of a funding agreement negotiated between the parties.

(4) The Applicant must satisfy the ODOT Research Program Manager that he or she will receive all applicable federal, state and local permits and licenses before the allocation of resources and disbursement of funds.

(5) The Applicant must satisfy the ODOT Research Program Manager that he or she has or will obtain insurance if necessary in the amount and coverage satisfactory to ODOT.

Stat. Auth.: ORS 184.616, 184.619 & 184.631

Stat. Implemented: ORS 184.631

Hist.: DOT 4-2004, f. & cert. ef. 8-20-04

DIVISION 70

OREGON INNOVATIVE PARTNERSHIPS PROGRAM

731-070-0005

Purpose and Intent of the Oregon Innovative Partnerships Program

(1) The primary purpose of the Oregon Innovative Partnerships Program is to expedite project delivery and maximize innovation in project financing and delivery by encouraging Public-Private Partnerships.

(2) Public-Private Partnerships are formed when all parties benefit and when the outcome of the partnerships exceeds what any of the parties could accomplish on their own.

(3) When properly designed and implemented, Public-Private Partnerships can supplement limited State transportation revenues with a wide range of other sources.

(4) ODOT will operate the Oregon Innovative Partnerships Program in an environment that encourages cooperative partnerships between and among public and private sectors.

(5) While recognizing that other jurisdictions have undertaken Public-Private Partnerships, ODOT intends to be a leader in its approach to fostering cooperation amongst the parties for the public good.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0010

Definitions for the Oregon Innovative Partnerships Program

As used in OAR 731-070-0010 to 731-070-0360:

(1) "Agency" means a public agency, as defined in ORS 279.011(7).

(2) "Commission" or "OTC" means the Oregon Transportation Commission created by ORS 184.612 and any person or persons authorized or directed by the Commission to take any action or make any decision authorized by these rules on the Commission's behalf.

(3) "Competing Proposal" means a written submission to the Department that a proposer submits in response to a notice issued by the Department under OAR 731-070-0130.

(4) "Conceptual Proposal" means a written submission to the Department satisfying the requirements set forth in OAR 730-070-0060.

(5) "Department" or "ODOT" means the Oregon Department of Transportation created by ORS 184.615.

(6) "Detailed Proposal" means a written submission to the Department satisfying the requirements set forth in OAR 730-070-0070.

(7) "Director" means the Director of Transportation appointed under ORS 184.620 and any person or persons authorized or directed by the Director to take any action or make any decision authorized by these rules on the Director's behalf.

(8) "Major Partner" means, with respect to a limited liability company or joint venture, each firm, business organization or person that has an ownership interest therein in excess of 5%.

(9) "Major Subcontractor" is any subcontractor designated in the proposal to perform 10% or more of the scope of work for a proposed Project.

(10) "Program" or "OIPP" means the Oregon Innovative Partnerships Program established under Oregon Laws 2003, chapter 790, codified at ORS 367.800 to 367.826.

(11) "Public-Private Partnerships" or "PPP" means a nontraditional arrangement between the Department and one or more private or public entities that provides for the implementation of a Transportation Project that may include:

(a) Acceptance of a private contribution to a transportation system project or service in exchange for a public benefit concerning that project or service;

(b) Sharing of resources and the means of providing transportation system projects or services;

(c) Cooperation in researching, developing, and implementing transportation system projects or services;

(d) Use of innovative funding methods; or

(e) Expedited project delivery.

(f) The use of the word "partnership" to describe such an arrangement does not confer on the relationship formed any of the attributes or incidents of a partnership under common law or under ORS Chapters 68 and 70.

(12) "Private Contribution" means resources supplied by a private entity to accomplish all or any part of the work on a transportation system project, including funds, financing, income, revenue, cost sharing, technology, staff, materials, equipment, expertise, data, or engineering, construction, or maintenance services, or other items of value.

(13) "Transportation Project" or "Project" has the meaning given that term in ORS 367.802.

(14) Terms not otherwise defined herein shall have the meaning given them in ORS 367.800 to 367.826.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0020

General Selection Policies

(1) The Department may exercise broad discretion, subject to the ultimate approval of the Commission, in evaluating and selecting proposals in accordance with the criteria stated in OAR 731-070-0010 to 731-070-0360. To conduct a meaningful evaluation of a proposal, ODOT may refine its examination of the proposal so that the features offered by a particular proposal are translated into, or examined in light of, the general criteria identified in section (3) of this rule.

(2) In light of the exemption from the public contracting requirements of ORS chapter 279 contained in ORS 367.806(5), the selection of proposals must be based on considerations that include public need, technical and financial feasibility, transportation efficiency, cost effectiveness, and acceleration of project delivery. The selection process must appreciate economy and potential savings to the public, but proposal selection will be determined on a best-value basis, taking into account the policies described in this rule and the applicable criteria identified in OAR 731-070-0110 and 731-070-0140, rather than on a lowest responsible bidder determination.

(3) In evaluating unsolicited proposals and in selecting projects for which to solicit proposals under OAR 731-070-0240, ODOT will give precedence to proposals and projects that will satisfy one or more of the following policies:

(a) Projects that will address an urgent or state-identified transportation need in a manner that will materially advance the project delivery time-frame in light of current or anticipated levels of funding and existing transportation plans.

(b) Projects that use primarily rights-of-way and publicly-owned real property that already are owned or under the long-term control of ODOT or other public entities that have authority to put the real property to the use proposed.

(c) Projects for which planning, reliable feasibility determinations, comparable, successful prior projects or case studies demonstrate a strong potential to attract or generate a substantial contribution of non-state or non-tax resources to pay project cost items like capital, operation and maintenance, and provide a reasonable return on that investment in terms of:

(A) A private partner's investment, if any; and

(B) Transportation benefits to the public.

(d) Projects for which planning, reliable feasibility determinations, comparable, successful prior projects or case studies demonstrate a low risk of failure (in terms of the completion of infrastructure improvements and the attraction or generation of a substantial contribution of non-state or non-tax resources), practicable means of mitigating the risk of failure, or a high reward-to-risk ratio (in terms both of the benefits to the public and the private partner's investment incentive).

(e) Proposals that identify specific, reliable, confirmable and economically-viable, non-state or non-traditional sources of funding that will be available to supplement or replace state funding or other state resources for the project.

(f) Projects for which there is a demonstration of clear and substantial public support.

(g) Proposals that identify innovative construction approaches that will result in shorter build time, reduced construction cost or improved function in comparison to conventional approaches.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0030

Conflict of Interest and Improper Proposer Conduct

(1) By submitting a proposal, the proposer certifies that the proposer, to the best of its knowledge, is not aware of any information bearing on the existence of any potential Organizational Conflict of Interest. If the proposer is aware of information bearing on whether a potential Organizational Conflict of Interest may exist, the proposer shall provide, as an exception to the certification, a disclosure statement describing this information, in a form suitable to ODOT, as part of its proposal. For purposes of this section, "Organizational Conflict of Interest" means that because of other activities or relationships with other persons, a proposer, a principal officer of a proposer, or a prime contractor who is proposed to perform construction or design work on a proposed Transportation Project, is unable or potentially unable to render impartial assistance or advice to ODOT, or the person's objectivity in performing the proposed contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

(2) **Warranty Against Contingent Fees.** By submitting a proposal, the proposer warrants that the proposer, except for a bona fide employee or agency working solely for the proposer:

(a) Has not employed or retained any person or agency to solicit or obtain the contract that might result from submission of the proposal; and

(b) Has not paid upon agreement or understanding to any person or agency employed or retained to solicit or obtain a Transportation Project agreement any contingent fee. For breach or violation of this warranty, the Department shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

(c) As used in this rule:

(A) "Bona fide agency" means an established commercial or selling agency, maintained by a proposer for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain federal or state contracts nor holds itself out as being able to obtain any federal or state contract or contracts through improper influence.

(B) "Bona fide employee" means a person or firm employed by a proposer and subject to the proposer's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain federal or state contracts nor holds itself out as being able to obtain any federal or state contract or contracts through improper influence.

(C) "Contingent fee" means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a federal or state contract.

(D) "Improper influence" means any influence that induces or intends to induce a federal or state officer or employee to give consideration or to act regarding a federal or state contract on any basis other than the merits of the matter.

(3) By submitting a proposal, the proposer certifies, to the best of its knowledge and belief, that on or after December 23, 1989:

(a) No federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on his or her behalf in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into any cooperative agreement, and the extension, continuation, renewal, amendment or modification of any federal contract, grant, loan, or cooperative agreement;

(b) If any funds other than federal appropriated funds (including profit or fee received under a covered federal transaction) have been paid, or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on his or her behalf in connection with its proposal, the proposer shall complete and submit, with its proposal, OMB standard form LLL, Disclosure of Lobbying Activities, to the Department; and

(c) The proposer shall include the language of this certification in all subcontract awards at any tier and require that all recipients of subcontract awards in excess of \$100,000 shall certify and disclose accordingly.

(4) **Certification - Debarment, Suspension, Proposed Debarment and Responsibility Factors.** By submitting a proposal, the proposer certifies, to the best of its knowledge and belief, that neither the proposer, a Major Partner, a Major Subcontractor, nor any principal officer of a proposer, Major Partner or Major Subcontractor, who is proposed to perform construction or design work on a proposed Transportation Project:

(a) Is presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any federal agency or agency of the State of Oregon;

(b) Has, within a three-year period preceding the submission of its proposal, been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state, or local) contract or subcontract; violation of federal or state antitrust statutes relating to the submission of bids or proposals; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;

(c) Is presently indicted for, or otherwise criminally or civilly charged by a governmental entity with the commission of any of the offenses enumerated in subsection (b) of this section; or

(d) Has had, within a three-year period preceding the submission of its proposal, one or more contracts terminated for default by any federal, state or local government agency.

(5) For the purposes of this rule, a "principal officer of a proposer, Major Partner or Major Subcontractor," means an officer, director, owner, and partner and any person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).

(6) In addition to requiring the certification of compliance with the foregoing provisions of this rule, in any Transportation Project that involves funding provided by or through the federal government, ODOT shall be entitled to require, as a requirement of any contract for a Transportation Project with a proposer, that proposer make such additional certifications, warranties or commitments as may be required by the laws, rules, regulations or policies that govern the funding source or which are conditions of the receipt of such funding.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0040

Protection of ODOT from Proposer "Monopolization" of Site Claims

(1) By submitting a proposal, a proposer thereby waives and relinquishes any claim, right in or expectation that the proposer may assert against the State of Oregon, the Commission, ODOT, or their members, officers and employees, that the proposer may occupy, use, profit from, or otherwise exercise any prerogative with respect to any route, corridor, right of way or public property identified in the proposal as being involved in or related to the proposed Transportation Project. A proposer may obtain no right to claim exclusivity or the right of use with respect to any such route, corridor, right of way or public property by virtue of having submitted a proposal that proposes to use or otherwise involve or affect it.

(2) By submitting a proposal, a proposer thereby waives and relinquishes, as against the State of Oregon, the Commission, ODOT, and their members, officers and employees, any right, claim, copyright, proprietary interest or other right in any proposed location, site, route, corridor, right of way or alignment or transportation mode or configuration identified in the proposal as being involved in or related to the proposed Transportation Project. This waiver does not apply, however, to a proposer's rights in any documents, designs and other information and records that constitute "sensitive business, commercial or financial information that is not customarily provided to business competitors" as specified in OAR 731-070-0280 and 731-070-0290.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

Unsolicited Proposals for OIPP Projects

731-070-0050

Submission of Unsolicited Conceptual Proposal

(1) Unless prequalification is required under OAR 731-070-0350, any private entity or unit of government may submit an unsolicited Conceptual Proposal for a transportation project to ODOT for consideration under the OIPP.

(2)(a) A proposal review fee in the amount prescribed by OAR 731-070-0055 must accompany any unsolicited Conceptual Proposal submitted by a private entity or unit of government.

(b) A proposal review fee in the amount prescribed by OAR 731-070-0055 must accompany any unsolicited Detailed Proposal submitted by a private entity or unit of government.

(3) The proposer shall submit 20 copies, individually identified, of any unsolicited Conceptual Proposal in addition to the proposal bearing the signature of the authorized representative. The original proposal, required copies and processing fee shall be delivered to the Director or his designee.

(4) ODOT will consider an unsolicited proposal only if the proposal:

(a) Is unique or innovative in comparison with and is not substantially duplicative of other transportation system projects included in the state transportation improvement program within the Department or, if it is similar to a project in the state transportation improvement program, the project has not been fully funded by ODOT or any other public entity as of the date the proposal is submitted, or the proposal offers an opportunity to materially advance or accelerate the implementation of the project. Unique or innovative features which may be considered by ODOT in evaluating such a proposal may include but are not limited to unique or innovative financing, construction, design, schedule or other project components as compared with other projects or as otherwise defined by ODOT rules or regulations; and

(b) Includes all information required by and is presented in the format set out in OAR 731-070-0060. Such information shall include a list of any proprietary information included in the proposal that the proposer considers protected trade secrets or other information exempted from disclosure under ORS 367.803(5) and (6) and OAR 731-070-0280 and 0290.

(5) ODOT will not consider an unsolicited proposal for a project involving another state or local government unit of another state unless ODOT and the appropriate representative of the other state or of the local government unit of the other state have entered into an agreement that permits the acceptance of unsolicited proposals for such a project.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0055

Fees to Accompany Unsolicited Proposals

(1) The proposal review fees required by OAR 731-070-0050(2) are as follows, unless otherwise specified in sections (2) or (3) of this rule:

(a) For initial Conceptual Proposals, as defined in OAR 731-070-0010(4):

(A) A \$5,000 non-refundable fee for a project under \$100 million; and

(B) A \$20,000 non-refundable fee for a project \$100 million or more.

(b) If the Commission elects to invite competing Conceptual Proposals as described in OAR 731-070-0120, all subsequent submittals shall be accompanied by the fees in (1)(a).

(c) For Detailed Proposals, as defined in OAR 731-070-0010(6):

(A) A \$10,000 non-refundable fee for a project under \$100 million; and

(B) A \$40,000 non-refundable fee for a project \$100 million or more.

(2) If the cost of evaluating an unsolicited proposal exceeds the fees assessed under section (1) of this rule, the Director may assess additional fees that reflect the reasonable expected costs to be incurred by ODOT in evaluating the unsolicited proposal that exceed the amount deposited in section (1) of this rule.

(3) The Director may waive the fees specified in sections (1) and (2) of this rule if the interests of the state or the specific merits of the project would warrant such a waiver. In considering whether to grant a waiver the Director will consider the magnitude of costs versus benefits of such a waiver.

Stat. Auth.: ORS 184.616, 184.619, 367.822 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 6-2004(Temp), f. & cert. ef. 8-26-04 thru 2-21-05; DOT 1-2005, f. & cert. ef. 1-20-05

731-070-0060

Contents and Format of Conceptual Proposals

(1) An unsolicited or competing Conceptual Proposal shall include the following information, separated by tabs as herein described:

(a) TAB 1: Qualifications and Experience.

(A) Identify the legal structure of the private entity or consortium of private entities or of private and public entities (the "Team") submitting the proposal. Identify the organizational structure of the Team for the Project, the Team's management approach and how each Major Partner and Major Subcontractor identified as being a part of the Team as of the date of submission of the proposal fits into the overall Team.

(B) Describe the experience of each private entity involved in the proposed Project. Describe the length of time in business, business experience, public sector transportation experience, PPP experience, development experience, design-build experience and other similarly sized engagements of each Major Partner and Major Subcontractor. The lead entity must be identified.

(C) Provide the names, addresses and telephone numbers of persons within the Team who may be contacted for further information.

(D) Provide financial information regarding the private entity or consortium and each Major Partner demonstrating their ability to perform the proposed Project.

(E) If the Proposer is a limited liability company, all members and managers, if any (as those terms are defined in ORS 63.001), as well as any assignee of an ownership interest, regardless of whether the assignee has also acquired the voting and other rights appurtenant to membership.

(F) If the Proposer is a trust, the trustee and all persons entitled to receive income or benefit from the trust.

(G) If the Proposer is an association other than a limited liability company, all members, officers and directors of the association.

(H) If the Proposer is a partnership or joint venture, all of the general partners, limited partners or joint venturers.

(I) On the written request of an entity that previously has been prequalified under OAR 731-070-00350 or 731-070-0360, ODOT may waive any requirement of this subsection (a) for which ODOT determines that the entity has provided sufficient information in the prequalification process.

(b) TAB 2: Project Characteristics.

(A) Provide a topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project.

(B) Provide a description of the Transportation Project or Projects, including all proposed interconnections with other existing transportation facilities or known publicly identified projects.

(C) Describe the Project in sufficient detail so the type and intent of the Project, the general location of the Project, and the communities that may be affected by the Project are clearly identified. Describe the assumptions used in developing the Project.

(D) List the critical factors for the Project's success.

(E) If the proposed Project does not conform with the state and local transportation plans or local comprehensive plans, outline the proposer's approach for securing the Project's conformity with state and local transportation plans and local comprehensive plans or indicate the steps required for acceptance into such plans.

(F) When a proposed Project is sited, in whole or in part, within the jurisdiction of a metropolitan planning organization or area commission on transportation, identify applicable regional and local approvals required for the project.

(G) Provide an explanation of how the proposed transportation project would impact local transportation plans of each affected locality.

(H) Provide a list of public transportation facilities and major apparent public utility facilities that will be crossed or affected by the Transportation Project and a statement of the proposer's plans to accommodate such facilities.

(I) Describe the role the proposer anticipates ODOT will have in the development, construction, operation, maintenance, financing, or any other aspect of the Transportation Project.

(c) TAB 3: Project Financing.

(A) Include a list and discussion of assumptions (user fees or toll rates, and usage of the facility) underlying all major elements of the proposed financing plan for the Project.

(B) Identify the probable risk factors relating to the proposed Project financing and methods for dealing with these factors.

(C) Identify any local, state or federal resources that the proposer contemplates requesting for the Project. Describe the total commitment (financial, services, property, etc.), if any, expected from governmental sources; the timing of any anticipated commitment; and its impact on project delivery.

(D) Identify any aspect of the financial model for the Transportation Project that implicates or potentially implicates the restrictions on use of highway-related revenues under Article IX, section 3a of the Oregon Constitution, and explain how the financial model avoids conflicting with those restrictions.

(E) Provide a conceptual estimate of the total cost of the Transportation Project.

(d) TAB 4: Public Support/Project Benefit/Compatibility.

(A) Describe the significant benefits of the Project to the community, region or state and identify who will benefit from the Project and how they will benefit. Identify any state benefits resulting from the Project including the achievement of state transportation policies or other state goals.

(B) Describe significant benefits of the Project to the state's economic condition. Discuss whether the Project is critical to attracting or maintaining competitive industries and businesses to the state or region.

(C) Identify any known or anticipated government support or opposition, or general public support or opposition, for the Project.

(D) Identify all major environmental, social and land use issues that the proposer knows or anticipates must be addressed.

(2) All pages of a Conceptual Proposal shall be numbered. Each copy of the proposal will be bound or otherwise contained in a single volume where practicable. All documentation submitted with the proposal will be contained in that single volume.

(3) A Conceptual Proposal submitted by a Private Entity must be signed by an authorized representative of the Private Entity submitting the unsolicited Conceptual Proposal.

(4) The Proposer shall include a list of any proprietary information included in the proposal which the proposer considers protected trade secrets or other information exempted from disclosure under ORS 367.804 and OAR 731-070-0280 and 0290.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0070

Contents and Format of Detailed Proposal

(1) A Detailed Proposal shall include the following information, unless waived by the Department, separated by tabs as herein described:

(a) TAB 1: Qualifications and Experience.

(A) Identify the legal structure of the private entity or consortium of private entities or of private and public entities (the "Team") submitting the proposal. Identify the organizational structure of the Team for the Project, the Team's management approach and how each Major Partner and Major Subcontractor identified as being a part of the Team as of the date of submission of the proposal fits into the overall Team.

(B) Describe the experience of each private entity involved in the proposed Project. Describe the length of time in business, business experience, public sector transportation experience, PPP experience, development experience, design-build experience and other similarly sized engagements of each Major Partner and Major Subcontractor. The lead entity must be identified.

(C) Provide the names, addresses and telephone numbers of persons within the Team who may be contacted for further information.

(D) Include the address, telephone number, and the name of a specific contact person at a public entity for which the private entity or the Team or the primary members of the Team have completed a development project, public-private partnership project or design-build project.

(E) Include the resumes for those managerial persons within the Team that will likely be associated in a significant way with the Project development and implementation.

(F) Provide financial information regarding the private entity or Team and each Major Partner that includes, if available, the most recent independently audited financial statement of the private entity or Team and of each Major Partner, and which demonstrates their ability to perform the work and Project as set forth in the Detailed Proposal, including ability to obtain appropriate payment and performance bonds.

(G) Submit executed disclosure forms, prescribed by ODOT, for the Team, each Major Partner and any Major Subcontractor.

(b) TAB 2: Project Characteristics.

(A) Provide a detailed description of the Transportation Project or Projects, including all proposed interconnections with other existing transportation facilities or known publicly identified projects. Describe the Project in sufficient detail so the type and intent of the Project, the general location of the Project, and the communities that may be affected by the Project are clearly identified. Describe the assumptions used in developing the Project.

(B) Identify any significant local, state or federal services or practical assistance that the proposer contemplates requesting for the Project. In particular, identify and describe any significant services that will need to be performed by the Department such as right-of-way acquisition or operation and maintenance of the completed Project.

(C) Include a preliminary list of all significant federal, state, regional and local permits and approvals required for the Project. Identify which, if any, permits or approvals are planned to be obtained by ODOT.

(D) List the critical factors for the Project's success.

(E) Identify the proposed preliminary schedule for implementation of the Project.

(F) Describe the assumptions related to ownership, law enforcement and operation of the Project and any facility that is part of the Project.

(G) Describe the payment and performance bonds and guarantees that the Team will provide for the Project.

(H) Identify any public improvements that will be part of the proposed Transportation Project that will constitute "public works" under ORS 279.348, the workers on which must be paid in accordance with Oregon's Prevailing Rate of Wage Law, ORS 279.348 to 279.375, and any public improvements the workers on which must be paid in accordance with the federal Davis-Bacon Act, 40 USC sections 3141 to 3148.

(c) **TAB 3: Project Financing.**

(A) Provide a projected budget for the project based on proposer's prior experience on other projects or other cost projection factors and information.

(B) Include a list and discussion of assumptions (e.g., user fees, toll rates and usage of the facility) underlying all major elements of the plan for the Project.

(C) Identify the proposed risk factors relating to the proposed Project financing and methods for dealing with these factors.

(D) Identify any significant local, state or federal resources that the proposer contemplates requesting for the Project. Describe the total commitment (financial, services, property, etc.), if any, expected from governmental sources; the timing of any anticipated commitment; and its impact on project delivery.

(E) Identify any aspect of the financial model for the Transportation Project that implicates or potentially implicates restrictions on the use of highway-related revenues under Article IX, section 3a of the Oregon Constitution, and explain how the financial model avoids conflicting with those restrictions.

(F) Identify the form of the Private Contribution and the members of the Team that will make the Private Contribution and the proposed compensation for such Private Contribution.

(G) Provide an explanation of how funds for the Transportation Project will be segregated, accounted for and expended in a manner that ensures that any moneys from the state highway fund will be expended exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in Oregon, as required by Article IX, section 3a(1), of the Oregon Constitution.

(H) Identify, to the extent possible, proposed financing team members, including banks, investment banks, equity investors, credit enhancement providers, bond trustees and legal counsel to the same.

(d) **TAB 4: Public Support/Project Benefit/Compatibility.**

(A) Identify who will benefit from the Project, how they will benefit and how the Project will benefit the overall transportation system.

(B) Identify any anticipated government support or opposition, or general public support or opposition, for the Project.

(C) Explain the strategy and plans that will be carried out to involve and inform the agencies and the public in areas affected by the Project.

(D) Describe the significant social and economic benefits of the Project to the community, region or state and identify who will benefit from the Project and how they will benefit. Identify any state benefits resulting from the Project including the achievement of state transportation policies or other state goals.

(f) **TAB 5: Special Deliverables.**

(A) Provide a statement setting out the plan for securing all necessary real property, including proposed timeline for any necessary acquisitions.

(B) Provide proposed design, construction and completion guarantees and warranties.

(C) Include traffic studies and/or forecasts and related materials that establish project revenue assumptions, including, if any, user fees or toll rates, and usage of the facility.

(D) Provide such additional material and information as ODOT may reasonably request.

(2) All pages of a proposal shall be numbered. Each copy of the proposal will be bound or otherwise contained in a single volume where practicable. All documentation submitted with the proposal will be contained in that single volume.

(3) A proposal submitted by a Private Entity must be signed by an authorized representative of the Private Entity submitting the proposal.

(4) The Proposer shall include a list of any proprietary information included in the proposal which the proposer considers protected trade secrets or other information exempted from disclosure under ORS 367.804 and OAR 731-070-0280 and 731-070-0290.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0080

Additional Proposer Organizational Disclosure Requirements

(1) In addition to the disclosure requirements of OAR 731-070-0060(1)(a) and 0070(1)(a), the Director or the Director's designee may impose, after the submission of a proposal, any other special disclosure requirements the Director determines to be reasonably necessary to evaluate the expertise, experience, financial backing, integrity, ownership and control of any proposer.

(2) All proposers must provide all the information required by this rule and the Director. All proposers and Key Persons must complete and submit the required disclosure form within the deadlines set by the director or the director's designee. All proposers and Key Persons must provide any documents required in the disclosure process, or other documents as determined by the Director, or their proposals may be rejected by ODOT.

(3) ODOT may reject, or require the supplementation of, a proposal if the proposer has not provided all information required in the disclosure form or if any information provided is not accurate, current or truthful. The failure or refusal of any proposer to properly execute, fully complete, or accurately report any information required by the required disclosure shall be sufficient grounds for rejection of the proposal.

(4) Any change in the status of the proposer, in the identity of any of the Key Persons, or the addition of any Key Persons must be reported to the Department within thirty (30) days of the known change, and those whose status has changed or who have been added as Key Persons will be required to submit the required disclosure information. For purposes of this section, a "change in the status of a proposer" means a reorganization of the business structure or corporate structure of the proposer or a Major Partner, or a change in ownership of the proposer or a Major Partner amounting to a transfer of over twenty percent of the entity's ownership.

(5) The burden of satisfying ODOT's disclosure requirements, both in terms of producing the disclosures and assuring their accuracy and completeness, resides with each proposer.

(6) Each proposer, by submitting a proposal, thereby accepts all risk of adverse public notice, damages, financial loss, criticism or embarrassment that may result from any disclosure or publication of any material or information required or requested by the department in connection with the proposer's submission of a proposal. In submitting a proposal, the proposer expressly waives, on behalf of itself, its partners, joint venturers, officers, employees and agents, any claim against the director, the State of Oregon, the Oregon Transportation Commission, ODOT, and their officers and employees, for any damages that may arise therefrom.

(7) An Agency that submits a proposal may, prior to submission, request ODOT to waive the disclosure requirements of this rule with respect to the corporate public entity and its officers. However, if the Agency proposes to enter into or establish a partnership or joint venture with a private party to perform any substantial portion of the proposed Project (as opposed to the engagement of only a prime contractor or subcontractors), then disclosure of the private party must be made as if the private party is a proposer, in accordance with this rule.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0110

Initial Review of Unsolicited Conceptual Proposals

(1) An unsolicited Conceptual Proposal submitted under OAR 731-070-0050 will be reviewed by an Initial Review Committee (IRC), which shall be appointed by the Director from Department personnel.

(2) The IRC will assess:

(a) Whether the proposal is complete;

(b) Whether the proposer is qualified;

(c) Whether the proposal appears to satisfy the requirements of OAR 731-070-0060;

(d) Whether the project as proposed appears to be technically and financially feasible;

(e) Whether the project as proposed appears to have the potential of enhancing the state transportation system; and

(f) Whether the project as proposed appears to be in the public interest.

(3) The IRC will report the results of its assessment to the Director. Based on this assessment, the Director will determine whether the proposal satisfies the requirements of section (2) of this rule. If the Director determines that the proposal satisfies the requirements set out in section (2) of this rule, the Director will forward a recommendation concerning the proposal to the Commission for preliminary review and approval. The recommendation will not include sensitive business, commercial or financial information or trade secrets as described in 731-070-0290.

Stat. Auth.: ORS 184.616, 184.619, 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0120

Commission Preliminary Review of Unsolicited Conceptual Proposals

At the first regular meeting of the Oregon Transportation Commission following a determination by the Director under OAR 731-070-0110 that an unsolicited Conceptual Proposal merits further review, the Commission will review the recommendation and approve or disapprove the proposal for further evaluation and action by ODOT under ORS 367.800 to 367.826 and OAR chapter 731, division 70.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0130

Competing Proposals

(1) Within 30 days of the Commission's preliminary approval of an unsolicited Conceptual Proposal under OAR 731-070-0120, ODOT shall provide public notice of the proposed project. This notice shall:

(a) Be published in a newspaper of general circulation and upon such electronic website providing for general public access as ODOT may develop for such purpose;

(b) Be provided to any county, city, metropolitan service district, or transportation district in which the project will be located;

(c) Be provided to any person or entity that expresses in writing to ODOT an interest in the subject matter of the unsolicited Conceptual Proposal and to any member of the Legislature whose House or Senate district would be affected by such proposal;

(d) Outline the general nature and scope of the unsolicited Conceptual Proposal, including the location of the transportation project and the work to be performed on the project; and

(e) Specify the address to which any competing Conceptual Proposal must be submitted.

(2) Any entity that elects to submit a competing proposal for the proposed project shall submit a written letter of intent to do so not later than 30 calendar days after ODOT's initial publication of notice. Any letter of intent received by ODOT after the expiration of the 30-day period shall not be valid and any competing proposal submitted thereafter by a private or governmental entity that has not submitted a timely letter of intent shall not be considered by ODOT.

(3) An entity that has submitted a timely letter of intent must submit its competing proposal to ODOT not later than 90 calendar days after ODOT's initial publication of notice under section (1) of this rule, or such other time as ODOT states in the notice. The competing proposal must:

(a) Be signed by an authorized representative of the proposer;

(b) Be accompanied by the processing fee for Conceptual Proposals required under OAR 731-070-0055(1); and

(c) Include the information and be organized in the manner required of an unsolicited Conceptual Proposal under OAR 731-070-0060.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0140

Evaluation of Unsolicited and Competing Conceptual Proposals

(1) **Evaluation Panel.** An Evaluation Panel shall be appointed by the Director and shall consist of not fewer than five nor more than nine members, at least three of whom shall be employees of the Department.

(2) **Evaluation Panel Review.** After expiration of the time to submit competing Conceptual Proposals to an unsolicited Conceptual Proposal, the Evaluation Panel will review the competing proposals to determine whether they satisfy the requirements of OAR 731-070-0050 and qualify for full evaluation.

(3) **Competing or Non-Competing Proposals.** As part of its initial review of Competing Proposals under section (2) of this rule, the Evaluation Panel shall make a preliminary assessment whether any of the Competing Proposals differ from the original unsolicited Conceptual Proposal in such a significant and meaningful manner that they should be treated as an original unsolicited Conceptual Proposal. If the Evaluation Panel believes that a proposal submitted as a competing proposal should be treated as an original unsolicited Conceptual Proposal and that it satisfies the requirements of OAR 731-070-0050, the Evaluation Panel shall forward the proposal to the Director, who shall determine whether the proposal should be submitted to the Commission for preliminary review and approval under OAR 731-070-0120, and the proposal shall thereafter be processed under these rules in the same manner as an unsolicited Conceptual Proposal.

(4) **Proposer Presentations.** At any time during this evaluation process, the Evaluation Panel may request proposers to make presentations to the Panel. Proposers shall be afforded not less than ten (10) business days following written notification from the Panel to prepare such presentations. The format of these presentations will include a formal presentation by the proposer, followed by any questions the Evaluation Panel may have pertaining to the project proposal or the presentation. These meetings will allow the Evaluation Panel to seek clarification of project elements and complete deliverable requirements, and provide proposers with the opportunity to further explain their proposed projects. If there is an issue to which the proposer is unable to respond during the formal presentation, the Evaluation Panel may, at its discretion, grant the proposer a reasonable period of time in which to submit a written response.

(5) **Evaluation Factors.** The Evaluation Panel shall assess the original unsolicited Conceptual Proposal and qualifying Competing Proposals based on the following factors:

(a) **Qualifications and Experience.** Does the proposer propose a team that is qualified, managed, and structured in a manner that will enable the team to complete the proposed project?

(A) **Experience with Similar Infrastructure Projects.** Have members of this team previously worked together or in a substantially similar consortium or partnership arrangement constructing, improving or managing transportation infrastructure? Has the lead firm managed, or any of the member firms worked on, a similar privatization project?

(B) **Demonstration of Ability to Perform Work.** Does the team possess the necessary financial, staffing, equipment, and technical resources to successfully complete the project? Do the team and/or member firms have competing financial or workforce commitments that may inhibit success and follow-through on this project?

(C) **Leadership Structure.** Is one firm designated as lead on the project? Does the organization of the team indicate a well thought out approach to managing the project? Is there an agreement/document in place between members?

(D) **Project Manager's Experience.** Is a Project Manager identified, and does this person work for the principal firm? If not, is there a clear definition of the role and responsibility of the Project Manager relative to the member firms? Does the Project Manager have experience leading this type and magnitude of project?

(E) **Management Approach.** Have the primary functions and responsibilities of the management team been identified? Have the members of the team developed an approach to facilitate communication among the project participants? Has the firm adequately

described its approach to communicating with and meeting the expectations of the state?

(F) **Financial Condition.** Is the financial information submitted on the firms sufficient to determine the firms' capability to fulfill its obligations described in the project proposal, and is that capability demonstrated by the submitted information?

(G) **Project Ownership.** Does the proposal identify the proposed ownership arrangements for each phase of the project and clearly state assumptions on legal liabilities and responsibilities during each phase of the project?

(H) **Participation of Small Businesses and Businesses Owned by Women and Minorities.** What is the level of commitment by the proposers to use small, minority-, and women-owned business enterprises in developing and implementing the project?

(I) **Competitive Subcontracting.** To what extent have adequate and transparent procurement policies been adopted by the proposer to maximize opportunities for competitive procurement of work, services, materials and supplies that the proposer will outsource?

(b) **Project Characteristics.** Is the proposed transportation facility technically feasible?

(A) **Project Definition.** Is the project described in sufficient detail to determine the type and size of the project, the location, all proposed interconnections with other transportation facilities, the communities that may be affected, and alternatives (e.g. alignments) that may need to be evaluated?

(B) **Proposed Project Schedule.** Is the time frame for project completion clearly outlined? Is the proposed schedule reasonable given the scope and complexity of the project?

(C) **Operation.** Does the proposer present a reasonable statement setting forth plans for operation of the project or facilities that are included in the project?

(D) **Technology.** Is the proposal based on proven technology? What is the degree of technical innovation associated with the proposal? Will the knowledge or technology gained from the project benefit other areas of the state or nation? Does the technology proposed maximize interoperability with relevant local and statewide transportation technology? Can the proposed project upgrade relevant local technology?

(E) **Conforms to Laws, Regulations, and Standards.** Is the proposed project consistent with applicable state and federal statutes and regulations, or reasonably anticipated modifications of state or federal statutes, regulations or standards? Does the proposed design meet applicable state and federal standards?

(F) **Federal Permits.** Is the project outside the purview of federal oversight, or will it require some level of federal involvement due to its location on the National Highway System or Federal Interstate System or because federal permits are required? Does the Proposal identify the primary federal permits and agencies that will be involved in review and oversight of the project?

(G) **Meets/Exceeds Environmental Standards.** Is the proposed project consistent with applicable state and federal environmental statutes and regulations? Does the proposed design meet applicable state environmental standards? Does the proposal adequately address air quality issues?

(H) **State and Local Permits.** Does the proposal list the required permits and provide a schedule for obtaining them? Are there known or foreseeable negative impacts arising from the project? If so, is there a mitigation plan identified? Are alternatives to standards or regulations needed to avoid those impacts that cannot be mitigated?

(I) **Right of Way.** Does the proposal set forth a method or plan to secure all property interests required for the transportation project?

(J) **Maintenance.** Does the proposer have a plan to maintain any facilities that are part of the proposed transportation project in conformance with department standards? Does the proposal clearly define assumptions or responsibilities during the operational phase including law enforcement, toll collection and maintenance? Under the proposal, will maintenance and operation of any new facilities be consistent with standards applied throughout the highway system and use the same work-forces and methods?

(c) **Project Financing.** Has the proposer provided a financial plan which will allow for access to the necessary capital to make a substantial contribution of non-state, private-sector, or other innovative financing resources to the financing of the facility or project?

(A) **Financing.** Did the proposer demonstrate evidence of its experience, ability and commitment to provide a sufficient private-sector contribution or other innovative financing contribution of funds or resources to the project as well as the ability to obtain the other necessary financing?

(B) **Financial Plan.** Does the financial plan demonstrate a reasonable basis for funding project development and operations? Are the assumptions on which the plan is based well defined and reasonable in nature? Are the plan's risk factors identified and dealt with sufficiently? Are the planned sources of funding and financing realistic? Is the proposer prepared to make a financial contribution to the project? Does the proposer adequately identify sources of non-state funding that it anticipates including in the project financing, and does the proposer provide adequate assurance of the availability of those funds and the reliability of the funding sources?

(C) **Estimated Cost.** Is the estimated cost of the project reasonable in relation to the cost of similar projects?

(D) **Life Cycle Cost Analysis.** Does the proposal include an appropriately conducted analysis of projected rate of return and life-cycle cost estimate of the proposed project and/or facility?

(E) **Business Objective.** Does the proposer clearly articulate its reasons for pursuing this project? Do its assumptions appear reasonable?

(d) **Public Support.** Has the proposer demonstrated sufficient public support for the proposed project or proposed a reasonable plan for garnering that support?

(A) **Community Benefits.** Will this project bring a significant transportation and economic benefit to the community, the region, and/or the state? Are there ancillary benefits to the communities because of the project?

(B) **Community Support.** What is the extent of known support or opposition for the project? Does the project proposal demonstrate an understanding of the national and regional transportation issues and needs, as well as the impacts this project may have on those needs? Is there a demonstrated ability to work with the community? Have affected local jurisdictions expressed support for the project?

(C) **Public Involvement Strategy.** What strategies are proposed to involve local and state elected officials in developing this project? What level of community involvement is contemplated for the project? Is there a clear strategy for informing and educating the public and for obtaining community input throughout the development and life of the project?

(e) **Project Compatibility.** Is the proposed project compatible with, or can it be made compatible with state and local comprehensive transportation plans?

(A) **Compatibility with the Existing Transportation System.** Does this project propose improvements that are compatible with, or that can be made compatible with, the present and planned transportation system? Does the project provide continuity with existing and planned state and local facilities?

(B) **Fulfills Policies and Goals.** Does the proposed project help achieve performance, safety, mobility or transportation demand management goals? Does the project improve connections among the transportation modes?

(C) **Enhance Community-Wide Transportation System.** Has the proposer identified the specific way in which the project benefits affected community transportation systems? Does this project enhance adjacent transportation facilities?

(D) **Conformity with Local, Regional and State Transportation Plans.** Does the project conform with, or can it achieve conformity with, city and county comprehensive plans and regional transportation plans? Does the project conform with, or can it achieve conformity with, plans developed by the Oregon Transportation Commission under ORS 184.618 and any applicable regional transportation plans or local transportation programs? If not, are the steps proposed under OAR 731-070-0060(1)(b) to achieve conformity with such plans adequate and appropriate to provide a

high likelihood that the project and the applicable plans can be brought into conformity?

(E) **Economic Development.** Will the proposed project enhance the state's economic development efforts? Is the project critical to attracting or maintaining competitive industries and businesses to the region, consistent with stated objectives?

(6) **Factors for Proposals that Include Tolling.** If the project financing component of a proposal includes a plan to impose tolls, the Evaluation Panel shall specifically consider:

(a) The opinions and interests of units of government encompassing or adjacent to the path of the proposed tollway project in having the tollway installed;

(b) The probable impact of the proposed tollway project on local environmental, aesthetic and economic conditions and on the economy of the state in general;

(c) The extent to which funding other than state funding is available for the proposed tollway project and the extent to which resources other than tolls would be required to be established and/or maintained as necessary security to support such a financing.

(d) The likelihood that the estimated use of the tollway project will provide sufficient revenues to independently finance the costs related to the construction and future maintenance, repair and reconstruction of the tollway project, including the repayment of any loans to be made from moneys in the State Tollway Account or other accounts;

(e) With respect to tollway projects, any portion of which will be financed with state funds or department loans or grants:

(A) The relative importance of the proposed tollway project compared to other proposed tollways; and

(B) Traffic congestion and economic conditions in the communities that will be affected by competing tollway projects; and

(f) The effects of tollway implementation on other major highways in the state system and on community and local street traffic.

(7) Evaluation Panel Recommendation.

(a) For any Conceptual Proposal that receives a favorable evaluation, the Evaluation Panel will prepare a written determination, based on facts and circumstances presented in the proposal or known to ODOT, that the proposal merits development into a Detailed Proposal.

(b) In its written determination regarding any Conceptual Proposal, the Evaluation Panel may specify conditions that it recommends the proposer be required to satisfy before proceeding to develop a Detailed Proposal. By way of example, such conditions may include, but are not limited to:

(A) Requiring the proposer to provide additional information or clarification concerning elements or parts of its Conceptual Proposal;

(B) Requiring the proposer to develop and submit additional information confirming the technical feasibility of the proposed Transportation Project;

(C) Requiring the proposer to develop and submit additional information confirming that the proposed Transportation Project complies with or can be brought into compliance with relevant local and state transportation plans, restrictions on property use, and environmental laws, or that the Transportation Project and the applicable plans, restrictions and environmental laws can otherwise be brought into conformity;

(D) Requiring the proposer to commit in writing, to ODOT, to undertake good faith efforts to modify or adjust in specific ways, in the Detailed Proposal, the Transportation Project that was the subject of the Conceptual Proposal to incorporate steps, characteristics or features that ODOT identifies as necessary or desirable to enhance the feasibility, public acceptance, transportation efficiency, or economy in execution or operation, of the Transportation Project;

(E) Otherwise requiring the proposer to develop and present revisions to, or alternatives within, the Detailed Proposal that will permit ODOT to obtain best value based on the requirements and evaluation criteria set forth in the notice or request for Conceptual Proposals and based on knowledge obtained by ODOT by virtue of its review and evaluation of the Conceptual Proposals; and

(F) Requiring the proposer to enter into an interim agreement, on terms satisfactory to the proposer and ODOT, under which pro-

poser will provide services to ODOT in connection with the development of the Detailed Proposal or further development of the project, including assistance to ODOT in obtaining any necessary regulatory approvals.

(c) The Evaluation Panel will report its assessments and recommendations to the Director. The Director will review the Evaluation Panel's assessments and recommendations and determine whether to forward any of them to the Commission.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0160

Use of a Process that Permits ODOT Feedback and Ability of Proponents to Supplement/Refine Proposals after Initial Submission; ODOT Authority to Elect Competitive Negotiations.

(1) **For Original Unsolicited Proposals:** ODOT reserves the right, to be exercised in its sole and absolute discretion, to require or to permit proposers to submit, at any time, revisions, clarifications to, or supplements of their previously submitted proposals. ODOT may, in the exercise of this authority, require proposers to add features, concepts, elements, information or explanations that were not included in their initial proposals, and may require them to delete features, concepts, elements, information or explanations that were included in their initial proposals. A proposer will not be legally bound to accept a request to add to or delete from a proposal any feature, concept, element or information, but its refusal to do so in response to a request by ODOT shall constitute sufficient grounds for ODOT to elect to terminate consideration of its proposal.

(2) For Competing Proposals:

(a) After ODOT's opening and review of competing proposals, ODOT may issue or electronically post an addendum to the request for competing proposals that:

(A) Requires proposers to address or add physical features or elements, and information or explanations that were not included in their initial proposals; or

(B) Requires proposers to delete physical features or elements that were included in their initial proposals; or

(b) ODOT will send any such addendum that it issues by a method other than electronic posting to all proposers who are eligible to compete under the particular competing proposal process.

(c) ODOT will issue or electronically post an addendum issued under this section. The addendum will contain a deadline by which the proposers must submit to ODOT any additions to, modifications or deletions from their proposals.

(d) A proposer will not be legally bound to accept a request to add to or delete from a proposal any feature, element or information or explanation, but its refusal to do so in response to an addendum issued by ODOT shall constitute sufficient grounds for ODOT to elect to terminate consideration of the proposer's competitive proposal and also may be considered by ODOT in determining the proposer to be selected as the result of the competing proposal process.

(3) ODOT Authority to Elect Competitive Negotiations:

(a) In addition to ODOT's ability to exercise any alternative selection or contracting process permitted under this rule or OAR 731-070-0270(2), ODOT may authorize, at its option, competitive negotiations with multiple proposers as a means of selecting from among Competing Proposals solicited under OAR 731-070-0130, or from among Detailed Proposals requested under OAR 731-070-0270(2)(b). Negotiations under this section are part of the proposal evaluation process and do not constitute the negotiation of a Transportation Project agreement.

(b) ODOT may announce its election to conduct competitive negotiations:

(A) In any notice issued for Competing Proposals under OAR 731-070-0130;

(B) In any request for the submission of Detailed Proposals under OAR 731-070-0270(2); or

(C) By written notice, by mail or by electronic means, to the proposers, issued at any time following ODOT's receipt of proposals under OAR 731-070-0130 or 731-070-0270(2).

(c) In any communication under subsection (3)(b) of this rule, or by notice to the proposers issued by mail or by electronic means at any time after the receipt of proposals, ODOT may announce that it will initiate competitive negotiations with all proposers who submitted responsive proposals, or only with proposers who qualify to negotiate because ODOT has determined that their proposals fall within a competitive range.

(d) When ODOT elects to negotiate only with proposers within a competitive range, then after ODOT's evaluation of proposals in accordance with the criteria set forth in the notice or request for proposals, ODOT will determine the proposers in the competitive range.

(A) For purposes of this section (3), the proposers in the competitive range consist of those proposers whose proposals, as determined by ODOT in its discretion, have a reasonable chance of being determined the best proposal as the result of the preliminary evaluation conducted under subsection (3)(d). In determining which proposals fall within the competitive range, ODOT may consider whether its preliminary evaluation of proposals establishes a natural break in the preliminary scores of the proposals that suggests those proposals that are sufficiently competitive to be included in the competitive range.

(B) ODOT will provide written notice to all proposers, by mail or by electronic means, of the proposals ODOT determines to fall within the competitive range. A proposer whose proposal is not within the competitive range may submit a written protest of ODOT's evaluation and determination of the competitive range within 14 calendar days after the date of ODOT's notice. A proposer's written protest must state facts and argument that demonstrate how the competitive range determination was flawed or how ODOT's determination constituted an abuse of discretion. If ODOT receives no written protest concerning the proposed selection listing within the 14 calendar day period, then ODOT will proceed with negotiations with the proposers whose proposals fell within the competitive range.

(C) In response to a timely filed protest, ODOT will issue a written decision that resolves the issues raised in the protest. ODOT will make its written determination available, by mail or by electronic means, to the protesting proposer and to the proposers falling within the competitive range. ODOT's written decision under this subsection shall constitute a final order under ORS 183.484.

(e) The object of competitive negotiations, which ODOT may conduct concurrently with more than one proposer or serially, is to maximize ODOT's ability to obtain best value and to permit proposers to develop revised proposals. Therefore, the negotiations may include, but shall not be limited to:

(A) Informing proposers of deficiencies in their proposals;

(B) Notifying proposers of parts of their proposals for which ODOT would like additional information; and

(C) Otherwise allowing proposers to develop revised proposals that will permit ODOT to obtain the best proposal based on the requirements and evaluation criteria set forth in the notice or request for proposals.

(f) The scope, manner and extent of negotiations with any proposer are subject to the discretion of ODOT. To prevent the disclosure of proposal information to a proposer's competitors, ODOT shall conduct negotiations with proposers before the subject proposals, information about the proposed Transportation Project, or proposal information have been shared with other government entities under ORS 367.804(5)(a). In conducting negotiations, ODOT:

(A) Shall treat all proposers fairly and shall not engage in conduct that favors any proposer over another;

(B) Shall not reveal to another proposer a proposer's unique technology, unique or innovative approaches to Transportation Project design, management or financing, or any information that would compromise the proposer's intellectual property, trade secrets or sensitive business information; or

(C) Shall not reveal to another proposer a proposer's price or pricing information, provided, however, that ODOT may inform a proposer that ODOT considers a proposer's price or pricing information to be too high or too low.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0170

Protests of Rejection of Proposal/Award of Contract to Competitor in Competing Proposals Context

(1) At least fourteen (14) calendar days prior to the final selection of the successful proposer in any competitive proposal selection process, ODOT will give, electronically or otherwise, written notice to all participating proposers of ODOT's apparent selection of the successful proposer. A proposer who would be adversely affected by the selection announced in the notice may, within the 14-day period, submit to ODOT a written protest of the selection of the apparent successful proposer.

(2) For purposes of this rule, a protesting proposer is adversely affected by a selection only if the proposer has submitted a responsive competing proposal and is next-in-line for selection. In other words, the protesting proposer must demonstrate that all higher-scoring proposers are ineligible for selection because either:

(a) The higher-scoring proposals were not responsive to the requirements stated in ODOT's notice requesting competing proposals; or

(b) ODOT committed a substantial violation of a provision in ODOT's notice requesting competing proposals, in these rules, or in ORS 367.800 to 367.826, or otherwise abused its discretion, in evaluating the competing proposals.

(3) A proposer's written protest must state facts and argument that demonstrate how the selection process was flawed or how ODOT's selection of the apparent successful proposer constituted an abuse of ODOT's discretion. If ODOT receives no written protest concerning the proposed selection listing within the 14-day period, then the selection of the successful proposer automatically shall become effective on the fifteenth (15th) calendar day after ODOT first transmitted or otherwise delivered its written notice of the apparent successful proposer.

(4) In response to a proposer's timely filed protest that complies with this rule, ODOT will issue a written decision that resolves the issues raised in the protest. In considering a timely protest, ODOT may request further information from the protesting proposer and from the apparent successful proposer identified in ODOT's notice issued under subsection (1) of this rule. ODOT will make its written determination available, by mail or by electronic means, to the protesting proposer and to the apparent successful proposer identified in ODOT's notice issued under subsection (1) of this rule. ODOT's written decision under this subsection shall constitute a final order under ORS 183.484.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0180

Commission Review and Selection of Proposals

The Commission shall review the evaluations of Conceptual Proposals forwarded by the Director under OAR 731-070-0140(7). Based on that review the Commission shall:

(1) Select one Conceptual Proposal for development of a Detailed Proposal;

(2) Select one Conceptual Proposal for development of a Detailed Proposal subject to the proposer's satisfaction of specified conditions; or

(3) Reject all Conceptual Proposals.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0190

Detailed Proposal

(1) Upon the Commission's selection of a Conceptual Proposal under OAR 731-070-0180(1) for further evaluation and on completion of the protest period, ODOT shall notify the proposer to submit a Detailed Proposal complying with the requirements of OAR 731-070-0070.

(2) Upon the Commission's provisional selection subject to satisfaction of conditions of a Conceptual Proposal under OAR 731-070-0180(2) for development of a Detailed Proposal and on completion of the protest period, ODOT shall notify the proposer of the

conditions. The proposer shall have twenty-one (21) calendar days from receipt of the Commission's notification to elect to proceed under specified conditions. If the proposer elects to proceed, ODOT shall work with the proposer to develop a plan for satisfying the conditions. If the plan entails entry into an interim "agreement" within the meaning of ORS 367.802(1), the agreement will conform to all relevant requirements of ORS 367.800 to 367.826.

(3) After the Commission's selection or provisional selection of a Conceptual Proposal and until submission of the Detailed Proposal, ODOT and the proposer may confer on any matter pertinent to development of the Detailed Proposal.

(4) The Evaluation Panel, as supplemented by consultants retained by ODOT, shall review the Detailed Proposal to ensure compliance with the requirements of ORS 731-070-0070. The Evaluation Panel shall evaluate the Detailed Proposal based on the factors set forth in ORS 731-070-0140(5) and any additional factors consistent with the intent and goals of the OPPI legislation, but the weighting and final decision is subject to the sole discretion of the Evaluation Panel.

(5) Upon completion of its review of the Detailed Proposal, the Evaluation Panel will recommend to the Director whether the Detailed Proposal should be advanced to a final agreement.

(6) After receipt of the Evaluation Panel's recommendation, the Director shall either accept or reject the Evaluation Panel's recommendation, and if accepted, the Director shall submit to the Oregon Transportation Commission the Detailed Proposal, as modified, if applicable, with a recommendation that the Detailed Proposal constitutes an acceptable basis for an agreement to enter into a public-private partnership with the proposer.

(7) After receipt of the selection from the Director, the Oregon Transportation Commission shall either approve or disapprove the Detailed Proposal selected by the Director for negotiation of a final agreement.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

Agreements for Transportation Projects

731-070-0200

Negotiation of Agreement

(1) A Detailed Proposal selected by the Commission for negotiation of a final agreement shall be referred to a working group appointed by the Director. The working group shall be responsible for negotiating the final agreement with the proposer. Each final agreement will define the rights and obligations of ODOT and the respective proposer with regard to the transportation project. The final agreement must include provisions specifying at least the following:

(a) At what point in the transportation project public and private sector partners will enter the project and which partners will assume responsibility for specific project elements;

(b) How the partners will share management of the risks of the project;

(c) How the partners will share the costs of development of the project;

(d) How the partners will allocate financial responsibility for cost overruns;

(e) The penalties for nonperformance;

(f) The incentives for performance;

(g) The invoicing and payment procedures and schedules to be followed, and the accounting and auditing standards to be used to evaluate work on the project; and

(h) Whether the project is consistent with the plan developed by the Oregon Transportation Commission under ORS 184.618 and any applicable regional transportation plans or local transportation programs and, if not consistent, how and when the project will become consistent with applicable plans and programs.

(2) If public moneys are used to pay any costs of construction of public works that is part of a transportation project, the construction contract shall contain provisions that require payment of

workers under the contract in accordance with ORS 279.334 and 279.348 to 279.380.

(3) An agreement for the construction of a public improvement as part of a transportation project shall approved for bonding, financial guarantees, deposits or the posting of other security to secure the payment of laborers, subcontractors and suppliers who perform work or provide materials as part of the project.

(4) The working group shall consider whether to implement procedures to promote competition among subcontractors for any subcontracts to be let in connection with the transportation project. As part of its request for approval of the agreement by the Commission under OAR 731-070-0230, the working group shall report in writing to the Commission its conclusions regarding the appropriateness of implementing such procedures.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0210

ODOT Objection to Subcontractors

(1) Prior to the execution of any contract with a proposer, the proposer must provide ODOT a list of all Major Subcontractors who will perform work in the construction, operation or maintenance of the Project. All subcontractors must be legally eligible to perform or work on public contracts under federal and Oregon law and regulations. No subcontractor will be accepted who is on the list of contractors ineligible to receive public works contracts under ORS 279.361.

(2) If ODOT has reasonable objection to any proposed subcontractor, ODOT is authorized to require, before the execution of a contract, an apparently successful proposer to submit an acceptable substitute. In such case, the proposer must submit an acceptable substitute, and the contract may, at ODOT's discretion, be modified to equitably account for any difference in cost necessitated by the substitution. ODOT will permit a maximum of fourteen (14) calendar days from the date of ODOT's written demand for substitution which to make an acceptable substitution. A proposer's failure to make an acceptable substitution at the end of the 14-day period will constitute sufficient grounds for ODOT to refuse to execute a contract without incurring any liability for the refusal. However, if the proposer had identified such a Major Subcontractor in its Detailed Proposal as an equity contributor to the Project, or the Major Subcontractor had committed other financial support that had been relied on by the proposer, then the proposer shall be granted a period of sixty (60) business days to identify an acceptable substitute. Following such identification, the proposer shall be granted an additional thirty (30) business days to conclude negotiations of acceptable terms and conditions with that substitute Major Subcontractor.

(3) ODOT will not require any proposer to engage any subcontractor, supplier, other person or organization against whom the proposer has reasonable objection.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0220

Legal Sufficiency Review of Final Agreement

On completion of a final agreement, the Attorney General will review it for legal sufficiency under ORS 291.047 and OAR chapter 137, division 045. When conducting that review, the Attorney General shall:

(1) Recognize that the agreement is the product of a partnership; and

(2) Defer to the business judgment of the department and the Oregon Transportation Commission concerning the assignment of risks and the incentives provided within the agreement.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0230

Commission Review of Final Agreement

On completion of the Attorney General's legal sufficiency review of the final agreement, the Commission shall:

- (1) Approve the final agreement;
 - (2) Reject the final agreement; or
 - (3) Return the final agreement to the working group for further negotiation on issues the Commission specifies.
- Stat. Auth.: ORS 184.616, 184.619 & 367.824
 Stat. Implemented: ORS 367.800 - 367.824
 Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

Solicitation of Proposals for OIPP Projects

731-070-0240

Commission Selection of Projects for Solicitation of Proposals

ODOT may solicit Proposals for a public-private partnership approach to planning, acquiring, financing, developing, designing, managing, constructing, reconstructing, replacing, improving, maintaining, repairing, leasing and/or operating a transportation project if the Commission has determined that such an approach has the potential to accelerate cost-effective delivery of the project or promote innovative approaches to carrying out the project.

Stat. Auth.: ORS 184.616, 184.619 & 367.824
 Stat. Implemented: ORS 367.800 - 367.824
 Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0250

Solicitation Documents

The Request for Proposals for a public-private transportation project approved for solicitation under OAR 731-070-0240 shall include the following:

- (1) General Information.
 - (a) Notice of any pre-proposal conference as follows:
 - (A) The time, date and location of any pre-proposal conference;
 - (B) Whether attendance at the conference will be mandatory or voluntary; and
 - (C) 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 proposers must be prequalified if prequalification is a requirement;
 - (c) The name and title of the authorized agency person designated for receipt of proposals and contact person (if different);
 - (d) Instructions and information concerning submission requirements including the address of the office to which proposals must be delivered and any other special information, e.g., whether proposals may be submitted by Facsimile or Electronic Data Interchange;
 - (e) The time, date and place of opening of proposals;
 - (f) The time and date of closing after which ODOT will not accept proposals, 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 30 days unless ODOT finds a shorter interval is in the public's interest;
 - (g) The form and submission of proposals and any information required therein;
 - (h) If the agreement 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 USC sections 3141 to 3148**), a statement that no proposal will be received or considered by ODOT unless the proposal contains a statement by the proposer, as a part of its proposal, that proposer agrees to be bound by and will comply with the provisions of ORS 279.350 or **40 USC sections 3141 to 3148**;
 - (i) If the project so requires, a statement that ODOT will not receive or consider a proposal 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;
 - (j) Whether a contractor or a subcontractor under the contract must be licensed under ORS 468A.720;
 - (k) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279.111. (See OAR 731-005-0245(3)); and

(1) How ODOT will notify proposers of Addenda and how ODOT will make Addenda available.

(2) Agency Need. A description of the transportation project for which ODOT is requesting proposals for a public-private partnership in such detail as ODOT considers appropriate or feasible under the circumstance.

(3) Evaluation process:

(a) A statement that ODOT may reject any proposal not in compliance with all prescribed procedures and requirements and other applicable laws, and that the rights reserved to ODOT in the consideration of unsolicited and competing proposals under OAR 731-070-0300 to 731-070-0330 apply equally to proposals submitted in response to the Request for Proposal;

(b) The anticipated solicitation schedule, deadlines, protest process, and evaluation process, if any; and

(c) Evaluation criteria that ODOT will use to select a proposal from among those submitted in response to the Request for Proposals.

(4) All contract terms and conditions, including warranties and bonding requirements, ODOT considers necessary, and including 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.

(5) 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 state law.

(6) 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, 184.619 & 367.824
 Stat. Implemented: ORS 367.800 - 367.824
 Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0260

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 the 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 proposals, unless the Contract Review Authority has exempted the solicitation from the advertisement requirement.

(a) Unless ODOT publishes by Electronic Advertisement as permitted under subsection (b) of this section, ODOT shall publish the advertisement for proposals 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 proposals 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 proposers. 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 the Department will publish advertisements for proposals 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 (a) of this section.

(c) In addition to ODOT's publication required under subsection (a) or (b) of this section, ODOT shall also publish advertisement for proposals in at least one trade newspaper of general statewide circulation if the transportation project includes or contemplates a Public Improvement with an estimated cost in excess of \$125,000.

(d) All advertisements for proposals 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 proposals;

(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. sections 3141 to 3148**).

(3) Posting Advertisement for Proposals. ODOT shall post a copy of each advertisement for proposals at the principal business office of ODOT. A proposer may obtain a copy of the advertisement for proposals 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 project cost exceeds \$5,000.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0270

Evaluation and Selection of Solicited Proposals

(1) Proposals received pursuant to a solicitation under OAR 731-070-0240 to 731-070-0260 shall be evaluated and a proposal selected for development of a Detailed Proposal in the same manner as and under the procedures established under OAR 731-070-0060 to 731-070-0180 for unsolicited proposals, unless and except as otherwise specified in the solicitation. It is provided, however, that the evaluation procedure also will comply with the requirement for consultation with regional and local government under OAR 731-070-0295. The development and evaluation of a Detailed Proposal and the negotiation, execution and approval of a Final Agreement shall be

governed by OAR 731-070-0200 to 731-070-0230, unless and except as otherwise specified in the solicitation.

(2) In a solicitation for proposals, when ODOT in its sole discretion deems it appropriate to do so given the nature of the proposal, ODOT may specify requirements for proposal content, and for criteria and procedures under which the proposals will be evaluated and selected, that are in addition to or in lieu of those provided for in OAR 731-070-0060 to 731-070-0230. Any alternative process or processes so specified will comply with the requirements of ORS 367.800 to 367.826. Examples of possible alternative processes include:

(a) Selecting a proposal for development into a final agreement based on a unitary proposal instead of a two-step conceptual/detailed proposal process; and

(b) Evaluating conceptual proposals to rank proposers and select one to perform development services necessary to refine the ultimate character and scope of the project, after which the highly ranked proposers would be asked to submit detailed proposals from which one would be selected for negotiation of a final agreement. These examples are offered for illustrative purposes only, and should not be construed to limit the scope of ODOT's discretion or authority to develop proposal and evaluation criteria and processes for any project as long as those criteria and processes comply with the requirements of ORS 367.800 to 367.826.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

Public Records

731-070-0280

Public Records Requests

(1) Upon written request and within a reasonable time, the Director or his designee shall provide records relating to transportation project proposals for inspection in accordance with ORS Chapter 192, 367.804 and these rules.

(2) ODOT may charge fees to cover its reasonable and actual costs in responding to public records requests. Such costs may include but are not limited to costs associated with locating records, separating exempt from nonexempt records, monitoring the requester's inspection of requested records, copying records and delivering copies of requested records. In accordance with OAR 731-001-0025, ODOT may charge fees calculated to reimburse it for its reasonable and actual costs as authorized by the relevant provisions of the Public Records Law.

(3) ODOT may prepare an estimate of the costs of responding to any request for public records, and may require payment of all or a portion of the estimated costs before acting on the request.

(4) Records related to a proposal for a Transportation Project submitted to ODOT under the Oregon Innovative Partnerships Program are exempt from disclosure under the Oregon Public Records Law until:

(a) ODOT shares the records or the information contained in them with a local government, metropolitan planning organization or area commission on transportation as part of the consultation process described in OAR 731-070-0295; or

(b) ODOT completes its evaluation of the proposed project and has selected the proposal for negotiation of an agreement.

(5) Notwithstanding section (4) of this rule, sensitive business, commercial or financial information that is not customarily provided to business competitors that is submitted to the department in connection with a Transportation Project is exempt from disclosure under the Oregon Public Records Law until the records or information contained in them is submitted to the Commission in connection with its review and approval of the transportation project under ORS 367.806(6) and OAR 731-070-0230.

(6) On ODOT's receipt of a request, under the Public Records Law, for the disclosure of records or information that have been submitted to ODOT by a proposer under the program authorized by ORS 367.800 to 367.826, ODOT will notify the proposer of the request and provide the proposer a reasonable opportunity to demonstrate that all or part of the requested records or information are exempt

from disclosure under ORS 367.800 to 367.826, the Public Records Law, ORS 192.410 to 192.505, the Uniform Trade Secrets Act, ORS 646.461 to 646.475, or other applicable law recognizing the confidentiality of public records and information. In determining whether the information or records are exempt from disclosure, ODOT will consider the evidence and objections to disclosure presented by the proposer, but as custodian of the records or information, ODOT must make the initial determination of the records that may be withheld from disclosure.

(7) An affected proposer who seeks to demonstrate that public records pertaining to it are exempt from disclosure must respond to ODOT with its evidence and objections within four working days of ODOT's issuance of notice of the request to the proposer. After considering the proposer's evidence and objections, ODOT will inform the proposer of its disclosure decision, giving the proposer no fewer than three working days in which to institute appropriate proceedings in its own behalf to protect the proposer's interests in preventing the disclosure or maintaining the confidentiality of the records or information. The proposer shall be exclusively responsible for all costs, expenses and attorney fees incurred in taking any action to prevent the disclosure of information or records under this section.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0290

Designation of Sensitive Business, Commercial or Financial Information and Trade Secrets

(1) The following procedure shall be followed by proposers to designate information as "sensitive business, commercial or financial information" under ORS 367.804(6): each individual page of a proposal that contains sensitive business, commercial or financial information must be clearly marked "Sensitive Business, Commercial or Financial Information."

(2) A proposer may desire that certain information be considered "trade secret" information for purposes of applying the public records exemption set out in ORS 192.501(2). To qualify for that exemption, trade secret information must meet the following criteria:

- (a) Not the subject of a patent;
- (b) Only known to a limited number of individuals within an organization;
- (c) Used in a business that the organization conducts;
- (d) Of potential or actual commercial value; and
- (e) Capable of providing the user with a business advantage over competitors not having the information.

(3) The following procedures shall be followed by the proposer to designate information as trade secret:

(a) Each individual page of a plan or progress report that contains trade secret information must be clearly marked trade secret;

(b) Written substantiation describing what information is considered trade secret and why must accompany the document. The written substantiation shall address the following:

(A) Identify which portions of information are claimed trade secret;

(B) Identify how long confidential treatment is desired for this information;

(C) Identify any pertinent patent information;

(D) Describe to what extent the information has been disclosed to others, who knows about the information, and what measures have been taken to guard against undesired disclosure of the information to others;

(E) Describe the nature of the use of the information in business;

(F) Describe why the information is considered to be commercially valuable;

(G) Describe how the information provides a business advantage over competitors;

(H) If any of the information has been provided to other government agencies, identify which one(s); and

(I) Include any other information that supports a claim of trade secret.

(4) Notwithstanding a proposer's designation of information as constituting "trade secret," and subject to a proposer's opportunity to object to disclosure under OAR 731-070-0280, ODOT will independently assess whether the trade secret exemption applies and whether the public interest requires disclosure when responding to a public records request.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

OIPP Program Administration

731-070-0295

Consultation with Local Government, Transportation District, Metropolitan Planning Organization or Area Commission on Transportation

As part of its evaluation of a proposal submitted under these rules, ODOT will consult with appropriate local governments, metropolitan planning organizations and area commissions on transportation. Consultation under this rule will occur in such manner and at such time as ODOT considers appropriate in the particular circumstance, and shall include:

(1) An informal information-sharing opportunity prior to completion of the department's evaluation of the proposal;

(2) Solicitation of comments from the appropriate local governments, transportation district, metropolitan planning organization or area commission on transportation; and

(3) Any additional method(s) of consultation appropriate under the circumstances.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0300

ODOT Rights Reserved

(1) ODOT reserves all rights available to it by law in administering these rules, including without limitation, the right in its sole discretion to:

(a) Reject any and all proposals at any time.

(b) Terminate evaluation of any and all proposals at any time.

(c) Suspend, discontinue and/or terminate comprehensive agreement negotiations with any proposer at any time prior to the actual authorized execution of such agreement by all parties.

(d) Negotiate with a proposer without being bound by any provision in its proposal.

(e) Request or obtain additional information about any proposals.

(f) Issue addenda to and/or cancel any RFP.

(g) In accordance with the rule-making procedures of ORS chapter 183, revise, supplement or withdraw all or any part of these rules.

(h) Decline to return any and all fees required to be paid by proposers hereunder.

(i) Request revisions to proposals.

(2) Under no circumstances shall the state, the Oregon Transportation Commission or ODOT be liable for, or reimburse, the costs incurred by proposers, whether or not selected for negotiations, in developing proposals or in negotiating agreements. Any and all information ODOT makes available to proposers shall be as a convenience to the proposer and without representation or warranty of any kind. Proposers may not rely upon any oral responses to inquiries. If a proposer has a question regarding application of these rules, the proposer may submit the question in writing to the Director or his designee.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0310

Extensions of Time: Waivers

(1) ODOT reserves the right to extend any deadline or time within which a proposer or ODOT must take any action required or permitted under OAR chapter 731, division 70 if the affected proposer applies in writing for relief to ODOT and demonstrates in that

application that special circumstances warrant the grant of such relief. For the purpose of this subsection, special circumstances that warrant the grant of relief include practical exigencies that reasonably can be regarded as imposing a substantial, practical impediment to the proposer's ability to meet the deadline or achieve the correction of a violation of rules. Special circumstances are circumstances beyond the reasonable control of the proposer organization and include, but are not limited to, the illness or other incapacity of key officers of the organization seeking relief, emergency reorganizations or replacements of the corporate structure, board of directors or executive officers of the organization, acts of God, and comparable practical impediments to a person's or organization's ability to meet a deadline or achieve the correction of a violation of rules. However, no such extension will be afforded to any single proposer for the requirements identified under sections OAR 731-070-0130(2) and (3).

(2) The grant or denial of relief under this rule must be determined by the Director or his designee. ODOT also reserves the right to waive or to permit the correction of minor or technical violations of rules in this Division. ODOT will not grant relief under this section in any case that involves the submission of competitive proposals or competitive responses in which granting the relief would give the entity or person applying for relief a material competitive advantage that is not made available to its competitors.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0320

ODOT's Authority to Suspend, by "Order," the Acceptance of Specified Categories of Unsolicited Proposals

(1) ODOT may, at any time, suspend its receipt and consideration of all unsolicited proposals, or of any class, category or description of unsolicited proposals, including but not limited to unsolicited Conceptual Proposals. ODOT may suspend its receipt and consideration of all unsolicited proposals, of any class, category or description of unsolicited proposals, or of unsolicited proposals to undertake any class, category or description of Transportation Project (such as, by way of illustration only, proposals to perform the maintenance of existing ODOT transportation facilities, proposals within certain cost categories, proposals that relate to certain geographic areas or proposals to repair state secondary highway surfaces) by issuing a written order that:

(a) Declares that ODOT has suspended the acceptance and consideration of all unsolicited proposals or of unsolicited proposals for certain types of Projects;

(b) Describes the proposals or the class or character of the Projects that are subject to the suspension; and

(c) Specifies either the term of the suspension or that the suspension will continue until recalled by a subsequent order of ODOT.

(2) Commencing on the effective date of the suspension order, ODOT will refuse to accept unsolicited proposals or unsolicited proposals for Transportation Projects of the class, category or description contained in the order, and may, as stated in the order, cease further processing and consideration of any such unsolicited proposals then currently under consideration by ODOT.

(3) By submitting an unsolicited proposal, each proposer thereby waives and relinquishes every claim of right, entitlement or expectation that the processing and consideration of its proposal will not be subject to suspension under this rule.

(4) The State of Oregon, ODOT, the Oregon Transportation Commission, and their officers and employees, shall have no responsibility or liability of any nature for the preservation, confidentiality or safekeeping of any proposal that is subject to a suspension order under this rule and is submitted to ODOT while that suspension order is in effect.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0330

ODOT's Authority to Prioritize the Processing of Submitted Proposals in Accordance with ODOT's Assessment of Need and Urgency.

(1) ODOT may, at any time, select any class, category or description of proposal or Transportation Project, including any individual proposal or Project, for the purpose of giving priority to the processing and consideration of unsolicited proposals by issuing a written order that declares that ODOT will give priority to the processing and consideration of unsolicited proposals for certain types of Projects (or to a particular proposal), and describes the class or character of the proposals or Projects (or the particular proposal or Project) that are given priority. The priority order may either specify the term of the priority order, identify the submitted proposals (or proposal) that are subject to the priority order, or provide that the priority order will continue in effect until recalled by a subsequent order of ODOT.

(2) Commencing on the effective date of the order giving priority, ODOT may undertake expedited processing and consideration of unsolicited proposals (or a particular unsolicited proposal) for Transportation Projects of the class, category or description contained in the order. The limited resources of the Department, in such cases, will require either the postponement of, or delay in, the processing and consideration of unsolicited proposals for Projects that are not within a class, category or description that is subject to a priority order.

(3) By submitting an unsolicited proposal, each proposer thereby waives and relinquishes every claim of right, entitlement or expectation that:

(a) Its proposal will enjoy the benefit of a priority order; and

(b) The processing and consideration of its proposal will not be subject to postponement or delay arising out of ODOT's issuance of an order that gives priority to another proposal or to proposals for different classes, categories or descriptions of Projects.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0350

Discretionary Order Requiring the Prequalification of Proposers — Unsolicited Proposals

(1) ODOT may, at any time, issue a written order that requires any entity that wishes to submit an Unsolicited Proposal to apply for prequalification to submit a proposal. The order must describe the character or class of the Project or Projects, and the size of the Projects in terms of estimated implementation or construction cost, that are subject to the prequalification requirement. The order also must provide that each proposer must be prequalified by ODOT in order to submit a proposal for the kind or kinds of Project described in the order, and that ODOT will reject proposals received for the kind or kinds of Projects described in the order from proposers who are not prequalified.

(2) The prequalification order also shall contain:

(a) The location at which interested entities may obtain prequalification applications, information about prequalification criteria and other related documents, if any; and

(b) The name, title, and address of the person designated to receive the prequalification applications.

(3) Each prequalification application shall be in writing and must substantially comply with the instructions given by ODOT in a prequalification application questionnaire or prequalification form issued by ODOT.

(4) ODOT may establish the criteria used to evaluate prequalification applications in light of the features and demands of the kind or kinds of Project for which prequalification is required as a condition of an entity's ability to submit an Unsolicited Proposal. The criteria may include, but shall not be limited to:

(a) The applicant's financial resources, including:

(A) Bonding capacity;

(B) Solvency; and

(C) Past payment history with employees, suppliers and subcontractors;

(b) The applicant's equipment and technology available to perform the Project, including whether the applicant has or reasonably can obtain, either itself, through subcontractors, or otherwise, all licenses and registrations necessary for use and operation of any technology or equipment involved in the Project, and all licenses and permits necessary to the lawful completion of the Project;

(c) The applicant's key personnel available to work on the Project, including:

(A) The specific capabilities of the applicant and its key personnel, as demonstrated by work on past projects which are comparable in size, nature, and technical and managerial complexity to the Project and to the scope of any construction services that may be required by the Project; and

(B) The identity and experience of the key personnel planned to be assigned to the Project;

(d) The applicant's performance history on other projects or contracts, including the applicant's approach to comparable projects and the planning, phasing and scheduling techniques employed by the applicant in those projects in general, and to the extent possible, particularly as applicable to the kind or kinds of Project for which prequalification is required;

(e) The applicant's safety programs and safety record including, where applicable, evidence of the applicant's experience modifier issued by the Department of Consumer and Business Services, Workers' Compensation Division;

(f) The applicant's experience or ability to provide the services of key persons with experience in design-build projects and similar innovative approaches to project completion;

(g) References from owners, architects and engineers with whom the applicant has worked in the past;

(h) The histories of the applicant and its Major Partners concerning their involvement, within the five years immediately preceding the issuance date of the department's prequalification order (or such shorter period as ODOT may specify in the order), in claims and litigation, including mediated or arbitrated construction claims and governmental administrative proceedings, arising out of past projects or under contracts to which they were parties in which the proceedings exceeded \$1,000,000 in liability exposure or claim amount;

(i) Information concerning whether the applicant, any Major Partner, and any key person of either has been, within the five years immediately preceding the issuance date of the department's prequalification order (or such shorter period as ODOT may specify in the order):

(A) Convicted of any 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) Convicted 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 person's responsibility as a contractor; or

(C) Convicted or determined to be liable under state or federal antitrust statutes.

(5) ODOT will, after receiving a prequalification application submitted in accordance with section (3) of this rule, notify the applicant whether the applicant is qualified to submit an Unsolicited Proposal for a Project of the kind or kinds described in ODOT's order issued under section (1) of this rule.

(6) If ODOT determines that the applicant is not qualified, ODOT shall provide the applicant written notice of that determination that contains a statement of the reason or reasons for that determination.

(7) An entity that ODOT determines not to be qualified may, within five (5) business days after its receipt of ODOT's written notice of that determination, submit to ODOT a written protest of the decision. The protest must state facts and argument to demonstrate that ODOT's decision was incorrect or constituted an abuse of ODOT's discretion.

(8) If an entity timely submits a protest that complies with section (7) of this rule, ODOT will issue a written decision that resolves

the issues raised in the protest. ODOT's written decision under this subsection shall constitute a final order under ORS 183.484.

(9) Unless otherwise specified in ODOT's order issued under section (1) of this rule, an ODOT determination that an applicant is prequalified to submit proposals for any particular kind or kinds of Project shall have an effective term of three years from the date of ODOT's written notice of the determination.

(10) Notwithstanding any specification of a term during which an entity's prequalification is effective, ODOT may terminate or revise an entity's prequalified status upon ODOT's discovery of information that adversely reflects on the applicant's prequalified status. Prior to any termination or adverse revision of an applicant's prequalification, ODOT will provide the applicant written notice of that determination that contains a statement of the reason or reasons for that determination and advise that entity that it may protest the proposed action under section (7) of this rule.

(11) On the written request of an entity that previously has been prequalified for a Project or for kinds of Projects similar in size and character to the kind or kinds of Projects described in the order issued under section (1) of this rule (as determined in the discretion of ODOT), or on the written request of a unit of local government, ODOT may waive the requirement that the entity or unit of local government must submit a prequalification application under this rule.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

731-070-0360

Discretionary Notice Requiring the Prequalification of Proposers — Competing Proposals

(1) Prior to furnishing public notice of a request for competing proposals, ODOT may issue written notice that any entity that wishes to submit a competing proposal in response to that request must be prequalified by ODOT. The notice must provide that each proposer must be prequalified by ODOT in order to submit a proposal in response to the particular request for competing proposals, and that ODOT will reject proposals received from proposers who are not prequalified.

(2) ODOT must publish each notice that prequalification is required in the same manner that it issues public notice of a solicitation under OAR 731-070-0260(2). Additionally, each notice shall contain:

(a) The location at which interested entities may obtain prequalification applications, information about prequalification criteria and other related documents, if any;

(b) The date and time by which entities must submit their prequalification applications to ODOT, which generally will be a reasonable time prior to ODOT's issuance of the request for competing proposals, and the location at which they must be filed; and

(c) The name, title, and address of the person designated to receive the prequalification applications.

(3) Each prequalification application shall be in writing and must substantially comply with the instructions given by ODOT in a prequalification application questionnaire or prequalification form issued by ODOT.

(4) ODOT shall establish the criteria used to evaluate prequalification applications prior to the advertised notice of required prequalification. The criteria may include, but need not be limited to:

(a) The applicant's financial resources, including:

(A) Bonding capacity;

(B) Solvency; and

(C) Past payment history with employees, suppliers and subcontractors;

(b) The applicant's equipment and technology available to perform the Project, including whether the applicant has or can reasonably obtain, either itself, through subcontractors, or otherwise, all licenses and registrations necessary for use and operation of any technology or equipment involved in the Project, and all licenses and permits necessary to the lawful completion of the Project;

(c) The applicant's key personnel available to work on the Project, including:

(A) The specific capabilities of the applicant and its key personnel, as demonstrated by work on past projects which are comparable in size, nature, and technical and managerial complexity to the Project and the scope of any construction services that may be required by the Project; and

(B) The identity and experience of the key personnel planned to be assigned to the Project;

(d) The applicant's performance history on other projects or contracts, including the applicant's approach to comparable projects and the planning, phasing and scheduling techniques employed by the applicant on those projects in general, and to the extent possible, particularly as applicable to the kind or kinds of Project for which prequalification is required;

(e) The applicant's safety programs and safety record including, where applicable, evidence of the applicant's experience modifier issued by the Department of Consumer and Business Services, Workers' Compensation Division;

(f) The applicant's experience or ability to provide the services of key persons with experience in design-build projects and similar innovative approaches to project completion;

(g) References from owners, architects and engineers with whom the applicant has worked in the past;

(h) The histories of the applicant and its Major Partners concerning their involvement, within the five years immediately preceding the issuance date of the department's prequalification notice (or such shorter period as ODOT may specify in the notice), in claims and litigation, including mediated or arbitrated construction claims and governmental administrative proceedings, arising out of past projects or under contracts to which they were parties in which the proceedings exceeded \$1,000,000 in liability exposure or claim amount;

(i) Information concerning whether the applicant, any Major Partner, and any key person of either has been, within the five years immediately preceding the issuance date of the department's prequalification notice (or such shorter period as ODOT may specify in the notice):

(A) Convicted of any 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) Convicted 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 person's responsibility as a contractor;

(C) Convicted or determined to be liable under state or federal antitrust statutes.

(5) ODOT will, after receiving a prequalification application submitted in accordance with section (3) of this rule, notify the applicant whether the applicant is qualified to submit a proposal in response to ODOT's request for competing proposals.

(6) If ODOT determines that the applicant is not qualified, ODOT shall provide the applicant written notice of that determination that contains a statement of the reason or reasons for that determination.

(7) An entity whom ODOT determines not to be qualified may, within five (5) business days after its receipt of ODOT's written notice of that determination, submit to ODOT a written protest of the decision. The protest must state facts and argument to demonstrate that ODOT's decision was incorrect or constituted an abuse of ODOT's discretion.

(8) If an entity timely submits a protest that complies with section (7) of this rule, ODOT will issue a written decision that resolves the issues raised in the protest. ODOT's written decision under this subsection shall constitute a final order under ORS 183.484.

(9) Unless otherwise specified in ODOT's notice issued under section (1) of this rule, an ODOT determination that an applicant is prequalified under this section for the Projects or kinds of Projects specified in the notice shall have an effective term of three years from the date of ODOT's written notice of the determination.

(10) Notwithstanding any specification of a term during which an entity's prequalification is effective, ODOT may terminate or

revise an entity's prequalified status upon ODOT's discovery of information that adversely reflects on the applicant's prequalified status. Prior to any termination or adverse revision of an applicant's prequalification, ODOT will provide the applicant written notice of that determination that contains a statement of the reason or reasons for that determination and advise that entity that it may protest the proposed action under section (7) of this rule.

(11) On the written request of an entity that previously has been prequalified for a Project or for kinds of Projects similar in size and character to the Project or kinds of Projects described in the notice issued under section (1) of this rule (as determined in the discretion of ODOT), or on the written request of a unit of local government, ODOT may waive the requirement that the entity or unit of local government must submit a prequalification application under this rule.

Stat. Auth.: ORS 184.616, 184.619 & 367.824

Stat. Implemented: ORS 367.800 - 367.824

Hist.: DOT 5-2004, f. & cert. ef. 8-26-04

DIVISION 80

ROAD USER FEE PILOT PROGRAM

731-080-0010

Authority and Purpose

Chapter 862, Oregon Laws 2001 authorizes the Department of Transportation to develop one or more alternatives to the current system of taxing highway use through motor vehicle fuel taxes. Section 43, Chapter 618, Oregon Laws 2003 allows the Department to vary any fee established under a pilot program to facilitate the maximum use of road capacity. The purpose of OAR 731-080-0010 through 731-080-0070 is to establish the Road User Fee Pilot Program.

Stat. Auth.: ORS 184.616, 184.619, Ch. 862, OL 2001 & Ch. 618, OL 2003

Stats. Implemented: Ch. 862, OL 2001 & Ch. 618, OL 2003

Hist.: DOT 4-2005, f. & cert. ef. 3-18-05

731-080-0020

Definitions

(1) "Area Pricing" means a different fee charged per mile driven in an area specified as an Area Pricing Zone during certain hours on certain days, as specified in the Pilot Program Agreement.

(2) "Area Pricing Zone" means a specified area within Oregon in which a Program Volunteer is charged a different fee when driving within that area during certain hours on certain days.

(3) "Area Pricing Group" means the group of Program Volunteers who are subject to Area Pricing.

(4) "Applicant" means an individual or service station that has indicated an interest in participating in the Pilot Program by completing and submitting an application for consideration.

(5) "Control Group" means the group of Program Volunteers who will not pay a VMT Fee.

(6) "Endowment Account" means an account funded by ODOT from which Program Volunteer VMT Fees will be deducted.

(7) "Fuels Tax" means the Oregon Motor Vehicle Fuels Tax as administered under ORS 319.010 through 319.430.

(8) "Non-Area Pricing Group" means the group of Program Volunteers who are not subject to Area Pricing.

(9) "Participating Service Station" means a service station selected to participate in the Pilot Program by installing necessary equipment for the Pilot Program.

(10) "Pilot Area" means the geographic area where the Program Volunteers reside.

(11) "Pilot Program" means the ODOT pilot program designed to test a mileage fee concept recommended by the RUFTF to the legislature in "Report to the 72nd Oregon Legislative Assembly" March 2003.

(12) "Program Volunteer" means an individual selected to participate in the Pilot Program.

(13) "Reader Device" means a VMT reader.

(14) "Reader Location Owner" means the owner of a location where a Reader Device is located, with the exception of Participating Service Stations.

(15) "Road User Fee Task Force" or "RUFTF" means the task force described in section 2, chapter 862, Oregon Laws 2001.

- (16) "Vehicle Miles Traveled" or "VMT" means miles driven.
(17) "VMT Fee" means a fee charged per mile driven in Oregon.

Stat. Auth.: ORS 184.616, 184.619, Ch. 862, OL 2001 & Ch. 618, OL 2003
Stats. Implemented: Ch. 862, OL 2001 & Ch. 618, OL 2003
Hist.: DOT 4-2005, f. & cert. ef. 3-18-05; DOT 6-2005, f. 10-20-05, cert. ef. 11-1-05

731-080-0030

Road User Fee Task Force Pilot Program Generally

(1) ODOT will conduct a 12-month Pilot Program in which Program Volunteers must pay a designated VMT Fee during the program's last six months in lieu of paying an amount equal to the Fuels Tax associated with the fuel purchased except for those in the Control Group, who will not pay a VMT Fee.

(2) The VMT Fee for the Non-Area-Pricing Group is 1.2 cents per mile.

(3) The VMT Fee for the Area Pricing Group is .43 cents per mile outside Area Pricing Zones and 10 cents per mile in Area Pricing Zones.

(4) Area Pricing Zones will be determined by ODOT prior to the start of the Pilot Program.

(5) Area Pricing Zones will be determined by ODOT based on high volume traffic locations and times.

Stat. Auth.: ORS 184.616, 184.619, Ch. 862, OL 2001 & Ch. 618, OL 2003
Stats. Implemented: Ch. 862, OL 2001 & Ch. 618, OL 2003
Hist.: DOT 4-2005, f. & cert. ef. 3-18-05; DOT 6-2005, f. 10-20-05, cert. ef. 11-1-05

731-080-0040

Program Volunteers

(1) ODOT may recruit up to 500 Applicants to participate in the Pilot Program as Program Volunteers.

(2) Program Volunteers will not have the Fuels Tax associated with fuel purchased at Participating Service Stations included in the fuel purchase price.

(3) ODOT will assess Program Volunteers the VMT Fee and refund the Fuels Tax associated with the fuel purchased when the Program Volunteer purchases fuel from a service station other than a Participating Service Station.

(4) ODOT will ensure that Participating Services Stations are reimbursed for Fuels Tax associated with the amount of fuel purchased by Program Volunteers each month.

(5) All Program Volunteers will receive compensation, not to exceed \$500 each, for participating in the Pilot Program.

(6) Program Volunteers are required to enter into a Pilot Program agreement, outlining the duties and obligations of each party in the Pilot Program. Fulfillment of each requirement of such agreement is a prerequisite to receipt of any compensation.

(7) ODOT may limit the amount of additional VMT Fee paid by Program Volunteers.

(8) Each Program Volunteer in the Non-Area Pricing Group and the Area Pricing Group will be assigned an Endowment Account during the last six months of the Pilot. Each Endowment Account will be assigned a dollar figure based on the amount of miles driven during the first six months of the Pilot.

(9) ODOT will charge Program Volunteers' Endowment Accounts any assessed VMT Fees during the last six months of the Pilot.

(10) ODOT will not charge any VMT fees during the first six months of the Pilot.

(11) Program Volunteers may receive unused Endowment Account funds as compensation.

(12) Program Volunteers may be charged for VMT Fees exceeding Endowment Account amounts. The amount charged shall not exceed the compensation amount.

Stat. Auth.: ORS 184.616, 184.619, Ch. 862, OL 2001 & Ch. 618, OL 2003
Stats. Implemented: Ch. 862, OL 2001 & Ch. 618, OL 2003
Hist.: DOT 4-2005, f. & cert. ef. 3-18-05; DOT 6-2005, f. 10-20-05, cert. ef. 11-1-05

731-080-0050

Participating Service Stations

(1) ODOT may select up to four Applicants to participate in the Pilot Program as Participating Service Stations. ODOT will issue a

Request for Information (RFI) for interested Applicants, which will be distributed throughout the Pilot Area. The RFI may include the invitation to an informational meeting with ODOT.

(2) Participating Service Stations will be selected based on location, expense to upgrade existing technology, and the number of the Applicant's service stations in the Pilot Area.

(3) ODOT may fund technology system upgrades for Participating Service Stations.

(4) ODOT may enter into negotiations with Participating Service Stations to determine compensation.

(5) Participating Service Stations are required to enter into a Pilot Program agreement, outlining the duties and obligations of each party in the Pilot Program. Fulfillment of all requirements of such agreement is a prerequisite to agreed upon payment for technology system upgrade and receipt of any compensation.

Stat. Auth.: ORS 184.616, 184.619, Ch. 862, OL 2001 & Ch. 618, OL 2003
Stats. Implemented: Ch. 862, OL 2001 & Ch. 618, OL 2003
Hist.: DOT 4-2005, f. & cert. ef. 3-18-05

731-080-0060

Reader Location Owners

(1) ODOT may select sites in addition to Participating Service Stations for installation of Reader Devices.

(2) Locations will be selected based on location and convenience to Program Volunteers.

(3) ODOT will fund installation and removal of Reader Devices at such locations.

(4) ODOT may enter into negotiations with Reader Location Owners to determine any compensation.

(5) Reader Locations Owners are required to enter into a Pilot Program agreement, outlining the duties and obligations of each party in the Pilot Program. Fulfillment of all requirements of such agreement is a prerequisite to agreed upon receipt of any compensation.

Stat. Auth.: ORS 184.616, 184.619, Ch. 862, OL 2001 & Ch. 618, OL 2003
Stats. Implemented: Ch. 862, OL 2001 & Ch. 618, OL 2003
Hist.: DOT 4-2005, f. & cert. ef. 3-18-05

731-080-0070

VMT Fee or Fuels Tax Collection

(1) A Program Volunteer's Endowment Account will be assessed the VMT Fee when purchasing fuel at a Participating Service Station except if in the Control Group.

(2) The amount of Fuels Tax associated with the amount of fuel purchased by the Program Volunteer will be automatically deducted from the purchase price by the Participating Service Station except if in the Control Group.

(3) When a Program Volunteer purchases fuel from a service station that is not a Participating Service Station and ODOT receives documentation of such purchase, including the amount of fuel purchased, the Fuels Tax associated with the purchase and the VMT:

(a) The Program Volunteer, except if in the Control Group, will be assessed the VMT Fee by ODOT; and

(b) ODOT will refund the Fuels Tax associated with the amount of fuel purchased.

(4) ODOT will reimburse Participating Service Stations, on a monthly basis, any Fuels Tax amounts associated with fuel purchased that have been deducted from a Program Volunteer's purchase price.

Stat. Auth.: ORS 184.616, 184.619, Ch. 862, OL 2001 & Ch. 618, OL 2003
Stats. Implemented: Ch. 862, OL 2001 & Ch. 618, OL 2003
Hist.: DOT 4-2005, f. & cert. ef. 3-18-05; DOT 6-2005, f. 10-20-05, cert. ef. 11-1-05

DIVISION 146

GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTING

731-146-0010

Application

(1) The Oregon Department of Transportation (ODOT) adopts OAR 137-046-0100 through 137-046-0480 (effective January 1, 2006), the Department of Justice Model Rules, General Provisions

Related to Public Contracting including the additional provisions provided in these rules.

(2) Unless the context of a specifically applicable definition in the Code or Model Rules requires otherwise, capitalized terms used in ODOT's public contracting rules (ODOT's Rules) will have the meaning set forth in the division of ODOT's Rules in which they appear, and if not defined there, the meaning set forth in Code or Model Rules.

(3) This rule applies retroactively to January 1, 2006.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.030 & 279A.065

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05; DOT 5-2006(Temp), f. & cert. ef. 5-25-06 thru 11-20-06; DOT 7-2006, f. & cert. ef. 11-17-06

731-146-0012

Delegation of Authority

(1)(a) "Designated Procurement Officer" (DPO) means the individual designated and authorized by the Director of the Oregon Department of Transportation (ODOT) to perform certain Procurement functions described in these rules.

(b) "Chief Procurement Officer" (CPO) of the Department of Administrative Services (DAS) means the individual designated and authorized by the Director of DAS to perform certain Procurement functions described in Oregon Administrative Rules chapter 125, divisions 246, 247, 248, and 249.

(2) Pursuant to ORS 279A.050, ODOT has authority to procure or supervise the procurement of all goods, services, public improvements and personal services relating to the operation, maintenance or construction of highways, bridges and other transportation facilities that are subject to the authority of ODOT. ODOT recognizes the benefit of statewide consistency and expertise when certain procurements under ODOT authority are instead procured for ODOT by the Department of Administrative Services. Therefore:

(a) ODOT delegates authority to the Chief Procurement Officer to procure goods and services for ODOT under Statewide Price Agreements, including, but not limited to: 5 and 10 Yard Dump Trucks, Snowplows, Street Sweepers, Glass Beads, Aluminum Sign Blanks, and Sheeting. This delegation also includes the authority to conduct associated Contract Administration. Procurements under this delegation shall be processed in accordance with Oregon Administrative Rules Chapter 125, Divisions 246, 247, 248, and 249.

(b) The ODOT Designated Procurement Officer may act on behalf of ODOT and, by written agreement between ODOT DPO and DAS CPO, delegate to DAS on a case-by-case basis other Procurements which are under ODOT's authority. If such delegation is accepted, DAS shall process these procurements under Oregon Administrative Rules Chapter 125, Divisions 246, 247, 248, and 249.

(c) For Procurements where there is a question of whether procurement authority is held by ODOT or DAS, ODOT DPO and DAS CPO will make final determination pursuant to procedures set forth in DAS policy. These Procurements include but are not limited to: Information Technology with the exclusion of Intelligent Transportation Systems (supporting and maintaining traffic flow on State Highways, which is under ODOT procurement authority), License Plates, Driver and Motor Vehicle Services, Motor Carrier Transportation Procurements, and Non-Highway related training.

Stat. Auth.: ORS 279A.065(5)(a), 279A.070

Stats. Implemented: ORS 279A.050, 279A.065(5), 279A.070, 279A.140

Hist.: DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0015

Special Approvals for Public Contracts When Required

(1) When Attorney General legal sufficiency review and approval is required under ORS 291.047, the Oregon Department of Transportation must seek legal approval.

(2) When ODOT contracts for services normally provided by another Contracting Agency or for services for which another Contracting Agency has statutory responsibilities, ODOT is required to seek the other Contracting Agency's approvals. Examples of these special approvals include, but are not limited to:

(a) Oregon Department of Administrative Services (DAS), Risk Management Division for providing tort liability coverage.

(b) DAS, Information Resource Management Division (IRMD), Publishing and Distribution for printing services.

(c) DAS, State Controller's Division for accounting services.

(d) Office of the Treasurer, Debt Management Division for financial and bond counsel services (bond counsel services also require the approval of the Attorney General).

(e) DAS, Information Resources Management Division (IRMD) for information-system related and telecommunications services. ODOT is also encouraged to use the DAS IRMD's Enterprise Planning and Policy Section as a resource in carrying out information system-related projects. This may include:

(A) Assistance to ODOT in developing Statements of Work related to information system projects;

(B) Reviews to assure consistency with State standards and direction; and

(C) A listing of vendors that provide information system-related services.

(f) Attorney or Financial Auditing Services.

(3) The Attorney General has sole authority to contract for attorney services. Exceptions may be granted in Writing on a case-by-case basis only by the Attorney General.

(4) The Secretary of State Audits Division has sole authority to contract for financial auditing services. Exceptions may be granted in Writing on a case-by-case basis only by the Secretary of State Audits Division.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.140(2)

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0020

Reporting Requirements for Personal Services Contracts

(1) Application. For the purposes of Division 146 only, "Personal Services" includes Architectural, Engineering and Land Surveying Services and Related Services.

(2) The Department of Administrative Services (DAS) State Procurement Office maintains an electronic reporting system called the Oregon Procurement Information Network (ORPIN) that maintains a report form for reporting Personal Services Contracts. ODOT must submit this report form to the DAS State Procurement Office for each Contract and subsequent Contract Amendment. The report form must include ODOT's name, not-to-exceed amount of the Contract, the name of the Contractor, the duration of the Contract, and its basic purpose. Whenever ODOT pays in a calendar year under a Personal Services Contract for services historically performed by its employees more than ODOT would have paid to its employees performing the same Work, ODOT must so report to DAS and include in the report a statement of justification for the greater costs, pursuant to ORS 279A.140(2)(h)(A)(i).

(3) ODOT must keep in the Procurement File all Personal Services Contracts, justification statements, when applicable, documentation of the selection process for each Contract, and report forms the later of six years following the Contract's expiration or termination, or the period as may be required by applicable law, or until the conclusion of any audit, controversy, or litigation arising out of or related to the particular Contract in the Procurement File. A Procurement File may be destroyed following the conclusion of the applicable retention period.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.140(h)(A)

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0025

Independent Contractor Status For Personal Services Contracts

(1) ODOT must develop a Statement of Work for services that will not result in an employee relationship with the potential Contractor.

(2) An independent contractor certification by Contractors must be included as a contract provision in each contract.

(3) If the nature of the services or project is such that an employee/employer relationship will exist, ODOT must hire the individual through normal personnel procedures.

(4) The Contract must include the Contractor's legal name, address, and Social Security or federal tax identification number.

(5) The Contract must provide that the Contractor is responsible for federal Social Security, except those categories excluded by law, and for any federal or state taxes applicable to the contract payment.

Stat. Auth.: ORS 279A.140(2)(h)(A)(i)
 Stats. Implemented: ORS 279A.140 & 279A.070
 Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0030

Procurement Files

(1) This Rule applies only to Procurements exceeding the Intermediate Procurement Threshold for Goods or Services; Procurements exceeding the Informal Selection Threshold for Architectural, Engineering, and Land Surveying Services; and Procurements exceeding the Intermediate Procurement Threshold for Public Improvements pursuant to OAR 137-047-0270, 137-048-0210, and 137-049-0160, respectively.

(2) Each Procurement File must contain:

- (a) An executed Contract, if awarded;
- (b) The record of the actions used to develop the Contract;
- (c) A copy of the Solicitation, if any;

(d) Any required findings or statement of justification for the selection of the Contractor and sourcing method pursuant to ORS 279A.200 through 279A.220 (Cooperative Procurement); 279B.055 through 279B.085 (seven methods for Goods or Services); 279C.100 through 279C.125 (Architectural, Engineering and Land Surveying and Related Services); or 279C.300 through 279C.450 (Public Improvements); and

(e) Documentation of Contract Administration pursuant to this rule.

(3) Each Procurement File may also contain, if required by ORS or Division 146 rules:

- (a) A list of prospective Contractors notified of any Solicitation.
- (b) The method used to advertise or notify prospective Contractors.

(c) A copy of each Offer that resulted in the Award of a Contract.

(d) The method of evaluating Offers, the results of the evaluation, and basis of selection.

(e) The record of any Negotiation of the Statement of Work and results.

(f) A record of all material Communications regarding the Solicitation by interested Contractors.

(g) All information describing how the Contractor was selected, including the basis for awarding the Contract.

(h) A copy of the Request for Special Procurement, if any.

(4) ODOT must maintain Procurement Files, including all documentation, for a period not less than six (6) years, except for ten (10) years beyond each Contract's expiration date for Architectural, Engineering and Land Surveying Services and Related Services or for another period in accordance with another provision of law.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
 Stats. Implemented: ORS 279A.050, 279A.065(5), 279A.070 & 279A.140
 Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0040

Contract Administration; General Definitions

(1) "Contract Administration" means all functions related to a given Contract between ODOT and a Contractor from the time the Contract is awarded until the Work is completed, accepted, and all payment has been made, or until the Contract is terminated, payment has been made, and disputes have been resolved.

(2) "Contract terms and conditions" means the entire Contract document including but not limited to:

- (a) The Contract;
- (b) A Solicitation Document incorporated by reference in the Contract; and
- (c) All attachments, exhibits or other requirements specifically referenced in the Contract.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
 Stats. Implemented: ORS 279A.050, 279A.065(5), 279A.070 & 279A.140
 Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0050

Contract Administration; General Provisions

(1) Authority. ODOT must conduct all Procurements, including Contract Administration, for Goods or Services, including Architectural, Engineering and Land Surveying Services and Related Services, and Public Improvements, pursuant to ORS 279A.050 and ORS 279A.075.

(2) Contract Administrator. ODOT must appoint, in Writing, a Contract Administrator as an ODOT representative for each Contract. The Contract Administrator may delegate in Writing a portion of the Contract Administrator's responsibilities to a technical representative for specific day-to-day administrative activities for each Contract.

(3) Documentation of Contract Administration. This section applies only to the following Procurements pursuant to OAR 125-047-0270, 125-048-0210, and 125-049-0160, respectively:

(a) Procurements exceeding the Intermediate Procurement Threshold for Goods or Services.

(b) Informal Selection Threshold for Architectural, Engineering, and Land Surveying Services and Related Services.

(c) Procurements exceeding the Intermediate Procurement Threshold for Public Improvements.

(4) Requirements. Documentation of Contract Administration is a part of the Procurement File in accordance with OAR 731-046-0030, and this documentation must include:

- (a) An executed Contract;
- (b) The record of the actions used to administer the Contract;
- (c) The name and contact information for the Contract Administrator and any technical representative delegates, together with a description of duties delegated to any technical representative;
- (d) All executed Amendments;
- (e) Claims related to the Contract;
- (f) Release of claims documents;
- (g) Contract close-out documents; and
- (h) Other documents related to Contract Administration.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070
 Stats. Implemented: ORS 279A.050, 279A.065(5), 279A.070 & 279A.140
 Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0060

Payment Authorization of Cost Overruns for Goods or Services including Architectural, Engineering and Land Surveying Services and Related Services Contracts

(1) Payments on Contracts that exceed the maximum contract consideration require approval from ODOT's Designated Procurement Officer and may require approval from the Department of Justice pursuant to OAR 137-045-0010 et seq. Approval may be provided if there is compliance with all of the following:

(a) The Original Contract was duly executed and, if required, approved by the Attorney General.

(b) The Original Contract has not expired or been terminated as of the date Written approval to increase the Contract amount is granted.

(c) The cost overrun is not associated with any change in the Statement of Work set out in the Original Contract.

(d) The cost overrun arose out of extraordinary circumstances or conditions encountered in the course of contract performance that were reasonably not anticipated at the time the Original Contract, or the most recent Amendment, if any, was signed. Such circumstances include, but are not limited to cost overruns that:

(A) Address emergencies arising in the course of the Contract that require prompt action to protect the Work already completed.

(B) Comply with official or judicial commands or directives issued during contract performance.

(C) Ensure that the purpose of the Contract will be realized.

(e) The cost overrun was incurred in good faith, results from the good faith performance by the Contractor, and is no greater than the

prescribed hourly rate or the reasonable value of the additional Work or performance rendered.

(f) Except for the cost overrun, the Contract and its objective are within the statutory authority of ODOT and ODOT currently has funds available for payment under the Contract.

(g) An officer or employee of ODOT has presented a Written report to ODOT's Designated Procurement Officer within 60 days of the discovery of the overrun that states the reasons for the cost overrun and demonstrates to the satisfaction of ODOT's Designated Procurement Officer that the Original Contract and the circumstances of the overrun satisfy the conditions stated above.

(h) ODOT's Designated Procurement Officer approves in Writing the payment of the overrun, or such portion of the overrun amount as ODOT's Designated Procurement Officer determines may be paid consistent with the conditions of this Rule. If ODOT's Designated Procurement Officer has signed the Contract, or has immediate supervisory responsibility over performance of the Contract, that Person must designate an alternate delegate to grant or deny Written approval of payment.

(2) ODOT must obtain an Attorney General's approval of the Contract Amendment, if such approval is required by ORS 291.047, before making any overrun payment.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.065(5)(a), 279A.070 & 279A.140

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0070

Ethics in Public Contracting — Policy

Oregon Public Contracting is a public trust. ODOT and Contractors involved in Public Contracting must safeguard this public trust.

Stat. Auth.: ORS 244.010 - 244.400, 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 244.010 - 244.400, 279A.065(5)(a), 279A.070 & 279A.140

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0080

Ethics in Selection and Award of Public Contracts

ODOT officers, employees or agents involved in the process of the selection and award of Public Contracts must carefully review and comply with the provisions of ORS 244.010 through 244.400.

Stat. Auth.: ORS 244.010 - 244.400, 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 244.010 - 244.400, 279A.065(5)(a), 279A.070 & 279A.140

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0090

Ethics in Appointments to Advisory Committees

ODOT's Designated Procurement Officer or a delegate may appoint procurement advisory committees to assist with Specifications, procurement decisions, and structural change that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competition pursuant to ORS 279A.015.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.065(5)(a), 279A.070 & 279A.140

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0100

Non-retaliation

Retaliation against anyone who complies with the Public Contracting Code and Rules in Division 146 related to ethics is prohibited. Any officer, employee or agent of ODOT or Contractor who engages in retaliation action will be subject to penalties pursuant to ORS 279A.990 and related rules. Also, any Contractor who engages in a retaliation action may be debarred.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.065(5)(a), 279A.070 & 279A.140

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0110

Ethics in Specification Development

(1) ODOT and Contractors must not develop Specifications that primarily benefit a Contractor, directly or indirectly, to the detriment of ODOT or the best interest of the State.

(2) ODOT must not develop Specifications that inhibit or tend to discourage Public Contracting with Qualified Rehabilitation Facilities (QRF) under ORS 279.835 through 279.855 and OAR 125-055-0005 through 125-055-0045 where those Specifications inhibit or tend to discourage the acquisition of QRF-produced Goods or Services without reasonably promoting the satisfaction of bona fide, practical procurement needs of ODOT.

(3) ODOT and Contractors must not develop Specifications that inhibit or tend to discourage Public Contracting under other public procurement laws or policies of the Department.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.065(5)(a), 279A.070 & 279A.140

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0120

Ethics in Sole Source

ODOT may not select a Sole-Source Procurement pursuant to ORS 279B.075 and avoid a competitive Procurement if the purpose of the selection is to primarily benefit the Contractor, directly or indirectly, to the detriment of ODOT or the best interest of the State.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.065(5)(a), 279A.070, 279B.075 & 279A.140

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0130

Fragmentation

A Procurement may not be artificially divided or fragmented so as to constitute a Small Procurement, pursuant to ORS 279B.065, or an Intermediate Procurement, pursuant to ORS 279B.070.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.065(5)(a), 279A.070 & 279B.065

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-146-0140

Ethics in ODOT and Contractor Communications

(1) Research Phase. ODOT is encouraged to conduct research with potential Contractors who can meet the State's needs. This research includes but is not limited to:

(a) Meetings with potential Contractors;

(b) Industry presentations; and

(c) Demonstrations by Contractors that, in ODOT's discretion, demonstrate Goods or Services that may be able to meet ODOT's needs.

(2) ODOT must document all items discussed during the research phase of Solicitation development. The research phase ends the day of a Solicitation release or request for a Quote pursuant to an Intermediate Procurement, unless the Solicitation or Intermediate Procurement provides for a different process that permits ongoing research.

(3) Solicitation and Contracting Phase. Any communication between ODOT and Contractors regarding a Solicitation, that occurs after the Solicitation release or request for a Quote and before the Award of a Contract, must only be made within the context of the Solicitation Document or Intermediate Procurement requirements.

(4) Communication may allow for discussions, negotiations, Addenda, Contractor questions, and ODOT's answers to Contractor questions about terms and conditions, specifications, Amendments, or related matters. During this phase, telephone conversations and meetings must be documented in the Procurement File. Written inquiries regarding the Solicitation should be responded to by ODOT in Writing.

(5) A record of all communications regarding the Solicitation by interested Contractors must be made a part of the Procurement File pursuant to OAR 731-146-0030.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.065(5)(a), 279A.070 & 279A.140

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

DIVISION 147

PUBLIC PROCUREMENT FOR GOODS AND SERVICES GENERAL PROVISIONS

731-147-0010

Application

(1) The Oregon Department of Transportation adopts OAR 137-047-0000 through 137-047-0810 (effective January 1, 2006) with the exception of 137-047-0270(4) and 137-047-0275, the Department of Justice Model Rules, Public Procurements for Goods or Services General Provisions including the additional provisions provided in these rules.

(2) This rule applies retroactively to January 1, 2006.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.015

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05; DOT 5-2006(Temp), f. & cert. ef. 5-25-06 thru 11-20-06; DOT 7-2006, f. & cert. ef. 11-17-06

731-147-0020

Life Cycle Costing

(1) Policy. Life Cycle Costing provides an acquisition method that is consistent with the concept of sustainability and also drives the concept of lowest cost of ownership and best value of the equipment purchased. When planning the award method of an Invitation to Bid (ITB) or Request for Proposal (RFP) for products or equipment, ODOT may consider using Life Cycle Costing whenever the costs of system operation, support, and disposal, and other quantifiable costs are significant in comparison with the cost of acquisition.

(2) For the purpose of chapter 731, division 147 rules, the following definitions apply:

(a) "Life-Cycle Cost" means the total cost to ODOT of acquiring, operating, supporting and (if applicable) disposing of the Goods being acquired.

(b) "Life Cycle Costing" means the various quantifiable cost factors, in addition to the acquisition cost of Goods or Services (Goods or Services are also referred to in Division 147 as "product, equipment, and service, separately or in any combination thereof").

(3) Concept. The concept of Life Cycle Costing will be limited to begin with the acquisition of the product or service, will include all the associated cost(s) of ownership, such as purchase price, shipping, maintenance and repair, longevity, and include disposition cost(s) at the end of life of the products or services. The initial acquisition price is adjusted with additional cost streams expected to occur over the anticipated life of the product or equipment. These additional cost streams must be clearly thought out costs or adjustments, and must be based upon reasonable assumptions. Cost streams are discrete elements of costs that relate to the particular purchase considered for Life Cycle Costing. In some cases cost streams may include negative costs or savings that are expected to result in a particular cost stream:

(a) Acquisition costs are all costs associated with acquiring a product or service for ODOT's use. For complex items, several Contracts may be required and costs may involve research and development as well as production, delivery, and installation of the item.

(b) Typical cost streams may include:

(A) Switching costs which are costs associated with changing from current equipment or products to another model or brand of equipment or products. Typically such costs may include: removal, shipping, training, and replacement of supporting supplies. Switching costs may also include increased project management or additional transition time.

(B) Operating and support costs which are all costs, including third party contract costs, associated with equipment, supplies, utilities, fuel, and services needed to operate and maintain an operational system.

(C) Disposal costs which are costs, including third party contract costs, associated with removing equipment from service and disposing of it. Evaluations that consider Life-Cycle Cost should also consider any significant salvage or resale value at the time of disposal. The DAS Oregon Property Services may help with estimating values, and with adherence to current rules regarding disposition of State property.

(4) Solicitation Requirements. Life Cycle Cost methodology is permitted under this rule for use in either an ITB or an RFP. When conducting a Life Cycle Costing-based award, the Solicitation must:

(a) Advise prospective Offerors how Life Cycle Costing will be considered in an award decision by using one of the following options:

(A) Awards may be made based on lowest evaluated cost resulting from Life Cycle Costing. Under this approach, the evaluation includes Life Cycle Costs in the Solicitation issued by ODOT;

(B) Awards of Invitations to Bid to the lowest Bidder include the total Life Cycle Costs as a part of the bid evaluation methodology and award. The lowest total Life Cycle Cost is considered the low Bid; or

(C) Awards of RFPs may include a Life Cycle Costing award factor in two ways:

(i) The RFP may include Life Cycle Costs as a part of the total points awarded for costs. In this method, all Life Cycle Costs are calculated and the lowest total Life Cycle Cost is awarded the maximum points allocated for cost in the RFP; or

(ii) The RFP may include a separate Life Cycle Cost factor that is assessed as weight or points and is considered in addition to other factors in the proposal evaluation methodology. As a separate evaluation factor, it may be used in addition to costs, when the cost factor does not consider Life Cycle Costing elements.

(b) Provide for adjustments to the cost stream when Life Cycle Costs continue over a period of years, for one or more of the following:

(A) Time value of money;

(B) Cost uncertainty; or

(C) Inflation factors.

(5) Factors in the Solicitation. To the extent ODOT considers practical, the Solicitation must provide relevant information (e.g., projected item usage, operating environment, the operating period, and other information that will be considered in the evaluation of the offer). ODOT may include projections and estimates of life and cycle times from independent third party sources. The Solicitation must describe how Life Cycle Cost will be applied in the award process. Factors not described in the Solicitation may not be used in the evaluation.

(6) Elements that may be used in Awards. Solicitations must describe what relevant costs, along with appropriate information to support Life Cycle Costs, the Offer must provide. Typical elements used in Life Cycle Costing Awards may include:

(a) Average unit price, including (when appropriate) recurring and nonrecurring production costs;

(b) Delivery, shipping and transportation costs;

(c) Switching costs prepared by ODOT that include a reasonable estimate of what it will cost to switch from a current product or brand to another;

(d) Unit operating and support costs (e.g., manpower, energy, parts requirements, scheduled maintenance, and training);

(e) Unit disposal costs (e.g., the cost of removing equipment from the Contracting Agency facility);

(f) Unit salvage or residual value; and

(g) Related information as requested to support costs such as testing and operational data.

(7) Award Decision. Award of an Invitation to Bid using Life Cycle Cost methods must be made to the responsible firm whose responsive offer provides the lowest overall cost of ownership in accordance with the Life Cycle Cost evaluation factors listed in the solicitation document. In the case of a Life Cycle Cost Request for Proposal, award must be made to the responsible firm whose responsive offer, after consideration of Life Cycle Cost factors as a part of price evaluation, and other factors listed in the Solicitation Document

are determined to be the most Advantageous or best Proposal for ODOT.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279B.025, 279B.270 & 279B.280

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-147-0030

Emergency Procurements Process

(1) ODOT may award a Public Contract as an Emergency Procurement pursuant to the requirements of OAR 137-047-0280 and 137-049-0150, whichever may apply. When an Emergency Procurement is authorized, the Procurement must be made with competition that is practicable under the circumstances.

(2) Pursuant to the requirements of this rule, ODOT may, in its discretion, enter into a Public Contract without competitive Solicitation if an emergency exists. Emergency means circumstances that could not have been reasonably foreseen that create a substantial risk of loss, damage, interruption of services or threat to public health or safety that requires prompt execution of a Contract to remedy the condition.

(3) Regardless of the dollar value of the Contract, when entering into an Emergency Contract, ODOT must:

(a) Make a Written declaration of Emergency, including findings describing the Emergency that requires the prompt execution of the Contract, stating the anticipated harm from failure to establish the Contract on an expedited basis;

(b) Encourage competition that is practicable under the circumstances; and

(c) Record the measures taken under subsection (b) of this section to encourage competition; the amounts of the Bids, Quotes or Proposals obtained, if any; and the reason for selecting the Contractor.

(4) Pursuant to ORS 279B.080, the head of the Contracting Agency, or person designated under ORS 279A.075, must declare the existence of the Emergency, as required by subsection (3)(a) of this rule, which must authorize ODOT to enter into an Emergency Contract.

(5) Any Contract awarded under this rule must be awarded within 60 days following the declaration of the Emergency unless an extension has been granted by the head of ODOT, or Person designated.

(6) For Contracts greater than \$5,000, ODOT must report a summary of the Contract on the Oregon Procurement Information Network (ORPIN) maintained by the DAS State Procurement Office and provide the Department of Justice, Attorney General with a copy of the Written documentation required in section (3) of this rule within a reasonable period of time or thirty (30) Days, whichever is less, following the declaration of an Emergency. ODOT must maintain a copy of the report in its Emergency Procurement File.

(7) Emergency Public Contracts may be exempted from Department of Justice legal sufficiency review requirement pursuant to OAR 137-045-0070.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279B.080

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-147-0035

Sole Source Delegation by Type

The Chief Procurement Officer of the DAS State Procurement Office has granted approval and authority including Contract Administration to ODOT's Designated Procurement Officer to conduct Sole Source Procurements outside of ODOT's authority under ORS 279A.050 up to the \$150,000.00 threshold. ODOT must seek written approval from the DAS State Procurement Office for Sole Source Procurements outside of ODOT's authority under ORS 279A.050 that exceed \$150,000.00.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279B.075

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-147-0040

Special Delegated Procurements

(1) Terms used in division 147 rules have the same meaning as defined in ORS 279B.085.

(2) Authorization. The Chief Procurement Officer of the DAS State Procurement Office has granted approval and authority per OAR 125-246-0140, and 125-247-0288 to the ODOT Designated Procurement Officer for the following Special Procurements:

(a) Brand Names or Products, "or Equal," Single Seller and Sole Source;

(b) Equipment Repair and Overhead;

(c) Purchases of Used Personal Property; and

(d) Reverse Auctions.

(3) The following apply to Brand Names or Products, "or Equal," Single Seller and Sole Source procurements:

(a) "Procurement of Brand Name 'or Equal' Products" means the Procurement of a product after specifying the registered Brand name of the product or requiring the same Specifications of the Brand Name product.

(b) Specifications. Solicitation Specifications for Public Contracts must not expressly or implicitly require any product of any particular manufacturer or seller except:

(A) "Or Equal" Specification. ODOT may specify a particular brand name, make or product suffixed by "or equal," "or approved equal," "or equivalent," "or approved equivalent," or similar language if there is no other practical method of Specification; and

(B) Specifying a particular make or product. ODOT may specify a Brand Name, make, or product without an "or equal" or equivalent suffix if there is no other practical method of Specification, after documenting the Procurement File with the following:

(i) A brief description of the Solicitation(s) to be covered including volume of contemplated future purchases;

(ii) The Brand Name, mark, or product to be specified; and

(iii) The reason ODOT is seeking this procurement method, which must include at least one of the following findings in the Procurement File:

(I) It is unlikely that Specification of the Brand Name, mark or product will encourage favoritism in the award of the Public Contracts or substantially diminish competition;

(II) Specification of the Brand Name, mark or product would result in substantial cost savings to ODOT; or

(III) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies.

(c) Public Notice. ODOT must make a reasonable effort to notify all known suppliers of the specified product and invite such suppliers to submit competitive bids or proposals; or must document the Procurement File with findings of current market research to support the determination that the product is available from only one seller. Posting a notice on ORPIN for a reasonable time period satisfies this requirement.

(d) Purchasing From Sole Source, Single Seller. ODOT may purchase a particular product or service (also known as Goods or Services) available from only one source if ODOT meets the requirements of paragraphs (b)(A) and (B) of this section and a Sole-Source Procurement pursuant to ORS 279B.075. ODOT, prior to purchase, must document the Procurement File with ODOT's findings of current market research to support the determination that the product or service is available from only one seller or source. ODOT's findings must also include:

(A) A brief description of the Contract or Contracts to be covered including volume of contemplated future purchases;

(B) Description of the Goods or Services to be purchased; and

(C) The reason ODOT is seeking this procurement method, that could include the following reasons:

(i) Efficient utilization of existing Goods or Services requires the acquisition of compatible Goods or Services;

(ii) The required product is data processing equipment which will be used for research where there are requirements for exchange of software and data with other research establishments; or

(iii) The particular product is for use in a pilot or an experimental project.

(e) Single Manufacturer, Multiple Sellers. ODOT may specify Goods or Services available from only one manufacturer, but available through multiple sellers, if ODOT meets the requirements of paragraphs (b)(A) and (B) of this section and the following:

(A) If the total purchase is \$5,000 or more but does not exceed \$150,000 and a comparable product or service is not available under an existing Mandatory Use Contract, competitive quotes must be obtained and retained in the Procurement File for Intermediate Procurements; or

(B) If the purchase exceeds \$150,000, and the comparable Good or Services is not available under an existing Mandatory Use Contract, ODOT must follow the Solicitation process for Competitive Sealed Bids or Competitive Sealed Proposals.

(f) Single Manufacturer, Multiple Purchases. If ODOT intends to make several purchases of the product of a particular manufacturer or seller for a period not to exceed five (5) years, ODOT must so state in the Procurement file, the Solicitation Document, if any, and the public notice described in paragraph (b)(B) of this section. Such documentation and public notice constitute sufficient notice as to subsequent purchases. If the total purchase amount is estimated to exceed \$150,000, this must be stated in the advertisement for Bids or Proposals.

(g) If ODOT competitively solicits, it must comply with the rules for that method of Solicitation pursuant to ORS 279B.055 through 279B.075 and 137-047-0255 through 137-047-0263.

(h) Nothing in this rule exempts ODOT from obtaining the approval of the Attorney General for legal sufficiency review requirement pursuant to ORS 291.047.

(i) ODOT must comply with ORS 200.035, notwithstanding this rule.

(4) The following apply to Equipment Repair and Overhaul procurements:

(a) Conditions. ODOT may enter into a Public Contract for equipment repair or overhaul without competitive bidding, subject to the following conditions:

(A) Service or parts required are unknown and the cost cannot be determined without extensive preliminary dismantling or testing; or

(B) Service or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source; and

(b) Process and Criteria. ODOT must use competitive methods wherever possible to achieve best value and must document in the Procurement File the reasons why a competitive process was deemed impractical. If the anticipated purchase exceeds \$5,000, ODOT must post notice on ORPIN. The resulting Contract must be in Writing and ODOT's Procurement File must document the use of this Special Procurement rule by number to identify the sourcing method. Nothing in this rule waives the Department of Justice legal sufficiency review requirement if applicable under ORS 291.047.

(5) The following apply to Purchase of Used Personal Property procurements:

(a) Authorization. Subject to the provisions of this rule, ODOT may purchase used property or equipment without competitive bidding and without obtaining competitive quotes, if, at the time of purchase, ODOT has determined and documented that the purchase will:

(A) Be unlikely to encourage favoritism or diminish competition; and

(B) Result in substantial cost savings or promote the public interest.

(b) "Used personal property or equipment" means the property or equipment which has been placed in its intended use by a previous owner or user for a period of time recognized in the relevant trade or industry as qualifying the personal property or equipment as "used," at the time of ODOT's purchase. "Used personal property or equipment" generally does not include property or equipment if ODOT was the previous user, whether under a lease, as part of a demonstration, trial or pilot project, or similar arrangement.

(c) Process and Criteria:

(A) For purchases of used personal property or equipment with a cost not exceeding \$150,000, ODOT must, where feasible, obtain

three competitive Quotes, unless ODOT has determined and documented that a purchase without obtaining competitive Quotes will result in cost savings and will not diminish competition or encourage favoritism.

(B) For purchases of used personal property or equipment exceeding \$150,000, ODOT must use competitive methods wherever possible to achieve best value and must document in the Procurement File the reasons why a competitive process was deemed impractical. If the anticipated purchase amount exceeds \$5,000, ODOT must post notice on ORPIN. The resulting Contract must be in Writing and ODOT's Procurement File must document the use of this Special Procurement rule by number to identify the sourcing method. Nothing in this rule waives the Department of Justice legal sufficiency review requirement if applicable under ORS 291.047.

(6) The following apply to Reverse Auction procurements:

(a) Process. A Reverse Auction means a process for the purchase of Goods or Services by a buyer from the lowest Bidder. ODOT, as the buyer, must conduct Reverse Auctions by first publishing a Solicitation that describes its requirements, and the Contract terms and conditions. Then, ODOT must solicit online Bids from all interested Bidders through an Internet-based program. The Solicitation must set forth a start and end time for Bids and specify any combination of the following type of information to be disclosed to Bidders during the Reverse Auction:

(A) The prices of the other Bidders or the price of the most competitive Bidder;

(B) The rank of each Bidder (e.g., (i) "winning" or "not winning" or (ii) "1st, 2nd, or higher");

(C) The scores of the Bidders if ODOT chooses to use a scoring model that weighs non-price factors in addition to price; or

(D) Any combination of paragraphs (A), (B) and (C) of this subsection.

(b) Before the Reverse Auction commences, Bidders must be required by ODOT to assent to the Contract terms and conditions, either in Writing or by an Internet "click" agreement. The Bidders then compete for the award of a Contract by offering successively lower prices, informed by the price(s), ranks, and scores, separately or in any combination thereof, disclosed by ODOT. The identity of the Bidders must not be revealed during this process. Only the successively lower price(s), ranks, scores and related details, separately or in any combination thereof, will be revealed to the participants. ODOT may cancel this Solicitation if it determines that it is in ODOT's or the State's best interest. At the end of the Bidding process, and if the solicitation has not been cancelled, ODOT must award any potential Contract to the lowest Responsible Bidder or in the case of multiple awards, lowest Responsible Bidders pursuant to ORS 279A.055(10)(b). This process allows ODOT to test and determine the suitability of the Goods or Services before making the Award. ODOT must comply with the following public notice procedures for this type of Solicitation:

(A) ODOT must disclose the Reverse Auction process in the Solicitation Documents.

(B) ODOT must provide initial notice of this Solicitation through ORPIN.

(C) ODOT must give subsequent notices of the price(s) offered, rank(s), score(s) and related details to the initial Bidders, as described in the Solicitation Document.

(D) ODOT must issue a Notice of Intent to award at least seven (7) calendar days prior to making the Award.

(c) Prequalification. For each Solicitation, under ORS 279B.085, on a case-by-case basis, ODOT may determine whether prequalification of suppliers is needed. If prequalification is used, ODOT must pre-qualify suppliers and provide an appeal process in accordance with ORS 279B.120 and related rules.

(7) The following process applies to Advertising Contracts: ODOT must use competitive methods wherever possible to achieve best value and must document in the Procurement File the reasons why a competitive process was deemed to be impractical. If the anticipated purchase exceeds \$5,000, ODOT must post notice on ORPIN. The resulting Contract must be in Writing and the Procurement File must document the use of this Special Procurement Rule by number

to identify the sourcing method. Nothing in this rule waves the Department of Justice Legal Sufficiency Review requirement, if applicable under ORS 291.047.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279B.085

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-147-0050

Mandatory Use Contracts and Price Agreements

(1) Mandatory Use Contracts, means for the purposes of this rule, includes DAS and ODOT Price Agreements, service agreements, and sales agreements, which may be established for the purposes of minimizing paper work, achieving continuity of product, securing a source of supply, reducing inventory, combining requirements for volume discounts, standardization among Agencies, and reducing lead-time for ordering. A Mandatory Use Contract requires ODOT to purchase Goods or Services for an anticipated need at a predetermined price under that specific Contract, provided the Mandatory Use Contract is let by a competitive Procurement Process pursuant to the requirements of ORS 279A, 279B, and 279C.

(2) ODOT may purchase the Goods or Services from a Contractor awarded a Mandatory Use Contract without first undertaking additional competitive Solicitation.

(3) ODOT must use Mandatory Use Contracts established by DAS or ODOT unless otherwise specified in the Contract, allowed by law or these rules.

(4) Notwithstanding section (3) of this rule, ODOT is exempted from Mandatory Use Contracts for acquisition of the following, regardless of dollar amount:

(a) Goods or Services from a Local Government Agency, provided that a formal, Written agreement is entered into between the parties;

(b) Goods or Services from the federal government, pursuant to ORS 279A.180;

(c) Personal property for resale through student stores operated by public educational Contracting Agencies; and

(d) Emergency purchases declared by a Contracting Agency pursuant to ORS 279B.080.

(5) The term of the Contract, including renewals, must not exceed the maximum term stated in the original Solicitation.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279B.090

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

731-147-0055

Sole Source Procurements

(1) Generally, ODOT may Award a Public Contract without competition as a sole-source Procurement pursuant to the requirements of ORS 279B.075 and OAR 731-147-0035.

(2) Public Notice. If, but for ODOT's determination that it may enter into a Contract as a sole-source, ODOT would be required to select a Contractor using source selection methods set forth in either ORS 279B.055 or 279B.060, ODOT shall give public notice of the determination that the Goods or Services or class of Goods or Services are available from only one source in a manner similar to public notice of competitive sealed Bids under ORS 279B.055(4) and OAR 137-047-0300. The public notice shall describe the Goods or Services to be acquired by a sole-source Procurement, identify the prospective Contractor and include the date, time and place that protests are due. ODOT shall give such public notice at least fourteen (14) Days before Award of the Contract, unless ODOT determines that a shorter interval is in the State's best interest, and that a shorter interval will not substantially affect competition.

(3) Protest. An Affected Person may protest the determination that the Goods or Services or class of Goods or Services are available from only one source in accordance with OAR 137-047-0710.

Stat. Auth.: ORS 279A.065 & ORS 279B.075

Stats. Implemented: ORS 279B.075

Hist.: DOT 5-2005, f. & cert. ef. 8-23-05

731-147-0060

Amendments for Intermediate Goods or Services Procurements

ODOT may amend a Public Contract awarded as an intermediate Procurement in accordance with OAR 137-047-0800, but the cumulative amendments shall not increase the total Contract Price to a sum that is greater than twenty-five percent (25%) of the original Contract price, except:

(1) ODOT may amend a Public Contract awarded as an intermediate Procurement in accordance with OAR 137-047-0800 over the twenty-five percent (25%) cumulative amount but not exceeding the \$150,000 threshold with written approval from the ODOT Designated Procurement Officer based upon a determination of the best interests of the State.

(2) ODOT may amend a Public Contract awarded as an intermediate Procurement in accordance with OAR 137-047-0800 over the twenty-five percent (25%) cumulative amount exceeding the \$150,000 threshold with written approval from the ODOT Designated Procurement Officer and Department of Justice based upon a determination of the best interests of the State.

(3) Nothing in this rule waives the Department of Justice legal sufficiency review and approval requirement, if applicable under ORS 291.047.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279A.050, 279A.065(5), 279A.070 & 279A.140

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

DIVISION 148

CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING, LAND SURVEYING AND RELATED SERVICES CONTRACTS

731-148-0010

Application

(1) The Oregon Department of Transportation adopts OAR 137-048-0100 through 137-048-0320 (effective January 1, 2006), the Department of Justice Model Rules, Consultant Selection: Architectural, Engineering, Land Surveying, and Related Services Contracts including the additional provisions provided in these rules.

(2) This rule applies retroactively to January 1, 2006.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05; DOT 5-2006(Temp), f. & cert. ef. 5-25-06 thru 11-20-06; DOT 7-2006, f. & cert. ef. 11-17-06

731-148-0020

Price Agreement Selection Process

(1) Consultants for Price Agreements must be selected, and the Oregon Department of Transportation (ODOT) must obtain Architectural, Engineering and Land Surveying and Related Services by selecting a Consultant or Consultants in the following manner. When ODOT selects more than one Consultant under the Price Agreement Solicitation process under OAR 137-048-0130(1), ODOT must identify objective criteria in the Solicitation Document and the Price Agreement to be used in assigning particular Architectural, Engineering and Land Surveying and or Related Services to the most qualified consultant.

(2) Design-Build Contracts involve the provision of both design and construction services for Public Improvements under one Contract. Under most circumstances, Design-Build Contracts are Mixed Contracts with the predominate purpose of the Contract involving construction of the Public Improvement. If the predominate purpose of the Contract is to obtain Architectural, Engineering and Land Surveying and Related Services, selection may proceed under these division 148 rules and shall not be considered a Design-Build project.

Stat. Auth.: ORS 279A.065(5)(a) & 279A.070

Stats. Implemented: ORS 279C.110 & 279C.115

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05

DIVISION 149

**GENERAL PROVISIONS RELATED TO PUBLIC
CONTRACTS FOR CONSTRUCTION SERVICES**

731-149-0010

Application

(1) The Oregon Department of Transportation adopts OAR 137-049-0100 through 137-049-0910 (effective January 1, 2006), the Department of Justice Model Rules, General Provisions Related to Public Contracts for Construction Services. The adoption of the Department of Justice Model Rules by this rule does not apply to any contracts that are subject to OAR chapter 731, division 5 or 7.

(2) The Public Improvements Contracts as well as the Public Contracts for ordinary construction Services that are not Public Improvements shall also comply with OAR 731-007-0335.

(3) This rule applies retroactively to January 1, 2006.

Stat. Auth: ORS 279A.065

Stats. Implemented: ORS 279A.065

Hist.: DOT 3-2005(Temp), f. 2-16-05, cert. ef. 3-1-05 thru 8-27-05; DOT 5-2005, f. & cert. ef. 8-23-05; DOT 5-2006(Temp), f. & cert. ef. 5-25-06 thru 11-20-06; DOT 7-2006, f. & cert. ef. 11-17-06